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Foreign Corporations—Transaction of Business—A Double Definition: Melfi v. Goodman, 69 N.M. 488, 368 P.2d 582 (1962); J. H. Silversmith, Inc., v. Keeter, 382 P.2d 720 (N.M. 1963)

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FOREIGN CORPORATIONS—TRANSACTION OF BUSINESS—A DOUBLE DEFINITION*—Under section 51-10-4, New Mexico Statutes Annotated,[1] a foreign corporation must comply with certain procedures "before transacting any business in this state."[2] A foreign corporation which fails to comply with this "qualifying statute" is prohibited from suing upon contracts made by it in New Mexico.[3] The Supreme Court of New Mexico has interpreted the term "transacting any business" to mean the transaction of enough business to justify the conclusion that the corporation is engaged in intrastate business as opposed to interstate business.[4] Foreign corporations, however, are allowed to use the courts of New Mexico without complying with the requirements of section 51-10-4 if the business transacted is not sufficient to indicate intrastate activity.[5]

J. H. Silversmith, Inc. v. Keeter[6] involved an action to recover money due on a promissory note executed in New Mexico by defendant.[7] Plaintiff, a Colorado corporation, conducted business as a general agent[8] for various insurance companies licensed and authorized to transact business in New Mexico. Defendant, a local insurance agent,[9] was appointed by plaintiff to represent the companies that plaintiff handled. The agreements between the parties authorized defendant to accept proposals for insurance, collect pre-

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* Melfi v. Goodman, 69 N.M. 488, 368 P.2d 582 (1962); J. H. Silversmith, Inc. v. Keeter, 382 P.2d 720 (N.M. 1963).

1. 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 . . . designating its principal office in this state and its agent . . . upon which agent process against said corporation may be served . . . .

N.M. Stat Ann. § 51-10-4(a) (1953).

2. *Ibid.*

3. Until such corporation so transacting business in this state shall have obtained said certificate from the state corporation commission, it shall not maintain any action in this state, upon any contract made by it in this state . . . .

N.M. Stat. Ann. § 51-10-5 (1953).

4. Abner Mfg. Co. v. McLaughlin, 41 N.M. 97, 64 P.2d 387 (1937); Vermont Farm Mach. Co. v. Ash, 23 N.M. 647, 170 Pac. 741 (1918); Goode v. Colorado Inv. Loan Co., 16 N.M. 461, 117 Pac. 856 (1911). See also Young v. Kidder, 33 N.M. 654, 275 Pac. 98 (1929), where the court discussed the foreign corporation statutes in light of the real estate "qualifying statutes."

5. *Ibid.*

6. 382 P.2d 720 (N.M. 1963).

7. The note was executed by defendant Keeter and was signed by defendant Marchiando as accomodation maker. The "defendant" referred to in this comment is Keeter.

8. The term "general agent," as used by the court and as commonly used by insurance agents, refers to an agent who acts as the equivalent of a wholesaler, or distributor, and who has no contact with the buying public.

9. The term "local insurance agent," as used by the court and as commonly used by insurance agents, refers to an agent who "retails" insurance—one who deals with the buying public.

miums, and remit the premiums less commissions.[10] Defendent executed a promissory note to plaintiff in lieu of cash payment of premiums owed to the companies. Defendant defaulted and plaintiff brought an action on the note.

The trial court dismissed the complaint on the ground that plaintiff had been transacting business in New Mexico in contravention of section 51-10-4 and was therefore barred from using the New Mexico courts. On appeal to the New Mexico Supreme Court, *held,* Reversed and Remanded with directions to enter judgment for plaintiff.[11]

The supreme court limited its discussion to the issue of "whether the activities of . . . [plaintiff] in New Mexico amounted to 'transacting business' so as to bring it within the purview of . . . [section 51-10-4]."[12] The court based its decision that there was no "transaction of business" upon the facts that plaintiff did not maintain an office in New Mexico, did not solicit business for its insurance companies directly, and no independent contracts were made with agents on plaintiff's behalf. Plaintiff's only activity in New Mexico was the selection, supervision, and removal of local agents on behalf of its insurance companies.[13] The court concluded, *inter alia,* that:

