Pushing the Fourteenth Amendment Limits on State Taxation of Multi-State Contacts

By Robert S. Schwartz

Robert S. Schwartz examines Fourteenth Amendment Due Process today, including its application in the Kaestner Family trust decision.

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State taxation of income connected to multi-state activities or mere presence is fertile ground for tax controversies with which most tax professionals are familiar. Two recently decided cases very well illustrate the point. One has recently been decided by the U.S. Supreme Court (the "Court" or "Supreme Court"); the other could be decided by the Court in a year or two. In addition, the case susceptible of being taken up by the Court portends further controversy in the multistate income tax area. The area of controversy which is the focus of this article is the Fourteenth Amendment due process clause. As intimated below, how a court construes the clause on the tax facts before it determines the outcome. Courts construe the clause differently.

On June 21, 2019, the U.S. Supreme Court decided *North Carolina Department of Revenue v. The Kimberley Rice Kaestner 1992 Family Trust*.[1] For the calendar year, tax years at issue, 2005 through 2008, Kimberley Rice Kaestner ("Kimberley") was a resident of North Carolina and the trust beneficiaries were Kimberley and her three children. North Carolina had earlier passed an income tax statute stating that trust income is taxable by North Carolina, if and to the extent trust income is for the benefit of one or more state resident trust beneficiaries.[2] What can be clearer? Nonetheless, the trustee did not pay the state income tax on trust income for the period 2005 through 2008. Consequently, the Department of Revenue audited and assessed the trust approximately $1.3 million in unpaid income taxes. The trustee determined to contest the assessment. North Carolina proved itself determined to go all the way to the Supreme Court.

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By the time the case reached the Supreme Court, all the legally significant facts had been mustered *via* stipulation or findings of facts at the North Carolina State court level. Fact stipulation or findings of fact are typically critical to the outcome of multi-state activities or presence cases.

The trustee did not make any distributions to Kimberley (or children) during the period 2005 through 2008. The trust had been created by a New York resident and the trust agreement stated that the trust was governed by New York law. The sole trustee of the trust was not resident in North Carolina, but rather resident in Connecticut. The trustee maintained the trust records at his Connecticut home and/or his Manhattan law office. The trust assets consisted of investment securities. The financial custodian of these investment securities was found to be holding them through a Massachusetts office. So the Court concluded, "trust administration" occurs outside of North Carolina.

The Court held that §105-160.2 violated the Fourteenth Amendment due process clause. The clause provides: "… nor shall any state deprive any person of life, liberty, or property, without due process of law." The Court noted that in the context of state taxation of multi-state activities or presence, the due process clause limits states to exerting taxing power "that bears fiscal relation to protection, opportunities and benefits given by the state."[3] The Court also looked to *Quill Corp. v. North Dakota*.[4] There the Court reasoned that the totality of its then precedents amounted to a two-step analysis to address these considerations. The first step is to ascertain whether there is "some definite link, some minimum connection between the state and the person, property or transaction the state seeks to tax." The Court followed this track.

A unanimous Court concluded, as a matter of fact and law, there was not "some definite link, some minimum connection" between trustee activities, or trust property or trust income and North Carolina. They were all judged to be located outside of protections, opportunities or benefits given by North Carolina by virtue of its being there. The Court focused on an arguable link or connection present because the trust beneficiaries had been North Carolina residents. Here the Court made ultimate findings of fact: the trust agreement empowered the non-resident trustee to distribute all, some, or none of trust income and principal among Kimberley (and children) as the non-resident trustee determined in his sole discretion. No beneficiary had a power to withdraw income or principal from the trust or to sell or mortgage his or her trust interest. Thus, no beneficiary had power or control over trust income or corpus. These findings ended the analysis. The author did not review the parties' briefs, but assuming North Carolina made arguments in support of manifest, virtual presence of the trustee and trust property in-state *via* frequent enough computer communications to beneficiaries about trust administration and investments, the Court did not dignify these arguments by mentioning them or the facts behind them. (This is a frequent occurrence in tax litigation.) From the perspective of tax professionals' ability to make predictions about state taxation of income connected to multi-state activities or mere multi-state presence, thankfully, the Court affirmed three North Carolina lower court decisions along the trustee's long road to justice.

