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Doing Business in Oklahoma: Will Minimum Contracts Subject a Foreign Corporation to Oklahoma's Qualification Statutes

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"DOING BUSINESS" IN OKLAHOMA: WILL MINIMUM CONTACTS SUBJECT A FOREIGN CORPORATION TO OKLAHOMA'S QUALIFICATION STATUTES?

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If a corporation which utilizes hundreds of Oklahomans to sell tens of thousands of dollars of goods each week in the homes of various residents of the State of Oklahoma is not considered to be engaged in "doing business" within the State of Oklahoma, then what sort of activity is required in order for a corporation to be considered to be "doing business in Oklahoma?"[1]

I. INTRODUCTION

Courts have long struggled with the equivocal concept of "doing business,"[2] particularly concerning exactly what corporate activity will

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1. Answer Brief for Apellees at 18, C.H. Stuart, Inc. v. Bennett, 617 P.2d 879 (Okla. 1980).

2. The source of this confusion has been created by state statutes which either define the concept of "doing business" in the negative, or fail to define it at all. *See, e.g.*, MODEL BUSINESS CORP. ACT § 106:

> Without excluding other activities which may not constitute transacting business in this State, a foreign corporation shall not be considered to be transacting business in this State, for the purposes of this Act, by reason of carrying on in this State any one or more of the following activities:
>
> (a) Maintaining or defending any action or suit or any administrative or arbitration proceeding, or effecting the settlement thereof or the settlement of claims or disputes.
>
> (b) Holding meetings of its directors or shareholders or carrying on other activities concerning its internal affairs.
>
> (c) Maintaining bank accounts.
>
> (d) Maintaining offices or agencies for the transfer, exchange and registration of its securities, or appointing and maintaining trustees or depositories with relation to its securities.
>
> (e) Effecting sales through independent contractors.
>
> (f) Soliciting or procuring orders, whether by mail or through employees or

qualify as "doing business" intrastate. The sheer abundance of statutory and case law in recent years evidences a broad expansion of the type of foreign corporate activity which constitutes "doing business"[3] intrastate.

This article, focusing on Oklahoma case law, examines those business transactions which will subject a foreign corporation to state qualification statutes.[4] It also reviews the history of the "doing business" concept together with the policies underlying its application and its evolution from a framework of exclusion to one of inclusion.[5]

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agents or otherwise, where such orders require acceptance without this State before becoming binding contracts.

(g) Creating evidences of debt, mortgages or liens on real or personal property.

(h) Securing or collecting debts or enforcing any rights in property securing the same.

(i) Transacting any business in interstate commerce.

(j) Conducting an isolated transaction completed within a period of thirty days and not in the course of a number of repeated transactions of like nature.

Id. Oklahoma statutes do not supply a definition of "doing business."

In the absence of explicit legislative guidance, judicial opinions have supplied affirmative definitions tailored to the facts and circumstances of individual cases. For example, Oklahoma courts have long recognized the definition of "doing business" established by the court in *Fuller v. Allen*, 46 Okla. 417, 148 P. 1008 (1915):

> [Doing business means] the doing or performing a series of acts which occupy the time, attention, and labor of men for the purpose of livelihood, profit, or pleasure . . . . [T]he doing of a single act pertaining to a particular business or transaction will not be considered carrying on, transacting, or doing business.

Id. at 423, 148 P. at 1010. *Accord*, Wilson v. Williams, 222 F.2d 692 (10th Cir. 1955); C.H. Stuart, Inc. v. Bennett, 617 P.2d 879 (Okla. 1980); Seidenbach's v. A.E. Little Co., 294 P. 126 (Okla. 1930); Barnett v. Aetna Explosives Co., 96 Okla. 132, 220 P. 874 (1923); Denison v. Phipps, 87 Okla. 299, 211 P. 83 (1922).

An abundance of scholarly commentary exists on this issue. *See generally* H. HENN, LAW OF CORPORATIONS, §§ 98, 100, 101 (2d ed. 1970); Walker, *Foreign Corporation Laws: The Loss of Reason*, 47 N.C.L. REV. 1 (1968); Comment, *An Analysis of Doing Business*, 25 COLUM. L. REV. 1018 (1925); Note, *State Regulation of Foreign Corporations: Qualification: Interstate v. Intrastate Business*: Eli Lilly & Co. v. Sav-On-Drugs, Inc., 366 U.S. 276 (1961), 47 CORNELL L.Q. 300 (1962); Comment, *California's Statutory Attempt to Regulate Foreign Corporations: Will it Survive the Commerce Clause?*, 16 SAN DIEGO L. REV. 943 (1979); Comment, *Doing Business—A Re-Examination*, 12 W. RES. L. REV. 89 (1960); Comment, *Corporate Registration: A Functional Analysis of "Doing Business"*, 71 YALE L.J. 575 (1962).

3. *See* Note, *"Doing Business": Defining State Control Over Foreign Corporations*, 32 VAND. L. REV. 1105 (1979) [hereinafter cited as *Doing Business*]. *See also* notes 15-18 *infra* and accompanying text.

4. Each state has a statute which provides that any foreign corporation engaging in intrastate commerce must comply with certain requirements. Typical requirements include: filing an application to do business within the state; trade name registration; consent to service of process; the filing of the corporation's bylaws, charter, and certificate of incorporation; and the payment of a fee. While initially these requirements are only a minimal burden on a corporation's time and treasury, qualifying to do business has the future practical effect of requiring a corporation to pay a net corporate tax, which can be quite costly. *E.g.*, OKLA. STAT. tit. 18, §§ 1.11a, 1.11b, 1.201(a) (1971).

5. Notes 33-39 *infra* and accompanying text.

The Oklahoma Supreme Court's most recent interpretation of "dong business" is *C.H. Stuart, Inc. v. Bennett*.[6] This case, although perhaps an anomaly, may signal the Oklahoma Supreme Court's desire to obtain greater control over foreign corporations. The court, in denying C. H. Stuart, Inc. access to Oklahoma courts for failing to comply with Oklahoma's qualification statutes,[7] may have been concerned with affording domestic corporations assistance in bearing the cost of state services, and therefore sought to alleviate any competitive disadvantage resulting from allowing the foreign corporation to carry on intrastate business unhampered by the taxes and other obligations associated with Oklahoma's qualification statutes.[8] In reaching this decision, the court appeared to be influenced by the volume of sales the company had generated in Oklahoma.[9]

Oklahoma courts have long recognized a dual definition of "doing business." A corporation having only "minimum contacts" with the state was amenable to service of process, yet the same corporation was required to have "significant contact" with the state in order to fall under the purview of its qualification statute.[10] At first blush, this appears to be a rather two-sided justice. A foreign corporation that engages in even minimal activity within a state can be haled into the state's courts to defend in an action.[11] If the same corporation desires to bring suit against a state resident, however, it may well find the door closed by the state's qualification (frequently termed "door-closing") statute. One writer suggested that policy dictates that if a foreign corporation desires to avail itself of the benefits of a local forum, it is only fair that it bear its share of the costs of providing state services via qualification requirements.[12] In so doing, any competitive disadvantage to local corporations which are burdened by taxes and other duties will be equalized. As a result of the *Stuart* decision, it appears that "doing profitable business" in Oklahoma will trigger an implied "minimum contacts" test for determining the applicability of the state's qualification statutes. While *Stuart* alone poses a minimal threat to foreign

6. 617 P.2d 879 (Okla. 1980).

7. *Id.* at 885.

8. OKLA. STAT. tit. 18, §§ 1.11a, 1.11b, 1.201(a) (1971).

9. 617 P.2d at 885.

10. *E.g.*, Sooner Beverage Co. v. G. Heileman Brewing Co., 194 Okla. 252, 150 P.2d 72 (1944).

11. World-Wide Volkswagen Corp. v. Woodson, 585 P.2d 351 (Okla. 1978), *rev'd*, 444 U.S. 286 (1980).

12. *See Doing Business, supra* note 3, at 1141.

corporations engaged in direct business transactions within this state, the supreme court's application of a minimum contacts test may signal an invigorated attempt to gain control over foreign corporations "doing profitable business" within Oklahoma.

II. THE EVOLUTION OF "DOING BUSINESS"

Judicial interpretation of the concept of "doing business" has varied depending upon the nature of the inquiry. Three distinct categories of "doing business" have emerged with different levels of corporate activity triggering their applicability. Courts must ascertain whether a corporation is "doing business" in order to subject it to service of process and local suits, to impose taxes upon it, and to subject it to regulatory legislation.[13] Traditionally, a lower level of corporate activity was necessary to subject a foreign corporation to service of process than was needed to subject it to state tax or regulatory statutes.[14]

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13. Eli Lilly & Co. v. Sav-On-Drugs, Inc., 366 U.S. 276, 288-89 (1961) (Douglas, J., dissenting). Justice Douglas points out that these three categories pose "strikingly different" problems. The level of activity necessary to satisfy one category may not satisfy another category. *See, e.g.*, Davis-Wood Lumber Co. v. Ladner, 210 Miss. 863, 50 So. 2d 615 (1951); International Text-Book Co. v. Tone, 220 N.Y. 313, 115 N.E. 914, 915 (1917). To add to the confusion, courts often blend their discussions of what constitutes "doing business" among the three categories, resulting in considerable judicial confusion on the subject. *See also Doing Business, supra* note 3, at 1105-06.

14. *See* Mid-Continent Tel. Corp. v. Home Tel. Co., 307 F. Supp. 1014 (N.D. Miss. 1969). The court noted that a "more strict standard has been applied in qualification cases because of the penalizing nature of the statute that denies access to the unquestioned rights in the local courts, which may often be the only available forum." *Id.* at 1018. *See also* H. HENN, LAW OF CORPORATIONS, § 97 at 152 & n.15 (1970).

