A Failure in Statutory Interpretation: The MTC and P.L. 86-272

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In this article, Dakessian and Penza contend that the Multistate Tax Commission's recent revisions to its statement of information regarding P.L. 86-272 are improperly guided by policy judgments and fail to abide by the fundamental rules of statutory construction.

Relying on an overly broad interpretation of the U.S. Supreme Court's decision in *Wayfair*, the Multistate Tax Commission appears poised to recommend weakening P.L. 86-272's protection — even though *Wayfair* did not interpret and made no mention of the federal statute.[1]

The MTC's P.L. 86-272 work group proposed a revised version[2] of the MTC's "Statement of Information Concerning Practices of Multistate Tax Commission and Signatory States Under Public Law 86-272" (Revised Statement), which has been approved by the MTC's Executive Committee for consideration by the MTC. The Revised Statement adopts the view that a business would lose P.L. 86-272 immunity based on routine interactions with customers through the internet.[3] The Revised Statement provides:

> As a general rule, when a business interacts with a customer via the business's website or app, the business engages in a business activity within the customer's state.[4]

The Revised Statement asserts that this "general rule," referred to herein as the Internet Rule, is supported by the *Wayfair* decision. The *Wayfair* Court, in discarding the physical presence standard under the Court's dormant commerce clause jurisprudence, highlighted the artificiality of a physical presence standard by explaining that an internet seller "may be present in a State in a meaningful way without that presence being physical in the traditional sense of the term."[5]

Seizing on *Wayfair*, the Revised Statement bases the Internet Rule on the following logic: (1) a business is present in a state when it interacts with customers in that state through the internet; and therefore (2) any internet-based interaction that is not solicitation will cause the business to lose P.L. 86-272 immunity.[6] Accordingly, the Revised Statement reflects the work group's view that a business would lose P.L. 86-272

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[1] *South Dakota v. Wayfair Inc.*, 138 S. Ct. 2080 (2018).

[2] Statement of Information Concerning Practices of Multistate Tax Commission and Supporting States Under Public Law 86-272, MTC, Nov. 20, 2020 (Revised Statement).

[3] Any reference to "customers" in this article encompasses potential customers.

[4] Revised Statement, at 8.

[5] *Wayfair*, 138 S. Ct. at 2095.

[6] 15 U.S.C. section 381. Any reference to "solicitation" in this article encompasses activities that are ancillary to solicitation. *See Wisconsin Department of Revenue v. William Wrigley Jr. Co.*, 505 U.S. 214 (1992) (holding that the word "solicitation," as used in P.L. 86-272, includes activities that are ancillary to solicitation).

immunity if it provided post-sale assistance to a customer by email or electronic chat initiated through the business's website.[7] Further, the work group believes that the business would also lose P.L. 86-272 immunity if it allowed customers to apply for branded credit cards through its website.[8]

The work group said its task "was statutory interpretation, not policy making."[9] With the utmost respect to the efforts of the work group, it appears that the opposite is true. This article will demonstrate that: (1) the Internet Rule is unmoored from basic rules of statutory interpretation; and (2) the Revised Statement's uneven application of the Internet Rule reflects policy judgments that extend beyond statutory interpretation.

A Proper Interpretation of P.L. 86-272 Prohibits the Application of the Internet Rule

In analyzing a federal statute, the job of the courts is "to determine congressional intent."[10] "There is no better or more authoritative expression" of congressional intent "than the statutory text."[11] It is "a fundamental canon of statutory construction" that the words of a statute will be interpreted according to their "ordinary, contemporary, [and] common meaning."[12]

This framework guides the proper interpretation of P.L. 86-272. Under P.L. 86-272, a person loses immunity from a state's net income tax if the "business activities within such State by or on behalf of such person" exceed solicitation of orders for the sale of tangible personal property.[13] The phrase "by . . . such person" clarifies that P.L. 86-272 immunity turns on the in-state activities performed by the seller.

