Vanderbilt Law Review

Volume 29
Issue 2 *Issue 2 - Symposium: State Taxation of Interstate Business*

Article 4

3-1976

"Solicitation" and "Delivery" Under Public Law 86-272: An Uncharted Course

Paul J. Hartman

Follow this and additional works at: https://scholarship.law.vanderbilt.edu/vlr

Part of the Commercial Law Commons, and the Taxation-State and Local Commons

Recommended Citation
Paul J. Hartman, "Solicitation" and "Delivery" Under Public Law 86-272: An Uncharted Course, 29 *Vanderbilt Law Review* 353 (1976)
Available at: https://scholarship.law.vanderbilt.edu/vlr/vol29/iss2/4

This Symposium is brought to you for free and open access by Scholarship@Vanderbilt Law. It has been accepted for inclusion in Vanderbilt Law Review by an authorized editor of Scholarship@Vanderbilt Law. For more information, please contact mark.j.williams@vanderbilt.edu.

"Solicitation" and "Delivery" Under Public Law 86-272: An Uncharted Course

*Paul J. Hartman**

TABLE OF CONTENTS

		Page
I.	INTRODUCTION	353
	A. A Capsulized Version of Provisions of Public Law 86-272	353
	B. Origin, Nature, and Scope of the Problem	354
II.	THE ENACTMENT AND SCOPE OF PUBLIC LAW 86-272	359
	A. The Meaning of "Solicitation" and "Delivery" Under Public Law 86-272: The Cases	363
	(1) Invocation of Public Law 86-272 by the Foreign Seller to Escape Taxation	364
	(2) The Invocation of Public Law 86-272 by the Taxing State to Prevent Apportionment of Net Income from a Multistate Operation	374
III.	THE IMPACT OF THE TWENTY-FIRST AMENDMENT OF THE UNITED STATES CONSTITUTION ON THE SOLICITATION AND DELIVERY PROVISIONS OF PUBLIC LAW 86-272	387
IV.	SUMMARY COMMENT AND CONCLUSIONS	388
	APPENDIX: PUBLIC LAW 86-272	399

I. INTRODUCTION

A. A Capsulized Version of Provisions of Public Law 86-272

In 1959, in response to pressure from multistate business and over the protest of state tax authorities and others, Congress passed Public Law 86-272 limiting the power of state and local governments to tax net income derived from interstate commerce.[1] The provisions

* Professor of Law, Vanderbilt University School of Law. B.A., Maryville College, 1936; LL.B., University of Virginia, 1939; LL.M., 1949; J.S.D., Columbia University, 1952. The author wishes to express his appreciation for the valuable research done by John S. Bryant, J.D., Vanderbilt University School of Law, while a student at Vanderbilt. *See* Note, *Public Law 86-272: Legislative Ambiguities and Judicial Difficulties*, 27 VAND. L. REV. 313 (1974).

1. Act of Sept. 14, 1959, Pub. L. No. 86-272, §§ 101-202, 73 Stat. 555, *as amended*, 15 U.S.C. §§ 381-84 (1970). The full text of 15 U.S.C. §§ 381-84 is set forth in the Appendix to this article *infra*. For a comprehensive, perceptive, and useful analysis of Public Law 86-272, coupled with constitutional ramifications surrounding state taxation, see BEAMAN, PAYING TAXES TO OTHER STATES, ch. 6, *Minimum Nexus for Direct Net Income Taxes* (1963).

of Public Law 86-272, briefly stated, prohibit state or local governments from imposing net income taxes on sellers of tangible personal property whose business activities in the state are limited to one or more of the following:

> 1. solicitation of orders for sales of tangible personal property by the seller or his own representative when the orders are sent outside the taxing state for approval or rejection and are filled by shipment or delivery from a point outside that state;[2]
> 2. solicitation of orders for the sale of tangible personal property by the seller or his own representative for the benefit of a prospective customer of the business, which orders are sent out of the state for acceptance, and are filled from a point outside the taxing state;[3]
> 3. sales or solicitation by "independent contractors" who represent more than one principal and who hold themselves out as "independent contractors" in the regular course of their business.[4]

In contrast to the permitted activities of the taxpayer itself, the independent contractor may complete a sale and maintain an office within the taxing state without subjecting the out-of-state seller to tax liability, so long as the independent contractor's activities on behalf of the taxpayer consist solely of making sales or soliciting orders for sales of tangible personal property.[5] Judicial application of the "independent contractor" exemption, however, will not be analyzed in this article.

It is the scope of the first two escape hatches—the breadth of the "solicitation" and "delivery" exemption—upon which this article will focus. More particularly, the following discussion will delve into the apprehensions of multistate business that led to the enactment of Public Law 86-272, the conflicting views regarding the wisdom of this federal statute, the interpretative difficulties resulting from Congress' failure to define "solicitations," and the possible avenues of relief for these problems.

B. *Origin, Nature, and Scope of the Problem*

The forces that galvanized Congress into action, leading to the passage of Public Law 86-272, were a triumvirate of decisions of the

2. 15 U.S.C. § 381(a)(1) (1970).
3. *Id.* § 381(a)(2).
4. *Id.* §§ 381(c), (d)(1).
5. *Id.* § 381(c).

United States Supreme Court in 1959. The cases were *Northwestern States Portland Cement Co. v. Minnesota,*[6] *Brown-Forman Distillers Corp. v. Collector of Revenue,*[7] and *International Shoe Co. v. Fontenot.*[8]

Perhaps most significant was the *Northwestern States* decision.[9] At issue was the constitutionality of state net income tax laws which levied taxes on that portion of a foreign corporation's net income earned from and fairly apportioned to business activities within the taxing state when those activities are exclusively in furtherance of interstate commerce. No question was raised by the taxpayer as to the reasonableness of the apportionment of net income under the taxing state's formulas. Over both commerce and due process clause objections, the Supreme Court sustained the levies by a vote of six to three. Taxpayer in *Northwestern States* was an Iowa corporation with its home office and manufacturing plant in Iowa. Taxpayer's only connection with the taxing state (Minnesota) was that it employed four salesmen who maintained a regnlar and systematic course of solicitation of orders for sales of taxpayer's cement among Minnesota customers. The solicitation of orders was from a leased sales office that was staffed by a "district manager" and secretary and was used by the soliciting salesmen as a clearinghouse for their solicited orders. All orders were sent back to Iowa from the taxing state for acceptance or rejection, and delivery of the accepted orders was made from taxpayer's out-of-state plant. In addition to their regular solicitation duties, the salesmen received and transmitted to taxpayer claims of loss or damage in shipments to purchasers. Forty-eight percent of taxpayer's total sales resulted from the solicitation in the taxing state,[10] which levied its net in-

6. 358 U.S. 450 (1959). For a detailed analysis of these 3 cases, see Hartman, *State Taxation of Corporate Income from a Multistate Business,* 13 VAND. L. REV. 21, 23-43 (1959).

7. 234 La. 651, 101 So. 2d 70 (1958), *cert. denied,* 359 U.S. 28 (1959).

8. 236 La. 279, 107 So. 2d 640 (1958), *cert. denied,* 359 U.S. 984 (1959).

9. The *Northwestern States* decision consolidated 2 cases, *Northwestern States Portland Cement Co. v. Minnesota* and *Williams v. Stockholm Valve & Fittings.*

10. 358 U.S. at 454-55. Similarly, the *Stockholm Valve* case involved a Georgia tax on the net income of a Delaware corporation with its principal office and plant in Alabama. Taxpayer maintained a sales-service office that was headquarters for one salesman and a secretary in the taxing state and that served 5 states. As in the *Northwestern* case, all orders solicited by the salesmen in the taxing state were transmitted to an out-of-state source for approval, and goods were shipped from that source to customers in the taxing state. Other than office equipment, supplies, and advertising literature taxpayer had no property in the taxing state; taxpayer's substantial connection with the taxing state was the above-described solicitation of orders. From 1-2% of taxpayer's total sales originated in Georgia. To apportion the net income attributable to the taxing state for tax purposes, the statute applied a 3-factor ratio based on inventory, wages, and gross receipts. *Id.* at 455-57.

come tax on the amount of taxpayer's income attributable to its activities in Minnesota, as determined by a three-factor apportionment formula.

In meeting the due process clause claim, the Court observed that "the 'controlling question is whether the state has given anything for which it can ask return.' "[11] In giving short shrift to the due process clause objection, the Court pointed out that the "taxes imposed are levied only on that portion of the taxpayer's net income which arises from its activities within the taxing state. These activities form a sufficient 'nexus' between such a tax and transactions within a state for which the tax is an exaction."[12] Exploitation of the taxing state's market for the capture of profits, along with the protection afforded by the condition of the market during the process, should be enough for the state to demand something in return, thus satisfying the requisites of due process.

Addressing itself to the commerce clause question, the Court squarely faced the question whether the clause bars the way to a tax imposed upon that portion of a foreign corporation's net income earned from, and fairly apportioned to, business activities within the taxing state (Minnesota) when those activities are exclusively in furtherance of interstate commerce. The Court concluded that "the entire net income of a corporation, generated by intrastate as well as interstate activities, may be fairly apportioned among the States for tax purposes by formulas utilizing in-state aspects of interstate affairs."[13]

Throughout the *Northwestern States* opinion run three main themes regarding the commerce clause assault on the tax: First, interstate commerce should bear its just share of state tax burdens in return for the benefits it derives from activities within the taxing state. Secondly, state taxes on net income should be sustained when they do not discriminate against interstate commerce by giving local business a direct commercial advantage and do not subject interstate commerce to actual multiple tax burdens, which will place that commerce at a competitive disadvantage relative to local business. No such discrimination could be found by the Court, and no actual multiple tax burdens on the net income by another state were shown. Thirdly, the challenged taxes were not prohibited levies

11. *Id.* at 465, quoting Wisconsin v. J.C. Penney Co., 311 U.S. 435, 444 (1940).

12. 358 U.S. at 464, quoting Wisconsin v. J.C. Penney Co., 311 U.S. 435, 445 (1940).

13. 358 U.S. at 460. Justice Harlan filed a separate concurring opinion in which he agreed with the majority of the Court that prior decisions did support the constitutionality of the taxes in question. 354 U.S. at 469.

upon the privilege of engaging in interstate commerce. Here the Court preserved the distinction between a valid tax levied directly "on" net income derived from interstate commerce, and an invalid excise levied "on" the privilege of engaging in interstate commerce and "measured by" the same net income.

A dissenting opinion of Justice Whittaker, with whom Justices Frankfurter and Stewart joined, was of the thinking that the taxes levied on the net income contravened the commerce clause since the business was exclusively interstate commerce. These Justices were of the view that the challenged taxes were laid directly on, and thereby were prohibited regulation of, exclusively interstate commerce. Justice Frankfurter also delivered a separate dissenting opinion in *Northwestern States*. For him the result of this decision was "to break new ground," because he thought that the Court had "never decided that a State may tax a corporation when the tax is on income related to the State by virtue of activities within it when such activities are exclusively part of the process of doing interstate commerce."[14] He did not think the Court should take this new step. Likewise, Justice Frankfurter took the very realistic and pragmatic view that small or moderate sized corporations doing exclusively interstate business would now be faced with new and pressing problems because such concerns would be required to keep informed of the tax laws of all the states in which they did business and would be required to file tax returns in many more states than heretofore, all of which would involve large increases in bookkeeping, accounting, and legal cobwebs to meet these new business-hampering demands. Justice Frankfurter stated that the problem of taxation of interstate business is one that clearly calls for a legislative solution. Congress alone, he reasoned, can provide for a full and thorough canvassing of the multitudinous and intricate factors that compose the problem of the taxing freedom of the states and the needed limits on such state taxing power. Only Congress, the Justice thought, can formulate policies founded upon economic realities.[15]

The majority opinion also recognized that there is a congressional " 'need for clearing up the tangled underbrush of past cases' with reference to the taxing power of the States."[16] Thus both the majority and dissenting views in the *Northwestern States* case demonstrated a judicially recognized need for congressional action in the

14. 358 U.S. at 470 (Frankfurter, J., dissenting).
15. *Id.* at 476-77.
16. *Id.* at 457.

formulation of a realistic policy for state and local taxation of interstate business.

Suppose the taxpayer in *Northwestern States* had not had offices in the taxing state. Would the tax have been held inimical to the commerce clause, and would there have been a "sufficient nexus" to satisfy due process requirements for a tax imposed upon the net income? The two subsequent cases of *Brown-Forman Distillers Corp. v. Collector of Revenue*[17] and *International Shoe Co. v. Fontenot*[18] soon shed some light on these questions. In *Brown-Forman* the Supreme Court of the United States granted a motion to dismiss the appeal and refused certiorari from a decision of the Louisiana court that the imposition of the Louisiana net income tax upon a Kentucky distiller does not unconstitutionally burden interstate commerce, even though the only connection of the taxed foreign corporation with the taxing state was the presence of "missionary men" who called on wholesalers but did not solicit orders. The "missionary men" on occasion accompanied the salesmen of these wholesalers and assisted them in displaying the taxpayer's merchandise at retail business establishments. Unlike *Northwestern States*, in *Brown-Forman* there were no sales offices in the taxing state, and the taxpayer's "missionary men" did not have authority to solicit orders.

