1979 WL 42698 (S.C.A.G.)

Office of the Attorney General

State of South Carolina
November 13, 1979

***1** Honorable Grady L. Patterson
Chairman
State Board of Financial Institutions
Post Office Box 11194
Columbia, South Carolina 29211

Honorable John T. Campbell
Secretary of State
Post Office Box 11350
Columbia, South Carolina 29211

Gentlemen:
You have both requested opinions on behalf of Attorney A.L. Moses based upon an identical fact situation. Since the questions are so closely related, I felt a single response would be appropriate.

In order to respond to your questions a brief summary of the facts is necessary. The trust department of a national bank located in a state contiguous to South Carolina conducts the following trust business:
1) The bank serves as testamentary trustee for persons domiciled outside the State of South Carolina and manages such property within the State as is held by the trust;

2) The bank serves as inter vivos trustee for settlors domiciled outside of South Carolina and again performs management functions for the settlor's property in South Carolina; and

3) The bank serves as inter vivos trustee for settlors domiciled in South Carolina, occasionally soliciting business within the state, but not maintaining an office or agent in South Carolina.

The questions posed are first, whether the bank is doing a trust business in South Carolina, which necessarily requires as a condition precedent the approval of the Board of Financial Institutions; secondly, whether the bank by virtue of its activities is "doing business" in South Carolina within the meaning of the South Carolina Business Corporation Act, Section 33-23-10, Code of Laws of South Carolina, 1976; and finally whether our answer to either of the above questions would differ if the bank served as ancillary executor or administrator by appointment of a South Carolina probate court.

Because of the very limited facts which have been posed, I am unable to formulate an opinion which could be accurately applied to a "real world" situation. Obviously, there are a number of variables not addressed by the hypothetical which might alter the results of this opinion. I offer this thought as a caveat to the opinion. Nevertheless, it appears that in the first two factual situations mentioned above, which involve the bank's representation of non-South Carolina domicilaries, it is my opinion that it would not be necessary for the bank to obtain the approval of the Board of Financial Institutions. The bank's activities appear ancillary to a trust business performed outside this State and would not be considered "doing trust business" in South Carolina under Section 34-21-10, Code of Laws of South Carolina, 1976, as amended. However, in the third situation, where the bank serves as inter vivos trustee for South Carolina domicilaries, it is my opinion that it would be necessary for the bank to obtain the Board's approval. This becomes even more obvious when one considers

that the bank is outwardly soliciting such business from South Carolina residents. Trust business, like banking, is subject to pervasive state control. American Trust Company v. S.C. State Board of Bank Control, 381 F.Supp. 313 (D.S.C.1974). Certainly, it is within the authority of the State to require approval by the board before a foreign bank can serve as inter vivos trustee for South Carolina settlors. Cf. 59 Fed.Res.Bull, 305 (1973).

***2** With regard to the question of whether the bank must domesticate in South Carolina the same caveat mentioned above must apply. In 1963 Ops.Att.Gen. No. 1527, at page 91, we cautioned:
Even though the mere ownership of property in the State does not alone constitute "doing business," ... foreign coporate trustees may be required to qualify or domesticate in this state, if the investment in real estate constitutes "doing business" in the State of South Carolina. The question of whether a particular foreign corporation is doing business within this state in such a manner as to subject it to our domestication statutes is not susceptible of precise answer. Each case must stand upon its own particular facts, as there is no present statutory definition of the term "doing business." See Thompson v. Ford Motor Co., 200 S.C. 393, 21 S.E.2d 34.

It would naturally follow that if serving as inter vivos trustee for South Carolina domicilaries constitutes "doing trust business," it would also constitute "doing business" under the Business Corporations Act. As to the first and second fact situations, however, the bank's activities may fall within one of the exclusionary provisions of Section 33-23-10(b) of the Code, e.g. subsections (5) (creating or acquiring evidences of debt); (6) (securing or collecting debts or enforcing any rights in property covering same); (7) (effecting a transaction in interstate or foreign commerce); (9) (conducting isolated transaction.) No precise answer can be made, because of the limited facts given with regard to the banks "contacts" in South Carolina.

Interestingly, it should be noted that if the corporate name of the bank contains any work or phrase which implies that the corporation engages or is authorized to engage in the business of "banking" the corporation must obtain approval to engage in banking in South Carolina from the State Board of Financial Institutions. See, Sections 33-5-10(a)(3)(A) and 33-23-50(a) of the Code of Laws of South Carolina, 1976. Since national banks are prohibited from branch banking across state lines, (see 12 U.S.C. § 36), the Board could not approve such application, and the bank would find itself in a "Catch 22" situation unless it desired to change its corporate name.

The final question posed in both requests is whether the above conclusions would differ if the bank was appointed an ancillary executor or administrator for the estate of a decedent (not domiciled in S.C.) by appointment of a South Carolina probate court. Obviously, this appointment, would not affect the inter vivos trusteeships; therefore, we need only address the testamentary trust situation. It is my opinion that the appointment of a national bank in a contiguous state as ancillary executor or administrator in South Carolina will not convert an out-of-state trust business into a South Carolina trust business. Rather, such estate work would still appear to be ancillary to the out-of-state trust business. On the other hand, in order to engage in such estate work, the national bank would have to register in South Carolina under the South Carolina Business Corporation Act. Under Sections 21-13-320 of the Code, a corporation created under the laws of the United States must have "a business in this State"; thus, by definition they must be domesticated in order to be appointed administrator or executor.

***3** I hope my thoughts will be of some assistance to you. If you should need further assistance, please do not hesitate to contact me.
Very truly yours,

Richard B. Kale, Jr.
Senior Assistant Attorney General

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