Minnesotacare: Workable Financing or Just Wishful Thinking?

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I. INTRODUCTION

The Minnesota Legislature has attempted to create a new era of health care insurance for uninsured and underinsured residents of Minnesota. The rising costs of medical services,1 coupled with an alarming number of people without adequate health insurance,2

1. According to one recent report, on average families spent nine percent of their annual income on health payments in 1980 and 11.7% in 1991. FAMILIES USA FOUNDATION, HEALTH SPENDING: THE GROWING THREAT TO THE FAMILY BUDGET (Dec. 1991). Spending is projected to reach a level of 16.4% of family income by the year 2000. Id.

2. Within the United States, one report estimated there are nearly 34 million
have driven the issue of state subsidized health insurance to the forefront of political debate. Enacted in 1992, MinnesotaCare seeks "to lay a new foundation for the delivery and financing of health care in Minnesota. . . ."3 By passing MinnesotaCare, one of the first comprehensive health care reform plans, Minnesota has taken the initial step down the path of what many people see as inevitable state-subsidized medical insurance for the underinsured and uninsured.4

The most heavily debated issue in MinnesotaCare was its source of financing.5 Although the funding of MinnesotaCare is spread among several different sources,6 the most contentious source involves a two-percent revenue tax upon resident7 and nonresident health care providers.8 The tax on nonresident health care providers is yet an-

3. The Minnesota Health Right Act, Ch. 549, art. 1, § 1, 1992 Minn. Laws 1487, 1488 (codified at MINN. STAT. § 62J.015 (1992)). The recently enacted MinnesotaCare has already undergone an attack upon its name. When originally conceived, the statute was referred to as HealthRight. Donna Halvorsen & Tom Hamburger, Durenberger Says Health-Care Law Waiver Won't Be Granted This Session, MPLS. STAR TRIB., Sept. 26, 1992, at 1B. This name was changed after potential copyright infringement problems arose. Id. The statute was finally given its present title of MinnesotaCare. Ch. 247, art. 4, § 18, 1993 Minn. Laws 1365, 1397. For convenience, the Act will be referred to as "MinnesotaCare" and citation will be made according to Minnesota Statutes where appropriate.


6. This Comment focuses mainly on the funding derived from the imposition of a two percent gross revenue tax on nonresident health care providers; MinnesotaCare's funding, however, is spread out among several different sources. MinnesotaCare calls for revenue contributions from the following sources: (1) a five percent tax increase on cigarettes; (2) a two percent tax on gross revenues of wholesale drug distributors; (3) a two percent gross revenue tax on hospitals and other health care providers; and (4) a tax on persons receiving "prescription drugs for resale or use in Minnesota, other than from [a distributor covered in subdivision 3] . . . equal to two percent of the price paid." The Minnesota Health Right Act, Ch. 549, art. 9, §§ 7(1)-(4), 16, 992 Minn. Laws 1487, 1613, 1616.

7. MINN. STAT. § 60A.15(1) (1992). MinnesotaCare mandates the levying of a gross revenue tax upon hospitals, surgical centers, and other health care providers. Id. § 295.50. For purposes of convenience, in this Comment, these different medical entities will be referred to collectively as "health care providers."

8. Id. § 60A.15(1)(a). In relevant part, the statute states:

    every domestic and foreign company, including town and farmers' mutual insurance companies, domestic mutual insurance companies, health maintenance organizations, and nonprofit health service corporations, shall pay to the commissioner of revenue installments equal to one-third of the insurer's total estimated tax for the current year. [I]installments must be based on a sum equal to two percent of the premiums . . . .
other form of the often litigated sales and use taxes employed by states to recover revenue on goods and services sold to its residents.

This Comment will analyze the portions of MinnesotaCare that address the financing of the insurance program and specifically the revenue raised from taxing nonresident health care providers. This Comment will emphasize the difficulties likely to be encountered by Minnesota in seeking to enforce the tax, especially in light of due process and Commerce Clause limitations on a state’s ability to tax interstate commerce.