The court in *Mid-Continent* did recognize, however, that not all jurisdictions adhere to this view:

> [C]ourts in some jurisdictions have held that the meaning of the phrase "doing business" is indivisible and does not vary according to the context in which it is used, i.e., the same levels of activity are considered "doing business" by a foreign corporation whether for purposes of: (1) taxing it, (2) serving process on it, or (3) barring it from state courts for failure to meet the state's qualification requirements. Courts of other states have held that the meaning of the phrase "doing business" changes according to the context in which it is used. In some states, for example, a greater level of activity is required to obtain service of process on a foreign corporation than to bar it from the courts of the state for "doing business" without qualifying. The reason generally given for the distinction is that in service of process cases, courts look to due process rights of the foreign corporation as a defendant, while in qualification cases the courts are generally concerned with ascertaining the legislative intent in enacting qualification statutes and with the effect of such statutes on interstate commerce.

307 F. Supp. at 1017-18 (citations omitted).

This article focuses solely on the concept of "doing business" in relation to state qualification statutes. Exhaustive scholarly material exists on International Shoe Co. v. Washington, 326 U.S. 310 (1945) and its progeny regarding subjecting foreign corporations to local suits. *See, e.g.*, Lacy, *Personal Jurisdiction and Service of Summons after* Shaffer v. Heitner, 57 OR. L.R. 505 (1978); Woods, Pennoyer's *Demise: Personal Jurisdiction after* Shaffer *and* Kulko *and a Modest Prediction Regarding* World-Wide Volkswagen Corp. v. Woodson, 20 ARIZ. L.R. 861 (1978); Note, *State*

"Doing business" first evolved as an exclusionary concept, reflecting the states' fear and distrust of foreign corporations. The United States Supreme Court articulated this initial attitude toward corporations in the 1869 case of *Paul v. Virginia*:[15]

> There is scarcely a business pursued requiring the expenditure of large capital, or the union of large numbers, that is not carried on by corporations. It is not too much to say that the wealth and business of the country are to a great extent controlled by them. And if, when composed of citizens of one State, their corporate powers and franchises could be exercised in other States without restriction, it is easy to see that, with the advantages thus possessed, the most important business of those States would soon pass into their hands. The principal business of every State would, in fact, be controlled by corporations created by other States.[16]

Consequently, qualification statutes were enacted as a method to exclude foreign corporations from doing business within a state.[17]

With the gradual emergence of large-scale corporate activity transcending multi-state boundaries, the states enjoyed an economic boost. Although desirous of the monetary benefits flowing from an increasingly mobile society, the states remained somewhat distrustful of foreign corporate activity. Not wishing to exclude an increasingly mobile corporate influx, the states channeled this distrust into regulatory control. Foreign corporations engaged in intrastate business were subjected to statutory qualification standards in order to ensure accountability, but corporations engaged in interstate business were ex-

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Adjudicatory Jurisdiction Over Nonresident Defendants, 15 TULSA L.J. 827 (1980). The Supreme Court in *International Shoe* held that a state may exercise in personam jurisdiction over a nonresident defendant as long as there exist sufficient "minimum contacts" between the defendant and the forum state, "that maintenance of a suit would not offend traditional notions of fair play and substantial justice." International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

15. 75 U.S. 168 (1869).

16. *Id.* at 181-82.

17. *See* Comment, *An Analysis of Doing Business, supra* note 2, at 1018-19.

> The reason why [qualification statutes] may be imposed is that a foreign corporation is a creature of local law and is not recognized in another state except through comity. It can have no legal existence beyond the sovereignty where it is created, and unless it is engaged in interstate commerce, or is employed by the federal government, has no right to enter another state except by the consent of the latter. Such state, therefore, can exclude it entirely or admit it on prescribed terms and conditions, or exclude it without cause after it has been admitted, subject to certain constitutional limitations which may become applicable as a result of its presence.

Id. at 1019 (footnotes omitted).

cepted from such standards.[18]

From its exclusionary inception, to its present inclusive application, the term "doing business" has remained abstruse with an occasional defendant's plea urging that a corporation was "doing business" in violation of a qualification statute to provide insulation from suit.[19] Corporations bringing suit invariably allege that any business conducted within the state is purely interstate commerce and, therefore, protected by the commerce clause.[20] Ultimately, it is up to the courts to delineate what corporate activity constitutes interstate business protected by the commerce clause of the Constitution, and what corporate activity constitutes intrastate activity, not so protected and thus subject to state qualification statutes.

A. *Interstate versus Intrastate "Doing Business"*

State regulatory control over foreign corporations suffers more than any other state jurisdictional area from the absence of definitive standards.[21] When confronted with the defense that a corporation should be precluded from bringing suit due to noncompliance with a qualification statute, courts have generally been reluctant to find that intrastate business was conducted because of the harsh consequences of

18. The tremendous corporate growth in the United States over the past several decades has created numerous problems regarding a foreign corporation's local presence. Two competing policies have come into play, the need for a strong national economy thereby prohibiting restrictive state regulations which would hamper interstate commerce, and the need for state regulatory control over a foreign corporation's local activities in order to afford local citizens protection from possible harmful corporate activity. These competing policies are frequently presented to the courts in attempts to resolve the "doing business" dilemma. *See* Note, *Corporations—State Regulation of Foreign Corporations—Interstate v. Intrastate Business*, 19 ALA. L. REV. 193, 194 (1966); *Doing Business*, note 3 *supra*.

19. Typical sanctions for failure to qualify to "do business" include the denial of the corporation's right to use the applicable statute of limitations; the imposition of fines, imprisonment, or personal liability on the directors or officers of the corporation; and subjection of the corporation to various disabilities with respect to bringing or defending suits relating to corporate contracts. This last sanction, the one most commonly applied, is generally felt to be the harshest.

A number of cases have addressed this issue. *See, e.g.*, Allenberg Cotton Co. v. Pittman, 419 U.S. 20 (1974); Eli Lilly & Co. v. Sav-On-Drugs, Inc., 366 U.S. 276 (1961); Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282 (1921); International Textbook Co. v. Pigg, 217 U.S. 91 (1910); Baker & Co. of Fla. v. Preferred Risk Mut. Ins. Co., 569 F.2d 1347 (5th Cir. 1978); Riblet Tramway Co. v. Monte Verde Corp., 453 F.2d 313 (10th Cir. 1972); Wilson v. Williams, 222 F.2d 692 (10th Cir. 1955); Tanner Co. v. Plains Broadcasting Co. 486 F. Supp. 1313 (W.D. Okla. 1980); C.H. Stuart, Inc. v. Bennett, 617 P.2d 879 (Okla. 1980); Sooner Beverage Co. v. G. Heileman Brewing Co., 194 Okla. 252, 150 P.2d 72 (1944); Bailey v. Parry Mfg. Co., 59 Okla. 152, 158 P. 581 (1916); Fuller v. Allen, 46 Okla. 417, 148 P. 1008 (1915).

20. International Textbook Co. v. Pigg, 217 U.S. 91, 95 (1910).

21. *See Doing Business, supra* note 3, at 1117.

such a finding.[22]

Historically, courts have used the device of characterization to allow foreign corporations to circumvent state qualification statutes.[23] By characterizing a corporation's local activity as "an aspect of" or "incidental to" interstate commerce, courts have freed foreign corporations from qualification statutes.

The seminal decision, *International Textbook Co. v. Pigg*,[24] involved a Pennsylvania corporation selling correspondence course materials in Kansas. When a Kansas student failed to pay for his purchase, the corporation brought suit in a Kansas court for breach of contract. In response, the student sought to preclude the corporation from maintaining suit due to its failure to comply with Kansas' qualification statute. The Court, refusing to find that the corporation had engaged in intrastate business, held that the corporation's activities in Kansas were an aspect of interstate commerce and as such, were protected by the commerce clause.[25]

> [A]ll interstate commerce is not sales of goods. Importation into one State from another is the indispensable element, the test, of interstate commerce; and every negotiation, contract, trade, and dealing between citizens of different States, which contemplates and causes such importation, whether it

22. *E.g.*, International Textbook Co. v. Pigg, 217 U.S. 91 (1910) "[Qualification] *regulations are clearly a burden and a restriction upon . . . commerce*. Whether intended as such or not, they operate as such." *Id.* at 110 (emphasis in original). Shealy v. Challenger Mfg. Co., 304 F.2d 102, 105 (4th Cir. 1962). The Oklahoma Supreme Court addressed the harsh nature of state qualification statutes in Sooner Beverage Co. v. G. Heileman Brewing Co., 194 Okla. 252, 150 P.2d 72 (1944). "The failure of a foreign corporation doing business in the state to domesticate renders its contracts with citizens of the state unenforceable in the courts of this jurisdiction and prevents it from maintaining any action in our courts arising out of either contract or tort." *Id.* at 253, 150 P.2d at 74 (citations omitted). With this in mind, the supreme court determined: "[W]e are of the opinion and hold that the business transactions of the plaintiff in this state were . . . not of such a nature as to deprive it of access to the courts of this state." *Id.* at 255, 150 P.2d at 75.

23. Characterization is a device frequently used in choice of law cases as the key to identification of significant state contacts. Any single case may be characterized as sounding in tort, contract, or procedure and the significant contacts would depend on which characterization was found to be appropriate. "[C]haracterization came in time to be recognized as a flexible legal tool which does not itself produce results inexorably, but often only affords logical justification for results independently arrived at." R. LEFLAR, AMERICAN CONFLICTS LAW 140 (1959).

In a "doing business" context, if a court characterizes a foreign corporate activity as "an incident" of interstate commerce, it will fall under commerce clause protection. If, however, the same activity is characterized as intrastate commerce, the corporation may not claim such protection. If the activity is judicially characterized as intrastate commerce, a foreign corporation will not be permitted to bring suit in any court within the state if it has not satisfied the state's qualification statutes. *See Doing Business, supra* note 3, at 1118.

24. 217 U.S. 91 (1910).

25. *Id.* at 106-07.