Similarly, in *International Shoe Co. v. Fontenot*, the Supreme Court denied certiorari in a case from Louisiana holding that regular and systematic solicitation of orders by fifteen salesmen was sufficient to subject a foreign corporation engaged in a purely interstate operation to a Louisiana apportioned net income tax. Samples of shoes in the custody of its salesmen and company-owned automobiles used by the salesmen constituted the taxpayer's sole property in the taxing state. Furthermore, at the expense of the taxpayer the salesmen displayed samples in the taxing state, using hotel rooms or rooms of public buildings.

The breadth of the Supreme Court's language in the *Northwestern States* case, especially when coupled with its refusal to review the two cases of *Brown-Forman* and *International Shoe*, caused many observers to think that quite marginal activities might be held to create net income tax liabilities. The concern with the possibility of this expansion in scope of state and local taxing power provided the primary impetus for the enactment of Public Law 86-

17. 234 La. 651, 101 So. 2d 70 (1958), *cert. denied*, 359 U.S. 28 (1959).
18. 236 La. 279, 107 So. 2d 640 (1958), *cert. denied*, 359 U.S. 984 (1959).

272.[19] This trilogy of decisions by the Supreme Court of the United States constituted the percussive force that caused representatives of business to voice their consternation to Congress to curtail the sweep of these cases. In response to this pressure, somewhat truncated congressional hearings were held.[20] At these hearings the fears and apprehensions of businesses rang like a forte anvil chorus, in comparison with only a pianissimo refrain from the tax collectors and others counselling congressional caution. Businessmen asked Congress to remove what they regarded as a loblolly of confusion and uncertainty in the tax field and to establish minimal jurisdictional standards on the amount of activity in which foreign business could engage without incurring state and local tax liability. Specifically, Congress was urged to enact a law that would bar the imposition of net income taxes on businesses whose only activity in a particular state was the solicitation of orders.

II. The Enactment and Scope of Public Law 86-272

The pressures described above achieved the enactment of Public Law 86-272. The sense of urgency with which the Law was drafted and enacted prompted one commentator to describe Public Law 86-272 as "a piece of hasty, hysteria legislation . . . pressured through . . . Congress by a highly organized and certainly skillfully handled group of trade organizations."[21]

From the date of its enactment, there has been diversity of opinion about the wisdom of Public Law 86-272. At the hearings held by the Committee on Finance of the United States Senate this congressional curb on state and local power to tax net income was vigorously criticized. The authors of the minority report of the Committee[22] considered the legislation to be an invasion by Congress of the states' inherent power to raise needed taxes. The minority report also expressed the view that the congressional limitation was nothing more than a protective measure for a few manufacturing states and a few companies that do a specific type of multistate business.[23]

19. 1 Report of the Special Subcomm. on State Taxation of Inter-State Commerce of the House Comm. on the Judiciary, H.R. Rep. No. 1480, 88th Cong., 2d Sess., at 145 (1964) [hereinafter cited as Willis Subcommittee Report].

20. *Id.* at 8.

21. Roland, *State Taxation of Interstate Income: A State Tax Administrator's Viewpoint*, 12 Tax Exec. 35 (Oct. 1959).

22. Report of the Senate Comm. on Finance, State Taxation of Income Derived from Interstate Commerce, S. Rep. No. 658, 68th Cong., 1st Sess. 10-14 (1959). The minority report was given by Senators Albert Gore and Eugene McCarthy and included the individual view of Senator Russell B. Long, who also opposed the Bill.

23. *Id.*

Attacks were mounted against Public Law 86-272 on the ground that Congress had overstepped its powers under the commerce clause. Nevertheless, the Law has successfully weathered these onslaughts.[24]

Title II of Public Law 86-272 authorized only a congressional study of net income taxes. The statute later was amended to authorize expanded hearings on all matters pertaining to the taxation of interstate commerce.[25] Pursuant to this amendment additional hearings were held by the Special Subcommittee charged with this extensive four-year study of state taxation of interstate commerce. At these hearings multistate business representatives urged that Congress impose even more severe restrictions on states' taxing power than those found in Public Law 86-272.[26] State tax administrators, on the other hand, consider Congress' action too restrictive and have continually recommended that the state's jurisdiction to tax be freed from the arbitrary restriction of Public Law 86-272.[27]

As we have seen, the gist of this statute permits a company or person whose net income is derived from interstate commerce to send a representative into another state to solicit orders for the sale of tangible personal property if the orders are sent out of state for approval or rejection and, if approved, are filled by shipment or delivery from a point outside the state, without that person or company being subject to a state or local net income tax[28] in the state of solicitation.

Excluding the immunity given to solicitations and delivery through an "independent contractor" under Public Law 86-272,[29] there are two basic types of solicitation activities that may be en-

---

24. *See, e.g.*, International Shoe Co. v. Cocreham, 246 La. 244, 164 So. 2d 314, *cert. denied sub nom.* Mouton v. International Shoe Co., 379 U.S. 902 (1964); State *ex rel.* CIBA Pharmaceutical Prod., Inc. v. State Tax Comm'n, 382 S.W.2d 645 (Mo. 1964); Smith Kline & French Laboratories v. State Tax Comm'n, 241 Ore. 50, 403 P.2d 375 (1965). For a succinct, able comment on the constitutional power of Congress under the commerce clause to enact Public Law 86-272, see 18 VAND. L. REV. 313 (1964). For a comprehensive treatment of the power of Congress to enact regulatory and tax legislation, see Hartman & Sanders, *The Power of Congress to Prohibit Discrimination in the Assessment of Property of Interstate Carriers for State Ad Valorem Taxes*, 33 ICC PRAC. J. 654 (1966).

25. Act of Apr. 7, 1961, Pub. L. No. 87-17, 75 Stat. 41, *amending* Pub. L. No. 86-272, tit. II, 73 Stat. 555 (1959).

26. 1 WILLIS SUBCOMMITTEE REPORT 485. *See also* Dane, *Small Business Looks at Public Law 86-272 in the Perspective of Its Alternatives*, 46 VA. L. REV. 1190 (1960).

27. *See* Cox, *Federal Limit on State Taxes Is Unfair to Consuming States and to Local Firms*, 11 J. TAX. 354 (1959); Roland, *Public Law 86-272: Regulation or Raid*, 46 VA. L. REV. 1172 (1960).

28. "Net income tax" means any tax imposed on, or measured by net income. 15 U.S.C. § 383 (1970).

29. *See* note 4 *supra* and accompanying text.

gaged in by the sellers of tangible personal property without incurring net income tax consequences. The first type involves the solicitation of orders by the seller or his own representative. So long as the orders are approved outside the state and are filled by shipment or delivery from a point outside the state, solicitation is a protected activity. Paragraph (1) of section 101, subsection (a) of Public Law 86-272 expressly allows:

> the solicitation of orders by such person, or his representative, in such State for sales of tangible personal property, which orders are sent outside the State for approval or rejection, and, if approved, are filled by shipment or delivery from a point outside the state.[30]

The second type of solicitation activities that may be engaged in by the seller in the sale of tangible personal property without creating for him net income tax liability is solicitation by the seller or his own representative, as in the case of so-called "missionary men," when the solicitation is directed toward obtaining orders in the name of or for the benefit of a prospective customer. This protection from net income taxation is contained in a rather awkward, unclear sentence, found in paragraph (2) of section 101, subsection (a), which gives immunity from the taxing power of state and local governments when:

> the solicitation of orders by such person, or his representative, in such State in the name of or for the benefit of a prospective customer of such person, if orders by such customer to such person to enable such customer to fill orders resulting from such solicitations are orders described in paragraph (1).[31]

The statute does not prohibit a tax on net income from any sales activities except when the *only* business contact of the out-of-state seller with the taxing state is simply the "solicitation" of orders that are sent out of the state for approval or rejection and, if approved, are filled by "shipment or delivery" from a point outside the taxing state. As stated above, the solicitation tax exemptions of the statute apparently apply to the activities of "missionary men" who seek orders in the name of or for the benefit of a customer of the taxpayer.[32] This was the situation in the *Brown-Forman* case,[33] in which Brown-Forman's representatives urged retailers to buy Brown-Forman products, not directly from the company, but from wholesalers in the taxing state. The later examination of other cases

30. 15 U.S.C. § 381(a)(1) (1970).
31. 15 U.S.C. § 381(a)(2) (1970).
32. *See* note 30 *supra* and accompanying text.
33. *See* note 17 *supra* and accompanying text.

will deal with this facet of "solicitation" under Public Law 86-272.[34] Viewed as a temporary "stopgap" measure pending further study of the problem,[35] the statute expressly insulates from net income taxation only the foreign seller satisfying the conditions of Public Law 86-272, and does not apply to companies incorporated in the taxing state or to individuals domiciled or residing there.[36]

Regrettably, Public Law 86-272 does not define the critical term "solicitation." The power of a state to tax foreign business remains, therefore, a question for the courts to decide. Furthermore, since the United States Supreme Court has not yet given a determinative interpretation of this *federal* statute, the meaning of solicitation is subjected to the interpretations of the courts of fifty separate states.

The ambiguity is compounded by the very real question of whether Public Law 86-272 actually abrogates the precise holding of the *Northwestern States* case. Does the tax immunity given by Public Law 86-272 extend to solicitation from the taxpayer's own offices in the taxing state, as in the *Northwestern States* situation?[37] *Heublein, Inc. v. South Carolina Tax Commission*,[38] a 1972 Supreme Court decision, clearly declares that "[t]he impetus behind the enactment of § 381 [Public Law 86-272] was this Court's opinion in *Northwestern States Portland Cement Co. v. Minnesota* . . . ."[39] Nevertheless, legislative history suggests that the *Northwestern States* holding may remain unblemished by Public Law 86-272. The original bill, as reported out of the Senate Finance Committee, exempted from net income taxation the following:

> (3) the maintenance and operation by such person, or by his representative, in such State of *an office the primary purpose and use of which is to serve representatives of such person who are engaged in solicitation of orders* described in paragraph (1) or (2), or both, and to receive, process, and forward such orders.[40]

This particular provision was stricken from the bill by a vote of

---

34. *See* Part II A (1) *infra*.

35. During the Senate floor debate Senator Saltonstall stated: "What the bill does, in substance, is to put the matter in status quo until the Finance Committee, which, as I understand it, is going to study the suhject, will know whether there should be any further changes in the law or not." 105 CONG. REC. 16,354 (1959). For further reference to the stopgap nature of the law, see 1 WILLIS SUBCOMMITTEE REPORT 438-39.

36. 15 U.S.C. § 381(b) (1970).

37. *See* notes 9-12 *supra* and accompanying text.

38. 409 U.S. 275 (1972).

39. *Id.* at 279.

40. 105 CONG. REC. 16,470 (1959) (emphasis added).

sixty-five to twenty-nine on an amendment sponsored by Senator Talmadge of Georgia on August 20, 1959.[41]

A. The Meaning of "Solicitation" and "Delivery" under Public Law 86-272: The Cases

The next section of this article will examine the practical application of Public Law 86-272 and the thorny problems inherent in defining the "solicitation" of orders and the "delivery" of goods so solicited, activities which give rise to tax immunity under the statute. Since Congress failed to provide any guidance on the meaning of "solicitation" and "delivery," it of necessity compelled the states to provide their own definitions, thus leaving to the state courts the task of determining when an out-of-state seller is doing more than solicitation and delivery within the taxing state for purposes of net income tax liability. Further, since the judiciary has no caliper with which to measure the exact quantum and nature of activities that constitute *more than* "solicitation" and "delivery," varying interpretations could be expected. The result, ironically, has been a diversity of interpretations of a *federal* statute enacted to secure some semblance of certainty and uniformity in one area of the taxation of multistate businesses.

The state court decisions have wound a tortuous path in defining solicitation and delivery. They have veered from a liberal construction that permits a foreign seller to conduct many activities incidental to solicitation without sacrificing the protection of the statute, to a more narrow interpretation that affords less protection to the out-of-state seller. Moreover, this fluctuation in defining solicitation and delivery, as shown below, has taken place within the same jurisdiction.

In practice the problem is compounded by the fact that the question of the interpretation of solicitation and delivery has been presented in two ways to the state courts. Public Law 86-272 has not been a one-sided escape valve. First, under the only express meaning of the statute, the out-of-state seller has contended that it is exempt from net income tax because its activities within the taxing state do not exceed "solicitation." In addition, the states have grafted onto this federal statute a correlative use to prevent a *domestic* seller from assigning for tax apportionment a part of its multistate net income to another state. The states' theories have been that the taxpayer, because of Public Law 86-272, is not subject

41. *Id.*

to a tax in the other state on its income from the business activities conducted in that state, since it is only soliciting orders or making deliveries there; hence, the domestic taxpayer is not taxable by the other state, and no assignment of its multistate income to the other state should be permitted.

In either situation in which Public Law 86-272 is invoked, the breadth of the interpretation of "solicitation" and "delivery" often is determinative of the outcome of the case. Since the former situation, the assertion by the out-of-state taxpayer of the "solicitation" immunity, is the one that occurs most frequently, it will be examined first.

(1) Invocation of Public Law 86-272 by the Foreign Seller to Escape Taxation

The state courts of Oregon have been in the forefront in the interpretation of "solicitation" and "delivery." Indeed, an examination of Oregon's decisions reveals the judicial uncertainty that prevails. Oregon has waivered from an early liberal construction of "solicitation," which enabled the foreign seller with substantial in-state activities to escape taxation, to a more narrow interpretation of "solicitation," which affords the foreign seller less protection from taxation, with a resulting increase in tax revenue.