Along the decision's way, the Court perhaps made a telling observation in light of its inconsistent Fourteenth Amendment precedents (discussed below): "the trust made no direct investments in the state." The observation naturally points to the fact that trust investments did not include the ownership of such things as North Carolina real estate or gold bullion stored at a North Carolina location. If and to the extent the trust owned interests in publicly traded entities, that can be corporations or REITs or agricultural commodities funds or other investment vehicles, that had business locations or owned properties or rights to crops or livestock in North Carolina, which the trust likely did own, presumably had the Court spoken further, the Court would have identified these sorts of investments as "indirect" investments in North Carolina, and, hence, not a sufficient connection with the state. However, a prior Court decision casting doubt on this surmise is International Harvester.[5] That case involved the upholding of a Wisconsin "dividend privilege tax" requiring corporations doing business in Wisconsin to withhold and report a 2 1/2% tax on dividends declared out of earnings apportioned to company Wisconsin situs transactions and assets. More likely the Court would have had resort to the Court's Fourteenth Amendment due process precedents, including tax cases, that include the concept of a non-resident "purposefully availing" him or herself of the protections, opportunities or benefits of the state seeking tax money. Owning stock or units or what investment have you in publicly traded entities doing business or owning property or being organized under a state's business entity laws lacks a "purposefully availing" flavor. The *International Harvester* decision does not mention the "purposefully availing" criterion. Indeed the decision has a conclusive rather than a fully reasoned air about it.

The Fourteenth Amendment question that awaits resolution is the Court's answer to whether or not non-resident

individuals or trusts or other entities investing in stock of subchapter S corporations, or non-publicly traded interests in partnerships, limited liability companies or other entities doing business in a state or owning assets there, or perhaps extending to being merely organized under the state's business entity law, purposefully avail themselves of the protections, opportunities or benefits of the state by investing in non-traded entities in response to word of mouth investment opportunities, private offering circulars, or other private means. The second recent case deserves to and might eventually reach the Court because of this question as well as, surprisingly to many, the fact that the judge found the Court's "unitary business operations" concept irrelevant to the case.

Goldman Sachs involves a New York City general corporation tax ("GCT") assessment of approximately $4,000,000 against Goldman Sachs Petershill Fund Offshore Holdings (Delaware) Corp. (the "Petitioner") for calendar year 2010.[6] The assessment arose out of the audit of one Petershill U.S. IM Master Fund, L.P. (the "L.P.") of which the Petitioner was an approximately 89% passive limited partner. Petitioner reported its share of L.P. income and expenses to the city and paid 2010 GCT taxes, but it did not report its share of the L.P.'s sale of a 9.99% passive member interest in one Claren Road Asset Management, LLC ("Claren Road"), an alternative investment bought by the L.P. three years earlier, to an unrelated third party. Petitioner's share of the L.P.'s sale gain was approximately $54 million.

As noted above, fact stipulation or findings of fact are typically critical to the outcome of multi-state activities or presence cases. The following findings of fact were made by the ALJ:

- Petitioner served as a Delaware "blocker corporation" for its two shareholders. They were non-New York, probably non-U.S., limited partnerships taking in money from foreign investors for the purpose of investing in closely held investment management companies located in the United States.
- The L.P. was organized, as was Petitioner, to facilitate the offshore partnerships' investments in investment management companies located in the United States.
- The offshore limited partnerships' investment manager (and apparently the L.P.'s as well) was an England and Wales corporation doing business in London and a subsidiary of Goldman Sachs Group, Inc.
- Neither Petitioner nor the L.P. conducted any business activities in New York. The London based investment managers of the offshore limited partnerships had one meeting in the city with Claren Road personnel related to deciding to invest in Claren Road.
- Neither Petitioner nor the L.P. owned any tangible property in New York.
- Neither Petitioner nor the L.P. had any employees located in New York.
- The only interest Petitioner owned in the L.P. was an approximately 89% passive limited partner interest; apparently Petitioner did not have or exercise control over the L.P.
- Neither Petitioner nor the L.P. (which owned a 9.99% member interest in Claren Road) "engaged in any other transactions [besides ownership]" with Claren Road. Neither Petitioner nor the L.P. nor any Goldman Sachs affiliate participated in the management, control or day-to-day operation of Claren Road.
- During 2008–2010 Claren Road was doing business in the city.
- The parties stipulated that neither the offshore investment limited partnerships, nor Petitioner, nor the L.P., nor Claren Road had publicly traded ownership interests.
- The parties stipulated that neither Petitioner and Claren Road nor the L.P. and Claren Road were part of a "unitary business operation." In other words, neither Petitioner's nor the L.P.'s businesses were inter-related to, integrated with, or interdependent on the business activities of Claren Road. Claren Road was a completely independent operation managed and operated by unrelated persons for the benefit of themselves and passive investors in Claren Road.[7]