> If the making and delivery of the promissory note in New Mexico could be said to constitute transacting business here, it is but a single act of business which this court has held would not bring a foreign corporation within its qualifying statutes.[14]

However, in *Melfi v. Goodman,*[15] a 1962 case, the supreme court construed the phrase "transaction of business," contained in section 21-3-16, New Mexico States Annotated,[16] to include the execution of a single promissory note in New Mexico by a resident of New Mexico, who was a major shareholder in a New Mexico corporation, to a non-resident in satisfaction of a

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10. Although only two agreements between the parties called for payments of premiums to plaintiff, there was no evidence that defendant paid any money directly to the insurance companies. Hence, the note included all moneys due and owing plaintiff.

11. J. H. Silversmith, Inc. v. Keeter, 382 P.2d 720, 723 (N.M. 1963).

12. *Id.* at 722.

13. The court held that "in effect . . . [plaintiff's] office was the same as the 'office' of the insurers." *Ibid.* Any debtor-creditor relationship arose, therefore, not between plaintiff and defendant, but between the insurance companies and defendant.

14. *Id.* at 723.

15. 69 N.M. 488, 368 P.2d 582 (1962).

16.

> Any person, whether or not a citizen or resident of this state, who in person or through an agent does any of the acts enumerated in this subsection thereby submits himself or his personal representative to the jurisdiction of the courts of this state as to any cause of action arising from:
>
> (1) The transaction of any business within this state . . . .

N.M. Stat. Ann. § 21-3-16 (A) (1) (Supp. 1963).

judgment outstanding against the corporation.[17] In an action to enjoin the non-resident from foreclosing a mortgage given to secure the note, the trial court entered an order quashing service made upon defendant because "defendant did not come within the purview of the statute, and, further, that the statute was unconstitutional."[18] On appeal to the New Mexico Supreme Court, *held,* Reversed and Remanded with directions to vacate the order quashing the service and proceed with the trial. Defendant was subject to jurisdiction under section 21-3-16 and could be sued in the New Mexico courts.[19]

The test adopted by the court in *Melfi* provided that the power of a New Mexico court to enter a binding judgment against an individual who was not served with process in New Mexico "depends upon two questions: first, whether he has certain minimum contacts with the state[20] . . . and, second, whether there has been a reasonable method of notification."[21]

If the test for "transaction of business" used in *Melfi* had been applied to the facts of *Silversmith,* then *Silversmith,* a foreign corporation, could not have maintained its action in the New Mexico court; section 51-10-5 would have barred action. Since New Mexico has ruled that foreign corporations are subject to service of process, although this is not specifically enumerated in the statutes,[22] the ruling in *Melfi* might properly have been used in *Silversmith.*

17. Plaintiff, to protect the corporation from execution of the judgment, agreed to purchase the judgment, paying defendant $10,000 cash, the balance to be paid in semi-annual installments of $6,500. A mortgage was assigned to defendant as security. The agreement was entered into, and the initial payment was made, in Lincoln County, New Mexico. Defendant thereafter threatened to foreclose the mortgage and execute on the judgment even though plaintiff was not in default.

18. Melfi v. Goodman, 69 N.M. 488, 490, 368 P.2d 582, 583 (1962).

The supreme court disposed of the trial court's ruling of unconstitutionality by summarily stating that the due process clause was not violated by the statute. Among the cases cited as authority for this statement is Nelson v. Miller, 11 Ill. 2d 378, 143 N.E.2d 673 (1957). In the *Nelson* case, action was brought by a resident of Illinois for negligence against a resident of Wisconsin who appeared specially to quash personal service made on him. The Supreme Court of Illinois interpreted their service of process statute, Ill. Stat. Ann. ch. 110, § 17 (Supp. 1962) [from which New Mexico drafted N.M. Stat. Ann. § 21-3-16 (Supp. 1963)], in light of the doctrine of International Shoe Co. v. Washington, 326 U.S. 310 (1945), and found that the service did not offend "traditional notions of fair play and substantial justice."

