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Is the Plaintiff Doing Business in Illinois - A Perfect Defense?

A state statute may not be used to impede the free flow of interstate commerce. The fact that an uncertified foreign corporation has engaged in interstate commerce with a domestic company does not affect its standing as a plaintiff in Illinois courts under the Illinois Business Corporation Act.

By Edward S. Margolis

In the past several hundred years, the profession of alchemy has more or less fallen into a state of progressive decline. I, for one, however, believe that the creative spirit which motivated these wizards of old as they mumbled incantations over their ovens and concocted elixirs of perpetual youth has not died out even in this age of exact science. Indeed this time-honored tradition of striving to create gold from the "base metals" has been preserved in substance, if not in form, by a singular class not unfamiliar to the readership of this journal. I speak, of course, of that unique breed of individual - the defense lawyer.

This is not to say that all defense lawyers dabble in the mystical arts, but I have seen enough of them in my time to observe that almost to the man their eyes grow misty when the conversation turns to the creation of a "perfect defense." Just the other day I was jarringly reminded of this fact by a defense lawyer of approximately the same vintage as myself. I had filed a simple suit in federal court on behalf of a New York plaintiff to collect money for merchandise sold to an Illinois company. There was diversity of citizenship and the amount involved exceeded the jurisdictional minimum. Pretty routine? Not on your life! Not when confronted by the perfect defense.

THE PERFECT DEFENSE

A word about the perfect defense is in order. The perfect defense is perfect within itself. It depends not on the facts of the case. It does not look to what is right, nor what is wrong. It essentially is a paralyzing thrust which totally disables the plaintiff and renders him incapable to proceed with the action.

To appreciate the simplicity and beauty of a perfect defense, the verbatim text of my adversary's motion to dismiss recently filed in the United States District Court is presented:

1. That the Complaint herein alleges the diversity- jurisdiction of the United States District Court and further states that the Plaintiff is a corporation incorporated under the laws of the State of New York.

2. That the Complaint alleges a number of business transactions between the Plaintiff and the Defendant, an Illinois corporation, all of which constituted doing business in the State of Illinois (emphasis added).

3. That the Plaintiff does not presently possess a Certificate of Authority from the State of Illinois to transact business in the State of Illinois as a foreign corporation.

4. That Chapter 32 of the Illinois Revised Statutes, § 157.25 specifically prohibits any foreign corporation which transacted business in the State of Illinois without a Certificate of Authority to maintain a civil action in the State of Illinois.

5. Such Statute is applicable to diversity actions brought within the State of Illinois.

WHEREFORE, the Defendant prays that this court dismiss this action and grant the Defendant its costs.

While the author is familiar with this defense, he had never quite seen it reduced to a perfect five-paragraph format. There was no affidavit in support of the motion to dismiss and no evidentiary facts as to the transactions between the parties other than the sale of merchandise mentioned in the motion.

When questioned, the attorney filing the motion stated that he files this motion routinely and always wins - "works like a charm." What followed was a nine-month odyssey through federal and state law traveling from the presiding district judge to a magistrate for discovery and ultimately back to the presiding judge where the perfect defense, at least in its ultimate five-paragraph form, was dealt a fatal blow.

THE INQUIRY BEGINS

From the outset, it is clear that every non-resident corporation bringing suit in Federal District Court in the state of Illinois is a potential target for a motion to dismiss under the Illinois Business Corporation Act. A practitioner upon being retained by a local client should routinely check with the Secretary of State as to whether or not such foreign corporation has duly registered to do business in Illinois. If the corporation is registered, the inquiry ends, as such foreign corporation undeniably has the right to prosecute its action in the Illinois courts. If, on the other hand, there is no registration, the practitioner can begin inquiry as to whether the activities of the defendant constitute "doing business" under the Illinois statute.

MINIMAL CONTACTS v. DOING BUSINESS

Every practicing lawyer is aware of the landmark Supreme Court decision in International Shoe Co. v. Washington and its progeny. In International Shoe, the Court first announced the doctrine of minimal contacts as the due process requirement to obtain jurisdiction over a non-resident defendant. The principal foundation of the jurisdiction and public policy in deciding these cases is the interest of the state in providing redress in its own courts against persons who inflict injury upon or otherwise incur obligations to those within the ambit of the state's legitimate protective policy.

There is a great temptation to extend this doctrine of "minimal contacts" beyond its scope and apply it to the question of whether a plaintiff is doing business in Illinois. Indeed, my opponent in support of his perfect defense cited the fact that the plaintiff had shipped books in interstate commerce into Illinois and concluded that this constituted doing business. In response, the plaintiff agreed that if one of its books exploded in Illinois and injured an employee of the defendant, Illinois courts would indeed have jurisdiction over the plaintiff. As ludicrous as this may seem, this was the legal position which the defendant maintained.