The ALJ held that the city's GCT assessment did not violate the Fourteenth Amendment due process clause. The clause provides: "… nor shall any state deprive any person of life, liberty, or property, without due process of law." The ALJ recognized that the Court's due process clause precedents limit the city to imposing taxes "that bear fiscal relation to protection, opportunities and benefits given by the [city] … to activities or transactions [or assets located] within the [city]." The ALJ recognized that the Court's precedents apply a two-step analysis.

The first step is to ascertain whether there is "some definite link, some minimum connection, between the state and the person, property or transaction the state seeks to tax." The ALJ held that Claren Road's city activities for the benefit of Petitioner (among other investors in the L.P. that had in turn invested in Claren Road) and for unrelated investors in Claren Road, coupled with Petitioner's indirect investment therein, established "some definite link, some minimum connection" between the city and Petitioner. This conclusion is questionable since the decision recognizes Petitioner as

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a non-resident entity and acknowledges Petitioner did not own or lease property or engage in transactions in the city (other than indirectly owning an 8.89% interest in Claren Road—a fact the court characterized as a "transaction").

The ALJ proceeded to the second step. The second step is to ascertain whether a non-resident's "income attributed to the [taxing jurisdiction] is rationally related to values connected with the taxing [jurisdiction]." ALJ concluded that Petitioner failed to provide evidence that any "extraterritorial value" was being taxed, *i.e.*, that the city was taxing gain that arose from assets, activities, or transactions outside of the city. Yet Petitioner did, importantly to appeal, get into the record that the due diligence into and decision to invest in Claren Road took place in London, the L.P.'s oversight of the investment on a regular basis took place in London and the decision to sell took place in London.

Nevertheless, the ALJ found that the city provided protection, opportunities or benefits to Claren Road's city-centered activities and transactions that had resulted in value creation for Petitioner measured by the gain from the L.P.'s sale of its Claren Road interest. The ALJ relied primarily on *International Harvester Co.*, cited above. Although the dividend amounts paid by the corporation in *International Harvester* to shareholders were 2% to Wisconsin residents and 98% to non-residents, the Court reasoned that Wisconsin had still provided "protection and benefits to appellant's corporate activities and transactions in the state." Accordingly, Wisconsin was entitled to impose a tax on the corporation as it "fairly measured the benefits the shareholders have received from the corporation's Wisconsin activities." In the course of upholding the tax on the corporation, the Court, in what today the Court can readily describe as *dicta*, stated that a dividend tax directly on the shareholders likewise would pass muster. The ALJ drew upon the *dicta* and concluded that Petitioner had received a similar kind of value derived from the city as the dividend recipient shareholders of International Harvester derived from Wisconsin, assuming Wisconsin had imposed tax directly on them *in lieu* of its withholding taxation scheme.

The *Kaestner* and *Goldman Sachs* cases share in common the same Fourteenth Amendment considerations and fundamental analysis. The first case voided a tax assessment with respect to income generated by investment activities outside of North Carolina, but for the benefit of North Carolina residents. The second case sustained a tax assessment with respect to investment activities outside of New York, *i.e.*, the purchase and sale of a minority interest, for the benefit of a person resident outside of New York. However, arguably Petitioner's taxable gain was generated inside New York in that Petitioner's gain arose from its purposefully availing itself of an investment in Claren Road, an entity with known New York City activities. Given other Supreme Court's precedents, such as *Hanson v. Denckla*,[8] only that court can bring some clarity and order. (The *Hanson* decision is cited in the *Kaestner* decision.)

In *Hanson*, the Court reiterated that personal jurisdiction, in the case by Florida courts, must be supported by minimum contacts, which meant that the three defendant/Delaware institutional trustees must have purposefully availed themselves of the privilege of conducting activities in Florida thereby taking advantage of the benefits and protections of its laws. The minimum contacts test, however, was not satisfied because the trustees did not transact any business in Florida, nor did they have offices or administer trusts or hold assets there, nor did they solicit any business from Florida consumers of institutional trustee services, nor otherwise did they exercise privileges in the state. For purposes of *in rem* jurisdiction the Court found as a fact, similar to *Kaestner*, that the securities constituting the trusts' corpus were held in Delaware. The Court did not consider income paid by the trustee of one of the trusts, an *inter vivos* trust, to its beneficiary domiciled Florida as conferring upon the Florida courts either *in personam* or *in rem* jurisdiction on that trust. Several of the Court's earlier due process taxation cases are cited in the decision.

