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ARIZONA ATTORNEY GENERAL

DEPARTMENT OF LAW LETTER OPINION NO. 73-22-L (R-33)

REQUESTED BY: GEORGE M. DEMPSEY
Executive Secretary
Arizona Corporation Commission

QUESTION: Is a foreign business which has qualified to do business pursuant to A.R.S. §§ 10-481, et seq., thereafter required to comply with the provisions of A.R.S. § 10-173 regarding limitations on corporate indebtedness.

ANSWER: No.

The pertinent statute, A.R.S. § 10-173, has been reproduced below:

A. No corporation shall incur or subject itself to a total indebtedness or liability, direct or contingent, in an amount exceeding two thirds of its authorized capital stock, or, in the case of corporations having no par value stock, in such an amount as shall be computed by rules and regulations of the corporation commission.

B. Such limitation shall not apply to indebtedness authorized by three fourths of the votes cast with respect thereto in conformity with the provisions of the articles of incorporation and the by-laws of a corporation, at a lawfully held meeting of the shareholders thereof, and approved by the corporation commission.

C. The rediscounting of securities owned by a corporation, representing lawfully made loans, or the pledging or guaranteeing of such securities by the direct or indirect obligation of the corporation, by, with or to the federal intermediate credit bank, the regional agricultural credit corporation or other agency of the United States, or a bank or banking institution, if the transaction is authorized by the

articles of incorporation of the corporation and approved by the corporation commission, shall not be construed as a creation of indebtedness within the meaning of this section.

The question has reference specifically to the provisions of Paragraph A. There is a vast distinction between a foreign corporation's becoming "qualified to do business" in Arizona and its having to re-incorporate locally. Thus, it is conceivable that different rules might be applied to foreign and domestic corporations.

As a backdrop to this regulatory scheme, however, lies Article 15, Section 5 of the Arizona Constitution, which provides:

No corporation organized outside of the limits of this State shall be allowed to transact business within this State on more favorable conditions than are prescribed by law for similar corporations organized under the laws of this State; and no foreign corporation shall be permitted to transact business within this State unless said foreign corporation is by the laws of the country, state, or territory under which it is formed permitted to transact a like business in such country, state, or territory.

Therefore, the question may be re-stated in the context of the relevant constitutional and statutory guidelines as follows:

Does allowing a foreign corporation to incur indebtedness in an amount exceeding two-thirds of its authorized capitalization thereby permit it to transact business locally on more favorable terms than those available to Arizona corporations?

We maintain that it does not, for much the same reasons as were advanced in Attorney General Opinion No. 65-9, dated May 7, 1965.

We find particularly persuasive the dichotomy drawn therein between "transacting business" and the legal prerequisites to a foreign corporation's doing business, set forth at A.R.S. §§ 10-481, et seq.

The opinion alluded to previously held that failure to require foreign corporations to file their articles of incorporation in each county wherein they proposed to transact business did not infringe the constitutional prohibition against allowing foreign corporations to transact business on terms more favorable than those available to domestic corporations.

The safeguards intended by A.R.S. § 10-173 are obvious-- prevent thin capitalization, secure creditors' rights, obviate unsatisfied judgments, assure payment of dividends, etc. Nevertheless, we remain convinced that the disparity of treatment does not affect the business activities of foreign corporations, nor does it afford them an unfair competitive advantage.

While there have been no local cases on this particular question, the leading commentator, at several points in his multi-volume treatise, expresses the opinion that imposition of such a limitation upon foreign corporations as a precondition to allowing them to do business would be improper.

. . . [T]he law is well settled that each state has the power to exclude any foreign corporation, except those engaged in interstate commerce or acting as agents of the federal government, from entering into its limits for the transaction of business except upon such terms and conditions as it may see fit to impose. This does not, however, extend so far as to give the legislature of a state power to regulate or control the internal affairs of a foreign corporation. . . .
Fletcher, Cyclopedia of Corporations, Ch. 67, § 8445 (1960).

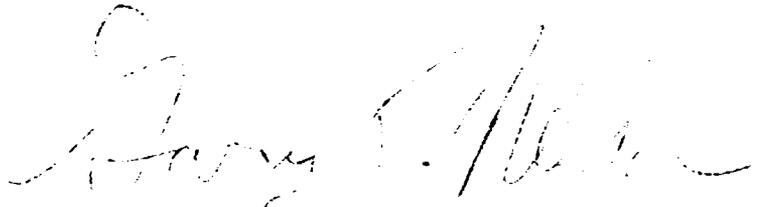
Lastly, as a matter involving statutory construction, the same commentator stated the following general rule:

. . . [S]tatutes granting powers, privileges or immunities to "corporations", without any qualifying words, will be construed as applicable only to domestic corporations in the absence of plain indications to the contrary, or unless the legislative intent that the statute shall extend to foreign corporations is clearly expressed in the terms of the statute. [Citations omitted.] Fletcher, op. cit., Ch. 67, § 8301.

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Neither criterion appears satisfied as regards A.R.S.
§ 10-173. Thus, we have answered your question in the nega-
tive.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Gary K. Nelson".

GARY K. NELSON
The Attorney General

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