The Revised Statement's Internet Rule misconstrues the phrase "by . . . such person": The rule confuses the activities performed by a seller's customer with the activities of the seller. Consider the following example:

> A seller provides post-sale assistance to customers through its website. A customer located in New York accesses the seller's website and engages in an electronic chat with the seller's employee, who is located in California.

In this example, the seller performed an activity in California, and the customer performed an activity in New York. The Internet Rule, on the other hand, treats the seller as having performed an activity in New York.

The Internet Rule thus reflects a contrived and unnatural use of the English language. If you were in New York and had a telephone conversation with a friend in Massachusetts, would you say you performed an activity in Massachusetts? Of course not. Your friend performed an activity (speaking on the telephone) in Massachusetts, and you performed an activity (speaking on the telephone) in New York. Similarly, when a seller interacts with a customer through the internet, only the customer performs an activity in the state in which she is located.[14] By conflating the activities of a seller and its customers, the Internet Rule is inconsistent with the common and ordinary meaning of P.L. 86-272.[15]

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[7]Revised Statement, at 8-9 (Scenario 2).

[8]Revised Statement, at 9 (Scenario 3).

[9]Memorandum to the Chair of the MTC Uniformity Committee from the P.L. 86-272 work group, at 2 (Mar. 30, 2020).

[10]*NLRB v. United Food and Commercial Workers Union, Local 23, AFL-CIO*, 484 U.S. 112, 123 (1987).

[11]*Medical Center Pharmacy v. Mukasey*, 536 F.3d 383, 394 (5th Cir. 2008).

[12]*Perrin v. United States*, 444 U.S. 37, 42 (1979).

[13]15 U.S.C. section 381.

[14]This of course assumes that the seller and customer are not in the same state.

[15]This analysis has focused on the ordinary and common meaning of P.L. 86-272 but not its contemporary meaning. A statute's contemporary meaning is its meaning at the time that the statute was enacted. *Perrin*, 444 U.S. at 42; and *Wisconsin Central Ltd. v. United States*, 138 S. Ct. 2067, 2074 (2018). One could argue that a "business activity within" a state could *never* include internet-based activities because those activities did not exist when P.L. 86-272 was enacted in 1959. On the other hand, the Court recently clarified that a federal statute's plain language may lead to results that were not anticipated by Congress at the time of the statute's enactment. *See Bostock v. Clayton County*, No. 171618 (U.S. June 15, 2020) (holding that Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating against homosexual and transgender individuals, even if this result was not anticipated by Congress at the time of the statute's enactment). Regardless, even if P.L. 86-272 could be applied to internet-based activities according to the contemporary meaning of the statute, that application would also need to be consistent with the common and ordinary meaning of the statute.

The Internet Rule's Reliance on *Wayfair* Is Misplaced

The Internet Rule is not saved by the *Wayfair* decision. The Revised Statement explains that:

> The Supreme Court recently opined, in *South Dakota v. Wayfair, Inc.*, construing the Commerce Clause, that an Internet seller "may be present in a State in a meaningful way without that presence being physical in the traditional sense of the term." 138 S. Ct. 2080, 2095 (2018). Although the *Wayfair* Court was not interpreting P.L. 86-272, the Supporting States consider the Court's analysis as to virtual contacts to be relevant to the question of whether a seller is engaged in business activities in states where its customers are located for purposes of the statute.[16]

The Revised Statement does *not* explain how *Wayfair* is relevant to the construction of P.L. 86-272. Indeed, it cannot give an explanation because *Wayfair*, and any discussion of virtual presence therein, does not inform P.L. 86-272's proper interpretation. The *Wayfair* Court addressed the dormant commerce clause and therefore was *not* bound by rules of statutory construction.