> be of goods, persons, or information, is a transaction of interstate commerce.[26]

Similarly, the Court in *Dahnke-Walker Milling Co. v. Bondurant*[27] stressed the importance of the essential character of the transaction.[28] In defining the spectrum of interstate commerce, the Supreme Court stated:

> Where goods in one State are transported into another for purposes of sale the commerce does not end with the transportation, but embraces as well the sale of goods after they reach their destination and while they are in the original packages. On the same principle, where goods are purchased in one State for transportation to another the commerce includes the purchase quite as much as it does the transportation.[29]

Not only does the commerce clause protect the importation and subsequent sale of foreign goods, but it also encompasses any activity leading up to the sale. For example, in *Robbins v. Shelby*,[30] the first of a long line of "drummer cases",[31] the Supreme Court held that the solicitation of (drumming up) business fell within the parameters of interstate commerce. Thus, sending agents to another state to solicit sales and enter into contracts did not constitute "doing business" for corporate amenability to qualification statutes. Not until the Court's landmark decision in *Eli Lilly & Co. v. Sav-On-Drugs, Inc.*[32] was "doing business" changed from an essentially exclusionary concept to one of inclusion.[33]

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26. *Id.* at 107 (quoting Butler Bros. Shoe Co. v. United States Rubber Co., 156 F. 1, 17 (1907)) (emphasis omitted). *See also* Addyston Pipe & Steel Co. v. United States, 175 U.S. 211 (1899) in which the Court stated: "[I]nterstate commerce consists of intercourse and traffic between the citizens or inhabitants of different States, and includes not only the transportation of persons and property and the navigation of public waters for that purpose, but also the purchase, sale and exchange of commodities." *Id.* at 241 (citations omitted).

27. 257 U.S. 282 (1921).

28. *Id.* at 292. "The essential character of the transaction as otherwise fixed is not changed by a mere possibility [of sale made intrastate]." *Id.*

29. *Id.* at 290 (citations omitted). *See also* Federal Trade Comm'n v. Pacific States Paper Trade Ass'n, 273 U.S. 52 (1927); Buck Stove & Range Co. v. Vickers, 226 U.S. 205 (1912).

30. 120 U.S. 489 (1887).

31. *See e.g.*, Nippert v. City of Richmond, 327 U.S. 416, 420 (1946); Real Silk Hosiery Mills v. City of Portland, 268 U.S. 325 (1925); Cheney Bros. Co. v. Massachusetts, 246 U.S. 147 (1918); International Textbook Co. v. Pigg, 217 U.S. 91 (1910); Brennan v. Titusville, 153 U.S. 289 (1894); Corson v. Maryland, 120 U.S. 502 (1887).

32. 366 U.S. 276 (1961) (Douglas, J. dissenting).

33. One commentator suggests that the question prior to the *Lilly* decision was "whether a foreign corporation could ever be engaged in local business to an extent sufficient to permit a state to require a corporation to qualify . . . ." *Doing Business, supra* note 3, at 1119.

In *Lilly*, an Indiana pharmaceutical company brought an action in a New Jersey state court to enjoin a New Jersey corporation from selling Lilly's products below minimum retail price.[34] The New Jersey corporation moved to dismiss the complaint on the grounds of noncompliance with the New Jersey qualification statute. Lilly alleged its actions were entirely interstate commerce and therefore immune from statutory compliance.[35]

The facts revealed that Lilly maintained an office in New Jersey and employed a secretary and eighteen "detailmen," many of whom resided in New Jersey. The "detailmen" visited retail pharmacists, physicians, and hospitals to promote sales of Lilly's products. Occasionally, the detailmen received orders from retailers for Lilly products and transmitted them to a wholesaler. They also supplied advertising and promotional material to retail druggists.[36]

Departing from a long line of judicial precedent,[37] the Court failed to characterize this intrastate activity by Lilly's detailmen as a part of, or in furtherance of, interstate commerce.[38] Rather, it concluded, in a five-four decision, that Lilly had conducted *both* intrastate and interstate business in New Jersey.[39] In the language of the Court, " '[t]o hold under the facts above recited that plaintiff [Lilly] is not doing business in New Jersey is to completely ignore reality.' "[40]

Justice Douglas, in a harsh dissent, criticized the majority for blending the categories of "doing business."[41] While Justice Douglas believed Lilly may have been doing sufficient business to subject the corporation to service of process or taxation,[42] he believed Lilly's New Jersey activities constituted "drumming up" business,[43] previously protected by the commerce clause.[44] Justice Douglas predicted: "[t]his case on its own may do little injury. But it provides the formula whereby a State can stand over the channels of interstate commerce in a way that promises to do great harm to the national market that here-

34. 366 U.S. 276, 276-77 (1961).
35. *Id.* at 277.
36. *Id.* at 279-80.
37. See notes 24-31 *supra* and accompanying text.
38. 366 U.S. 276, 280 (1961).
39. *Id.* at 279.
40. *Id.* at 280 (quoting the trial court, 57 N.J. SUPER., at 298-99, 154 A.2d at 654).
41. See note 13 *supra* and accompanying text.
42. 366 U.S. 276, 289 (1961) (Douglas, J. dissenting).
43. *Id.* at 290. "Soliciting interstate business has up to this day been on the same basis as doing an interstate business, so far as the protection of the Commerce Clause is concerned." *Id.*
44. *Id.* at 291.

tofore the commerce clause has protected."[45]

Thirteen years after the *Lilly* decision, the Supreme Court again addressed the "doing business" dilemma in *Allenberg Cotton Co. v. Pittman*,[46] this time reversing the decision of the Mississippi Supreme Court which had refused commerce clause protection to a Tennessee cotton merchant. In *Allenberg*, a Tennessee corporation brought a breach of contract action against a Mississippi farmer for failure to deliver cotton. The farmer alleged in his defense that the corporation (Allenberg) could not maintain suit because it had failed to qualify according to Mississippi law.[47]

Allenberg's actions consisted of sending purchase contracts to a Mississippi cotton buyer who contracted with local farmers for the purchase of cotton. The buyer phoned the necessary purchase information to the Tennessee corporation where individual contracts were prepared, signed, and sent back to the buyer for each farmer's signature. The farmers then delivered the cotton to a local Mississippi warehouse where the buyer paid them.[48] The Mississippi Supreme Court held that these transactions were "wholly intrastate in nature, being completed upon delivery of the cotton at the warehouse . . . ."[49] The court deemed the fact that the cotton might be sold in interstate commerce as irrelevant.[50]

The United States Supreme Court, holding the *Lilly* case not to be on point,[51] concluded that Allenberg's contacts in Mississippi did not "exhibit the sort of localization or intrastate character . . . required in situations where a State seeks to require a foreign corporation to qualify to do business."[52] The Court, in distinguishing *Lilly*, emphasized that Allenberg had no Mississippi office, did not own or operate a

45. *Id.* at 292. The *Lilly* decision has not passed without scholarly critique. *See, e.g.*, Comment, *State Regulation of Foreign Corporations: Qualification: Interstate v. Intrastate Business: Eli Lilly & Co. v. Sav-On-Drugs, Inc., 366 U.S. 276 (1961)*, 47 CORNELL L.Q. 300 (1962); Comment, *Corporate Registration: A Functional Analysis of "Doing Business"*, 71 YALE L.J. 575 (1962).

Subsequent lower court decisions have not realized Justice Douglas' fear and have afforded commerce clause protection to foreign corporations. *See, e.g.*, Riblet Tramway Co. v. Monte Verde Corp., 453 F.2d 313 (10th Cir. 1972); Norman M. Morris Corp. v. Weinstein, 466 F.2d 137 (5th Cir. 1972); Rose's Mobile Homes, Inc. v. Rex Financial Corp., 383 F. Supp. 937 (W.D. Ark. 1974).

46. 419 U.S. 20 (1974).

47. *Id.* at 24.

48. *Id.* at 23-24.

49. *Id.* at 24.

50. *Id.*

51. *Id.* at 32.

52. *Id.* at 33.

warehouse in Mississippi, nor had any employees soliciting business in Mississippi.[53]

B. *A Factual Resolution*

The decisions of the Supreme Court in *Lilly* and *Allenberg* reveal no clear distinction between purely interstate business and that type of business having enough intrastate components to be subject to state qualification statutes. In the absence of definitive legislative guidance, lower federal and state courts often rely on the holding in a previously decided case with an analogous fact pattern.[54] This vests these courts with a great deal of discretion in the characterization process and, as one might suspect, if one wants to find that a foreign corporation has engaged in intrastate activity, the very broad definition espoused in *Lilly* provides the opportunity.[55] Somewhat surprisingly, however, most courts have remained reluctant to impose qualification standards on foreign corporations "doing business" within a state.[56]

III. THE OKLAHOMA PERSPECTIVE ON "DOING BUSINESS"

Title 18, section 1.201(a) of the Oklahoma Statutes provides that "[a]ny foreign corporation which has engaged in or transacted . . . business within [Oklahoma] . . . before it shall have become domesticated . . . shall not be permitted to maintain any action . . . in any court of this State. . . ."[57] Oklahoma further requires that any foreign corporation "doing business" within its boundaries file a trade name report with the Secretary of State.[58] Failure to do so will also preclude

53. *Id.*

54. *See, e.g.*, Sar Mfg. Co. v. Dumas Bros. Mfg. Co., 526 F.2d 1283 (5th Cir. 1976); Metropolitan Paving Co. v. International Union of Operating Eng'rs, 439 F.2d 300 (10th Cir. 1971); William B. Tanner v. Plains Broadcasting Co., 486 F. Supp. 1313 (W.D. Okla. 1980); Unlaub Co. v. Sexton, 427 F. Supp. 1360 (W.D. Ark. 1977).

55. In *Lilly*, the Court deemed Lilly's activity of sending employees into New Jersey to induce retailers, physicians, and hospitals to purchase Lilly products from other in-state wholesalers to be localized enough to satisfy New Jersey's qualifications statute. Eli Lilly & Co. v. Sav-On-Drugs, Inc., 366 U.S. 276, 283-84 (1961).

