

Opinion No. 51-5442

October 8, 1951

BY: JOE L. MARTINEZ, Attorney General

TO: Hon. Beatrice B. Roach Secretary of State Santa Fe, New Mexico

{*148} This is in reply to your letter of August 16, 1951, in which you requested an opinion interpreting {*149} that portion of Chap. 126, Laws of 1951, which is now found in § 54-804 (b), N.M.S.A. You also enclosed a letter from a New York attorney, describing the present activities and future plans of his insurance company client, and asking whether this company could file under § 54-804 (b). In addition you asked what fee you should charge a corporation for filing a statement constituting the Secretary of State its attorney for the service of process, and what fee should be charged to forward all documents to the present place of business of a corporation, as required by § 54-804 (b).

It is my opinion that the insurance corporation described in the enclosure to your letter is eligible to file under § 54-804 (b). It should first be noted that this section does not specifically exclude insurance companies, as such, from its provisions. The first portion of this section reads as follows:

"Any foreign corporation or foreign bank, without being admitted to do business in this state, may loan money in this state, only on real estate mortgages, trust deeds, and notes in connection therewith, and take, acquire, hold and enforce such notes, mortgages or trust deeds given to represent or secure money so loaned or for other lawful consideration, . . ." (Emphasis mine.)

It is true that later in this section we find this language:

"Provided, that such activity by such corporation or bank shall not constitute 'doing business' under subsection (a), above, . . ."

and I have noted that subsection (a) (§ 54-804 (a)) refers to foreign corporations **other** than banking, insurance or railroad companies. However, it should also be noted that 'foreign banks', although excluded from § 54-804 (a), are expressly mentioned as coming within the purview of § 54-804 (b). It is therefore, my opinion that insurance corporations are to be similarly included in the term "any foreign corporation." To be eligible to file under this act, however, no insurance company can be carrying on an insurance business in this state and circumventing the requirements of Chap. 60, Title 4, N.M.S.A.

What constitutes "doing business" so as to make a corporation ineligible to file under § 54-804 (b) must be decided on the facts of each case. In the case of Hutchinson v.

Gilbert, 45 Fed. 2d 139, Judge L. Hand, in reviewing the cases concerning what constituted "doing business", came to this conclusion:

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

It is my opinion that the contemplated activities of the particular company in question, described in the enclosure to your letter, will not constitute "doing business" in New Mexico. Furthermore, it is obvious that what this company proposes to do is specifically authorized by § 54-804 (b), and since insurance companies as such are not excluded from its provisions, the company may file under this section. I am enclosing for your information a copy of Attorney General Opinion No. 5319, dated September 8, 1950, which discusses at some length many of the cases which have aided me in my holding in this opinion.

In answer to your other questions, it is first of all my opinion that a fee of \$ 3.00 should be charged for acceptance of service and forwarding all documents to the present place of business of the foreign corporation. In § 19-305, N.M.S.A., which requires similar services to be performed by your office in the acceptance of processes, a fee of \$ 3.00 is stipulated, and I believe such fee should also be charged under § 54-804 (b). Concerning the fee to be charged a corporation for filing its statement constituting the secretary of state its attorney for the service of process, I could find no statute to assist me in determining {^{*150}} a proper fee. § 3-106, N.M.S.A., sets out what fees the Secretary of State **shall** charge for particular items of work done in his office. No item in this schedule of charges covers the filing of such a statement as here concerns us. In my opinion, however, the language of § 3-106 does not mean that no fees can be charged for services other than those enumerated therein. It is my further opinion, therefore, that for the filing of a corporation statement under § 54-804 (b), you may charge any reasonable fee, which is in line with fees charged by other departments of the State government for similar services.

Trusting that this opinion answers all your questions on this subject, I remain