19. Melfi v. Goodman, 69 N.M. 488, 491, 368 P.2d 582, 584 (1962).

20. The phrase "minimum contacts" or "minimal contacts" as stated by the court in Melfi v. Goodman, 69 N.M. 488, 491, 368 P.2d 582, 584 (1962), originated in International Shoe Co. v. Washington, 326 U.S. 310 (1945), and is now uniformly recognized as the test for determining whether due process requirements are met when personal service is made upon non-residents out of the state of the forum.

21. 69 N.M. at 491, 368 P.2d at 584 (1962). The court adopted the language of Gray v. Am. Radiator & Standard Sanitary Corp., 22 Ill. 2d 432, 176 N.E.2d 761 (1961), which dealt with the construction of Ill. Stat. Ann. ch. 110, § 17 (Supp. 1962).

22. See Crawford v. Refiners Co-op. Ass'n., 71 N.M. 1, 375 P.2d 212 (1962),

That the term "transaction of business" has been interpreted to mean different things in different situations is clear. The United States Supreme Court has recognized that the definition of "doing business" varies in direct relation to the type of problem involved.[23] But is a double definitional standard necessary? Does it not seem reasonable at first glance to conclude that a foreign corporation which is subject to actions brought against it in a state court should also be found to be "qualified to do business in the state" under foreign corporations statutes? The answers to these questions hinge upon the requirements of due process[24] and of the commerce clause[25] of the Constitution, respectively. Foreign corporations may be served with process only where the requirements of due process are met.[26] At the same time, such corporations must be able to move freely in interstate commerce. These considerations lead to the divergence in definitional standards as illustrated by *Melfi* and *Silversmith*.

Virtually all states have statutes requiring foreign corporations to comply with certain procedures before "doing business" in their state.[27] In New Mexico, the statutory language differs; section 51-10-4 states that "[e]very foreign corporation, except banking, insurance and railroad corporations, before *transacting* any business in this state . . ." must comply with certain procedures.[28]

When defining minimum activity necessary to require the application of section 51-10-4 and the similar statutes of other states,[29] courts have been limited by the facts of each case and by the protection afforded foreign corporations under the commerce clause of the Constitution. The rule generally accepted by the United States Supreme Court has been recognized to be:

> When a corporation is engaged in interstate commerce in a state other than that of its residence, and as a related part of such engagement there are performed acts which are merely incidental to the

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where the court held that there was no question but that the legislative intent of N.M. Stat. Ann. §§ 64-24-3 to -4 (1953) was to include corporations as well as natural persons within the meaning of the term "non-residents."

23. Perkins v. Benquet Consol. Mining Co., 342 U.S. 437 (1952).

24. U.S. Const. amend. XIV, § 1.

25. U.S. Const. art. I, § 8, cl. 3.

26. International Shoe Co. v. Washington, 326 U.S. 310 (1945). See note 31 *infra*.

27. See Fletcher, Private Corporations § 8606 (1955), for a collection of such statutes.

28. N.M. Stat. Ann. § 51-10-4 (1953). (Emphasis added.) See note 1 *supra* for the text of the statute.

The Supreme Court of New Mexico, however, in Goode v. Colorado Inv. Loan Co., 16 N.M. 461, 117 Pac. 856 (1911), found that the phrase "transacting business" should be held to be equivalent to the words "doing business" which are found in most state statutes.

29. See note 27 *supra*.

> carrying on of such commerce, such acts will not constitute doing business in that state within the meaning of . . . [the qualifying] statutes . . . .[30]

When dealing with the activity necessary for courts to acquire jurisdiction over foreign corporations transacting business in a state, however, it must be recognized that the tests for jurisdiction have undergone great change during the last fifty years.[31] The trend today "is clearly discernible toward expanding the permissible scope of state jurisdiction over foreign corporations and other nonresidents"[32] to the limits set by the due process clause of the Constitution, without eliminating restrictions imposed by state courts. Due process, according to rationale taken from *International Shoe Co. v. Washington*,[33]

> [r]equires only that in order to subject a defendant to a judgment in personum, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'[34]

It is essential in every case involving service of process that there be some action by which a foreign corporation "purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protection of its laws."[35]

Service of process statutes such as New Mexico's were drafted to incor-

30. *In re* Bell Lumber Co., 149 F.2d 980, 985 (7th Cir. 1945). The court held that the test to be applied was:

> [I]f acts performed are not merely incidental to interstate commerce, but are substantial with acts thereto, then the business is carrying on business in that state and is subject to reasonable requirements of state statutes.