56. The principal reason for this reluctance would appear to be the harsh result that stems from a finding of intrastate activity. Denying a foreign corporation access to state courts to bring an action appears to many to be inconsistent with the relative ease with which the same corporation could be hailed into a state court to defend an action. Likewise, concerns for free enterprise have formed the very basis of our economy. *See Doing Business, supra* note 3, at 1117-23. The last century has witnessed a boost to the economy which is largely attributable to this nation's free enterprise system.

57. OKLA. STAT. tit. 18, § 1.201(a) (1971).

58. *Id.* § 1.11a (1971).

> A corporation doing business in this State under any name other than that of the

the corporation from maintaining a suit in Oklahoma.[59] The Oklahoma statutes, however, do not define what activity constitutes "doing business," and the Oklahoma courts have struggled to define the concept's parameters.[60]

Judicial interpretation of the concept of "doing business" was first articulated in Oklahoma in the 1915 case of *Fuller v. Allen*,[61] which involved a Missouri cigar vending machine company contracting with an Oklahoma buyer to ship thirty machines to Oklahoma. The company brought a breach of contract action against the buyer. In response, the Oklahoma purchaser alleged that the vending machine company had transacted business in Oklahoma without having complied with the requisite statutory formalities and was therefore precluded from maintaining an action in Oklahoma.[62] The Oklahoma Supreme Court, agreeing with the buyer, found that the vending machine company's actions were solely interstate commerce and that the company was not "doing business" in Oklahoma. The court offered the following definition as justification for its decision:

> [Doing business means] doing or performing a series of acts which occupy the time, attention, and labor of men for the purpose of livelihood, profit, or pleasure. It is well settled upon authority that the doing of a single act pertaining to a particular business or transaction will not be considered carrying on, transacting, or doing business. The mere term itself

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corporation shall file a report with the Secretary of State setting forth the trade name under which such business is carried on, a brief description of the kind of business transacted under such name, the address wherein such business is to be carried on, the corporate name and the name and address of its registered agent in this State.

59. *Id.* § 1.11b (1971):

> Any domestic or foreign corporation which has engaged in or transacted, or is engaging in or transacting, business within this State under any name other than that of the corporation without filing the report required by Section 1 above, shall not be permitted to maintain any action in any court of this State until such report has been filed. Any court of this State having equity jurisdiction may, upon petition being filed against such corporation by the Attorney General, or by any person, association or corporation interested or affected, enjoin the defendant corporation from doing business under that name until it complies with Section 1 above (footnotes omitted).

Advocates of qualification statutes frequently argue that once a corporation has complied with the registration requirements, all disabilities are removed and the corporation may maintain suit in the state courts. The practical effect of registration, however, is not as simple. *See* note 4 *supra* and accompanying text.

60. *See* note 2 *supra*.

61. 46 Okla. 417, 148 P. 1008 (1915). The *Fuller* decision was overruled insofar as it applied to a foreign corporation's amenability to suit by a state resident in B. K. Sweeney Co. v. Colorado Interstate Gas Co., 429 P.2d 759, 763 (Okla. 1967).

62. 46 Okla. 417, 419, 148 P. 1008, 1008 (1915).

implies more than one transaction.[63]

Due to the absence of a legislative definition of "doing business" Oklahoma courts have relied on the *Fuller* definition to determine whether a foreign corporation has engaged in intrastate business. In applying *Fuller* to new fact situations, the courts have examined three principal areas:

(1) The regularity of an admittedly intrastate activity;
(2) Whether the transaction was incidental to or separate from interstate commerce; and
(3) The mechanics of the transaction itself.[64]

A. *The Regularity of the Activity*

In *Wilson v. Williams*,[65] the Tenth Circuit Court of Appeals relied on the *Fuller* definition to find that the plaintiff had not conducted intrastate business in Oklahoma. The plaintiff, a foreign corporation that owned personal property and mineral interests in real estate in Oklahoma, had contracted to drill an oil well on the defendants' property. When the defendants refused to pay in accordance with the contract, the plaintiff sued for breach of contract. The defendants affirmatively pleaded that the plaintiff lacked capacity to bring the action because it was doing business in Oklahoma without having satisfied the state's qualification statute.

The Tenth Circuit found that "the mere taking of title to . . . property and the passive ownership of it did not constitute engaging in or transacting business in Oklahoma."[66] The court also found that the drilling of a single oil well did not constitute the "series of acts" necessary to subject a foreign corporation to intrastate "doing business" requirements.[67]

Eleven years before *Wilson* was decided, the Oklahoma Supreme Court had commented in *Sooner Beverage Co. v. G. Heileman Brewing*

63. *Id.* at 423, 148 P. at 1010 (1915).
64. See C.H. Stuart, Inc. v. Bennett, 617 P.2d 879, 883 (Okla. 1980).
65. 222 F.2d 692 (10th Cir. 1955).
66. *Id.* at 697.
67. *Id. Accord*, Walden v. Automobile Brokers, Inc., 195 Okla. 453, 160 P.2d 400 (1945). "[I]n order to be doing business within the State of Oklahoma . . . there must be a series of acts showing an intention to do business in violation of the statutes and a single instance or transaction does not contravene the terms of the statutory enactments." *Id.* at 455, 160 P.2d at 402. For additional cases supporting this point, see Cugley Incubator Co. v. Franklin, 193 Okla. 202, 142 P.2d 125 (1943); Central Life Assurance Soc'y v. Tiger, 177 Okla. 108, 57 P.2d 1182 (1936); Barnett v. Aetna Explosives Co., 96 Okla. 132, 220 P. 874 (1923).

Co.[68] that the " 'quantity of business conducted within a state by an unlicensed foreign corporation may be sufficient to subject such corporation to process of the state courts and yet be insufficient to require it to become licensed before suing in the state courts.' "[69] Only one year later, the United States Supreme Court enunciated the famous "minimum contacts" requirement for subjecting a foreign corporation to service of process.[70]

In light of *Sooner Beverage*, it is clear the "minimum contacts" requirement is insufficient to subject a corporation to qualification requirements. In order to constitute a "regular" activity for the purpose of finding intrastate business activity, a foreign corporation must engage in more than a single, isolated transaction, and its activities must be more than casual or irregular transactions.[71]

B. *Transactions "Incidental to" Interstate Commerce*

The Oklahoma courts have distinguished between those activities which are incidental to interstate commerce and those which are separate and distinct from it. In *Cugley Incubator Co. v. Franklin*,[72] a Michigan corporation sought the services of an Oklahoma resident to notarize a conditional sales contract and to ship an incubator to a resi-

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68. 194 Okla. 252, 150 P.2d 72 (1944).

69. *Id.* at 254, 150 P.2d at 75.

> A great deal of confusion has been caused by failing to distinguish between cases where the question is the necessity of domesticating before bringing suit, and cases where the question is whether the foreign corporation is amenable to legal process. The standards are not the same, and the quality, character, and quantity of business conducted within the state may be sufficient to subject a foreign corporation to process and yet be insufficient to require it to take out a license.

Id. (quoting from Wills v. National Mineral Co., 176 Okla. 193, 196, 55 P.2d 449, 452 (1936)). *See* notes 10 & 11 *supra* and accompanying text.

70. International Shoe Co. v. Washington, 326 U.S. 310 (1945): "[D]ue process requires only that in order to subject a defendant to a judgment *in personam*, . . . [that] he have certain minimum contacts . . . such that the maintenance of a suit does not offend 'traditional notions of fair play and substantial justice.' " *Id.* at 316 (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

71. *Id.* at 320. *See* Steinway v. Majestic Amusement Co., 179 F.2d 681, 682-83 (10th Cir. 1949) (dealing with service of process).

The District Court of Mississippi also addressed this issue, stating:

> [A] foreign corporation is "doing business" within the state when it performs acts . . . that are "within the functions of its corporate powers" and "the business so performed is substantial in scope." The "substantiality" and "scope" of local activity are equated with "some substantial part of its ordinary or customary business, usually continuous in the sense that it may be distinguished from merely casual, sporadic, or occasional transactions and isolated acts."

Mid-Continent Tel. Corp. v. Home Tel. Co., 307 F. Supp. 1014, 1019 (N.D. Miss. 1969) (citations omitted).

72. 193 Okla. 202, 142 P.2d 125 (1943).

dent of Colorado.[73] The Oklahoma Supreme Court held that the corporation's Oklahoma activities were merely incidental to interstate commerce.[74]

> The fact that plaintiff sent the conditional sales contract and the notes along with the bill of lading and directed defendant to the office of a notary public to execute said contract and notes, and thereafter requested defendant to ship the used incubator to a named person in Colorado and paid defendant for his services and expenses in connection therewith, were all incidental to the interstate transaction which plaintiff had with the defendant and did not constitute doing business in the state.[75]

Similarly, the court in *William B. Tanner Co. v. Plains Broadcasting Co.*[76] found the plaintiff's activities to be an incident of interstate commerce. In *Tanner*, the plaintiff, a Tennessee corporation, contracted with an Oklahoma radio station to provide promotional advertising and other services on an exchange and barter basis. The court held that the plaintiff's activities, which included the providing of "goods, merchandise, and services," did not exhibit the sort of intrastate character necessary to fall under the purview of Oklahoma's qualification statute.[77] Just as the Oklahoma Supreme Court had concluded in *Sooner Beverage Co. v. G. Heileman Brewing Co.*,[78] the federal court in the Western District of Oklahoma held that "[s]uch isolated or incidental transactions do not deprive an undomesticated foreign corporation of access to the courts of this state."[79]

Other Oklahoma courts have also expressed a willingness to allow some foreign corporate activities to take place within the state, unhampered by regulatory statutes. Oklahoma courts accomplish this by

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73. *Id.* at 203, 142 P.2d at 126-27.

74. *Id.* at 204-05, 142 P.2d at 128. *See* Colbert v. Toll, 31 F.2d 837 (6th Cir. 1929) (dealing with a foreign corporation executing a trust) where the court stated the same proposition: "[T]he doing of business by a foreign corporation means the transaction of 'some substantial portion of its ordinary business,' as distinguished from transactions incidental to a business that is conducted outside the state." *Id.* at 838. *See also* Ruby S.S. Corp. v. American Merchant Marine Ins. Co., 224 A.D. 531, 231 N.Y.S. 503 (1928).

