

## BCL 1312(a): Violation of Statute Held Not Jurisdictional in Nature

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The Appellate Division, First Department, ruled that the poundage should be calculated on the basis of the amount received in the Nevada settlement. It reasoned that the sheriff would have satisfied the judgment in the absence of the request not to proceed.<sup>194</sup>

The First Department has warned that it will closely scrutinize transactions of this nature to insure that plaintiffs and defendants do not make sham settlements in order to avoid large poundage fees.

#### BUSINESS CORPORATION LAW

*BCL 1312(a): Violation of statute held not jurisdictional in nature.*

Section 1312(a) of the Business Corporation Law, a taxing statute, provides that "[a] foreign corporation doing business in this state without authority shall not maintain any action . . . unless and until such corporation has been authorized to do business in this state. . . ."

In *Hot Roll Manufacturing Co. v. Cerone Equipment Co.*,<sup>195</sup> the plaintiff, an unauthorized foreign corporation doing business in New York, obtained a default judgment against the defendant. Thereafter, the defendant initiated an action to vacate the judgment for lack of jurisdiction based on the plaintiff's noncompliance with BCL 1312(a), *i.e.*, failure to obtain the necessary license.

In holding that satisfaction of the section was not a jurisdictional requirement, the Appellate Division, Third Department, construed the statute's language "maintain any action" to be synonymous with "continue any action," rather than with "begin any action."<sup>196</sup> It held that failure to satisfy the requirements of BCL 1312(a) affects legal capacity to maintain an action, but not jurisdiction of such action.<sup>197</sup>

Several prior decisions have construed BCL 1312(a) similarly.<sup>198</sup> However, the instant decision is inconsistent with the purpose of BCL 1312(a). It would have been preferable to suspend execution on the judgment until the plaintiff-corporation had qualified to do business in the State.

<sup>194</sup> *Id.* at 230, 328 N.Y.S.2d at 568.

<sup>195</sup> *Id.* 339, 329 N.Y.S.2d 466 (3d Dep't 1972) (3-2).

<sup>196</sup> *Id.* at 341, 329 N.Y.S.2d at 467.

<sup>197</sup> *Id.* at 340, 329 N.Y.S.2d at 467, *citing* *Wood & Selick v. Ball*, 190 N.Y. 217, 82 N.E. 21 (1907); *Conklin Limestone Co. v. Linden*, 22 App. Div. 2d 63, 253 N.Y.S.2d 578 (3d Dep't 1964).

<sup>198</sup> *See, e.g.*, *Hooton Chocolate Co. v. Star Chocolate Novelties*, 63 Misc. 2d 482, 311 N.Y.S.2d 698 (Sup. Ct. Columbia County 1970); *Oxford Paper Co. v. S.M. Liquidation Co.*, 45 Misc. 2d 612, 257 N.Y.S.2d 395 (Sup. Ct. N.Y. County 1965).