II. THE LEGISLATIVE HISTORY AND PURPOSE OF MINNESOTA CARE

On April 23, 1992, Governor Arne H. Carlson signed into law the controversial health care reform legislation, MinnesotaCare. The complexity of the law and its lofty objectives were matched only by its overwhelming length.9 MinnesotaCare listed a plethora of objectives10 but sought mainly to address two recurring problems burdening the health care industry: the lack of cost containment for health care services and insufficient access to adequate health insurance.11

The cost of health care sharply increased during the past decade. One recent study released by Families USA Foundation stated that nationwide the average health payments for a typical family increased by over 146% from 1980 to 1991.12 Based on current trends in inflation and the economy, this study predicted that American families will on average pay $9,397 each year for health care by the year 2000. This represents a 439% increase over the last two decades.13 Cognizant of these predictions, Minnesota became one of the first states in the nation to pass legislation to combat this ris-
ing national problem.14

A. Background

In September 1989, the Minnesota Health Care Access Commission was appointed by Governor Rudy Perpich and was charged with the task of recommending a comprehensive plan to provide access to health care for all Minnesotans.15 The commission found that access to health care was a major problem for most Minnesotans, a problem attributed to insurance practices and high costs throughout the system.16 While the problem appeared intensified in rural areas, the commission concluded that adequate access to health care was an achievable goal.17 Also included in the commission's report was a plan designed to improve management of health care costs.18

The commission further noted that insurance rates varied greatly among individuals because insurance adjusters used personal factors such as gender, current health status, and preexisting health conditions to set rates for each individual.19 Opponents of this method alleged that such practices discriminate against women, the sick, and the elderly. These perceived injustices, along with the high level of noncoverage in Minnesota, provided the impetus for the commission's proposed reform of rate setting policies within the insurance industry.20

This proposed reform was the commission's most important rec-
ommendation. The commission recommended changing the rate justification from one based on health status, gender and preexisting conditions to a system utilizing a "community rating" method of premium rate setting. Under a community rating method, insurance premium rates would generally decrease because the average overall community health determines the rate, and the health of the individual insured becomes irrelevant. Costs are spread out to all members of the community, underwriting the higher health care expenses of women, children, and the aged.

B. Legislative Action

Senator Linda Berglin and Representative Paul A. Ogren introduced the MinnesotaCare bill to the legislature. Although the bill enjoyed a surprising amount of bipartisan support, concerns over the bill's complexity and financing hampered its passage.

1. Changes in Rate Determination

MinnesotaCare mandates radical changes in current industry-wide insurance practices, including underwriting and rating practices for individuals and small businesses. The purpose of the proposed insurance reform is to combat the increasing costs of health care and to lower the burden of these costs throughout the state. A series of restrictions have been placed upon insurers' ability to determine rates and coverage to aid employers and individuals in obtaining health insurance. For example, health carriers may not cancel or fail to renew a policy due to the health status of the policy holder.

22. Id. at 53-60. Under a community rating method, premium rates are "based on the average cost of actual or anticipated health care used by all subscribers in a specific geographic area." House Comm. on Interstate & Foreign Commerce, A Discursive Dictionary on Health Care, 94th Cong., 2d Sess., 33 (Feb. 1976). The community rating method spreads the costs of health care—specifically illnesses—evenly across the entire community rather than charging individuals based on personal factors. Id. One advantage of such a rating system is that premiums do not vary from individual to individual because of factors such as age, sex, or existing health status. Id.
23. Commission, supra note 15, at 15. The commission viewed implementation of the "community rating" method as an effective tool to control premium rates for individual and small group plan holders by eliminating insurance restrictions because of preexisting conditions and other factors causing health care costs and, correspondingly, premiums to increase. Id. at 16. In particular, the commission found that current insurance practices discriminated against women, children, the elderly, and those with disabilities or health problems. Id.
25. Id. § 62.015.
26. Id.
27. Id. § 62A.31(1).
nor may they determine premium rates based upon the sex of the insured.28