75. 193 Okla. at 204, 142 P.2d at 127 (citation omitted).

76. 486 F. Supp. 1313 (W.D. Okla. 1980).

77. *Id.* at 1316. "Plaintiff's contacts with the state of Oklahoma . . . were at all times a mere incident to transactions in interstate commerce and are protected by the commerce clause . . . ." *Id. See also* Fruit Dispatch Co. v. Wood, 42 Okla. 79, 81-83, 140 P. 1138, 1140 (1914).

78. 194 Okla. 252, 150 P.2d 72 (1944).

79. *Id.* at 254, 150 P.2d at 75 (citation omitted). *See also* Consolidated Pipe Line Co. v. British Am. Oil Co., 163 Okla. 171, 21 P.2d 762 (1933); Fruit Dispatch Co. v. Wood, 42 Okla. 79, 140 P. 1138 (1914).

finding the foreign corporate activity within the state to be merely "incidental to" interstate commerce and therefore beyond the purview of Oklahoma's qualification statutes.[80]

C. *The Mechanics of the Transaction in Question*

In contrast to the previous factors examined, the frequency of the foreign corporate activity and its relation to the overall transaction, the actual mechanics of the transaction require greater judicial scrutiny.[81] In conducting this inquiry, courts encounter the burdensome task of finding the most analogous factual situation to the case at bar in order to resolve the "doing business" dilemma.[82]

The Oklahoma Supreme Court used this approach in *Sooner Beverage Co. v. G. Heileman Brewing Co.*,[83] in which the plaintiff, Heileman Brewing Co., a Wisconsin corporation, sold beer to the defendant

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80. *See, e.g.,* Cugley Incubator Co. v. Franklin, 193 Okla. 202, 204, 142 P.2d 125, 127 (1943).

81. It is submitted that if the foreign corporate transaction in question only took place once or was incidental to the primary purposes and aims of the corporate activity, the court would have little difficulty deciding the issue. Most cases, however, do not fall within these factors and this necessitates a close examination of both the form and substance of the activity involved.

Often, corporations "doing business" interstate follow carefully prescribed methods of conduct to avoid any potential problems of being caught engaging in intrastate business. For example, the CORPORATION LAW GUIDE sets forth a formula designed to protect interstate sales from intrastate qualification standards:

> A corporation can safely make sales to residents of another state, without being required to qualify to do business there, by following a basic sales formula. The formula involves three steps to be taken in consummating a sale:
>
> (1) The purchase order or contract must be subject to final acceptance or approval outside the state in which it is given;
>
> (2) The order must be filled by a shipment originating from a state other than that in which the purchaser is located; and
>
> (3) Payment must be made to an office of the seller located in a state other than that in which the purchaser is located.
>
> Each of the three steps involves the crossing of the state's line. The order or contract is sent from the state to another state for acceptance. Upon acceptance of the order or contract, goods are shipped from another state into the first state. Payment is made by remittance sent outside the state. Each phase of the sale involves more than one state.
>
> Steps "1" and "3" are not always necessary to bring one's sales activities within the ambit of immunity afforded interstate commerce. The portion of the transaction which gives interstate color to the sale is the shipment of goods across state lines into the customer's state . . . . As a general rule, the mere solicitation by a local sales office of orders for approval outside the state does not require qualification to do business in the state.

[1976] 1 CORP. L. GUIDE (CCH) ¶ 1145.

82. See Sooner Beverage Co. v. G. Heileman Brewing Co., 194 Okla. 252, 150 P.2d 72 (1944); Cugley Incubator Co. v. Franklin, 193 Okla. 202, 142 P.2d 125 (1943); Dunn v. Birmingham Stove & Range Co., 170 Okla. 393, 44 P.2d 86 (1935); Seidenbach's v. A.E. Little Co., 146 Okla. 247, 294 P. 126 (1930); Bailey v. Parry Mfg. Co., 59 Okla. 152, 158 P. 581 (1916); Fruit Dispatch Co. v. Wood, 42 Okla. 79, 140 P. 1138 (1914); Verdigris River Land Co. v. Stanfield, 25 Okla. 265, 105 P. 337 (1909).

83. 194 Okla. 252, 150 P.2d 72 (1944).

Sooner Beverage Co. on an open account. Heileman did not maintain a warehouse or place of business in Oklahoma, did not own any merchandise in storage there, and made no other sales in Oklahoma.[84] The corporation, however, did maintain two agents in Oklahoma, one to collect on the open account and one to promote and solicit sales of its beer.[85] The Oklahoma Supreme Court held that these facts did not warrant characterizing Heileman's activities as intrastate in the sense that it would be deprived of the privilege of resorting to the courts of this state for a redress of its grievances.[86] Thus, while the court scrutinized the substance of foreign activity engaged in within the state in light of previous analogous factual decisions, it tempered its examination with the realization that a finding of intrastate activity would deny Heileman the right to judicial redress in Oklahoma. The court's expressed reluctance in *Sooner Beverage* to find intrastate activity due to the resultant disability of Heileman to bring suit in Oklahoma's state courts is consistent with the fact that Oklahoma courts have long held that the burden of proving facts sufficient to preclude a foreign corporation of the right to maintain an action in Oklahoma rests with the defendant.[87]

This reluctance has not been evident, however, where the foreign corporation has shipped goods to Oklahoma *to be held as inventory* and later sold within the state.[88] The Oklahoma Supreme Court discussed this distinction between a shipment to be held as inventory and a direct shipment to a purchaser in *Bailey v. Parry Manufacturing Co.*[89] Parry Manufacturing, an Indiana corporation, contracted with an Oklahoma storekeeper for the sale of buggies. The storekeeper received the vehi-

84. *Id.* at 254, 150 P.2d at 74.

85. *Id.*

86. *Id.* Similarly, the court in Dunn v. Birmingham Stove & Range Co., 170 Okla. 393, 44 P.2d 86 (1935) held:

> The mere fact that a foreign corporation may have an agent or representative in this state is not proof that such corporation is doing business in this state. The further fact that it ships goods or merchandise into this state under contracts solicited or obtained by such agents in this state is not proof that such business is intrastate and not interstate business.

Id. at 394, 44 P.2d at 87.

87. In order for the defendant to successfully rely on Oklahoma's qualification statutes as a bar to the plaintiff's maintaining an action, the defendant has the burden of pleading and proving that the plaintiff was transacting business in Oklahoma without complying with the appropriate statutory requirements. Dime Sav. & Trust Co. v. Humphreys, 175 Okla. 497, 499, 53 P.2d 665, 667 (1936). *Accord*, Barnett v. Aetna Explosives Co., 96 Okla. 132, 133, 220 P. 874, 875 (1923).

88. *See* Seidenbach's v. A.E. Little Co., 146 Okla. 247, 294 P. 126 (1930); Bailey v. Parry Mfg. Co., 59 Okla. 152, 158 P. 581 (1916). These instances may be contrasted with those situations where a corporation has shipped goods in response to a customer's order.

89. 59 Okla. 152, 158 P. 581 (1916).

cles and paid for their freight from Indiana, exhibited them in his shop (although title was retained by the company), and sold the buggies, keeping as commission all profits exceeding an agreed reimbursement price to the company. Upon termination of this arrangement, the storekeeper was to return any unsold vehicles to the company.[90] When the contract was terminated, the storekeeper refused to return the vehicles, and Parry brought a conversion action against him in Oklahoma. The storekeeper alleged that Parry was precluded from bringing suit for failure to qualify to "do business" in Oklahoma. The Oklahoma Supreme Court agreed, basing its decision on the actual mechanics involved:

> Where goods are shipped by a resident of another state to his commission agent in this state, *not in response to* an order from a purchaser, but to be held by such agent as the whole or part of his stock of commission goods in this state, and thereafter to be sold and delivered from said stock in this state by this commission agent, this last sale and delivery is not a transaction of interstate commerce.[91]

The Oklahoma Supreme Court addressed this point further in *Seidenbach's v. A.E. Little Co.*,[92] in which a Massachusetts corporation had contracted with a Tulsa retailer for the sale of shoes. The Massachusetts corporation owned the shoe stock, the shelving and fixtures used in its display, and it employed the manager and clerks who sold the shoes within the defendant's store. The shoes were, however, advertised and sold under the defendant's name. The parties also agreed that the Tulsa retailer would receive a percentage of the sales revenue, with the remainder going to the defendant corporation.[93] The Oklahoma Supreme Court, quoting language from *Fuller v. Allen*[94] and *Bailey v. Parry Manufacturing Co.*[95] concluded that these actions did indeed constitute "doing business" for the purpose of subjecting the foreign corporation to Oklahoma's qualification statutes.[96] Once again,

90. *Id.* at 154, 158 P. at 583.

91. *Id.* at 155, 158 P. at 584 (quoting Duluth Music Co. v. Clancy, 139 Wis. 189, 120 N.W. 854 (1909)) (emphasis added).

92. 146 Okla. 247, 294 P. 126 (1930).

93. *Id.* at 247-48, 294 P. 127-28.

94. 46 Okla. 417, 148 P. 1008 (1915).

95. 59 Okla. 152, 158 P. 581 (1916).

96. 146 Okla. at 248-49, 294 P. at 128-29.

the distinguishing feature was the direct sales from local inventory.

Oklahoma courts, following national precedent, have allowed foreign corporations to engage in a network of activities: sending agents into the state to solicit and promote business,[97] contracting with state residents for the sale of merchandise,[98] maintaining branch offices and warehouses in Oklahoma,[99] and entering into contractual arrangements with state corporations to distribute goods.[100] Oklahoma courts, however, have distinguished between these activities and those in which a foreign corporation sends goods or merchandise into Oklahoma to be held as inventory and later sold to state residents. In this latter situation, the actual sale has been seen as taking place intrastate, thus subjecting the foreign corporation to Oklahoma's qualification statutes.