The early case of *Smith Kline & French Laboratories v. State Tax Commission*[42] squarely presented to the Supreme Court of Oregon the question of the scope of "solicitation." There the court held that the activities of the taxpayer, a foreign corporation, did not exceed the boundaries of "solicitation"; hence the seller was exempt from taxation under Public Law 86-272. The parties stipulated the facts. Taxpayer, a Pennsylvania corporation, manufactures pharmaceutical products in interstate commerce. Within the taxing state of Oregon taxpayer had no office, no office equipment, no stock of goods, no telephone listing, no mailing address, and no automobile. To conduct its activity in the taxing state, taxpayer employed five or six resident professional representatives, so-called "detail men." Taxpayer reimbursed these representatives for the use of their own cars and other expenses and provided them with samples and sales material. Under the supervision of taxpayer's out-of-state office, these "detail men" visited hospitals, other institutions, doctors, and retailers and wholesalers handling taxpayer's products to explain the use and usefulness of the products and to encourage

42. 241 Ore. 50, 403 P.2d 375 (1965).

their use and sale. While the "detail men" did occasionally solicit orders, their primary function was to promote the use of taxpayer's products. At their homes the "detail men" maintained stocks of samples for promotional use. Among the ultimate product users only state institutions dealt directly with taxpayer. All other ultimate users purchased from retailers. The retailers in turn purchased from wholesalers, whose salesmen solicited from druggists, hospitals, and institutions. Oregon wholesalers placed orders with taxpayer at its out-of-state office, where the orders were accepted.

Oregon levied its corporate net income tax against taxpayer who resisted payment of the tax under Public Law 86-272 on the theory that it was engaged only in the "solicitation of orders" in the taxing state and thus was exempt from the tax. The taxing state, on the other hand, contended that Public Law 86-272 creates an "island of immunity" around solicitation activity and that solicitation of orders requires that an *actual order* be sought by an individual calling upon a potential customer. The taxing state thus maintained that the activities of the taxpayer's representatives, who *merely encouraged the placing of orders* with the wholesale drug firms selling taxpayer's products, did not qualify taxpayer for exemption under Public Law 86-272.[43]

Taxpayer contended that the statute properly should be construed as a "minimum activity" statute—that it exempts all corporations the activities of which do not *exceed* solicitation of orders. Further, taxpayer contended that its employees in the taxing state did solicit orders for the taxpayer's customers within the meaning of Public Law 86-272 and that the statute does not require the receipt of an order by taxpayer's representatives, so long as they were soliciting and encouraging the purchase of taxpayer's products.[44] This argument would seem to square with paragraph (2), section 101, subsection (a) of Public Law 86-272, which exempts solicitation of customers' customers.[45]

The Supreme Court of Oregon, adopting portions of the lower court's opinion, held that the activities of taxpayer's employees did not exceed the bounds of "solicitation," and taxpayer was exempted from the tax. Citing legislative history, the Oregon court concluded that the legislative reports of congressional hearings show that "Congress intended to exempt not only the specifically described phase of interstate sales efforts but also *all lesser*, included

43. *Id.* at 54-55, 403 P.2d at 377.

44. *Id.*

45. 15 U.S.C. § 381(a)(2) (1970). *See* note 3 *supra* and accompanying text.

phases."[46] Moreover, the court concluded that "the nature of plaintiff's [taxpayer's] business makes its activities in Oregon [the taxing state] the equivalent of solicitation of orders in other, less technical business." Again the court added: "[b]y soliciting the stocking of plaintiff's [taxpayer's] products by druggists and the prescription of those drugs by physicians, plaintiff's detail men performed the same sales function in plaintiff's field that salesmen soliciting actual orders from the users perform in other businesses."[47]

To conclude, the highest tribunal of Oregon reasoned that a realistic legal and factual interpretation of the "solicitation" feature of Public Law 86-272 required exemption of taxpayer from the corporate tax of Oregon (the taxing state). The rationale of the Oregon court thus adopted a broad interpretation of "solicitation."

The "all lesser, included phases" rationale of *Smith Kline & French* seemed to have established a strong and deep beachhead for the interests of multistate business, and it threatened to make substantial inroads into the taxing power of the states. Yet, within two years the broad compass of "solicitation" that found lodgment in the *Smith Kline & French* rationale was significantly eroded by the more narrow interpretation by the same Oregon court in *Herff Jones Co. v. State Tax Commission.*[48]

In *Herff Jones* taxpayer was a foreign corporation engaged in the sale of school class rings. Taxpayer had a contract with Master Engravers, Inc. (Masters), making the latter the franchise agent for taxpayer in the taxing state of Oregon and in other western states. Four resident Oregon salesmen handled and solicited orders for taxpayer's product and also sold merchandise for Masters and other companies. Primarily they contacted schools. When a salesman called on a school to solicit orders for class rings, he was required by taxpayer to secure a five dollar deposit on each ring sold. The orders were then sent to an out-of-state source from which the orders were shipped to the buyers. The salesman or the school could also collect the balance and forward it to Masters. Taxpayer had no office, place of business, or telephone listing in Oregon (the taxing state), and taxpayer owned no property in Oregon except the salesmen's samples.

When Oregon imposed its corporate income tax on the part of taxpayer's income earned in Oregon, taxpayer invoked the exemp-

---

46. 241 Ore. at 55, 403 P.2d at 377 (emphasis added).
47. *Id.* at 56, 403 P.2d at 378.
48. 247 Ore. 404, 430 P.2d 998 (1967).

tion of Public Law 86-272, claiming that it was engaged only in soliciting orders. On the question of whether the activity of the salesmen within Oregon went beyond mere solicitation so as to remove taxpayer from the protection of Public Law 86-272, the Oregon Supreme Court held against taxpayer. It rejected the broad interpretation of solicitation found in the rationale of the Oregon court in its prior *Smith Kline & French* decision as not warranted. In sweeping language, *Herff Jones* declared that "it seems clear that in order to come within the purview of Public Law 86-272 the *only* business activity which plaintiff's sales representatives could engage in is the solicitation of orders."[49] Further, the court declared that it is "abundantly clear from the record that the representatives do more than this."[50] The court observed that taxpayer's salesmen, aside from actually soliciting orders, also collect an initial deposit on the merchandise ordered and forward the deposits to taxpayer. The sales representatives on occasion also collect the balance due on the merchandise when it is delivered to the school and do other collection work for taxpayer. Additionally school officials and local jewelers aid in handling taxpayer's sales for compensation. The *Herff Jones* court held that taxpayer's activities within the taxing state went beyond mere solicitation of orders for taxpayer's goods and thus taxpayer was held liable for the Oregon net income tax. The *Herff Jones* decision thus seemingly rejected the broad "all lesser, included activities" standard previously established in *Smith Kline & French*. The Oregon court apparently scuttled the idea that it would "exempt not only the specifically described phase of interstate sales efforts but also all lesser, included phases"[51] —activities it had described as nontaxable in *Smith Kline & French*. In its place the court substituted a more restrictive view of the "solicitation" immunity.

In the year following *Herff Jones* the Oregon court again employed a narrow construction of the curb of Public Law 86-272 on net income taxation. In *Briggs & Stratton Corp. v. Commission*,[52] the Oregon Tax Court considered the net income tax liability of a foreign corporation doing business in Oregon. Taxpayer, a Delaware corporation with its principal office in Wisconsin, was not licensed to do business in the taxing state of Oregon and had no office and owned no property there. Taxpayer's main business was the manu-

---

49. *Id.* at 412, 430 P.2d at 1001-02.

50. *Id.* at 412, 430 P.2d at 1002.

51. Smith Kline & French Laboratories v. State Tax Comm'n, 241 Ore. 50, 55, 403 P.2d 375, 377 (1965).

52. 3 Ore. Tax Rep. 174 (1968).

facture and sale of gasoline engines. Orders for the sale of engines in the taxing state were accepted at an out-of-state source from which the merchandise was shipped to customers in the taxing state. Taxpayer sold its engines to ten customers. Nine of them were equipment manufacturers who purchased taxpayer's engines for motive power in their manufactured product. The remaining customer was Tracey & Company, a central warehouse distributor who acted as an independent contractor in handling and distributing taxpayer's products in the taxing state. Taxpayer's only representative in Oregon, an out-of-state salaried sales and service supervisor, spent approximately one week of every eight weeks in the taxing state. Contacting the nine equipment manufacturers, this supervisor gave engineering advice and encouraged the manufacturers to buy Briggs & Stratton engines. Taxpayer's same supervisor also maintained a close liaison with Tracey & Company, inspecting Tracey's tools to see that they were adequate to repair the taxpayer's engines, instructed the manufacturers on proper service techniques, assisted Tracey with any problem as a sort of troubleshooter, and made sure that Tracey's inventory was adequate. Taxpayer's supervisor did not make collections or repossessions, approve credit, accept payments, or make any deliveries of merchandise. Nor did he engage in newspaper advertising in the taxing state, but he did provide up-to-date service manuals. Taxpayer's supervisor, along with Tracey, conducted three or four service schools in the taxing state each year for the benefit of the personnel of Tracey and others. At the school the supervisor showed the mechanics how to repair and service taxpayer's products. Two other members of taxpayer's out-of-state organization also assisted at these schools.

Over taxpayer's objection that it was exempt from the corporate net income tax by reason of Public Law 86-272, the court upheld the levy of the tax on the ground that taxpayer's activities in the taxing state were more than solicitation of orders in Oregon. The court pointed out that taxpayer's sales and service supervisor rectified complaints, gave technical engineering advice to customers, approved the appointment of service distributors, conducted training schools, lectured on service techniques, and inspected the customers' inventory.[53] Coupled with *Herff Jones*, the *Briggs & Stratton* decision makes it apparent that the broad "all lesser, included phases" interpretation of "solicitation" enunciated in *Smith Kline & French* is no longer a viable doctrine in Oregon.

53. *Id.* at 180.

In a recent decision that appears to have no unusual significance, the Oregon court in *Olympia Brewing Co. v. Department of Revenue*[54] held that the presence in the taxing state (Oregon) of beer kegs belonging to taxpayer (a foreign corporation), for the purpose of dispensing taxpayer's draft beer, was sufficient to exclude the taxpayer from the corporate net income tax immunity granted by Public Law 86-272. Despite taxpayer's determined protestations to the contrary, the court concluded that the presence of the beer kegs in the taxing state went beyond the congressionally prescribed tax exemption benchmark of *only* "solicitation of orders" for the sale of tangible personal property within the taxing state.[55]

While Oregon seems to have been in the vanguard of those states formulating guidelines for "solicitation" as a tax-exempt activity under Public Law 86-272, a number of other states also have been confronted with Public Law 86-272 as a potential roadblock to the imposition of net income taxes. Missouri found the question of the breadth of the "solicitation" immunity dumped on its judicial doorstep in *State* ex rel. *CIBA Pharmaceutical Products, Inc. v. State Tax Commission*.[56] In the 1964 *CIBA* case, the Missouri Supreme Court struggled with the scope of "solicitation" with respect to the net income tax of Missouri in a factual situation not unlike that presented in *Smith Kline & French*. In *CIBA* the taxpayer, a New Jersey corporation with its main offices in that state, was authorized to transact business in the taxing state. Taxpayer was a pharmaceutical house that manufactured drugs and distributed them throughout the United States. Taxpayer sold pharmaceutical products to retail druggists, wholesale pharmaceutical companies, and pharmacists at hospitals, as well as to doctors. In its business taxpayer employed approximately twelve "professional service representatives" to solicit orders in Missouri. Some representatives lived in the taxing state and operated from their homes there. The orders taken by the representatives in Missouri were sent to taxpayer's out-of-state home office for approval or disapproval. The approved orders were filled by shipment of the drugs into the taxing state.

CIBA supplied its representatives with automobiles and reimbursed them for expenses, but CIBA owned no sales office, nor ware-

54. 266 Ore. 309, 511 P.2d 837 (1973), *cert. denied*, 415 U.S. 976 (1974).

55. From the viewpoint of the taxpayer, it is unlikely that it would, with a great deal of animation, join in singing the chorus of that timeless polka, the name of which proved taxpayer's Waterloo: "Roll out the barrel. We'll have a barrel of fun."

56. 382 S.W.2d 645 (Mo. 1964).

houses in the taxing state. Although solicitation of orders from retail druggists and pharmacists was the principal duty of taxpayer's representatives in the taxing state, they also left promotional materials with the druggists and sometimes assisted the pharmacists in taking inventory. Taxpayer's representatives also visited or "detailed" doctors in their territories, explaining the therapeutic value of taxpayer's products to the doctors. In so doing, the representatives explained what the product was, what it would do, and left literature and samples. Concededly, the main object in "detailing" the doctors was to persuade them to write prescriptions for taxpayer's products.