By contrast, section 157.25 of the Business Corporation Act, the section upon which the defendant based its motion, concerns itself with sanctions against a corporation which does business in Illinois without paying franchise taxes. The cases which have interpreted this section deal with entirely different legal and policy questions. These cases hold that the plaintiff is entitled to do business in interstate commerce and to file suits in any state of the union per the commerce and equal protection clauses of the federal Constitution. The public policy which the courts address in these cases is the right of a foreign corporation to sue and to collect money on a transaction arising out of interstate commerce and the prevention of the unjust result of allowing a defendant an undeserved sanctuary from its just debts.

WHAT IS AND WHAT IS NOT DOING BUSINESS

The federal district court, in ruling on an Illinois law in a diversity of citizenship case, applies the law of the state of Illinois as declared by the legislature of the state or by its courts. (Erie R. Co. v. Tompkins.) Put simply, the federal court should decide the defendant's motion as an Illinois court would decide the motion.

First, it must put the burden of showing that the plaintiff was doing business in the state of Illinois without authority on the defendant. While this is certain, it is far less clear as to what conduct on the part of the plaintiff constitutes the doing of business. We do know. however, that the presence of an office within the state of Illinois does not, in itself, constitute doing business as defined by the Illinois statute.' Further, the Illinois courts have held that having a resident salesman in the state and storing merchandise in public warehouses also does not constitute doing business in Illinois'

What is clear is that the Illinois courts take a liberal attitude in interpreting what constitutes doing business in the context of the Illinois Business Corporation Act when the standing of a foreign corporation to sue in the state of Illinois is challenged. It is the law of Illinois that failure to comply with the Business Corporation Act regarding acquiring a certificate of authority should not be construed to exclude a foreign corporation from its right to sue to collect money on a transaction arising out of interstate commerce. This liberal approach is further illustrated in the case of Chicago and Milwaukee Telegraph Co. v. Type Telegraph Co.'"

> Under the rules of construction applicable to statutes of this character, this statute should be construed liberally, and unless corporations of this character come within the plain provisions of the act, it should not be so construed to nullify their contracts and deprive them of their legal remedies.

The most recent and perhaps the definitive statement on this subject by the Illinois Supreme Court comes in the case of Charter Finance Co. u. Henderson, which takes the Illinois cases a step further.

> We note also that even if Charter's activities had constituted the transaction of business, sections 102 and 125 may still have been inapplicable. In Textile Fabrics Corp. v. Roundtree (1968), 39 III. 2d 122, 125, this court held that our "statutes relative to foreign corporations cannot be given effect in such a way as to impede the federal authority and responsibility to insure the free flow of interstate commerce." In a similar case involving a provision in Mississippi's corporate law identical to section 125, the United States Supreme Court recently reached the same result, holding that "Mississippi's refusal to honor and enforce contracts made for interstate or foreign commerce is repugnant to the Commerce Clause." (Allenberg Cotton Co. v. Pittman (1974), 419 U.S. 20, 42 L. Ed. 2d 195, 95 S. Ct. 260). Although we need not rule directly on the question, it is at least arguable that Charter's transactions with Illinois residents, involving the flow of money across State lines, were contracts made for interstate commerce which, under Roundtree and Allenberg, Illinois courts cannot refuse to enforce.

THE ELI LILLY & COMPANY CASE

While the federal court under Erie v. Tompkins looks to the state law to interpret state statutes, there are occasions when the constitutional validity of such state statutes is questioned and the federal courts then will embark upon a constitutional inquiry which may go beyond the scope of any previous state interpretation.

Such an inquiry with regard to a foreign corporation registration statute of the type which is in effect in Illinois took place in the case of Eli Lilly is- Co. v. Sav-On-Drugs, Inc. In this five-to- four decision, the majority of the United States Supreme Court held that Eli Lilly & Company had established such an elaborate network of intrastate activities that the Court could not accept its position that it was merely operating in furtherance of interstate commerce.

In that case, the defendant had a permanent office with its name on the door and a telephone number which was listed in the regular and classified sections of the phone book. Eli Lilly further had twenty salaried employees, and solicited from hospitals, physicians, and drug stores, who, in turn, would have to buy merchandise intrastate from wholesalers who warehoused Eli Lilly's goods within the state. The majority of the Supreme Court, with four Justices dissenting, stated that this activity taken as a whole constituted doing business in the state of New Jersey.

The reason this case came to be heard by the United States Supreme Court was that the New Jersey Supreme Court had upheld the New Jersey statute excluding Eli Lilly from filing a lawsuit in New Jersey, and the case made its way to the United States Supreme Court on the issue of whether such statute constituted an illegal interference with interstate commerce.

Eli Lilly stands for the proposition that revenue statutes requiring a foreign corporation to register before doing business within a state are constitutional if the transactions of the foreign corporation are intrastate in character. The Court in viewing the totality of the business activities of Eli Lilly in New Jersey found it overwhelmingly clear that the corporation was involved in intrastate commerce.