Oklahoma opinions have not revealed the reason for this distinction. The Oklahoma Supreme Court, however, hinted at a primary consideration in *Seidenbach's v. A.E. Little Co.*[101] There, the court considered the public's perception of the transaction involved. The court took cognizance of the fact that the shoes were advertised for sale under the name of the Oklahoma corporation, and so far as the public was concerned, the stock of shoes was owned by the Oklahoma corporation.[102] Thus, where Oklahoma consumers believe that they are making a purchase from an Oklahoma corporation, that transaction may be treated as intrastate business.[103]

IV. *C.H. STUART, INC. V. BENNETT*: IS SALES VOLUME GOING TO BE THE DETERMINATIVE FACTOR?

The Oklahoma Supreme Court recently examined the "doing business" dilemma in *C.H. Stuart, Inc. v. Bennett*.[104] In *Stuart*, the court, although taking cognizance of the previous case law, appeared to consider the sales volume of the foreign corporation in Oklahoma as an

97. *See* notes 85 & 86 *supra* and accompanying text. *See also* Norman M. Morris, Corp. v. Weinstein, 466 F.2d 137, 142 (5th Cir. 1972).

98. Fuller v. Allen, 46 Okla. 417, 148 P. 1008 (1915).

99. Fruit Dispatch Co. v. Wood, 42 Okla. 79, 140 P. 1138 (1914).

100. Sooner Beverage Co. v. G. Heileman Brewing Co., 194 Okla. 252, 150 P.2d 72 (1944).

101. 146 Okla. 247, 294 P. 126 (1930).

102. *Id.* at 247-48, 294 P. at 127-28. "The shoes were advertised for sale under the name of the defendant corporation, and, so far as the public and customers were informed, the stock of shoes was owned by the defendant corporation." *Id.*

103. This would appear to be both a logical and fair result. If a foreign corporation benefits from the consumer's belief that he is dealing intrastate, then the corporation ought to be held accountable to Oklahoma (via qualification requirements) for the benefit received.

104. 617 P.2d 879 (Okla. 1980).

important, and perhaps determinative factor in determining whether intrastate business had been conducted.[105] An examination of the *Stuart* case reveals an invigorated effort by Oklahoma courts to gain greater control over foreign corporations doing business within this state.

A. *Factual Setting*

C.H. Stuart is a New York corporation in the business of selling costume jewelry nationwide under the trade name "Sarah Coventry."[106] The company uses a network of local employees,[107] who solicit other state residents to hold "fashion shows" for friends and neighbors.[108] A Sarah Coventry employee attends the show, demonstrates jewelry samples from a kit supplied by the company, and accepts orders.[109]

> By normal operating procedure, all orders solicited at the party are forwarded to Sarah Coventry's New York office, where the order is either accepted and filled or rejected. The condition that all orders are subject to acceptance in New York is printed on the face of all order blanks filled in by customers.[110]

Before commencing employment, all Sarah Coventry employees complete employee contracts which are forwarded to New York for ac-

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105. Although it was not explicitly discussed in the case, it is this author's opinion that the court was significantly influenced by the size of Sarah Coventry's sales volume in Oklahoma. Two factors form the basis of this opinion. First, the Bennett's raised this fact in their brief to the court and thus the court was aware of it. Answer brief for Appellees at 7, C.H. Stuart, Inc. v. Bennett, 617 P.2d 879 (Okla. 1980). Second, and most important, the language of the court in its definition of doing business suggests this was a factor:

> [E]ngaging in business in Oklahoma consisted of "the doing or performing of a series of acts which require time, attention, and labor, for the purpose of livelihood, profits, or pleasure; . . ." Obviously, the sales from the demonstration kits were a "series of acts which require time, attention, and labor for the purpose of . . . profits . . . ."

617 P.2d at 882 (quoting Wilson v. Williams, 22 F.2d 692, 697 (10th Cir. 1955)).

The court's emphasis on "profits" seems anomalous since it expressly held that the "four direct kit sales" per year was the only intrastate activity by Sarah Coventry that violated Oklahoma's qualifications statutes. *Id.* at 885. The profits from these four direct sales were minimal when compared to Sarah Coventry's total sales volume in Oklahoma. Perhaps the court's reliance on "profits" was actually directed at Sarah Coventry's total sales volume, most of which was totally beyond the reach of Oklahoma's qualification statutes.

106. Hereinafter, the Stuart company will be referred to as Sarah Coventry.

107. This hierarchy or pyramidal structure is composed of: area manager, regional manager, branch manager, unit directors, and fashion show directors. 617 P.2d at 881.

108. *Id.*

109. *Id.* The kits are owned by Sarah Coventry and they must be returned to the corporation when the employee no longer works for the company.

110. *Id.*

ceptance or rejection. The employment contracts contain covenants not to compete, which provide that upon an employee's termination, he will not disclose any customer lists nor solicit any other employees to leave the company's employ for a period of two years.[111]

Ben and Diane Bennett had been regional managers for Sarah Coventry for four years before they quit and began working for a competitor. Sarah Coventry alleged that the Bennetts breached their employment contract by inducing other Sarah Coventry employees to terminate employment and join them in working for the competitor, in violation of the two-year contract provision.[112]

Sarah Coventry brought a breach of contract action against the Bennetts for a total of one hundred thousand dollars in an Oklahoma district court.[113] The Bennetts moved for a dismissal of the action, alleging that Sarah Coventry's in-state activities constituted "doing business" in Oklahoma within the meaning of sections 1.201(a)[114] and 1.11b[115] of the Oklahoma statutes, and that the company's failure to qualify in Oklahoma precluded it from bringing suit.

The district court, relying on the factually analogous Connecticut decision of *Armor Bronze & Silver Co. v. Chittick*,[116] dismissed Sarah Coventry's action, holding that the company had engaged in intrastate business for purposes of Oklahoma's qualification statutes. The Oklahoma Supreme Court affirmed.[117]

B. *Analysis of the Court's Decision*

Although the Oklahoma Supreme Court delineated and evaluated all of Sarah Coventry's intrastate activity, it found determinative that the Bennetts, at the direction of their supervisor, made sales (up to four times each year) directly from their sales kits to customers, in contra-

111. *Id.*

112. *Id.* In the words of Sarah Coventry's legal counsel, the Bennetts' "made a wholesale raid on salespeople in a total breach of contract." Phone conversation with Mr. Franklin T. Russell, Assistant Secretary and Legal Counsel of the C.H. Stuart Company, Newark, New York (March 18, 1981).

113. 617 P.2d at 881. Sarah Coventry also sought injunctive relief against the Bennetts. Sarah Coventry, in addition to alleging its activities were solely interstate commerce, alleged that its right to maintain suit in Oklahoma was unaffected by Oklahoma's domestication statute as a condition precedent to bringing suit. *Id.* at 885-86. This issue is not discussed in this article.

114. Note 57 *supra* and accompanying text.

115. Note 59 *supra* and accompanying text.

116. 221 F. Supp. 505 (D. Conn. 1963). See notes 143-151 *infra* and accompanying text.

117. 617 P.2d at 880. The Oklahoma Supreme Court rationalized that "the evidence was such that the trial court could have found that the company's agents were engaged in business in Oklahoma." *Id.* at 884.

vention of the stated company policy of making sales only by order subject to acceptance by the company in New York.[118] The court concluded that such direct sales to Oklahoma customers constituted intrastate business for the purpose of the corporation's amenability to Oklahoma's qualification statutes.[119]

The court held that Mr. Bennett's testimony concerning the direct sales demonstrated that Sarah Coventry had met the Oklahoma definition of "doing business" espoused in the *Fuller* case.[120] "Obviously, the sales from the demonstration kits were a 'series of acts which require time, attention, and labor, for the purpose of . . . profits . . . .' "[121] In looking at the three factors courts have examined in evaluating a corporation's activities: regularity of the activity, how integrally related it was to the corporation's business, and the actual mechanics of the transaction, the Oklahoma Supreme Court held that Sarah Coventry's activities were intrastate in all three respects.[122]

The court considered the Bennetts' direct sales from the demonstration kits to be "regular" and "recurring."[123] "[R]egular", was as opposed to "isolated" as defined by the court in *Wilson v. Williams*.[124] *In Wilson*, the court held that the drilling of a single oil well was insufficient to fall within the purview of "doing business."[125] In contrast, the court in *Stuart* held that the sales from the demonstration kits were

118. *Id.* at 882. Two additional facts should be noted, however. First, although Mr. Bennett's testimony was disputed, the court apparently did not consider it self-serving in spite of the fact that Mr. Bennett, the defendant in this action, was the *only* witness produced at trial who testified this occurred. *See id.* Secondly, the fact that direct sales were made from the demonstration kits was not a major argument raised by the defendant. It was "mentioned" in only two sentences of defendant's 27-page brief. Answer Brief for Appellees at 5, C.H. Stuart, Inc. v. Bennett, 617 P.2d 879 (Okla. 1980).

119. 617 P.2d at 884.

120. *Id.* at 883 (citing Fuller v. Allen, 46 Okla. 417, 148 P. 1008 (1915)).

121. *Id.* at 884 (omissions in opinion). This result would be more palatable had the court stated it had used the "doing business" test articulated in *International Shoe*. It is suggested that the direct sales so laborously scrutinized by the court were merely "minimum contacts," and although this test has traditionally been reserved for personal jurisdiction cases, the Oklahoma Supreme Court felt it "reasonable" to invoke it in the *Stuart* decision. Professor Henn has noted that "standards of reasonableness change with the times." H. HENN, LAW OF CORPORATIONS, § 96 at 149 (2d ed. 1970). The Oklahoma Supreme Court may have felt that the very profitable nature of Sarah Coventry's business, as a whole, made it reasonable to subject the corporation to Oklahoma's qualification statutes. *See* note 134 *infra* in which the Court held substantial revenues derived from foreign corporate activity within Oklahoma were enough to subject the foreign corporation to personal jurisdiction.

122. 617 P.2d at 883.