Missouri imposed its corporate net income tax on income resulting from taxpayer's activities in Missouri. Taxpayer claimed income tax immunity under Public Law 86-272 on the basis that its Missouri activities did not transcend the "solicitation of orders." The Missouri Tax Commission adopted a "show me" attitude, contending that taxpayer's activities did exceed the boundaries of "solicitation" and thus the exemption was not available to taxpayer.[57] The Missouri court disagreed and granted taxpayer an exemption from the tax, on the ground that taxpayer's activities in the taxing state did not exceed the minimum exemption standards of Public Law 86-272. While recognizing the scarcity of precedent construing this provision of Public Law 86-272, the court stated that no "cases or legal authorities have been found . . . which can be of any substantial aid in deciding what Public Law 86-272 actually means and whether [taxpayer's] activities in Missouri come within the statutory minimum standard or not."[58] The court concluded that the statute "was hastily enacted, not very clear, and considerably restricted in scope. . . ."[59]

In buttressing its decision to exempt taxpayer from the net income tax, the Missouri court took the position:

> We find nothing . . . to indicate [that] any business or financial transactions took place when the representatives "detailed" the doctors, or when they distributed free samples, or when they gave out literature, or when the representatives met together. . . .[60]

To conclude, the court added, "[T]hese were not business transactions where finances were involved or taxable income produced. . . ."[61]

57. *Id.* at 651-52.
58. *Id.* at 652.
59. *Id.*
60. *Id.*
61. *Id.*

In arriving at its decision that taxpayer's activities did not exceed solicitation of orders because they were not business transactions since they did not produce a direct transfer of money or product, the court seems impervious to the realistic impact of the extensive promotional program of taxpayer in producing business.

The *CIBA* court complained of lack of precedent. One can only speculate as to the outcome of that case if the more immunity-restrictive decisions of *Herff Jones* and *Briggs & Stratton*[62] had been decided before *CIBA* reached the Missouri judiciary. Since the activities held exempt in *CIBA* likely would have *exceeded* the "solicitation of orders" under the now prevailing Oregon standard, there would not have been the paucity of precedent that so bothered the *CIBA* court. Moreover, it might not be utterly amiss to ask why taxpayer was spending its money for its representatives to flood Missouri by "detailing" the doctors, distributing free samples, handing out literature, and holding meetings of representatives, if not in the hope of later reaping a harvest of business or financial rewards. Still the Missouri court myopically viewed these activities as *not* being "business transactions where finances were involved or taxable income produced."[63] It is a bit difficult for this writer to believe that such activities sprang from motives of pure altruism on the part of CIBA.

The *CIBA* court's apparent disregard for the promotional activities carried on by taxpayer's representatives in the taxing state may be contrasted to the later decision of the New Jersey court in the case of *Clairol, Inc. v. Kingsley*,[64] calling into judgment a New Jersey net income tax, which was resisted under the exemption provisions of Public Law 86-272. In *Clairol*, taxpayer was a Delaware corporation engaged in the manufacture and sale of hair coloring preparations and cosmetics. Taxpayer, who was not authorized to do business in the taxing state, had no retail outlets there. It sold basically to (a) wholesalers who sold to local drugstores, (b) retail drug chains, (c) "beauty jobbers" who sold to local beauty salons, and (d) a miscellany of other nonretail customers, including food chains, rack jobbers who sold to small food markets, department stores, and variety stores. Taxpayer advertised on a national scope on the major television networks and radio, and in magazines and newspapers. Taxpayer had no formal office in the taxing state, nor

62. *See* text accompanying notes 42-43, 48-53 *supra*.

63. 382 S.W.2d at 652.

64. 109 N.J. Super. 22, 262 A.2d 213 (App. Div.), *aff'd*, 57 N.J. 199, 270 A.2d 702 (1970), *appeal dismissed*, 402 U.S. 902 (1971).

any real estate, office furniture, telephone, or bank account there.

Detailmen worked under the personal supervision of a district manager. Their duties included paying visits to retail druggists regularly so as to review the display of taxpayer's products, rotate its products, and take inventories. If the inventory disclosed a need for new stock, an order would be written up with the assistance of the detailmen and would be sent by the druggist to a wholesaler with whom the druggist normally traded. Orders by wholesalers or other major contacts were not accepted within the taxing state. Furthermore, taxpayer employed other representatives who called on "beauty jobbers" who purchased taxpayer's product. Although these representatives who called on the beauty salons did very little in the way of order taking, they had technical backgrounds and their main function was to visit the beauty salon to tell its operators how best to use taxpayer's products and to demonstrate new techniques.

The taxing state (New Jersey) assessed against the taxpayer its corporate business tax computed on the basis of the taxpayer's net worth and net income, both determined on the basis of instant activities. Taking the position that its activities within the taxing state did not transgress the boundaries of "solicitation," taxpayer argued that Public Law 86-272 specifically invalidated both taxes. The court examined the various duties performed by taxpayer's detailmen and representatives in the course of their jobs, and concluded that it "is . . . evident that Clairol's [taxpayer's] business activities in New Jersey extend beyond the mere solicitation of orders either on its own behalf or on behalf of its wholesalers."[65] Taxpayer was held liable for the tax. In contrast to the Missouri court in *CIBA*, the New Jersey court recognized the economic substance behind the promotional activities of taxpayer's representatives and held Clairol subject to the tax. The court noted:

> That increased public favor of Clairol's products will eventually result in increased orders from retail druggists to wholesalers and from wholesalers to Clairol, or as in the case of its hair products from beauty salons to "beauty jobbers" and from the latter to Clairol, does not blanket all Clairol's activities with the protection afforded by the federal act to cases where the only business of the taxpayer is the solicitation of orders.[66]

The *Clairol* court expressly rejected the broad interpretation of solicitation promulgated in the *Smith Kline & French* and *CIBA* cases and adopted the narrower *Herff Jones* interpretation of "solicitation of orders." The court concluded that the taxpayer's activities

65. *Id.* at 30, 262 A.2d at 217-18.
66. *Id.* at 30, 262 A.2d at 218.

in the taxing state (New Jersey) exceeded the boundaries of activity insulated from net income taxation by Public Law 86-272. Also, the court refused to follow *CIBA*, which held that since no business or financial transactions took place when the taxpayer's representatives "detailed" customer doctors, as described above, taxpayer was within the scope of exempt solicitation.[67]

Some of the activities involved in both *CIBA* and *Clairol* appear to fall within the "missionary man" operations where the solicitation of a customer is insulated from the tax by Public Law 86-272.

The Supreme Court of Arkansas, too, adhering to the rationale of *Herff Jones* in Oregon and *Clairol* in New Jersey, adopted what the Arkansas court regarded as a narrow construction of "solicitation of orders" under Public Law 86-272 in the 1971 decision of *Hervey v. AMF Beaird, Inc.*[68] In *Hervey*, the taxpayer, a foreign corporation engaged in the manufacture and sale of propane gas storage tanks, resisted the application to it of Arkansas' income tax on the ground of the Public Law 86-272 exemption. Taxpayer employed a salesman who made monthly calls upon retail dealers in Arkansas, checked the retailer's inventory, which was maintained perhaps on consignment, solicited orders, and billed the retailer as he sold taxpayer's products to the public. Occasionally the salesman accepted payment on behalf of taxpayer when the salesman came around to check inventory. The salesman received the orders for transmittal to taxpayer's extra-state home office where the orders were accepted or rejected.

The trial court granted summary judgment in favor of taxpayer on the ground that taxpayer's activities did not exceed "solicitation of orders." On appeal, the Supreme Court of Arkansas found that taxpayer's salesmen exceeded solicitation when they regularly checked the retailers' inventories. The court reversed the trial court's summary judgment for taxpayer and remanded the case for further proceedings on the fact question of whether the relationship between taxpayer and its customers involved consignment or sale of tangible personal property. If the customer had taxpayer's goods on consignment, he would be *selling for taxpayer*. Thus, it is hard to see how the salesman could be said to be soliciting orders for the "sale" of tangible personal property in the consignment situation. Under these circumstances, the Public Law 86-272 exemptions would have no application to taxpayer.

---

67. *See* text accompanying note 61 *supra*.
68. 250 Ark. 147, 464 S.W.2d 557 (1971).

The different approaches taken by the courts of these various states highlight the shortcoming of Public Law 86-272—its failure to give realistic and predictable guidelines for the interpretation of "solicitation." The conflicting interpretations point up the need for uniform legislative or judicial guidance in this "stop gap" quagmire that has been fermenting for over sixteen years. Since its hasty enactment of Public Law 86-272 in September 1959, Congress has not acted to provide any practical standards for determining the meaning of "solicitation." Likewise, any guidance from the United States Supreme Court will be found in decisions by that Court yet to be written. In the meantime, the fifty states are left to wrestle individually with the problem.

The situation resulting from a comparison of the two different approaches typified by the *CIBA* case in Missouri and the *Clairol* case in New Jersey clearly demonstrates the type of problem facing out-of-state sellers in determining whether their activities are protected as "solicitation of orders" under Public Law 86-272. The same seller performing the same activities in two separate states may find itself subject to tax in one state and not in the other. Since the test for "solicitation of orders" used by the courts of one state is not binding upon the courts of another, there is no touchstone by which the seller can find a satisfactory answer to its tax problems. Thus, it is virtually impossible for a corporation to structure its activities in anticipation of tax consequences, and in many states this uncertainty allegedly has led to a failure on the part of corporations to file any tax return in close situations.[69] Hence, the failure to have trustworthy guidelines on the meaning of "solicitation" is most unfortunate for *both* the taxpayer and the taxing authority.

(2) The Invocation of Public Law 86-272 by the Taxing State to Prevent Apportionment of Net Income from a Multistate Operation

Although Public Law 86-272, as expressly stated in the statute, properly can be invoked only by a foreign seller attempting to avoid taxation of income resulting from its activities in the taxing state, nevertheless the taxing states have read into the statute by implication the power to invoke Public Law 86-272 to expand their taxing jurisdiction. This situation seemingly has been confined to situations in which domestic corporations, engaged in multistate business, seek to reduce their domestic taxes by apportioning a part of their net income to another state. The state, on the other hand,

69. *See* 1 WILLIS SUBCOMMITTEE REPORT 152.

takes the position that when the provisions of Public Law 86-272 exempt the taxpayer from a tax in the other state, no apportionment should be permitted and that the home state should be permitted to tax the entire net income generated by the corporation's multistate or multinational business. The taxpayer, on the other hand, contends, in resisting, that its activities in a foreign state exceed "solicitation" and render it subject to the taxing power of the foreign state; hence it should be permitted to apportion its multistate income to reduce its domestic tax liability and perhaps escape multiple taxation.

Whether this is a proper construction of this federal statute by the state courts to increase their tax take is but another of the questionable and perplexing perquisites peremptorily preempted by the states, since there is no congressional nor judicial polestar by which the courts must steer the ship of state in construing Public Law 86-272.

One of the early cases in which this position was squarely and clearly presented is *Cal-Roof Wholesale, Inc. v. State Tax Commission.*[70] Again we find the Supreme Court of Oregon front and center on the judicial stage in the controversy over whether taxpayer's extra-state activities constituted more than the solicitation of orders as contemplated by Public Law 86-272. Taxpayer, a domestic corporation of the taxing state (Oregon), was a distributor of building materials in Oregon and Washington. It conducted operations in Washington through a salesman living in that state.

When the taxing state of Oregon levied its corporate net income tax on taxpayer's *total* net income, taxpayer sought to apportion a part of its multistate income to the state of Washington. The taxing state had a statute permitting apportionment of income in a multistate business. Washington had no income tax statute. The court of the taxing state (Oregon) took the position, however, that the taxpayer had sufficient activities in Washington in connection with solicitation of orders for building materials that taxpayer sold in Washington to permit Washington, if it had a law like the taxing state's corporate income tax law, to impose a tax on that portion of taxpayer's income attributable to its Washington activities. The Oregon court stated the issue before it in the following language: "Does the taxpayer, an Oregon corporation engaged in certain limited activities in the state of Washington, qualify to exclude from its net income subject to the Oregon excise tax that portion of in-

70. 242 Ore. 435, 410 P.2d 233 (1966).

come attributable to the activities in the state of Washington?"[71]

Over the objections of state taxing officials, the Oregon court permitted apportionment. The court held that the operations of taxpayer in Washington took it out of the solicitation of orders protection of Public Law 86-272. The following excerpt from the court's opinion sums up the whole matter in a nutshell:

> The plaintiff's [taxpayer's] Washington operations were carried on by a salesman living in Washington. His chief activity was the solicitation of orders which were approved in the Oregon home office. Most deliveries of goods were made from Oregon in trucks leased by the plaintiff in Oregon. The plaintiff's Washington salesman operated entirely within the State of Washington and lived there but maintained no office except for his home. Plaintiff customarily entered into cooperative advertising agreements in Washington with its Washington customers. In addition to his principal activity, soliciting orders, the Washington salesman on numerous occasions collected delinquent accounts, made pick-ups of merchandise which customers desired to return, and customarily carried with him a supply of small items which he sold and delivered within the State of Washington. Also, he was authorized to and did on some occasions give spot credit and accept orders rather than submit them to the home office in Oregon for approval.[72]

The Oregon court also expressed the view that it would be a violation of the commerce clause to subject taxpayer to double taxation (if Oregon were permitted to tax the entire income), since taxpayer had sufficient nexus in Washington potentially to be taxed there.