Since Eli Lilly, the Supreme Court has taken this issue up only one other time in the case of Allenberg Cotton Co. v. Pittman. In Allenberg, the Court held that the Mississippi law, identical to the Illinois statute, could not be enforced to bar plaintiffs from enforcing their contracts in interstate commerce. What is critical to note is that these cases only reach the federal courts on the constitutional issue when the state bars a foreign corporation from using its courts. With the liberal approach taken by the Illinois courts, it is little wonder that such cases did not emanate from the state of Illinois.

Perhaps it would be best from the outset when confronted with the "perfect defense" to read to the presiding judge the dictum in Charter Finance Co. v. Henderson, wherein the Supreme Court of Illinois speculates:

> Although we need not rule directly on the question, it is at least arguable that Charter's transactions with Illinois residents, involving the flow of money across state lines, were contracts made for interstate commerce which under Roundtree and Allenberg, Illinois courts cannot refuse to enforce.

CONCLUSION

The federal court in denying the first-mentioned motion to dismiss noted:"

> A state statute may not be used to impede the free flow of interstate commerce. Under the U.S. Supreme Court's rulings, the corporation must be involved in intrastate trade to be "doing business" in the state. Illinois courts take a restrictive view of what constitutes "doing business" in favor of allowing interstate commerce to flow freely. In the present case. Plaintiff has not engaged in activities within the state to constitute intrastate business. Plaintiff's activities in Illinois are interstate in nature and do not arise to the level of doing business in Illinois. Plaintiff may maintain this action in the Federal Courts in Illinois under diversity of citizenship jurisdiction. The conduct and execution of Plaintiff's business does not constitute the pattern of intrastate activity contemplated by Eli Lilly and Company. The Plaintiff is a York publisher of books who sold merchandise to Defendant in interstate commerce. Defendant's motion to dismiss should be denied.

The real conflict which arises in the reported cases stems from the right of a corporation under the commerce clause of the Constitution to freely do business in interstate commerce without impediment versus the state's right to reasonably tax intrastate transactions. In a state like Illinois, where the courts have uniformly allowed foreign corporations to freely use their courts to enforce interstate obligations, the analysis as set out in Eli Lilly is truly unnecessary. Only where there has been a history of state challenges to foreign corporations should the federal court concern itself with a detailed examination of a corporation's intrastate activities when the subject matter of the lawsuit involves interstate commerce.

What the future may hold concerning the willingness of Illinois courts to more carefully scrutinize the intrastate activities of foreign corporations is open to speculation. Perhaps in an era of diminishing federal assistance to state government, Illinois will follow a stricter path of enforcement in an effort to generate needed revenues by encouraging foreign corporations to register in the state of Illinois and, thereby, pay franchise taxes. Until such date. however, the law of Illinois as announced in Charter Finance Co. has dealt a fatal blow to another perfect defense.

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1. *ILL. REV. STAT. ch. 32, S 15T.125 (1981): "No foreign corporation transacting business in this state without a certificate of authority is permitted to maintain a civil action in any court of this state until such corporation obtains a certificate of authority."*
2. *International Shoe Co. v. Washington, 326 U.S.310,66S.Ct. 154(1945).*
3. *The Illinois "Long Arm Statute," ILL. REV. STAT. ch. 110, } 2-209 (1981) is a codification of the International Shoe doctrine.*
4. *Bamberger-Stearn Co. v. Anderson, 207 III. App. 222 (1917).*
5. *Erie R. Co. v. Tompkins, 304 V.S. 64,58S. Ct. 817 (19.38).*
6. *Air Conditioning Training Corp. v. Majer, 324 III. App. 387, 58 \.E.2d 294 (l»14); United Newspapers Magazine Corp. v. United Advertising Cos., 297 III. App. 637. 17 \.E.2d 345 (1938); Charter Finance Co. v. Henderson, 15 III. App. 3d 1065, 305 \.E.2d 338, (1973), and Vernon Co. v. Trimble, 23 III. App. 3d 240, 318 \.E.2d 666 (1974).*
7. *Journal Co. of Troy v. F.A.L. Motor Co., 181 III. App. 5.30 (1913).*
8. *Marshall Milling Co. v. Rosenbluth, 231 III. App. 325 (1924).*

9. *Bamberger-Steam v. Anderson. supra note 4.*
10. *Chicago & Milwaukee Telegraph Co. v. Type Telegraph Co., 137 Ill. App. 131. 161-162 (1907).*
11. *Charter Finance Co. v. Henderson. 60111.2d 323,328 (1975).*
12. *Eli Lilly & Co. v. Sav-On-Drugs, Inc.. 366 L-.S. 276, 81 S. Ct. 1316 (1961).*
13. *Crosset & Dunlap v. Attorney's Escrow Serv., Inc., 81 C 733 in the United States District Court, Northern District of Illinois, Eastern Division. The opinion was written by Magistrate Carl B. Sussman and later adopted in total by Judge Marvin Aspen as part of the court's ruling.*