123. *Id.* (The Bennetts' made such sales up to four times each year).

124. 222 F.2d 692 (10th Cir. 1955). *See* notes 57-59 *supra* and accompanying text.

125. 222 F.2d at 697.

not isolated transactions[126] and were sufficient to subject Sarah Coventry to Oklahoma's qualification statutes. It seems that the court engaged in a numbers game in making this distinction because the work associated with drilling even one oil well is continuous and is not performed just four times a year.

The *Stuart* court's analysis of the second factor, the "integral-relation" test, is also perplexing. The court held that the four direct sales from the demonstration kits were "not simply incidental to interstate transactions,"[127] as illustrated in *Cugley Incubator Co. v. Franklin*.[128] The court did so, even though it viewed all of Sarah Coventry's other activities as interstate commerce.[129] The anomaly of this holding is apparent upon considering the Bennetts' testimony which revealed that six hundred parties were held each month in the Bennetts' region alone, resulting in sales of approximately forty thousand dollars each month.[130] It is difficult to accept the court's reasoning that "up to four direct sales a year" are not incidental to approximately 7,200 regional parties per year at which solely interstate sales are made.

Moreover, Mr. Bennett's testimony revealed that the direct sales occurred just prior to Christmas, when customers were anxious to make a purchase and unable to wait for the order to be shipped from New York.[131] The Bennetts were placed in a position of either making a direct sale or losing a customer. Such a direct sale should not be deemed a willful violation of Oklahoma's qualification statute, but rather an act to promote Sarah Coventry's business by not alienating customers. Considering the total scheme of Sarah Coventry's business, it is difficult to agree with the court's conclusion that the direct sales were anything more than incidental to the typical mail order sales.

Upon examining the third element, the actual mechanics of the transaction, the court deemed the Bennetts' acceptance and filling, from their sales kits, of customer orders entirely within Oklahoma to constitute intrastate business as defined in *Bailey v. Parry Manufactur-*

126. 617 P.2d at 884.

127. *Id.*

128. 193 Okla. 202, 142 P.2d 125 (1943).

129. 617 P.2d at 884. "Sarah Coventry has chosen a formal method of doing business that is wholly interstate." *Id.*

130. Answer Brief for Appellees at 7, C.H. Stuart, Inc. v. Bennett, 617 P.2d 879 (Okla. 1980). Moreover, there were five other regional managers operating in Oklahoma during the Bennetts' employment with the company. *Id.* If their individual sales approximated that of the Bennetts, Sarah Coventry would certainly have been financially prosperous in Oklahoma.

131. 617 P.2d at 881.

ing Co.[132] The court demarcated the direct sales from the demonstration kit once it reached Oklahoma from the act of shipping the kit from New York to Oklahoma and concluded that the former was not a transaction of interstate commerce.[133] *Bailey*, however, like *Seidenbach*,[134] involved the entire stock of a foreign corporation which was held as inventory and later resold in Oklahoma. In *Stuart*, the Oklahoma Supreme Court specifically found that Sarah Coventry maintained no inventory in Oklahoma.[135] These cases are further distinguishable from *Stuart* because the activity of "up to four direct sales a year" did not constitute a major portion of Sarah Coventry's local business. Moreover the corporation's intent in the former case was to ship inventory for subsequent sale in Oklahoma, whereas Sarah Coventry's intent was to ship a demonstration kit from which orders would be taken and filled out of state.

A better approach would have been to view the kit sales as an exchange within the definition of interstate commerce used in *Addyston Pipe & Steel Co. v. United States*.[136] The *Stuart* facts reveal that after the direct sales were made the Bennetts ordered jewelry from the company to replace the jewelry sold from the kit.[137] Nevertheless, the court apparently isolated the kit sales from the remainder of Sarah Coventry's business activity in Oklahoma thus contravening precedent holding that "[e]ach case must be determined on its own set of facts . . . *looked upon as a whole*."[138] Or perhaps the court did examine the scope of the entire transaction, and after scrutinizing in particular the sales volume of Sarah Coventry in Oklahoma, it searched for a method of gaining control over this very profitable corporation.

1. Substance Over Form

After examining the three factors, the *Stuart* court made the following observations:

> Sarah Coventry would not, simply by maintaining employees in the state to solicit orders and collect money, be do-

132. 59 Okla. 152, 158 P. 581 (1916). (*Bailey* dealt with the direct sale of buggies from inventory located within Oklahoma).
133. 617 P.2d at 883-84.
134. Seidenbach's v. A.E. Little Co., 146 Okla. 247, 294 P. 126 (1930).
135. 617 P.2d at 884.
136. 175 U.S. 211 (1899). For the definition, see quote at note 21 *supra*.
137. 617 P.2d at 883.
138. Armor Bronze & Silver Co. v. Chittick, 221 F. Supp. 505, 511 (D. Conn. 1963) (emphasis added).

> ing business in the state. Also, merely recruiting employees in Oklahoma is not conducting business within the state when the employment contracts are subject to acceptance in New York. As a matter of fact, Sarah Coventry has chosen a formal method of doing business that is wholly interstate and, if followed, would not be transacting business in Oklahoma. By its formal method, all contracts are subject to acceptance in New York. No office, warehouse, or inventory is kept in the state; no real property is owned or leased in the state; no products are advertised in the state and only recruitment advertisements are placed; no bank account is maintained in the state; and all jewelry is shipped into the state from the home office in New York.[139]

Thereafter the *Stuart* court, in a drastic departure from precedent, elevated the substance of the transaction over its form. "[W]hatever the formal policy of a company claiming to engage only in interstate commerce, the company's actions 'speak more loudly than the legal terms used to describe relationships . . . as appear in the wording in its contracts and forms.' "[140] The court noted that although Sarah Coventry's corporate forms bore an inscription that all customer orders were subject to acceptance in New York, Sarah Coventry's actions revealed that intrastate sales were made despite formal company policy.[141] The court is commended for scrutinizing substance over form. In so doing, however, its possible preoccupation with volume of total sales, may have caused it to inflate inappropriately the significance of the direct kit sales.

The court drew a parallel between *Stuart* and *Armor Bronze & Silver Co. v. Chittick*[142], noting a strikingly similar factual pattern. Armor Bronze & Silver Co. was a Massachusetts corporation which utilized a "party plan" system similar to Sarah Coventry to sell copperware. Armor Bronze brought a suit in a Connecticut district court against one of its former employees, but the suit was dismissed because Armor Bronze had engaged in intrastate commerce without having satisfied Connecticut's qualification statute.[143] As the court concluded:

> [T]here are, on the one hand, cases where a . . . salesman for

139. 617 P.2d at 884 (citations omitted).

140. *Id.* at 884 (quoting Armor Bronze & Silver Co. v. Chittick, 221 F. Supp. 505, 514 (D. Conn. 1963)).

141. *Id.* at 884-85.

142. 221 F. Supp. 505 (D. Conn. 1963).

143. *Id.* at 514. In *Armor*, the sales representatives engaged in a substantial number of sales outside of the "party plan" that were *not* subject to acceptance in Massachusetts. These sales

> the foreign corporation simply takes orders with the explicit understanding that a binding contract will be made only when the order is accepted by the foreign corporation at a place outside of Connecticut and, on the other hand, cases where a foreign corporation by its authorized agents enters into contracts within the State of Connecticut on its behalf. The former are interstate commerce . . . . The latter clearly come within the requirements of [Connecticut's qualification statute].[144]

The *Stuart* court noted that between these two extremes there lies a myriad of fact situations not clearly belonging to one class or the other, but which must nevertheless be judged as constituting either interstate or intrastate business.[145] The Oklahoma Supreme Court concluded that Sarah Coventry's activities lay between the *Armor* extremes and that it was reasonable for the trial court to conclude that such activities constituted intrastate "doing business."[146]

Connecticut, however, does not recognize the dual definition[147] of "doing business" followed in Oklahoma.[148] Instead, the Connecticut

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totaled approximately $30,000. The *Armor* court noted that even though this was against stated company policy, the company "was well aware of it . . . ." *Id.* at 513.

144. *Id.* at 511 (citations omitted).

145. 617 P.2d at 884.

146. *Id.*

In equity cases, the law has long recognized:

> A presumption of correctness exists in favor of a trial court's findings . . . . However . . . if it appears from the record that the conclusions reached by the trial court are against the clear weight of the evidence, the Supreme Court has always reserved the right, and acknowledged the duty, of setting aside the judgment of the trial court and rendering such judgment as should have been rendered below.

Peyton v. McCaslin, 417 P.2d 316, 320 (Okla. 1966) (citations omitted).

The Oklahoma Supreme Court appeared to acknowledge this presumption in *Stuart*. In this writer's opinion, however, the trial court's conclusion was against the "clear weight of the evidence."

147. "Dual definition" refers to one set of standards for dealing with service of process and another set for amenability to qualification statutes. 221 F. Supp. at 514.

148. Sooner Beverage Co. v. G. Heileman Brewing Co., 194 Okla. 252, 150 P.2d 72 (1944). *See* notes 69 & 70 *supra* and accompanying text.

OKLA. STAT. tit. 12, § 1701.03 (1971) establishes the criteria for the judicial exercise of personal jurisdiction. It provides, in part, that a court may exercise personal jurisdiction over a corporation when the corporation causes tortious injury in Oklahoma by an act or omission outside the state if it regularly "solicits business or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered" in Oklahoma. *Id.* § 1701.03(a)(4) (emphasis added).