In a later case before the Oregon Supreme Court involving apportionment, the state again took the position that it was entitled to tax all of the income of a domestic corporation engaged in multistate business, on the ground that the taxpayer's activities outside the taxing state were immune from tax in other states under the "solicitation" immunity of Public Law 86-272. In *Iron Fireman Manufacturing Co. v. State Tax Commission*,[73] taxpayer, a domestic corporation of Oregon (the taxing state), was engaged in the manufacture of airplane parts, which it sold to the Boeing Aircraft Company in Seattle, Washington. Orders by Boeing for taxpayer's products were not taken in business fashion because of the specialized character of the products involved, and because of the nature of dealings between the two companies. The complex technical nature of the work necessitated the maintenance of close contact between taxpayer's manager and specialists for both companies. As a result, taxpayer's officials maintained extremely close liaison with the Boeing officials on the planning and design of the items so they

71. *Id.* at 436-37, 410 P.2d at 234.
72. *Id.* at 448, 410 P.2d at 234.
73. 251 Ore. 227, 445 P.2d 126 (1968).

would be both functional and the most "economical for producibility."[74] After taxpayer and Boeing had agreed on a contract for taxpayer to manufacture certain items, the close working relationship continued between the specialists for both Boeing and taxpayer. Many of taxpayer's officials made regular trips to Boeing in Washington to take care of manufacturing problems, installation problems, repair work, redesign discussions, and production problems that occurred after the work had started on the manufactured parts. Taxpayer's production engineers, production workers, metallurgists, quality control managers, and assembly supervisors were some of the officials who spent several weeks of the year working closely with Boeing in Washington.

When Oregon levied its corporate income tax against taxpayer's *total* net income, taxpayer took the position that it was entitled to exclude from its total income that portion resulting from operations in the state of Washington. The taxing officials of Oregon opposed this apportionment on the ground that taxpayer's activities in Washington did not exceed "solicitation of orders" under Public Law 86-272; hence taxpayer was immune from taxation in Washington. Consequently, reasoned the taxing officials, Oregon, as the home state of this domestic corporation, could tax the total income, although Oregon had a statute permitting apportionment of income from a multistate business.

In permitting taxpayer to apportion its net income from its interstate business, the Oregon court was of the opinion that taxpayer's "mutual endeavor" with Boeing in Washington greatly exceeded the mere solicitation of orders under Public Law 86-272. The factual connection of taxpayer with Boeing in Washington, warranting apportionment, is made clear from this quoted portion of the Oregon court's pervasive opinion:

> The record discloses that during 1960 and 1961, and for many years prior thereto, [taxpayer] and Boeing had continuously engaged in a complex mutual endeavor to provide Boeing with a large variety of specially designed and precisely engineered and manufactured parts for the airplanes manufactured by Boeing. This mutual endeavor included fairly regular meetings and consultations between the personnel of both companies, principally in Seattle, but also in Portland. There was an almost constant interchange and pooling of talents, resources and expertise in the engineering, manufacturing, installation and testing of the parts furnished by [taxpayer]. In our view, the relationship between the parties involved far more activity than the mere solicitation of orders.[75]

---

74. *Id.* at 231, 445 P.2d at 128.
75. *Id.* at 232, 445 P.2d at 128.

The court expressed the view that the execution of contracts in Washington did not seem to satisfy the requirement of Public Law 86-272 that all orders be accepted or rejected outside the taxing state. The court, however, did not base its decision on this ground. Instead, it held that taxpayer's activities in Washington exceeded "solicitation."[76]

Just why the state of Oregon would so strenuously try to torpedo apportionment in *Iron Fireman* on the ground that taxpayer was engaged in no more than the solicitation of orders in Washington is nonplussing to this writer.

Similarly, in *Hawes v. William L. Bonnell Co.*,[77] the Georgia court was confronted with the question whether the taxing state (Georgia) could employ the "solicitation" exemption to prevent a multistate business from apportioning its income among the states where it did business. Taxpayer, a Georgia corporation, attempted to take advantage of a Georgia statute that authorizes apportionment of income when the taxpayer is doing business in several states. Ninety-two percent of taxpayer's gross sales were made to customers outside Georgia. Yet, the State Revenue Commissioner contended that taxpayer's activities in other states did not constitute doing business there and thus taxpayer was not eligible to apportion its income within the purview of the Georgia apportionment statute. Taxpayer argued that its activities in states outside Georgia constituted doing business under the Georgia apportionment statute as interpreted by prior Georgia case law. As a second string on his bow, taxpayer maintained that its out-of-state business activities exceeded "solicitation" under Public Law 86-272, thus bringing taxpayer within the reach of the tax laws of the other states. Consequently, taxpayer maintained that it should be permitted to apportion part of its income to states outside Georgia.

The taxpayer in *Hawes* produced and sold aluminum extrusion products. All orders for its products were forwarded to its office in Georgia and were subject to acceptance there by taxpayer. Further, merchandise was delivered to customers outside Georgia. Taxpayer maintained corporate sales agencies in Florida and New York, with the New York office serving taxpayer's eastern sales accounts. In addition, taxpayer employed sales representatives who operated from offices in their homes in five different states and a credit manager located outside Georgia who devoted his entire time to credit and collection work for taxpayer's sales accounts. Finally, taxpayer

76. *Id.* at 233, 445 P.2d at 129.

77. 116 Ga. App. 184, 156 S.E.2d 536 (1967).

shipped inventory to several out-of-state retailers who held the merchandise on consignment until it was sold.

Interpreting the state income apportionment statute, the Court of Appeals of Georgia held that taxpayer's extra-state activities constituted doing business within the purview of the apportionment statute and that taxpayer was authorized to apportion its income. Addressing the state's argument that Public Law 86-272 prevented apportionment because taxpayer's extra-state operations constituted "solicitation" of orders only, the Georgia court made it clear that Public Law 86-272 did not in any manner relate to a *domestic* corporation of Georgia. The court stated that although attempting to tax a *foreign* corporation might now run afoul of the federal statute (Public Law 86-272), it would not affect the state provision as to Georgia corporations engaging in the described activities in other states. In response to the state's argument that it is a bad policy to allow a corporation an exemption for certain activities that are no longer taxable in a foreign state because of Public Law 86-272, the court tersely replied that if this is true, it is a matter for the remedial power of the legislature not the courts. The court added that "[w]hat the legislature might have intended had it known of the federal statute is a matter of pure speculation and is better left to the realm of conjecture."[78]

The Georgia court in *Hawes* refused to accede to the state's argument that Public Law 86-272 prevented apportionment because taxpayer's extra-state operations were tax exempt as a result of the federal statute. The court repudiated this argument because, by its own terms, Public Law 86-272 did not in any manner relate to taxpayer since it was a *domestic* corporation of the taxing state. Thus the *Hawes* decision represents an important and an intriguing development. Public Law 86-272 expressly provides that the "solicitation" provision of that statute shall not preclude the imposition of a net income tax by any state or political subdivision thereof upon any corporation which is incorporated under the laws of that state.[79] No previous case had taken the position of *Hawes*. Indeed, neither *Cal-Roof*[80] nor *Iron Fireman*[81] rejected the state's position that a domestic corporation should not be permitted to apportion its multistate income because the taxpayer was a *domestic* corporation. Both courts did reject the state's position, but on the ground that

78. *Id.* at 191-92, 156 S.E.2d at 541.
79. 15 U.S.C. § 381(b)(1) (1970).
80. *See* notes 70-72 *supra* and accompanying text.
81. *See* notes 73-76 *supra* and accompanying text.

the extra-state activities of the taxpayer constituted more than "solicitation of orders." No expressed significance was attached in either case to the fact that the taxpayer was a *domestic* corporation.

One of the earliest cases involving Public Law 86-272 was *John Ownbey Co. v. Butler*,[82] a Tennessee case in which the taxing state invoked Public Law 86-272. Although the opinion is not very clear, seemingly the state took the position that all the net income from the extra-state activity of the taxpayer (a domestic corporation) should be attributable to the taxing state because the out-of-state activities producing the income constituted only exempt "solicitation of orders" for the sale of goods under Public Law 86-272. Although not relying entirely on Public Law 86-272, the court did use this statute to reinforce its decision against the taxpayer.

The *Ownbey* case involved four domestic corporations that contested the Tennessee corporate excise tax, which was measured by their entire net income. Gray & Dudley Company, the only taxpayer examined here, is a manufacturer and seller of appliances that annually sold approximately five percent of its products to customers within Tennessee, while approximately ninety-five percent of the total sales were made through solicitation of orders of manufacturers' representatives, with shipment from taxpayer to out-of-state purchasers. Approximately eight percent of the deliveries in these states were made through independent warehouses located in Connecticut, New York, Louisiana, and California, where the orders were solicited. From these warehouses manufacturers' representatives, operating within the same states where the warehouses were situated, made sales and deliveries directly to the customers, who were billed from taxpayer's Tennessee office, to which payment was remitted. Taxpayer likewise made about two percent of its extrastate sales in Louisiana and New York through agents of taxpayer located in those two states. The goods sold there were shipped to taxpayer's agents, who upon receipt stored the goods in their warehouses. From their out-of-state warehouse inventory these agents made sales and deliveries, received all payments for such sales, maintained books and records, and submitted a monthly inventory to taxpayer's Tennessee office, accompanied by payments that the agents had received for the goods.

Contending that about ten percent of its out-of-state activities *exceeded* "solicitation of orders" within the purview of Public Law 86-272, thus rendering it subject to taxation in the foreign states, taxpayer argued that it should be entitled to apportion its taxable

82. 211 Tenn. 366, 365 S.W.2d 33 (1963).

income to its operations in the foreign states. After discussing the exemption provisions of Public Law 86-272, the Tennessee court, in a per curiam opinion of highly doubtful soundness, gave short shrift to taxpayer's argument that its activities outside Tennessee were more than "solicitation of orders." After finding that taxpayer maintained no place of business elsewhere, the court held that taxpayer's *total* earnings should be apportioned to the taxing state of Tennessee. Essentially, the court chose not to come to grips with the question of the tax immune nature of taxpayer's extra-state operations. In its perplexing effort to answer taxpayer's exemption argument, the court stated that:

> Gray & Dudley shows that a very small portion of its business is conducted from out-of-state locations. The portions of the business which might be considered as being done there is so small that it really does not make any difference or show that the apportionment formula should follow.[83]

The court's strange use of a de minimis approach to the solicitation question appears unique, to say the least. If, because of taxpayer's extra-state activities, ten percent of its gross sales could be attributed to extra-state business consisting of *more than* "solicitation and delivery" of orders, in the view of this writer, these facts would hardly justify the application of the de minimis doctrine. Additionally, it is most difficult to believe that the de minimis doctrine properly has any application whatsoever in this type situation.

Seemingly the *Ownbey* court virtually recognizes its error in not permitting taxpayer to apportion when it states:

> If it so happened that this very, very small percentage of business that is claimed to be done is done, and there are certain statutes under which things done there might be taxed, if they are taxed, it is perfectly easy for Gray & Dudley [taxpayer] to make this known in making its return and the Commissioner can adjust the matter at the time.[84]

Thus the court would excuse its refusal to permit apportionment with the statement that if taxpayer (Gray and Dudley) is taxed elsewhere, "it is perfectly easy for Gray & Dudley to make this known in making its return and the Commissioner can adjust the matter at that time."[85] The court seems unmindful of an earlier portion of its opinion in which it declared:

> In all four cases the controversy arose out of recomputation by the Commissioner of the respective corporations' excise tax liability for a year or years

83. 211 Tenn. at 381, 365 S.W.2d at 39.
84. *Id.* at 381-82, 365 S.W.2d at 39.
85. *Id.* at 382, 365 S.W.2d at 39.

> ending in 1959 or later. In each case the appellant [taxpayer] had filed its return in due time and had paid the tax shown as the appellant had computed its return.[86]

Thus the Commissioner presumably already had all the facts at hand when he made his decision to deny apportionment, and so did the Tennessee Supreme Court when it decided the case, as is shown by the recital in its opinion of facts which fairly clearly indicate taxpayer's extra-state activities constituted more than solicitation and delivery of orders. Elsewhere, moreover, net income apportionment by a domestic corporation has been allowed even though the other states where taxpayer did business imposed no tax on the business. Sufficient nexus in the other states to support a potential tax has been enough to warrant apportionment.[87]

The legislative history of Public Law 86-272 and the statute itself, in addition to a number of authorities, make it clear that the use of warehouses and maintenance of inventories in the customer's state exceed the definition of "solicitation and delivery" of orders as envisioned by the drafters of Public Law 86-272.[88] Public Law 86-272 expressly and plainly provides that tax exemption is *not* given unless the solicited order is approved outside the state in which the order was solicited, *and* the order is filled by "shipment or delivery" from a point outside the state in which the order was solicited. In *Ownbey*, however, "delivery" of some of taxpayer's sales was made to a customer by taxpayer's representatives from warehouses to which taxpayer had shipped the goods for storage inside the state of solicitation. Moreover, taxpayer's representatives received payment for the goods stored in some of the warehouses and remitted these payments to taxpayer. The various activities described above hardly can be classified as "solicitation of orders" *only*; nor do they readily fall within the category of "delivery" of orders from a point outside the state in which the order was solicited.

Not only does the *Ownbey* decision appear contrary to Public Law 86-272, but the refusal to allow apportionment when such extra-state contacts are present seemed unsupported by other judicial intepretations of Public Law 86-272 until the *Coors* specter reared its grotesque form on the judicial horizon. In 1973 in *Coors Porcelain Co. v. State*[89] the Colorado Supreme Court was squarely faced with the *Hawes* argument that Public Law 86-272 relates only

86. *Id.* at 371, 365 S.W.2d at 35.