2. Changes in Rural Health Care

The legislature also addressed the particular health care problems of rural Minnesota.29 Generally, policy holders in a rural locale pay more for insurance than policy holders in a metropolitan area. To address this problem, MinnesotaCare established an Office of Rural Health30 to increase the quality of health care in rural Minnesota.31 For example, MinnesotaCare utilized the Rural Physician Education Account32 that provides for loan forgiveness incentives to medical school residents who locate in rural Minnesota.33

3. Collection of Data and Research

Another objective set forth in MinnesotaCare is the continuing collection of data and research to “improve the efficiency and effectiveness of health care in Minnesota.”34 A health care analysis unit has been created to collect data to promote improvements in health care provider efficiency and effectiveness35 and to develop outcome based practice guidelines to ensure that appropriate and effective care is rendered.36 Finally, the legislation seeks to promote alternative dispute resolution in medical malpractice cases37 and attempts to streamline discovery.38

4. Financing MinnesotaCare

   a. Sin Tax

The financing of MinnesotaCare presented one of the bill’s most controversial aspects. The legislature decided to raise revenue for the program by implementing a “sin tax” on cigarettes39 and a use tax on health care providers.40 The cigarette tax consists of a five cent tax increase in the already existing tax on each pack of cigarettes

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31. Id. § 144.1482(1)(4).
34. Id. § 62J.30(2).
35. Id. § 62J.30(3)(4).
36. Id. § 62J.34(1).
37. Id. § 604.11(2).
39. Id. §§ 297.02(1), 297.03(5).
40. Id. § 295.52 (1992).
sold within the state.41

b. Use Tax

Conversely, the use tax has met with much debate. This hotly debated tax consists of a two-percent gross revenue tax on health care providers, including doctors, hospitals, and drug wholesalers.42 A similar one-percent tax was imposed on health maintenance organizations and nonprofit health service corporations.43

MinnesotaCare establishes a variety of different actions by which out-of-state health care providers may fall within Minnesota’s tax jurisdiction.44 These actions range from maintaining an office within the state45 to the solicitation of business from potential customers in Minnesota.46 Regardless of the action, however, the state must still establish some “nexus” between Minnesota and the business activities of the potentially taxed corporation.47

Of particular interest to out-of-state health care providers is MinnesotaCare’s statutory presumption.48 In essence, this presumption states that if, in any calendar year, more than twenty persons domiciled in Minnesota receive services from a health care provider, that provider will be presumed to “regularly solicit business within Minnesota.”49 The effect of this presumption is that an out-of-state health care provider, maintaining no other contact with Minnesota, will be presumed to have a nexus with the state and thus will be subject to the state’s use tax.50 This statutory presumption provides an excellent illustration of the tension that exists between Congress’ power to regulate interstate commerce and a state’s attempt to tax it.

41. Id. § 297.02(1).
42. Id. § 295.52.
44. Id. § 295.51(1).
45. Id.
46. Id. § 295.51(1)(4).
47. For a state to impose a use tax upon an out-of-state corporation there must exist, among other things, a substantial nexus. Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977). For a more comprehensive analysis of the Complete Auto Transit requirements, see infra notes 89-93 and accompanying text.
48. MINN. STAT. § 295.51(2).
49. Id. Specifically, the clause states that “[a] hospital or health care provider is presumed to regularly solicit business within Minnesota if it receives gross receipts for covered services from 20 or more patients domiciled in Minnesota in a calendar year.” Id. The statute provides no guidance or reasoning as to how twenty patients were chosen as the cutoff point for imposition of the tax.
50. The statutory presumption, defining regular solicitation of business in Minnesota as providing services to twenty or more Minnesotans, indirectly establishes a nexus between an out-of-state corporation and the state. See supra note 49.
III. STATE TAXATION AND INTERSTATE COMMERCE

A. Historical Background

The scope of power afforded to Congress and denied to the states in the realm of taxation has been a subject of litigation since 1827, when the Supreme Court first struck down a state tax as violating the Commerce Clause. In *Brown v. Maryland*, the Supreme Court held unconstitutional a state tax placed on goods introduced into the taxing state because taxation of such commerce was a power granted exclusively to Congress via the Commerce Clause. Since *Brown*, the Court has set forth a variety of approaches to address the problem of state taxation of interstate commerce. At the outset, Con-

51. *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419 (1827). The *Brown* Court found that a state imposing a $50 licensing fee upon “all importers of foreign articles, or commodities of dry goods...” entering its boundaries violated the Commerce Clause. *Id.* at 419.