In a recent products liability action against an automobile retailer and wholesaler, the Oklahoma Supreme Court found personal jurisdiction based, in part, on the fact that the defendants derived substantial income from automobiles used in Oklahoma. World-Wide Volkswagen Corp. v. Woodson, 585 P.2d 351, 352 (Okla. 1978). The United States Supreme Court reversed, responding to the substantial revenue argument stating, "[f]inancial benefits accruing to the defendant from a collateral relation to the forum State will not support jurisdiction if they do not

court used the *International Shoe* test to subject Armor Bronze to Connecticut's qualification statutes. It held that Armor's operations established sufficient contacts with the state to make it reasonable and just to permit the state to subject Armor to the state's "transacting business" statutes.[149] In contrast, the Oklahoma Supreme Court, in *Heileman*, expressly stated that the *International Shoe* "minimum contacts" test was inapplicable in resolving the "doing business" dilemma pertaining to qualification statutes.[150]

The *Stuart* court did, however, focus on the *Armor Bronze* court's method of piercing the form of "doing business" in order to reveal the actual substance of the transaction. The *Armor Bronze* court looked beyond the corporation's legally laundered forms to conclude that "[a]ll of the protective verbiage designed to show a simple 'drummer' case situation . . . was in fact a subterfuge to cover quite a different set of legal relationships."[151]

Similarly, the Oklahoma Supreme Court, in an effort to pierce Sarah Coventry's corporate form, ignored the express company policy prohibiting direct demonstration kit sales and focused on the up to four direct sales made intrastate each year. Moreover, the court charged the Bennetts' actions to the company as their principal, rather than viewing the Bennetts' direct demonstration kit sales as actions of agents outside the scope of their authority.[152]

> If Sarah Coventry has been the victim of a disobedient servant and is totally innocent, it should not ordinarily be subjected to Oklahoma domestication and trade-name registration statutes. However, in this case, the company received and retained the benefits of its employees' sales, whether the sales were authorized or unauthorized. One who accepts the benefits of the unauthorized acts of his agent ratifies the acts and accepts all the burdens and benefits of the acts. It is not essential to ratification that the principal have knowledge of the acts of the agent if the benefits from the acts are retained

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stem from a constitutionally cognizable contact with that State." World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 299 (1980). The Supreme Court noted that, "[w]hatever marginal revenues petitioners may receive by virtue of the fact that their products are capable of use in Oklahoma is far too attenuated a contact to justify that State's exercise of *in personam* jurisdiction over them." *Id.*

149. 221 F. Supp. 505, 511 (D. Conn. 1963) (quoting International Shoe Co. v. Washington, 326 U.S. 310, 320 (1945)). The *Armor* court also placed emphasis on the "substantial portion" of Armor's business that was conducted intrastate. *Id. See also* note 143 *supra*.

150. *See* note 148 *supra* and accompanying text.

151. 221 F. Supp. at 512.

152. 617 P.2d at 884.

> after the happening of such events as would place a reasonably prudent person on inquiry.[153]

The court reasoned that Sarah Coventry should have been on notice that direct sales were occurring when it received orders from its employees.[154] It appears that the court strained to impute knowledge of the Bennett's actions to Sarah Coventry in its apparent preoccupation with the profits reaped by the corporation.[155] Did the Oklahoma Supreme Court really elevate the substance of a corporate transaction beyond its form, or were its actions a subterfuge of a different nature?

2. Dollars and Cents Over Legal Analysis

The Third Circuit in *Aldens, Inc. v. Packel*[156] recently commented that classifying the Supreme Court's commerce clause adjudications for the purpose of analytical application may seem to be a futile exercise. "In this area of constitutional law, perhaps more than any other, the political philosophy of the Court's majority at a given moment has influenced not only the outcome, but also the reasoning of the decisions."[157] Perhaps the Oklahoma Supreme Court's political philosophy influenced the outcome in *Stuart*. The gross revenues the Stuart company generated in Oklahoma may have outweighed any results obtained from legitimate legal analysis. The court may have decided that a company making this much money should bear its share of the cost of state services and not be permitted to escape state regulatory legislation.

Throughout its analysis,[158] the court appeared to be searching for

153. *Id.* at 885 (footnotes omitted). For other Oklahoma decisions supporting these principal-agent propositions, see Aldis v. Brown, 412 F. Supp. 1066 (W.D. Okla. 1975); Mechanical Constructors, Inc. v. B-W Acceptance Corp., 412 P.2d 957 (Okla. 1966); Holmes v. McKey, 383 P.2d 655 (Okla. 1963); Outboard Marine Center v. Little Glasses Corp., 338 P.2d 1101 (Okla. 1959); Oklahoma Title Co. v. Burrus, 172 Okla. 94, 44 P.2d 852 (1935); Lee v. Little, 81 Okla. 168, 197 P. 449 (1921).

154. 617 P.2d at 885. The court reasoned that because "[a] certain percentage of the orders from the various states are rejected by the company at the New York office . . . it is obvious that the clerical employees who process orders do more than merely accept the orders mechanically." *Id.* Thus, the court imputed knowledge of the unauthorized sales to the company. *Id.*

155. "[I]n this case, the company received and retained the benefits . . . . [and it must accept] all the burdens. . . ." *Id.* With the corporation doing one-half million dollars worth of business in the Bennett's Oklahoma region annually, the number of orders forwarded to the New York office must have been sizeable. It seems unlikely that a New York employee would distinguish the "up to four" orders directly sent from the Bennetts.

156. 524 F.2d 38 (3d Cir. 1975).

157. *Id.* at 45 (footnote omitted).

158. Sarah Coventry's legal counsel stated that over the past ten years the corporation had brought 54 suits, similar to the suit in *Stuart*, in 15 to 20 different states. It had only lost the "doing business" issue three other times (the states involved were Michigan, Alabama, and

a way to hold Sarah Coventry accountable for doing one-half million dollars worth of business annually in Oklahoma. In so doing, the Oklahoma Supreme Court seemed to view the corporation's volume of sales as being more determinative than the method used by the foreign corporation in conducting its business. Although it went through the motions of the traditionally applied "significant contacts" inquiry, the Oklahoma Supreme Court may have concluded that where substantial profit is involved, minimal intrastate activity by a foreign corporation is sufficient to subject it to Oklahoma's qualification statutes.

While the *Armor Bronze* court looked beneath the form of the transaction involved to scrutinize its substance, the Oklahoma Supreme Court virtually ignored the overall substance of Sarah Coventry's activities, choosing instead to scrutinize its agents' failure to comply with the corporate policy prohibiting direct sales. Although Sarah Coventry's actions were legally tailored on paper, the court scrutinized the fact that up to four unauthorized intrastate kit sales were made annually of which the corporation should have been, if not actually had been, aware. Championing its apparent ability to unmask this subversive activity, the Oklahoma Supreme Court's actions hint at the very subterfuge of which it accused Sarah Coventry. In its effort to pierce the form of the transaction to reveal its substance, the Oklahoma Supreme Court inflated an insignificant component of the substance (four direct kit sales) to form the foundation of its decision. In doing so, the court may have been so preoccupied with Sarah Coventry's volume of sales that this actually dictated the outcome of its decision. In placing a price tag on foreign corporate activity, the Oklahoma Supreme Court supplanted the traditional foundations of legal analysis characteristic of the "doing business" dilemma.

V. CONCLUSION

While the "doing business" dilemma has expanded from its exclusionary inception in 1869[159] to its current inclusive application, state and federal courts have remained reluctant to hold that a foreign corporation has engaged in intrastate business because of the resulting de-

Idaho). All of these cases involved unreported decisions. Telephone conversation with Franklin T. Russell, Assistant Secretary and Legal Counsel for the C.H. Stuart Company, Newark, New York (March 18, 1981).

159. Notes 10-12 *supra* and accompanying text.

nial of access to the courts. This situation, however, may be changing in Oklahoma.

The Oklahoma Supreme Court in *C.H. Stuart, Inc. v. Bennett*[160] has espoused the most expansive application of "doing business" to date in Oklahoma. Although historically courts have applied dual "doing business" tests in assessing a foreign corporation's amenability to service of process and its amenability to regulatory legislation, the *Stuart* decision may signal a trend in Oklahoma towards applying the "minimum contacts" test in both contexts.[161] In applying this test, courts would no longer scrutinize the degree or mechanics of the intrastate activity involved, but merely would determine whether *any* foreign corporate activity is involved. If so, the courts would then decide whether it would be fair and just to hold a corporation accountable. It appears that the realities of big business may have elevated the policy concerns for affording consumer protection over those promoting unhampered growth of interstate commerce.

The *Stuart* court, despite its verbiage to the contrary, applied the minimum contacts test to Sarah Coventry's Oklahoma activities. It apparently concluded that under notions of fair play and substantial justice, it was fair and reasonable to hold that a corporation doing one-half million dollars worth of business in Oklahoma annually was "doing business" under the purview of Oklahoma's qualification statutes.

Although the supreme court went through the motions of the appropriate legal analysis in reaching its decision, by elevating dollars and cents over the actual mechanics of the transaction, the court has implied that pure profit may be the determinative factor of the "doing business" analysis. If the profit is great enough, then a "minimum contacts" test will be applied to scrutinize the corporation's activity. While the *Stuart* decision alone poses a minimal threat to foreign corporations,[162] the Oklahoma Supreme Court's strategem may signal an in-

160. 617 P.2d 879 (Okla. 1980).

161. *Id.* In *Stuart*, the Oklahoma Supreme Court relied on a Connecticut case where the minimum contacts test was used to subject a foreign corporation to Connecticut's qualification statute. Armor Bronze & Silver Co. v. Chittick, 221 F. Supp. 505 (D. Conn. 1963). Prior to *Stuart*, in Oklahoma the minimum contacts test was insufficient in determining whether a foreign corporation was subject to the state's qualification statutes. Sooner Beverage Co. v. G. Heileman Brewing Co., 194 Okla. 252, 150 P.2d 72 (1944).

162. Sarah Coventry's legal counsel reported that, as a result of the *Stuart* decision, the corporation inserted new clauses in its employment contracts effective July 1, 1981, whereby an employee will expressly agree not to make sales from demonstration kits. Sarah Coventry has no plans to change its pattern of doing business in Oklahoma or any other state. Telephone conver-

vigorated effort to exert control over foreign corporations "doing profitable business" within Oklahoma.

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sation with Franklin T. Russell, Assistant Secretary and Legal Counsel, C.H. Stuart, Inc., Newark, New York (March 18, 1981).