87. Cal-Roof Wholesale, Inc. v. State Tax Commission, 242 Ore. 435, 410 P.2d 233 (1966).

88. *See* notes 96-97 *infra* and accompanying text.

89. 183 Colo. 325, 517 P.2d 838 (1973).

to standards applicable to a *foreign* corporation, and that the statute's correlative use[90] cannot be a basis for increasing taxable income by the state in which the corporation is *domestic*, where the income is generated by multistate and multinational operations.

The taxing state (Colorado) sought to tax all of a Colorado taxpayer's income from its widespread multinational business on the ground that taxpayer's extra-state business activities constituted no more than "solicitation of orders" under Public Law 86-272. The state reasoned that since taxpayer was exempt from taxation outside Colorado, Colorado had a "green light" to latch onto taxpayer's *total* net income from its multinational operations. A Colorado regulation provides in effect that if under Public Law 86-272 a *foreign* corporation is not doing taxable business in a state (presumably within the purview of the "solicitation only" provision), then the income attributable to that state is taxable by the state in which the corporation is *domestic*, and Coors was a domestic corporation of the taxing state of Colorado. Taxpayer urged, to the contrary, that the federal statute applies only to *foreign* corporations and cannot be applied to *domestic* corporations.

The *Coors* court agreed with the state that Public Law 86-272 may be used in a correlative manner to determine whether taxpayer's extra-state activities are tax exempt on the ground that taxpayer was engaged in no more than "solicitation of orders" outside the taxing state of Colorado and hence, Colorado could tax the entire net income produced by taxpayer's extra-state activities. After adopting the major premise of the taxing state, the court turned to the question of whether taxpayer's extra-state operations did exceed the statutorily prescribed "solicitation of orders" *only* exemption. The court's interpretation of "solicitation only" is significant, to say the least, and, in this writer's opinion, exceeds even the broad interpretation of "solicitation" first announced by the Oregon court in *Smith Kline & French*,[91] an interpretation subsequently repudiated by the Oregon judiciary itself in *Herff Jones*[92] and *Cal-Roof*,[93] in which "solicitation" was given a much narrower meaning.

The *Coors* facts were stipulated. Taxpayer, a domestic corporation of the taxing state of Colorado, manufactures porcelain and ceramic products, which it distributes in nineteen states and five

90. *See* Hawes v. William L. Bonnell Co., 116 Ga. App. 184, 156 S.E.2d 536 (1967), discussed in text accompanying notes 77-81 *supra*.

91. *See* text accompanying notes 46-47 *supra*.

92. *See* text accompanying notes 48-51 *supra*.

93. *See* text accompanying notes 70-72 *supra*.

foreign countries. Taxpayer employs approximately ten salaried and ten commissioned sales agents, who reside and maintain offices outside the taxing state in the states and foreign countries where Coors products are sold. The *Coors* court set forth at length the duties and responsibilities of the Coors field representatives. The court's language is so pertinent to a judgment of the soundness of the decision of this case that it is quoted at length. The representatives' duties and responsibilities are described in part as follows:

> To solicit sales from present customers and to develop and acquire new customers; . . . *To design parts for manufacture by Coors which will fit the needs of a particular customer or potential customer*; To be able to intelligently discuss with customer engineers the problems they are encountering *and to recommend design of Coors products to solve the particular problem involved*; To be able to present price-quotations to the customer and *negotiate such prices*; . . . To discuss with customers any complaints or problems involving the purchased product; *To demonstrate to customers how each Coors product operates* and explain to them why they should purchase the Coors product. . . . *Some agents buy directly and resell to their customers*. . . . Most of its manufactured products are custom made *as a result of designs submitted by its field representatives*.
>
> *Each field representative maintains his own business office in the locality wherein he resides*. Coors supplies each field representative with a business automobile and also places advertisements in the local telephone directory listing the local representative's business telephone. *Coors does not consistently maintain warehouses or stock of products, parts or supplies outside of Colorado*, but its out of state representatives do consistently maintain sample materials owned by Coors and on occasion *they possess Coors products for shipment to the customer and also retain Coors products which have been rejected* by the customer upon delivery.[94]

After examining this enormous mass of out-of-state activity, the court concluded that "[t]he question may be distilled to an inquiry of whether or not Coors went beyond the solicitation of orders in its out-of-state business," and then held that Coors extrastate business did not extend beyond the "solicitation of orders" only, for the sale of tangible personal property. The only considerations that gave the court any pause on the question whether taxpayer's extra-state activity consisted of *more than* "solicitation of orders" was that Coors' out-of-state representatives on occasion possessed products for shipment to customers and also retained Coors products that had been rejected by the customer on delivery. The court, however, summarily dismissed the significance of this extrastate activity with the casual observation that it appeared these acts were not in common practice and were the exception rather than the rule. It might not be inappropriate to point out, however, that Pub-

94. 183 Colo. at 327-29, 517 P.2d at 839-40 (emphasis added).

lic Law 86-272 provides for no "exceptions" to the solicitation only requirement for the statute to provide an exemption from taxation.

The *Coors* court, seemingly inflicted with judicial tunnel vision, disregarded the fact that taxpayer's agents maintain offices outside the taxing state and in states and foreign countries where Coors products are marketed. The virtually unanimous view, including the legislative history, on the scope of Public Law 86-272 squarely is that such operations would forfeit the tax exemption.[95] This point is solidly nailed down by the Senate hearings that led to the passage of Public Law 86-272, which make it clear that the drafters did not intend to include sales offices, ownership of warehouses, and storage of inventory within the definition of "solicitation" for purposes of the Public Law 86-272 exemption.[96] Also, Senator Harry F. Byrd, a member of the Senate Committee responsible for the bill, stated in the Congressional Record that: "[the statute] does not prohibit taxation if the company has a warehouse in the state or other physical facilities . . . for the purpose of implementing the sale of the goods."[97]

A question unanswered by the *Coors* court is whether the fact that some agents buy directly from taxpayer and resell to their customers does not also eliminate the out-of-state seller from the protection of Public Law 86-272 on the ground that the seller was not making the statutorily required *deliveries* from a point outside the state.[98] Likewise, other courts have regarded the instruction and demonstration to customers of the use of the seller's product as a factor that may forfeit the "solicitation and delivery" tax exemption.[99] Perhaps it would not be amiss to recall here that the pertinent part of Public Law 86-272 provides that the taxing power of state and local governments is congressionally ousted by Public Law 86-272 "if the *only* business activities within such State by or on behalf of such person [seller]" consists of "the solicitation of orders by

95. *See* Part II A *supra*.

96. S. REP. No. 658, 86th Cong., 1st Sess. 6-7 (1959).

97. 105 CONG. REC. 16,355 (1959).

98. Interestingly, in *Coors* no claim was made that taxpayer was exempt from taxation because Coors representatives were "independent contractors," affording protection from taxation on that ground. *See* notes 4-5 *supra* and accompanying text.

In Tonka Corp. v. Commissioner of Taxation, 284 Minn. 185, 169 N.W.2d 589 (1969), tbe taxing state (Minnesota) invoked Public Law 86-272. The state claimed that taxpayer was doing business in other states through "independent contractors"; hence taxpayer could not be taxable in the other state by reason of Public Law 86-272. Consequently, argued the taxing state, it could tax the total amount of taxpayer's multistate income. The court held, however, that taxpayer was not operating through "independent contractors" in the other state, but through representatives only. Thus taxpayer was permitted to apportion its income.

99. *See* text accompanying notes 52 & 64 *supra*.

such person, or his representative . . . for sales of tangible personal property, *which orders are sent outside the State* for approval or rejection, and, if approved, are filled by shipment or *delivery from a point outside the State* [where the order was solicited]."[100]

When all of the extra-state business activities of Coors are considered in light of the holdings and rationale of earlier cases,[101] it is inconceivable to this writer how it rationally can be concluded that taxpayer was "only engaged in the solicitation of orders" *outside* the taxing state of Colorado, within the purview of Public Law 86-272. Of course, it meant dollars and cents in the coffers of the taxing state to have its own court treat taxpayer's extra-state business activities as no more than solicitation of orders by representatives of taxpayer in all the states other than Colorado and foreign countries in which taxpayer carried on these activities.[102] Thus Colorado could sink its tax talons into *all* the net income earned by taxpayer in this far-flung, multinational operation.

If the *Coors* flood-tide interpretation of "solicitation of orders only" is followed, it is doubtful whether the high-water mark of tax-exemption could be judicially pushed much higher without inundating a necessary tax base. That unfortunate result would be especially applicable when the out-of-state seller invokes Public Law 86-272, contends that its activities *within the taxing state* do not exceed "solicitation of orders," and thus claims immunity from the net income tax. That invocation appears from the statute to be its only proper use and has been the area where perhaps most of the cases have arisen. If Colorado were faced with that question it would be interesting to speculate whether the Colorado judiciary might not use an accordion definition of "soliciation of orders only," so that it could be expanded and contracted to suit its ends. Additionally, the taxing state may invoke Public Law 86-272 and contend that taxpayer's extra-state activities consist only of solicitation and delivery and are exempt from taxation on its extra-state activities, thus

100. 15 U.S.C. § 381(a)(1) (1970) (emphasis added); *see* text accompanying notes 2-3 *supra*.

101. *See* Part II A *supra*.

102. It might plausibly be questioned whether Public Law 86-272 has any application at all to the *five foreign countries* in which taxpayer did business, since the federal statute only refers to activity among "States." At no place in Public Law 86-272 is "State" defined to include *foreign countries*. Also, the United States Government has tax treaties with 3 of the foreign countries involved (France, Netherlands, and Canada). There is no mention whatsoever in the *Coors* opinion whether these tax treaties might apply to the taxability of the income derived from these foreign countries. There is no need to cite authority for the proposition that a treaty made by the United States Government, if in conflict with the laws of Colorado (the taxing state), would be paramount.

leaving the income generated by the entire multistate business subject to taxation not only by the state in which a *corporation* may be incorporated, but also, presumably, by the state in which an *individual* is domiciled or of which he is a resident.

Unfortunately for the taxpayer in the *Coors* case—and for taxpayers similarly situated—the Colorado court's decision that taxpayer was engaged in the exempt solicitation of orders only is not binding on the courts of the other nineteen states and five foreign countries where Coors conducts its business. Hence, for all that Public Law 86-272 has to say, taxpayer may be subjected to taxation in some or all of these jurisdictions, as well as taxation on *all* of its net income in Colorado. Subjecting interstate business to such a cumulative tax burden, to which local business is not exposed, is multiple taxation of the rankest sort and gives local business a competitive advantage over multistate operations. Although the interstate taxpayer may resort to the commerce clause of the United States Constitution for protection, the cases make it clear that the taxpayer will have difficulty upsetting a tax on the ground that he is subjected to cumulative tax burdens not borne by local business.[103]

III. THE IMPACT OF THE TWENTY-FIRST AMENDMENT OF THE UNITED STATES CONSTITUTION ON THE SOLICITATION AND DELIVERY PROVISIONS OF PUBLIC LAW 86-272

The case of *Heublein, Inc. v. South Carolina Tax Commission*[104] called into question the relationship between the solicitation and delivery provisions of Public Law 86-272 and the twenty-first amendment of the United States Constitution. The twenty-first amendment, section 2, provides, in part, that "[t]he transportation or importation into any State . . . for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."[105] The breadth of this amendment is clarified in *Hostetter v. Idlewild Bon Voyage Liquor Corp.*:

> This Court made clear in the early years following adoption of the Twenty-first Amendment that by virtue of its provisions a State is totally unconfined by traditional Commerce Clause limitations when it restricts the importation of intoxicants destined for use, distribution, or consumption within its borders.[106]

---

103. Corrigan, *Interstate Corporate Income Taxation—Recent Revolutions and a Modern Response*, 29 VAND. L. REV. 423, 424; Dexter, *Taxation of Income from Intangibles of Multistate-Multinational Corporations*, 29 VAND. L. REV. 401, 402; Hellerstein, *State Taxation and the Commerce Clause: An Historical Perspective*, 29 VAND. L. REV. 335 (1976).

104. 409 U.S. 275 (1972).

105. U.S. CONST. amend. XXI.

106. 377 U.S. 324, 330 (1964).

Incident to South Carolina's long and detailed scheme of regulating the sale of liquor within the state, the manufacturer of alcoholic beverages was required, among other things, to send its products to its local representative in the state, who transferred them to a local wholesaler. This transfer occurred within the state and, as the United States Supreme Court concluded, clearly was neither " 'solicitation' nor the filling of orders [for liquor] 'by shipment or delivery from a point outside the State,' " within the scope of the exemption of Public Law 86-272.[107] South Carolina (the taxing state) levied its income tax on the income from the local sales of taxpayer's products. Heublein, a foreign corporation that produces alcoholic beverages for sale in South Carolina, attacked the validity of the tax on the ground that the taxing state's requirements for the sale of liquor in that state could not deny it the protection of Public Law 86-272. In support of its position taxpayer argued that the taxing state could not evade the purpose of Public Law 86-272 *by requiring taxpayer to do more than solicit business within the state,* and then taxing it for engaging in this compelled additional activity.