52. *Id.* at 447.


The first approach taken by the Court espoused the view that the Commerce Clause, for all intents and purposes, prohibits all state taxation of interstate commerce, except those done solely for the support of the state’s own government. *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419 (1827); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 10 (1824).

A second approach focused upon the question of whether the state’s regulation had an effect that was primarily national or local in character. *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299 (1852). Here, the latter regulation was within the taxing power of the states while the former was not. *Id.* at 319; accord *Gloucester Ferry Co. v. Pennsylvania*, 114 U.S. 196, 203-04 (1885); *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35, 42 (1868); *Gilman v. Philadelphia*, 70 U.S. (3 Wall.) 713, 726-27 (1866).

The Court’s third approach looked for congressional action—or inaction—in the area of a particular state taxation before ruling on the validity of the tax. Under this approach, where the power of Congress to regulate was exclusive, states were allowed to regulate matters of local concern only in the absence of previous congressional regulation. *Robbins v. Shelby County Taxing Dist.*, 120 U.S. 489, 493 (1887); *Reading R.R. v. Pennsylvania*, 82 U.S. (15 Wall.) 232, 248 (1873).

The Court’s fourth approach queried whether the state tax placed interstate commerce at a commercial disadvantage because of the risk of multiple taxation. *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250, 255-59 (1938). Although condemning state taxes which would be cumulative, the Western Court stated that “[e]ven interstate business must pay its way.” *Id.* at 254 (quoting *Postal Telegraph-Cable Co. v. Richmond*, 249 U.S. 252, 259 (1919)). The Court stated that, in order for a state tax to be upheld, it should not cause “cumulative burdens [upon interstate commerce] not imposed on local commerce.” *Western*, 303 U.S. at 256.

A fifth approach appeared to place more value on form than on substance. Under the direct-indirect approach, a state tax upon interstate commerce was upheld if indirectly levied but struck down if found to be “a direct tax on interstate sales.” *Freeman v. Hewit*, 329 U.S. 249, 256 (1946). Taken to its extreme, the Court struck down taxes levied upon “the privilege of carrying on exclusive interstate [commerce] in [a] State.” *Spector Motor Serv., Inc. v. O’Connor*, 340 U.S. 602, 608 (1951), over-
gress enjoyed nearly complete control over the regulation of interstate commerce.\(^{54}\) This exclusive control, however, eroded over time.\(^{55}\) Presently, courts analyze state taxation using a case by case analysis of due process and Commerce Clause implications of the tax.\(^{56}\) This section will provide an overview of the Supreme Court’s treatment of sales and use taxes on interstate commerce with a view toward how the Court’s past rulings may affect the newly enacted MinnesotaCare.\(^{57}\)

1. The Early Decisions

The Commerce Clause initially granted the federal government almost total power to regulate interstate commerce.\(^{58}\) At one time, the Commerce Clause was considered an exclusive grant of authority to Congress to regulate the area of interstate commerce.\(^{59}\) The plenary power of Congress over such commerce, however, was just one of many approaches applied by the Supreme Court over the past two

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ruled by Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977). This test proved difficult to apply because the direct-indirect distinction was too nebulous.


55. One cogent example of the erosion of Commerce Clause power is that state taxation, which in the past would have been considered a usurpation of Congress’ plenary power to regulate interstate commerce, has been increasingly allowed especially when viewed by the Court as an effort by the state to support its government. See Boston Stock Exch. v. State Tax Comm’n, 429 U.S. 318, 328-29 (1977).


57. For a more complete discussion of the history of state taxation on interstate commerce and the ramifications of the Due Process and Commerce Clauses, see Hartman, supra note 53.