Later, *Shaffer v. Heitner*[9] employed the same minimum contacts approach as *Hanson v. Denckla* to the issue of whether the Delaware courts had jurisdiction over individual officers of Greyhound Corp., a Delaware corporation, in respect of a shareholder derivative action alleging breaches of fiduciary duties. The Court accordingly reasoned the fact that a Delaware statute provided stock in Delaware corporations has Delaware presence does not in and of itself pass Fourteenth Amendment muster. In its fact finding the Court found no executives had contacts with Delaware as they lived in and worked in distant states. The Court held the executives had not purposefully availed themselves of the privilege of conducting activities within Delaware by accepting awards of compensatory shares of Greyhound Corp. and options to buy shares and holding those intangible properties. The Court also held executives had not purposefully availed themselves of the protections and benefits of Delaware law by taking jobs with Greyhound Corp.

Obviously, the *International Harvester* decision tacks another way for it arguably stands for the proposition that income received by a non-resident with respect stock of an entity found to be present in-state may be constitutionally taxed by the state, notwithstanding the taxpayer's out-of-state only presence, apparently an absence of purposefully availing, and no minimal contacts.

In any event, returning to *Kaestner* and *Goldman Sachs*, it is not hard to imagine the Court at least clarifying that the Fourteenth Amendment as applied to state taxation of trust income or corpus calls for a *sui generis* approach specific to non-business operation kinds of trusts, as the concurring opinion in *Kaestner* strongly suggests. Making a distinction on that basis at least plausibly sidesteps contradictions. The Petitioner has appealed to a higher New York court. Will it be determined to go all the way to the U.S. Supreme Court? Will that court take the case? Time will tell.

Meanwhile, the Supreme Court's decision in *South Dakota v. Wayfair, Inc. et al.*,[10] giving states and local governments the green light to impose sales tax collection and payment obligations on remote businesses selling to customers resident in-state, even though the business has only virtual, but not historically understood "physical" presence, has raised prospects for states to impose income taxes on those businesses as well. The ALJ in the *Goldman Sachs* case discusses *Wayfair* as supportive of city GCT taxation. However, while *Wayfair* removed the Court's prior "dormant" Commerce Clause bar of taxpayer physical presence, and reflects considerable rationale in support, it does not discuss Fourteenth Amendment limits, instead simply concluding: "It is settled law that a business need not have physical presence to satisfy the demands of due process." The Court then cites *Burger King Corp. v. Rudzewicz*,[11] a Florida long arm statue case, as coincidently was *Hanson v. Denckla*, where the Court, reversing the 11th Circuit, upheld Florida court jurisdiction over a Michigan franchisee of Miami based Burger King. The litigation's substantive dispute was over breaches of the franchise agreement. The key, ultimate finding of fact was Mr. Rudzewicz had "purposefully directed" himself to Burger King in Florida through signing the franchise agreement stating Florida law governs and a course of dealings with Miami headquarters. Consequently, the Court held he had "purposefully availed himself of the protections and benefits of Florida's laws."

Anecdotal evidence from practice indicates some states and municipalities are moving forward with ideas and others with efforts to impose apportioned income taxes on remote sellers, in some cases notwithstanding P.L. 86-272, or because they don't impose income taxes on a net income basis.[12] For example, in Corporation Tax Bulletin 2019-04 (Sept. 30, 2019) Pennsylvania's revenue department sets forth its position that under *Wayfair, inter alia,* a rebuttable presumption of due process presence arises for corporate net income purposes, assuming a remote corporation has in-state sales exceeding $500,000 regardless of the absence of virtual presence.[13] In such cases, the department warns—a taxpayer must file the corporate tax return. The bulletin recognizes that P.L. 86-272 could bar Pennsylvania from actually collecting its corporate tax, assuming the only business activities of a remote seller in-state consist of solicitation of orders for approval at an out-of-state location and fulfillment by shipment or delivery from outside the state. At least agent audit work is being drummed up concerning those who heed the warning.