The United States Supreme Court, affirming the South Carolina Supreme Court's denial of an exemption under Public Law 86-272, answered taxpayer by declaring that South Carolina's system of regulating the sale of liquor is valid under the twenty-first amendment, that South Carolina was pursuing constitutionally permissible ends, and that since her system of regulating the sale of liquor is valid, Public Law 86-272 does not prohibit taxation of taxpayer's local sales. In short, incident to the taxing state's valid scheme of regulating the sale of liquor within its boundaries, the Court concluded that a requirement that the taxpayer-manufacturer (Heublein) do more than merely solicit sales as a condition of doing business is not impermissible. This state regulation is permissible although it has the effect of requiring the extra-state taxpayer to undertake activities that eliminate it from the protection of the "solicitation" and "delivery" provisions of Public Law 86-272 with respect to the state's income tax. Thus, within the limited scope of the twenty-first amendment, a state can affirmatively deny an out-of-state manufacturer the protection of Public Law 86-272.

IV. Summary Comment and Conclusions

Forty-six states, plus the District of Columbia, have corporate net income taxes of some variety.[108] Thus, the problem of the impact

107. 409 U.S. at 278-79.

108. 1 P-H State & Local Taxes, All States Unit ¶ 101.

of Public Law 86-272 is of substantial importance. Between the tax immunity of Public Law 86-272 for net income taxes flowing from mere "solicitation" and "delivery" of orders for the interstate sale of tangible personal property and the tax consequences attaching to an intrastate business operation, lies a vast realm of doubt and ambiguity with regard to much of the activity involved in the distribution of goods.

Regarding "solicitation" Public Law 86-272 expressly states that no state or local government has power to impose a net income tax on income derived within the state from interstate commerce by any person if the *only* business activity within the taxing state by or on behalf of that person is the solicitation of customers, or the solicitation of orders for the benefit of a prospective customer of the business. To engage in this interstate activity without tax consequences, the out-of-state seller or his representative who solicits the order is further limited to solicitation of orders for the sale of tangible personal property that are accepted out of state and filled by "shipment or delivery from a point outside the state" from which the order was solicited.

In light of the enormous variety of activities conducted by interstate business, the status of the state decisional law under Public Law 86-272 today leaves a broad spectrum of commercial activity within an area of doubt on the question whether the activity of the taxpayer eliminates that person from the net income tax protection of the "solicitation" and "delivery" provisions of Public Law 86-272 as applied to interstate business. While Public Law 86-272 expressly answers the question of tax liability in some instances, a very considerable area remains in which the taxpayer and the tax administrator are left with only their respective arguments to pursue, rather than well-established tax guidelines to follow. Thus, regarding a wide range of commercial activities, the combined effect of state laws and Public Law 86-272 falls far short of providing a definitive answer to the question of tax consequences flowing from the particular transaction.

After exploring the labyrinth of the intricate, differing facts of the cases construing the "solicitation" and "delivery" exemption of Public Law 86-272, it appears practically impossible to distill from these cases a precise, uniform, predictively trustworthy interpretation of the scope of that exemption. This inability to formulate uniform, dependable guidelines is attributable to a number of considerations. In the first place, there have been relatively few cases in which the courts have interpreted the solicitation and delivery

provisions of Public Law 86-272. Moreover, the high court of each of the fifty states has autonomy to reach its own decision in this matter, since the United States Supreme Court has not given an authoritative interpretation of these provisions. Hence, conflicting decisions among the state courts are to be expected. A complicating circumstance that adds to the difficulty of distilling uniform guidelines from the decisions is the fact that each case in which the taxpayer has been denied the protection of the solicitation and delivery provisions of the federal statute has dealt with a number of activities, which have been used by the court *in toto* to deny exemption. Thus it is very difficult to single out any one activity as the determinative consideration in the court's denial of the exemption.

Neither Congress nor the United States Supreme Court has taken steps during the more than sixteen years in which Public Law 86-272 has been in effect to clear up the briar patch of this "stopgap" legislation; hence each of the fifty states is free to place its own construction on the solicitation and delivery provisions. It comes as no great surprise, therefore, that different courts have reached differing conclusions concerning the tax-insulating effect of solicitation and delivery of orders, on identical or highly similar operative facts of a case. Even the same jurisdiction has had a change of heart on the exemptive scope of such activities.[109]

Many perplexing and knotty problems remain unsolved. There is doubt whether a seller comes within the protection of "solicitation of orders" only in a state where the seller rents a display room. Activities engaged in by the seller in obtaining the original order may have helped secure the order, as well as repeat business. Thus, to what extent may the seller aid a customer in the installation of newly purchased equipment without jeopardizing his otherwise tax immune status? While Public Law 86-272 makes it clear that delivery of goods into a state does not deprive the selling company of tax immunity, nevertheless questions can arise regarding the meaning of "delivery." For example, does the term "delivery" include *installation* work—a term broad enough to encompass both jobs requiring five minutes and those requiring five weeks?[110] Has a seller done more than deliver its tangible personal property into the customer's state if the seller retains a security interest in the goods sold? Is the seller eliminated from the protection of Public Law 86-272 if in responding to a warranty obligation it services the delivered products on the customer's premises?[111]

109. *See* text accompanying notes 42-51 *supra*.
110. *See* 1 WILLIS SUBCOMMITTEE REPORT 146.
111. *Id.*

Further, does the residency of the taxpayer's representative in the state in which he solicits alone constitute activity that will eliminate taxpayer from the solicitation exemption of Public Law 86-272? There is authority to the effect that the representatives' residency alone does not destroy the exemption.[112] In a similar vein, does the fact that a taxpayer, a foreign corporation, has qualified to do business in a taxing state constitute enough connection with the taxing state so that the qualification alone will eliminate it from the solicitation provisions of Public Law 86-272? One case, *CIBA*, has answered the question in the negative. Tax immunity was granted.[112.1] These are but a few of the imponderables that remain under the solicitation and delivery provisions of Public Law 86-272.

The Special Subcommittee on State Taxation of Interstate Commerce, which conducted a study of state and local taxation of interstate commerce lasting over four years pursuant to Public Law 86-272, as amended,[113] compiled lists of what it regarded as "protected activities" and "unprotected or taxable activities," under Public Law 86-272. This classification was based upon results derived from the Subcommittee's method of conducting the study. While the Subcommittee's opinion is in no respect conclusive on what constitutes solicitation or delivery, nevertheless, in light of the combined expertise and extensive in-depth investigative experience of these members, their opinions should be persuasive and useful.

To use the Subcommittee's introduction, the "following lists indicate the activities treated as protected by Public Law 86-272 and those treated as not protected and therefore taxable. To be treated as protected by the statute in a state for purposes of the analysis in this section, a company has to be incorporated outside the State and have in the State one or more of the activities on the first list but none of the activities on the second list."[114]

Protected Activities

Usual or frequent activity in the State by employees soliciting orders without authority to accept them.

Usual or frequent activity in the State by employees displaying goods or engaged in other promotional activity, but not soliciting or taking orders.

---

112. *See, e.g.*, State *ex rel.* CIBA Pharmaceutical Prod., Inc. v. State Tax Comm'n, 382 S.W.2d 645 (Mo. 1964), discussed in text accompanying notes 56-63 *supra*. Further authority is found in the hearings that resulted in Public Law 86-272. *See* 105 CONG. REC. 16,354-55 (1959).

112.1. CIBA Pharmaceutical Products, Inc. v. State Tax Commission, 382 S.W.2d 645 (Mo. 1964), discussed in text accompanying notes 56-63 *supra*.

113. *See* note 25 *supra* and accompanying text.

114. 1 WILLIS SUBCOMMITTEE REPORT 426.

Unprotected or Taxable Activities

Maintenance of any business location in the State, including any kind of office.

Ownership of real property in the State.

Ownership of a stock of goods in a public warehouse.

Usual or frequent activity in the State by employees soliciting orders with authority to accept them.

Usual or frequent activity in the State by employees engaged in purchasing activity or in the performance of services (including installation, assembly, and repair of equipment).

Operation of mobile stores in the State (such as trucks with driver salesmen), regardless of frequency.[115]

The Subcommittee made it clear that it did not regard these two lists as exhaustive of all pertinent activities having tax consequences that might be conducted within a state.[116]

Subsequent to this Subcommittee analysis of Public Law 86-272, a number of cases have dealt with taxpayer activities that the Subcommittee includes on the "Protected Activities" or the "Unprotected or Taxable Activities" lists. There have been a few rather radical departures from what might be termed the Subcommittee's prognostications of taxable activities.[117] On the other hand, several cases have taken positions suggested by the Subcommittee's Report. As the Subcommittee predicted, for example, *servicing* and *repair*—usually coupled with other activities—have been used by the courts as activities that will bar the taxpayer from the haven of the Public Law 86-272 exemption.[118] Also as suggested, investigation of customer complaints has been one of the activities, when included along with others, that has caused the court to find tax liability.[119]

An activity that has provoked disagreement on whether it falls within the solicitation exemption of Public Law 86-272 is the extent to which the out-of-state seller may go in training or instructing prospective customers in the use of the seller's product. *CIBA*[120] and *Coors*,[121] on the one hand, and *Clairol*,[122] on the other, represent

115. *Id.* at 427.

116. *Id.*

117. *See, e.g.*, Coors Porcelain Co. v. State, 183 Colo. 325, 517 P.2d 838 (1973), discussed in text accompanying notes 89-103 *supra*, a case that characterized as mere solicitations a number of activities which had been predicted to be more than solicitations.

118. *See, e.g.*, Iron Fireman Mfg. Co. v. State Tax Comm'n, 251 Ore. 227, 445 P.2d 126 (1968), discussed in text accompanying notes 74-76 *supra*.

119. *See, e.g.*, Briggs & Stratton Corp. v. Commissioner, 3 Ore. Tax Rep. 174 (1968), discussed in text accompanying notes 52-53 *supra*.

120. State *ex rel.* CIBA Pharmaceutical Prod., Inc. v. State Tax Comm'n, 382 S.W.2d 645 (Mo. 1964), discussed in text accompanying notes 56-63 *supra*.

121. Coors Porcelain Co. v. State, 183 Colo. 325, 517 P.2d 838 (1973), discussed in text accompanying notes 89-103 *supra*.

122. Clairol, Inc. v. Kingsley, 109 N.J. Super. 22, 262 A.2d 213 (App. Div. 1970), discussed in text accompanying notes 64-67 *supra*.

sharply separable views on this point. In *CIBA* and *Coors* the pertinent activity was to familiarize prospective users with the product, presumably in part for the purpose of inducing sales. In *CIBA* no tax liability attached. In *Coors* such activity, along with other operations, was held not to exceed solicitation of orders. The Oregon case of *Smith Kline & French*,[123] the rationale of which was limited by *Herff Jones*[124] and *Cal-Roof*,[125] treated the instruction of prospective customers in the use of the product as an essential ingredient of solicitation, and granted taxpayer an exemption. In the later case of *Briggs & Stratton*,[126] however, the Oregon court, in *denying* the immunity under Public Law 86-272, emphasized that the seller's representative did more than solicit orders in giving technical engineering advice to customers as well as conducting training schools and lectures on proper service techniques.

To help secure an order or obtain repeat business, it may be customary for a salesman to help his customers check their inventory as an adjunct to the solicitation of orders. Nevertheless, courts have given weight to the salesman's participation in the inventory-taking process alone, or along with other factors, in determining that the salesman's activities encompassed more than the solicitation of orders, and thus denying the taxpayer an exemption under Public Law 86-272.[127]

The situation under the solicitation exemption of Public Law 86-272 is further complicated and exacerbated by the fact that some taxing states, without any express congressional authority, have treated this statute as more than strictly a *minimal nexus* statute for tax purposes. Instead, they in essence have converted this federal statute into an *apportionment* statute.[128] That is, some taxing states have invoked the provisions regarding solicitation and delivery of orders to decide whether the *extra-state business* of taxpayer exceeds those nontaxability tests, so as to *include* the income gener-

123. Smith Kline & French Laboratories v. State Tax Comm'n, 241 Ore. 50, 403 P.2d 375 (1965), discussed in text accompanying notes 42-47 *supra*.

124. Herff Jones Co. v. State Tax Comm'n, 247 Ore. 404, 430 P.2d 998 (1967), discussed in text accompanying notes 48-51 *supra*.

125. Cal-Roof Wholesale Inc. v. State Tax Comm'n, 242 Ore. 435, 410 P.2d 233 (1966), discussed in text accompanying notes 70-72 *supra*.

126. *See* text accompanying notes 52-53.

127. *See* Harvey v. AMF Beaird, Inc., 250 Ark. 147, 464 S.W.2d 557 (1971), discussed in text accompanying note 68 *supra*. *But see* State *ex rel.* CIBA Pharmaceutical Prod., Inc., 382 S.W.2d 645 (Mo. 1964).

