

Opinion No. 70-104

December 28, 1970

BY: OPINION OF JAMES A. MALONEY, Attorney General

TO: State Corporation Commission State of New Mexico Corporation & Franchise Tax Departments P.E.R.A. Building Santa Fe, New Mexico 87501

QUESTIONS

QUESTION

Is a business or "Massachusetts" trust organized under the laws of another state required to procure a certificate of authority as a foreign corporation before transacting business in the State of New Mexico?

CONCLUSION

No.

OPINION

{*186} ANALYSIS

As stated by one law review writer, with the passage of the Real Estate {*187} Investment Trust Act, an amendment to the Internal Revenue Code of 1954, (26 U.S.C. §§ 856-858), "the business trust -- a form of business organization which had passed into relative obscurity -- has been revitalized . . ." Note, **Liability of Shareholders in a Business Trust -- The Control Test**, 48 Va. L. Rev. 1105 (1962). See, e.g., **Pacific American Realty Trust v. Lonctot**, 62 Wash. 2d 91, 381 P.2d 123 (1963). See generally, Symposium, **Real Estate Investment Trusts**, 16 Bus. Law. 900-41 (1961); Symposium, **Real Estate Investment Trusts**, 48 Va. L. Rev. 1007-1148 (1962); Lynn, **Real Estate Investment Trusts: Problems and Prospects**, 31 Fordham L. Rev. 73 (1962); 3 Cavitch, **Business Organizations**, §§ 43.01-44.08; Annot. 156 A.L.R. 22 (1945).

It is of course a well established principle of law that a corporation must secure the permission of a state in which it is not incorporated before transacting business in that state. On the other hand, it was long assumed that a business trust, not being a corporate person but only a collection of citizens, was entitled to transact business in any state in view of the Privileges and Immunities Clause of Article Four, Section Two of the United States Constitution. That argument was laid to rest by the United States Supreme Court in its decision in **Hemphill v. Orloff**, 277 U.S. 537, 72 L. Ed. 978 48 S. Ct. 577 (1928). See Note, 15 Va. L. Rev. 249, 260 (1929).

The Court in **Hemphill v. Orloff, supra**, did not attempt to set down a hard and fast rule that all business trusts must be treated as corporations, but said that a state may, under the United States Constitution, regulate a foreign business trust if the latter was clothed with the ordinary functions and attributes of a corporation. Under the Michigan law which was at issue in **Hemphill**, a corporation was defined to "include all associations, partnership associations, and joint stock companies having the powers or privileges of corporations, not possessed by individuals or partnerships, under whatever term or designation they may be defined and known in the state where organized." See also **Harris v. United States-Mexico Oil Co.**, 110 Kan. 532, 204 P.754 (1922), **writ of error dismissed**, 260 U.S. 694 (1922), **cert. denied**, 260 U.S. 720 (1922); **State v. Hinkle**, 126 Wash. 581, 219 P.41 (1923).

The applicable definitions under the New Mexico Business Corporation Act are very simple in comparison to the Michigan, Kansas and Washington statutes. A corporation or domestic corporation "means a corporation for profit subject to the provisions of the Business Corporation Act, except a foreign corporation." A foreign corporation "means a corporation for profit organized under laws other than the laws of this state for a purpose or purposes for which a corporation may be organized under the Business Corporation Act." §§ 51-24-2 (A.) & (B.), N.M.S.A., 1953 Comp. (1969 Supp.). Although these definitions are derived from Section Two of the American Bar Association Model Business Corporation Act, we are unable to find any cases on the particular problem raised by this opinion interpreting the definitions. See also, North Dakota Century Code Ann. § 10-19-02.

It would appear that by the adoption of the above definition of foreign corporation the Legislature has not intended that the law be applied to business organizations which are not clearly corporations, identical to the form of business organization created under the laws of the State of New Mexico as a corporation. Construing a similarly limited, albeit different, definition of the word corporation, a New York court concluded that the Legislature had not covered the "Massachusetts" or business trust under the regulation of foreign corporations. **Burgoyne v. James**, 156 Misc. 859, 282 N.Y.S. 18 (S. Ct. 1935), **aff'd**, 246 App. Div. 605, 284 N.Y.S. 977 (1935). We believe that our courts would find the New York opinion persuasive and hold that a foreign "Massachusetts" or business trust is not required to procure a certificate of authority as a foreign corporation before transacting business in the State of New Mexico.

Although it should go without saying, we must emphasize that this opinion of necessity goes no further than resolving the question of registration of a foreign business trust as a foreign corporation. For example, we have not attempted to deal with the {*188} problem of whether or not the New Mexico "Blue Sky Law" applies to the sale of securities by a foreign business trust within the State of New Mexico. Compare, **State v. Cosegrove**, 36 Idaho 278, 210 P.393 (1922) with **Reilly v. Clyne**, 27 Ariz. 432, 234 P.35 (1925). See also, 156 A.L.R. 22, 185 (1945) and the articles on securities regulation in the two law review symposia cited above.

By: Mark B. Thompson III

Assistant Attorney General