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In addition, the Multistate Tax Commission and their signatory states are currently in the process of updating their July 27, 2001, statement on practices. Upon information and belief, they are doing so with an eye toward concluding, that if an in-state customer interacts with a remote business's website, the business will have engaged in non-protected activities in the state, and therefore falls outside of P.L. 86-272's net income taxation bar. Interaction appears to extend to a seller's website that transmits software code stored on a customer's computer to facilitate interactions between a customer and remote seller, *i.e.*, "cookies." This extension is actually the position taken by Massachusetts under the heading of "physical presence" in its controversial pre-*Wayfair* sales tax regulation, 830 CMR 64H.1.7 (effective October

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1, 2017), despite *Wayfair's* not certain to occur change to U.S. Constitutional limitations nine months later by adoption of a "virtual presence" test. All well and good, but has a given remote vendor purposefully availed itself of the protections, opportunities or benefits of the state? What if it engages a third party vendor also remote to the state for writing the software code, and which vendor also has access to whatever the customer information the software code generates? The overall multistate taxation situation is heating up for new controversies in the not too distant future. The competing arguments will be based in large part upon indistinct and inconsistent Court precedents concerning the Fourteenth Amendment due process clause.

At rock bottom of Fourteenth Amendment due process law is the seminal case of *International Shoe Co. v. Washington*,[14] where the rivers meet of state court jurisdiction over and state taxation of non-residents. The questions for decision were (1) whether, within the limitations of the due process clause of the Fourteenth Amendment, a Delaware corporation, had, by its activities in the State of Washington, rendered itself amenable to proceedings in the courts of that state to recover unpaid contributions to the state unemployment compensation fund exacted by the Washington Unemployment Compensation Act, and (2) whether Washington could exact those contributions consistently with the due process clause. The corporation had no office in Washington nor did it maintain a stock of merchandise there nor did it make contracts either for sale or purchase of merchandise there. However, during the tax years from 1937 to 1940 it employed 11 to 13 Washington residents whose principal activities were confined to Washington. They were compensated by commissions based upon the amount of their sales. In addition, the corporation supplied the salesmen with the line of shoe samples to display to prospective purchasers. On occasion, they rented sample rooms for exhibiting samples in business buildings or rooms in hotels. Overall, the Court found their in-state activities resulted in a large volume of interstate business in the course of which the corporation had received the benefits and protection of the laws of Washington, namely at least the right or privilege to employ labor there. The Court held: "It is evident that these operations establish sufficient contacts or ties with the state of the forum to make it reasonable and just, according to our traditional conception of fair play and substantial justice, to permit the state to enforce the [tax] obligations which appellant has incurred there … [and] appellant's 'presence' there for purposes of [the] suit [is] the taxable event by which the state brings appellant within the reach of its taxing power. The state thus has constitutional power to lay the tax and to subject appellant to a suit to recover it."

Recently Arizona has filed an action against California on the basis of the Court's original jurisdiction as provided for in Article III, Section 2.[15] The complaint is the California Franchise Tax Board is enforcing an $800 per year "doing business" tax against non-resident limited liability companies, limited liability partnerships and corporations who own membership interests in limited liability companies doing business in California. Arizona and numerous *amici curiae* have filed briefs to the effect the Court must or should take the case, and further arguing, under the heading of why, such substantive matters that California's imposition and collection of the tax against non-resident entity members violate Fourteenth Amendment due process law. California has filed an opposition brief stating the subject matter is not proper for a state against state lawsuit, but rather impacted non-resident entity limited liability company members must each pursue its own lawsuit because due process and other arguable issues do not admit of blanket judicial resolution. For example, there might be due process outcome difference depending upon whether a California limited liability company is member managed or manager managed. If the Court accepts this case, it is possible that some, all or none of the Fourteenth Amendment due process issues discussed in this article will be settled by the Court.