Ibid.

The court in *Bell* also commented that corporations should not be insulated merely because they engage in interstate commerce. See also Eli Lilly & Co. v. Sav-On-Drugs, Inc., 366 U.S. 276 (1961), where plaintiff's contention that its interstate business insulated it from the New Jersey qualifying statute, even though it engaged in intrastate business, was not accepted by the Court.

31. Any attempt to outline the development of the law in the last one hundred years is beyond the scope of this comment. There are innumerable articles and treatises devoted to this very subject which may be consulted if the reader is interested in pursuing the subject. See, *e.g.*, Comment, 8 N.Y.L.F. 293 (1962).

32. McGee v. International Life Ins. Co., 355 U.S. 220, 222 (1957).

33. 326 U.S. 310, 316 (1945).

34. Nelson v. Miller, 11 Ill. 2d 378, 143 N.E.2d 673, 677 (1957).

35. Hanson v. Denckla, 357 U.S. 235, 253 (1958).

The requisite activity for jurisdictional purposes as set forth in *International Shoe* has been discussed recently by the United State Supreme Court in two cases and has been modified slightly in each decision. The Court, in McGee v. International Life

porate the rationale of *International Shoe*;[36] their purpose is to extend personal jurisdiction to the limits allowed under the Constitution.[37] In so doing, the use of the words "transaction of any business" was not intended to reflect the meaning which had previously been ascribed to "doing business." Rather, the "minimum contact" theory of jurisdiction has been "accepted as a guiding light"[38] for the requirement of "transaction of any business." It is not the purpose of the service of process statute to impose regulation upon business; rather, it provides redress for the citizens of the state in its courts "against persons who, having substantial contact with the State, incur obligations to the State's protection."[39]

Although the activity within the state is only incidental to the transaction of interstate commerce by the foreign corporation, and any attempt to en-

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Ins. Co., 355 U.S. 220 (1957), a case where the only contact by the insurance company (a foreign corporation) with a resident was the mailing of an insurance certificate to him, held that service of process and subsequent personal jurisdiction over the insurance company did not violate the due process clause. One year later, however, in *Hanson,* the Court limited the effect of *McGee.*

In *Hanson,* the controversy dealt with a part of the corpus of a trust established in Delaware by a settlor who later became a domiciliary of Florida. The settlor died and the survivors were divided into two factions. The "legatees," as one group was called, insisted that the property in question passed under the residuary clause of the settlor's will which had been admitted to probate in Florida. The other group, the "appointees" and "beneficiaries," insisted that the property passed by the settlor's exercise of power of appointment expressed in the deed of trust in Delaware. The trustee and the trust estate remained at all times in Delaware. The Supreme Court found that Florida did not acquire jurisdiction over the trust estate or the trust merely by being the "center of gravity" of the controversy and the most convenient forum for adjudication.

A case decided just after publication of *Hanson,* Grobark v. Addo Machine Co., 18 Ill. App. 2d 10, 151 N.E.2d 425 (1958), specifically applied the language of *Hanson* to the Illinois service of process statute. The court in *Grobark* interpreted the language of its statute very literally and, using *Hanson,* concluded that physical presence was necessary to acquire jurisdiction over foreign corporations. "Transaction of any business" was said to require the commission of some definite act within the forum state.

36. Illinois courts have concluded that it was the intention of the drafters of the Illinois service of process statute, Ill. Stat. Ann. ch. 110, § 17 (Supp. 1962), to implement the "minimum contact" theory of jurisdiction enumerated in the *International Shoe* case. See, *e.g.,* Haas v. Fancher Furniture Co., 156 F. Supp. 564 (N.D. Ill. 1957).