59. Throughout much of this nation’s history, no federal legislation restricted the power of the states to tax interstate commerce. Initially, because of holdings such as Brown v. Maryland, 25 U.S. (12 Wheat.) 419 (1827), there was no need for Congress to adopt such legislation. Indeed, Chief Justice Marshall summarized the issue well: “W[h]en a State proceeds to regulate commerce with foreign nations, or among the several States, it is exercising the very power that is granted to Congress, and is doing the very thing which Congress is authorized to do.” Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 199-200 (1824).

As time passed, however, the Supreme Court’s stance on the role of state taxation of interstate commerce changed. See Hartman, supra note 53. To avoid losing even more of its power under the Commerce Clause, Congress moved to adopt legislation restricting the power of the states to tax interstate commerce. See 15 U.S.C. § 381 (1988); see also infra note 75.
Early cases involving interstate commerce granted little, if any, power to the states to tax business transacted across their borders. In *Leloup v. Port of Mobile*, the Supreme Court unequivocally held that "no State has the right to lay a tax on interstate commerce in any form." Yet, efforts by the states to impose taxes upon the transactions of interstate commerce continued. Eventually, the hard-line approach originally espoused by the Court gave way to a more flexible line of reasoning.

After *Leloup*, the Court vacillated between two distinct approaches regarding state taxation of interstate commerce. The first analysis was the "direct-indirect burden" approach. Under this approach, courts sought to determine whether the burdens placed upon interstate commerce by the tax were direct or indirect. Typically, a tax was characterized as indirect if it was imposed only upon a purely local business activity that the courts viewed as having little effect on interstate commerce. This approach proved difficult to apply on a consistent basis, and eventually the Court focused upon the likelihood that state taxes might impose a risk of multiple taxation on corporations involved in interstate commerce. The Court, however,
has not strictly adhered to this approach but has continued to use both approaches in searching for an effective analysis to resolve the taxation cases.\(^69\)

\[2. \text{ Modern Trends}\]

By 1959, the unrestricted freedom from state taxation for interstate commerce ended. *Northwestern States Portland Cement Co. v. Minnesota*\(^70\) held that the net income of an out-of-state corporation engaged solely in interstate commerce could be taxed by a state where the corporation did business.\(^71\) The Court determined that Northwestern States Cement’s activities formed a “sufficient nexus” between the tax and the transaction.\(^72\) The Court also held that the State of Minnesota had provided enough services to Northwestern States Cement to ask for the tax in return.\(^73\) The Court, however, qualified its holding: (1) the tax was limited to income derived only from local activities of the corporation within the taxing state; and (2) there must exist a “sufficient nexus” between the taxation and the corporation’s local activities within the state.\(^74\) Moreover, the Court stated that any state tax levied upon interstate commerce must comport with both Due Process and Commerce Clause requirements.\(^75\)


\(^70\) 358 U.S. 450 (1959). *Northwestern States Cement* was decided along with Stockham Valves & Fittings, Inc. v. Williams, 101 S.E.2d 197 (Ga. 1957). *Id. Northwestern States Cement* involved an Iowa corporation conducting business in Minnesota by soliciting orders, maintaining a three-room office, and receiving claims for lost or damaged goods during shipments to Minnesota purchasers. *Id.* at 454-55. The state tax, which was upheld by the Minnesota Supreme Court, sought to impose upon in-state and out-of-state corporations a tax on the taxable net income derived from sales made within the state. *Id.* at 453.

*Stockham* involved a Delaware valve and pipe fitting manufacturer that maintained a sales and service office in Atlanta. *Id.* at 455. Stockham engaged in soliciting, receiving, and forwarding of orders from its Georgia office to its home office in Birmingham, Alabama. *Id.* at 456. In neither case did the out-of-state corporation own real property within the taxing state. *Id.* at 454, 456. Unlike the *Northwestern States Cement* decision, *Stockham* was on appeal after being struck down by the Georgia Supreme Court as violating the Commerce and Due Process Clauses of the Federal Constitution. *Id.* at 452.