128. *See* Part II A (2) *supra*.

ated by the extra-state business of the taxpayer in its taxable income in the taxing state. Seemingly, Public Law 86-272 was intended by Congress to be only a *nexus* statute and thus, only to *prohibit* the *taxing state* from levying a tax on a *foreign* seller when taxpayer's business activity within the taxing state does not exceed a certain minimal standard. Neither the statutory language nor the legislative history seem reasonably to afford the state a means of widening its tax collection by holding that the taxpayer in a multistate operation, because of Public Law 86-272, is not taxable in another state, thus enabling the forum state to reach income generated in the other state. It seems to this writer that if a correct interpretation of this *federal* statute, as the statute appears *on its face* to read, is to consider it only a *minimal nexus* statute for the *taxing* state, then this statute should properly have no bearing on whether the selling taxpayer had income from extra-state activities that did or did not exceed this specific, congressionally prescribed *prohibition* against taxation of income.[129]

When the solicitation and delivery provisions of Public Law 86-272 have been invoked by the state for the purposes of determining the tax base of a business with respect to its extra-state operations, some courts have been even-handed in their interpretation of what activities transcend solicitation and delivery or orders. Other courts, unbridled by controlling authority, however, have tortured the concepts of solicitation and delivery out of all reasonable proportion, so as to find that the extra-state business did not exceed the permissible bounds of tax immunity.[130] In this self-serving manner a tax-grasping court can substantially increase the tax intake of its own state from multistate business by including the income from the out-of-state business within the reach of the taxing statute of the forum state. This doctrine of invocation by the state to reach income generated out of state seems to have been employed thus far only when a domestic corporation is the taxpayer. If the doctrine can be applied to domestic *corporations*, however, it logically should apply to *individuals* domiciled in or residing in the taxing state. Yet, Public Law 86-272 plainly provides that domestic corporations or individuals domiciled in or residing in the *state of solicitation* do *not*

129. *See* Barnes, *State Taxation of Interstate Commerce: Chaos and New Hope*, 16 W. RES. L. REV. 859, 876 (1965). Some authority has flatly repudiated this use of Public Law 86-272. *See* Hawes v. William L. Bonnell Co., 116 Ga. App. 184, 156 S.E.2d 536 (1967) discussed in text accompanying notes 77-79 *supra*.

130. *See* Coors Porcelain Co. v. State, 183 Colo. 325, 517 P.2d 838 (1973), discussed in text accompanying notes 89-103 *supra*; John Ownbey Co. v. Butler, 211 Tenn. 366, 365 S.W.2d 33 (1963), discussed in text accompanying notes 82-87 *supra*.

come within the provisions of this federal statute.[131]

The use of Public Law 86-272 by the taxing state to determine whether income from extra-state activities is exempt from taxation by this statute at first examination might seem to inject into the state tax equation an additional factor concerning the "choice of law" in the field of conflict of laws. When the taxing state purports to make a definitive finding on whether the extra-state activities producing the income exceed the compass of "solicitation" and "delivery" for the purpose of determining the amount of taxable net income, the cases seem to pretermit the question of what state's laws should govern for the purpose of characterizing the extra-state activity as more than solicitation or delivery of orders. Thus far, the forum state ostensibly has applied its own substantive law in making that characterization. The state in which the activity occurs, however, clearly seems to have the most "contacts" in the matter, which now seems to be the *sine qua non* for resolving choice of law problems. Since a *federal* statute is being interpreted, however, the state rules governing the choice of law should have no application here. Thus, seemingly the forum state properly could use its *own* interpretation of the federal statute to define solicitation or delivery of orders in another state, until an authoritative interpretation of Public Law 86-272 is handed down by the Supreme Court of the United States.

Moreover, the correlative use of Public Law 86-272 by a state to determine taxability of income from extra-state activities is not binding on any other state. Hence, for all that Public Law 86-272 has to contribute, a taxpayer may find itself subject to a tax in both states if the taxing state concludes that it can reach income from the extra-state activities. On the other hand, it is conceivable (but not as likely) that the taxpayer may escape a tax on its income if both states agree that taxpayer is engaged only in tax-exempt solicitation and delivery of orders for goods.[132]

With these and other problems in mind, the Special Subcommittee that conducted the study authorized under Title II of Public Law 86-272, as amended,[133] recommended sweeping congressional changes in the field of state and local taxation. The recommendations included the adoption of a two-factor formula (using property

131. 15 U.S.C. § 381(b) (1970).

132. For a discussion of this "nowhere income," see Corrigan, *Interstate Corporate Income Taxation—Recent Revolutions and a Modern Response*, 29 VAND. L. REV. 423, 429 (1976).

133. Act of April 7, 1961, Pub. L. No. 87-17, 75 Stat. 41, *amending* Pub. L. No. 86-272, tit. II, 73 Stat. 555.

and payroll) to be employed to apportion net income among the states in which a multistate business operates.[134] Some of the early bills introduced in Congress as a result of this study not only contained similar far-reaching changes, but also included the two-factor apportionment formula. In addition, many of these bills, pursuant to the Subcommittee's recommendations, contained Public Law 86-272 as an integral part of the bills.[135]

This type of pervasive action in the field of interstate commerce drew violent opposition from the tax administrators and others of like thinking. Further, they insisted, among other things, that the formula for apportionment of net income should be a three-factor formula, consisting of property, payroll, and *sales*, with the sales factor being assigned to the state of destination of the sold goods.

As a counterproposal to the Subcommittee's recommendations and the interstate taxation bills introduced in Congress, the Council of State Governments proposed a Multistate Tax Compact, which would be adopted by the states, with the approval of Congress.[136] Under this Compact the states would voluntarily agree on uniform regulations to ease the tax burdens on multistate business. The Compact was drafted by the Council of State Governments with the cooperation of the National Association of Tax Administrators, the National Association of Attorneys General, and the National Legislative Conference, under the auspices of the Council of State Governments.[137]

134. 4 REPORT OF THE SPECIAL SUBCOMM. ON STATE TAXATION OF INTERSTATE COMMERCE OF THE HOUSE COMM. ON THE JUDICIARY, H.R. REP. No. 952, 89th Cong., 1st Sess. 1145-50 (1965).

135. *See* H.R. 11798, 89th Cong., 2d Sess. (1965); S.1245, 93d Cong., 1st Sess. (1973); S. 2092, 93d Cong., 1st Sess. (1973).

136. There is some question whether congressional approval is necessary here. The compact clause of the United States Constitution provides that no state shall, without the consent of Congress, enter into any agreement or compact with another state or with a foreign power. U.S. CONST. art. 1, § 10. For the background, development, and present status of the interstate compact, see R. LEACH & R. SUGGS, THE ADMINISTRATION OF INTERSTATE COMPACTS (1959); V. THURSBY, INTERSTATE CORPORATION (Public Affairs Press 1953); F. ZIMMERMAN & M. WENDELL, THE INTERSTATE COMPACT SINCE 1925 (1951); Celler, *Congress, Compacts, and Interstate Authorities*, 26 LAW & CONTEMP. PROB. 682 (1961); Dunbar, *Interstate Compacts and Congressional Consent*, 36 VA. L. REV. 753 (1950); Engdahl, *Characterization of Interstate Arrangements: When Is a Compact Not a Compact?* 64 MICH L. REV. 63 (1965); Frankfurter & Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments*, 34 YALE L.J. 685 (1925); Grad, *Federal-State Compact: A New Experiment in Co-operative Federalism*, 63 COLUM. L. REV. 825 (1963); Weinfeld, *What Did the Framers of the Constitution Mean By "Agreements or Compacts?"*, 3 U. CHI. L. REV. 453 (1936); Note, *The Constitutionality of the Multistate Tax Compact*, 29 VAND. L. REV. 453 (1976).

137. *See* P-H STATE & LOCAL TAXES, ALL STATES UNIT ¶ 5100. Twenty-one states have adopted the Compact as regular members, and 15 are associate members. *Id.* ¶ ¶ 5150, 5151. *See* Corrigan, *supra* note 130 at n.44.

The Compact was designed to facilitate proper determination of state and local tax liability of interstate business, equitable apportionment of tax bases among the states, and convenience in all phases of state and local tax administration. To simplify taxpayer compliance and eliminate the possibility of double net income taxation, the taxpayer is given the option of paying taxes under the state and local laws in effect, or apportioning and allocating income under the provisions of the Uniform Division of Income for Tax Purposes Act (UDITPA), which provides a three-factor apportionment formula using property, payroll and sales factors.[138]

The Multistate Tax Compact apportionment formula would not conflict with Public Law 86-272, but under the supremacy clause, none of the Compact's provisions that do conflict with Public Law 86-272 could be sustained unless Congress expressly so provided. The Multistate Tax Compact cannot resolve *all* the pressing problems involved in state and local taxation of interstate business. It is just conceivable, however, that the Compact may satisfactorily handle enough of these problems, so that Congress may not be overly anxious to enact a broad pattern of legislation that pervades the whole area of state taxation of multistate business.

In any event, it is clear that the failure of Public Law 86-272 to provide guidelines for what constitutes "solicitation" and "delivery" has created uncertainty over the law's applicability among taxpayers, tax administrators, and the courts, as evidenced by the conflicting judicial interpretations among the state courts. Congress thus has opened up a Pandora's Box of troubles. As has been suggested, it has created a real risk of double taxation. Additionally, confusion regarding tax liability under this statute has caused many marginal taxpayers to file no returns at all.[139] A clarification of these areas of "solicitation" of orders and "delivery" of goods most emphatically is needed.

A decision, or perhaps a series of decisions, by the Supreme Court of the United States could help to remove this tapestry of confusion and might furnish some helpful guidance in the matter. Thus far the Supreme Court has refused to give this direction; instead, it has declined to consider a number of state court decisions that it was asked to review. While judicial guidance would help, it has been widely recognized, especially by the United States Supreme Court, that the legislative branch of government is better suited to formulate policies founded upon economic realities regard-

138. *Id.* ¶ 5105.

139. 1 WILLIS SUBCOMMITTEE REPORT 597.

ing taxation of interstate commerce than are the courts.[140] The accommodation of the states' right to tax and the national interest in unobstructed commerce is a delicate matter, requiring the research and statistical resources that only Congress can provide. The courts, on the other hand, must decide each case on an unsatisfactory piecemeal basis.[141]

Congress should afford some statutory help by giving guidance regarding these ambiguous terms so as to eliminate the uncertainty, confusion, and disparity of interpretation that now exists under Public Law 86-272. To promote maximum effectiveness, this congressional guidance should be coupled with a realistic and acceptable uniform income apportionment formula that would eliminate, as far as possible, multiple taxation of interstate business. This would go a long way in promoting fair and predictable state tax treatment for multistate and multinational businesses.

---

140. *See* Hartman, *State Taxation of Interstate Commerce: A Survey and an Appraisal*, 46 VA. L. REV. 1051, 1118-20 (1960).

141. *See* 1 WILLIS SUBCOMMITTEE REPORT 11-14.

APPENDIX
PUBLIC LAW 86-272

§ 381. Imposition of net income tax.

(a) Minimum standards.

No State, or political subdivision thereof, shall have power to impose, for any taxable year ending after September 14, 1959, a net income tax on the income derived within such State by any person from interstate commerce if the only business activities within such State by or on behalf of such person during such taxable year are either, or both, of the following:

(1) the solicitation of orders by such person, or his representative, in such State for sales of tangible personal property, which orders are sent outside the State for approval or rejection, and, if approved, are filled by shipment or delivery from a point outside the State; and

(2) the solicitation of orders by such person, or his representative, in such State in the name of or for the benefit of a prospective customer of such person, if orders by such customer to such person to enable such customer to fill orders resulting from such solicitation are orders described in paragraph (1).

(b) Domestic corporations; persons domiciled in or residents of a State.

The provisions of subsection (a) of this section shall not apply to the imposition of a net income tax by any State, or political subdivision thereof, with respect to—

(1) any corporation which is incorporated under the laws of such State; or

(2) any individual who, under the laws of such State, is domiciled in, or a resident of, such State.

(c) Sales or solicitation of orders for sales by independent contractors.

For purposes of subsection (a) of this section, a person shall not be considered to have engaged in business activities within a State during any taxable year merely by reason of sales in such State, or the solicitation of orders for sales in such State, of tangible personal property on behalf of such person by one or more independent contractors, or by reason of the maintenance of an office in such State by one or more independent contractors whose activities on behalf

of such person in such State consist solely of making sales, or soliciting orders for sales, o[f] tangible personal property.

(d) Definitions.

For purposes of this section—

(1) the term "independent contractor" means a commission agent, broker, or other independent contractor who is engaged in selling, or soliciting orders for the sale of, tangible personal property for more than one principal and who holds himself out as such in the regular course of his business activities; and

(2) the term "representative" does not include an independent contractor.

§ 382. Assessment of net income taxes; limitations; collection.

(a) No State, or political subdivision thereof, shall have power to assess, after September 14, 1959, any net income tax which was imposed by such State or political subdivision, as the case may be, for any taxable year ending on or before such date, on the income derived within such State by any person from interstate commerce, if the imposition of such tax for a taxable year ending after such date is prohibited by section 381 of this title.

(b) the provisions of subsection (a) of this section shall not be construed—

(1) to invalidate the collection, on or before September 14, 1959, of any net income tax imposed for a taxable year ending on or before such date, or

(2) to prohibit the collection, after September 14, 1959, of any net income tax which was assessed on or before such date for a taxable year ending on or before such date.

§ 383. Definition.

For purpose of this chapter, the term "net income tax" means any tax imposed on, or measured by, net income.

§ 384. Separability of provisions.

If any provision of this chapter or the application of such provision to any person or circumstance is held invalid, the remainder of this chapter or the application of such provision to persons or circumstances other than those to which it is held invalid, shall not be affected thereby.