37. In Orton v. Woods Oil and Gas Co., 249 F.2d 198 (7th Cir. 1957), the Circuit Court of Appeals held that performance of professional services by the plaintiffs for the benefit of the defendant foreign corporation were not sufficient to bring the defendant within any semblance of the "minimum contact" test followed in Illinois. The court commented that to hold otherwise would push the *International Shoe* doctrine to the breaking point and allow personal jurisdiction to transcend the bounds of due process.

38. *Id.* at 201.

39. Nelson v. Miller, 11 Ill. App. 2d 378, 143 N.E.2d 673, 679 (1957). The Illinois court used Henry L. Doherty & Co. v. Goodman, 294 U.S. 623 (1935), as authority for its conclusion.

force the "qualifying statute" will be held to be unconstitutional and void,[40] the exercise of service of process may be constitutional as within the due process clause. When a foreign corporation enjoys the protection of state courts (because it is not "doing business"), it is not unreasonable, but rather in furtherance of fair play and substantial justice, to require that corporation to make its defense within the state.[41]

In *Silversmith,* the Supreme Court of New Mexico applied the law of cases dating from 1911[42] as authority for the position that a single act of business was *not transacting* business for purposes of section 51-10-4. The general discussion of the law with regard to foreign corporations has illustrated the position taken by courts that "transaction of business" or "doing business" for purposes of qualifying statutes includes the transaction of a chain of activities which evidences an intent on the part of the foreign corporation to establish business in the jurisdiction with residents of the jurisdiction.

In *Melfi,* the rule of the case reflects the trend set by the most recent cases grappling with expansion of jurisdiction in light of the due process clause.[43] The "minimum contact" established by the execution of a promissory note within New Mexico, coupled with reasonable notification, allowed jurisdiction to be exercised over the nonresident defendant. No chain of activity needed to be shown since any discussion of violation of the commerce clause would have been wholly immaterial.

If, therefore, a foreign corporation appears as a *plaintiff* in an action in New Mexico, its activity in New Mexico is viewed in light of the commerce clause; it may move freely within the state and use the state's courts without

40. Butler Bros. Shoe Co. v. United States Rubber Co., 156 Fed. 1 (8th Cir. 1907); Furst v. Brewster, 282 U.S. 493 (1931).

In Abner Mfg. Co. v. McLaughlin, 41 N.M. 97, 64 P.2d 387 (1937), the supreme court recognized that interstate business was not "transacting business" within the meaning of the qualifying statute and could not be regulated by the state.

41. Nelson v. Miller, 11 Ill. App. 2d 378, 143 N.E.2d 673 (1957). In *Nelson,* the court recognized that if, in any given case, it would be burdensome to litigate the action in the state of the plaintiff, the doctrine of *forum nonconveniens* would be available. In addition, nonresident defendants generally have the privilege of removal to federal court and transfer to a district which would be more convenient. See 28 U.S.C. §§ 71, 114 (1958); 28 U.S.C. §§ 119, 163 (1958).

In McGee v. International Life Ins. Co., 355 U.S. 220 (1957), the Court, after uttering the now renowned phrase that "a trend is clearly discernible toward expanding the permissible scope of state jurisdiction over foreign corporations and other nonresidents" (*id.* at 222; see note 25 *supra* and accompanying text), decided that to deny plaintiff the right to redress in California courts would force plaintiff to "follow the insurance company to a distant state in order to hold it legally accountable." According to the Court, this would allow the insurance company the insulation of distance, thereby making it judgment proof. However, any inconvenience to the insurer would not amount to denial of due process.

42. See note 4 *supra.*

43. See note 35 *supra.*

complying with the statutory requirements regarding qualification until its activity is deemed to be intrastate. To hold otherwise would repress interstate commerce. If the same corporation is a defendant, *sued* in a New Mexico court, it is protected only by the due process clause and the "minimum contact" test set forth by the United States Supreme Court.

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