If the Court were to examine the Internet Rule, it would need to interpret P.L. 86-272 based on the common and ordinary meaning of the statute's text, as required in any statutory analysis (as discussed above).[17] The Court recently explained:

> When the meaning of the statute's terms is plain, our job is at an end. The people are entitled to rely on the law as written, without fearing that courts might disregard its plain terms based on some extratextual consideration.[18]

The Revised Statement does precisely what the Court cautions against: It disregards the plain terms of P.L. 86-272 based on an "extratextual consideration" — that is, the expansion of internet-based commerce — transforming what should be an exercise in statutory construction into an exercise in policymaking — "the last line of defense for all failing statutory interpretation arguments."[19]

The Internet Rule Reflects Policymaking Rather Than Statutory Interpretation

Not only is the Internet Rule inconsistent with P.L. 86-272, but the rule is also applied inconsistently within the Revised Statement, further demonstrating its detachment from the statutory text. This detachment is particularly evident when one considers the Revised Statement's inconsistent treatment of the acceptance of orders and the presentation of static information through the internet, leading to the conclusion that the Internet Rule reflects policy judgments rather than statutory interpretation.

Accepting Orders Through the Internet

If a seller approves or accepts an order in a state, it loses P.L. 86-272 immunity in that state. Under the Internet Rule, if a seller uses the internet to interact with a customer located in a state, the seller performs a business activity in that state. It follows that if a seller accepts an order from a customer through the internet, the seller accepts that order in the state where the customer is located and, therefore, loses P.L. 86-272 protection in that state. Taken to its logical limits, the Internet Rule, if it had the force of law, would strip all internet vendors of P.L. 86-272 protection.

The Revised Statement adopts the view that a seller would *not* lose P.L. 86-272 protection if its activities were limited to selling tangible personal property over the internet. We agree but highlight the Revised Statement's uneven application of the Internet Rule to demonstrate its arbitrary nature. Nothing in P.L. 86-272 supports disparate treatment of the internet-based acceptance of orders and other internet-based activities (for example, accepting applications for branded credit cards). The disparate treatment instead appears to reflect a policy judgment: Treating an

[16] Revised Statement, at 2.

[17] Even if *Wayfair* were somehow relevant to the interpretation of P.L. 86-272, the *Wayfair* Court did *not* hold that a "virtual presence" constitutes presence within in a state for purposes of taxation. In its discussion of virtual presence, the Court was merely highlighting the arbitrariness of the physical presence standard.

[18] *Bostock*, No. 171618 at 24.

[19] *Id.* at 30-31.

internet-based acceptance of an order as an in-state business activity under P.L. 86-272 would simply go too far.

Presenting Static Information Through the Internet

Under the Internet Rule, the seller performs a business activity in a state only when it "interacts" with a customer in that state. The Revised Statement thus provides:

> When a business presents static text or photos on its website, that presentation does not in itself constitute a business activity within those states where the business's customers are located.[20]

Based on the foregoing, a seller that posts an instruction manual on its website does not perform a business activity in the state in which a customer accesses those instructions. But if that same seller were to convey those same instructions to that same customer through an electronic chat, the seller would perform a business activity in the state where the customer is located and, if the Revised Statement had the force of law, lose its protection under P.L. 86-272.

Nothing in the language of P.L. 86-272 supports disparate treatment of technical assistance provided by static text and technical assistance provided by interactive chat. If a seller's sales representative, physically located in a state, provided an instruction manual to one customer and verbal instructions to another, would the former activity be protected and the latter activity be unprotected? This distinction is impossible to justify as a matter of statutory interpretation. It instead appears to reflect another policy judgment: Treating the presentation of static text on a website as an in-state activity would simply go too far.

Conclusion

The Internet Rule reflects an incorrect interpretation of P.L. 86-272; therefore, the MTC should remove the Internet Rule from the Revised Statement. The Court's decision in *Wayfair* places increased pressure on P.L. 86-272, potentially making the statute the last line of defense for many interstate businesses against state corporate income taxes. Given P.L. 86-272's importance, it is wrong for the MTC to adopt a position based on anything other than a sound legal analysis. ■

[20] Revised Statement, at 8.