ENDNOTES

1. *North Carolina Department of Revenue v. The Kimberley Rice Kaestner 1992 Family Trust*, U.S. Supreme Court, No. 18-457, June 21, 2019.
2. N.C. Gen. State. Ann. §105-160.2.
3. *Wisconsin v. J.C. Penney Co.*, SCt, 311 US 435 (1940).
4. *Quill Corp. v. North Dakota*, SCt, 504 US 298 (1992). The Quill decision's holding that the taxpayer's contacts with North Dakota were sufficient minimum contacts is consistent with *International Shoe Co. v. Washington*, SCt, 326 US 319 (1945) (discussed later), but the Court went one step further. It held that "In 'modern commercial life' it matters little that such solicitation is accomplished by a deluge of catalogs rather than a phalanx of drummers: The requirements of due process are met irrespective of a corporation's lack of physical presence in the taxing State. … In this case, there is no question that Quill has purposefully directed its activities at North Dakota residents, that the magnitude of those contacts is more than sufficient for due process purposes, and that the use tax is related to the benefits Quill receives from access to [customers in] the State." The Court reasoned, "…we have held that if a foreign corporation purposefully avails itself of the benefits of an economic market in the forum State, it may subject itself to the State's *in personam* jurisdiction even if it has no physical presence in the State. Comparable reasoning justifies the imposition of the collection duty on a mail-order house that is engaged in continuous and widespread solicitation of business within a State."

[5] *International Harvester Co. v. Wisconsin Department of Taxation*, SCt, 1 USTC 251, 322 US 435, 64 SCt 1060 (1944).

[6] *In the Matter of the Petition of Goldman Sachs Petershill Fund Offshore Holdings (Delaware) Corp.*, New York City Tax Appeals Tribunal, Administrative Law Judge ("ALJ") Division, TAT(H) 16-9 (GC) (Dec. 6, 2018).

[7] *Mobil Oil Company v. Vermont*, SCt, 445 US 425 (1980) expounds the "unitary business operation" principle in a corporate net income tax context. Mobil was headquartered in NYC, not incorporated in Vermont, and had relatively small amounts of receipts, payroll and property there. Before applying the state's three factor formulary apportionment, Vermont added back to Mobil's net income base dividends Mobil had received from off-shore subsidiaries. As against Mobil's position that the dividend sources were not so connected to protections, opportunities and benefits Vermont provided to Mobil as to be fairly taxed by Vermont, even with application of its admittedly fair apportionment formula, the Court held there was a satisfactory due process minimum connection between Vermont and the dividends because the dividends had as their source "enterprises functionally integrated with" Mobil, albeit from elsewhere. "… [T]hose dividends are income to the parent earned in a unitary business." There are other, later Court decisions parsing the unitary principle where states include out-of-state source income in their apportioned net income tax base. *ASARCO, Inc. v. Idaho*, SCt, 458 US 307 (1982), which comes out the other way, is clearly relevant. The author refrains from predicting whether the city's stipulation will undo it upon the taxpayer's appeal, assuming the unitary principle is eventually held to be the *sine qua non* of due process analysis on the facts. The application of the unitary principle to any given set of facts different than those in decided cases admits of result-oriented jurisprudence.

[8] *Hanson v. Denckla*, SCt, 357 US 235 (1958).

[9] *Shaffer v. Heitner*, SCt, 433 US 186 (1977).

[10] *South Dakota v. Wayfair, Inc. et al.*, SCt, 585 US___(June 21, 2018).

[11] *Burger King Corp. v. Rudzewicz*, SCt, 471 US 462 (1985).

[12] History is repeating itself. In *Northwestern Cement Company v. Minnesota*, SCt, 358 US 450 (1959), the Court broadened the horizons for states and localities taxing out-of-state persons by holding there is no Constitutional barrier to a nondiscriminatory, fairly apportioned, direct net income tax on an out-of-state business with sufficient contacts or "nexus" to the taxing state. The facts were an Iowa corporation made cement in Iowa and made sales from Iowa. It also had a sales office in Minnesota and delivered cement to Minnesota customers. (Apparently, *all* Minnesota sales were tentative until formally approved by Iowa headquarters.) The decision upheld Minnesota's three factor apportionment formula, and indirectly that of many other states such as Georgia. P.L. 86-272 was Congresses' response. Congress has yet to make a response to what is occurring at the state and local level on account of *Wayfair*.

[13] The position reflects an "economic presence" due process standard, long a favorite with many states, and upheld by some state courts. The Supreme Court has yet to hold economic presence passes due process muster. It is hard to accept this proposition: "economic presence" inevitably will be the basis for imposition of all state taxes and tax-related burdens with apportionment where necessary as per the seminal commerce clause decision in *Complete Auto Transit, Inc. v. Brady*, SCt, 430 US 274 (1977).

[14] *International Shoe Co. v. Washington*, SCt, 326 US 319 (1945).

[15] *Arizona v. California*, No. 220150 (Mar. 4, 2019).

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