\(^71\) *Id.* at 464-65.

\(^72\) *Id.* at 464.

\(^73\) *Id.* at 465 (quoting Wisconsin v. J.C. Penney Co., 311 U.S. 435, 444 (1940)).


\(^75\) *Id.* at 464-65. The Court limited its discussion of due process to a cursory observation that each corporation had the requisite “minimum contacts” to justify the state tax. *Id.*
Later that same year, Congress enacted a statute to limit the power of the states to tax interstate business transactions.\textsuperscript{76} The statute provided two means by which out-of-state corporations could avoid state taxation.\textsuperscript{77} First, no tax could be levied upon a corporation whose only business activities in the taxing state consisted of the solicitation of orders for sales of tangible personal property that were subsequently rejected or approved and filled for delivery from a location outside of the taxing state.\textsuperscript{78} Second, no tax could be levied if the business activities consisted of a solicitation of orders to a prospective customer, so long as the order fell into the description given in the first exception.\textsuperscript{79}

\textsuperscript{76} 15 U.S.C. § 381 (1988). The statute reads as follows:
(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 on behalf 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, or [sic] 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.

Subsequent court decisions have confirmed the implications of the statutory language that an out-of-state corporation is immune to state taxation even if it maintains an office within the state if its business activities relate solely to the solicitation of orders.80

B. National Bellas Hess, Inc. v. Department of Revenue

In 1967, the United States Supreme Court addressed whether a state could impose a use tax81 upon an out-of-state corporation whose only contacts with the taxing state were through the United States postal service or by common carrier.82 In *National Bellas Hess, Inc. v. Department of Revenue*,83 the State of Illinois sought to tax a mail-order house corporation.84 The Court ruled that regulation of a mail-order house was of “exclusive interstate character,”85 thus regulation of such an operation fell solely under the Commerce Clause and therefore completely under the control of Congress.86 Of particular importance in determining the interstate character was the fact that Bellas Hess maintained no “retail outlets, solicitors, or property within [the] state.”87 Thus, the Court continued to require a corporation’s physical presence within a state before allowing any taxation.88

Following *Bellas Hess*, the Supreme Court again faced “the perennial problem of the validity of a state tax . . . related to a corpora-

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81. A use tax has been defined as “a levy on the privilege of using within the taxing state property purchased outside the state, if the property would have been subject to the sales tax had it been purchased at home.” King v. L. & L. Marine Serv. Inc., 647 S.W.2d 524, 526 (Mo. 1983) (en banc), overruled by Director of Revenue v. Superior Aircraft Leasing Co., 734 S.W.2d 504 (Mo. 1987). Such taxes are commonly used by states to protect their respective sales taxes by removing the incentive for their residents to purchase items from other states having lower sales taxes. Minneapolis Star & Tribune Co. v. Minnesota Comm’r of Revenue, 460 U.S. 575, 577 (1983).

82. National Bellas Hess, Inc. v. Department of Revenue, 386 U.S. 753, 754 (1967). *Bellas Hess* involved a mail order house that maintained its principal place of business in Missouri but was incorporated in Delaware. *Id.* at 753-54. The company’s only contacts with Illinois consisted of issuing bi-annual catalogues, occasional advertising “flyers [to] . . . past and potential customers,” and delivery of ordered goods. *Id.* at 754. All of the contacts were conducted exclusively through the mail. *Id.*

83. 386 U.S. 753 (1967).

84. *Id.* at 753.

85. *Id.* at 759.

86. *Id.* at 759-60.

87. *Id.* at 758.

tion's operation of an interstate business." In Complete Auto Transit, Inc. v. Brady, the Court examined a state sales tax that allegedly violated the Commerce Clause by taxing an out-of-state corporation for the privilege of engaging in business within the State of Mississippi. Rejecting a previous line of cases, the Court held the statute did not offend the Commerce Clause. In addition, the Court set forth a four-pronged test to determine whether a state tax will withstand a Commerce Clause challenge. Under Complete Auto Transit the tax:

(1) must be applied to an activity having a substantial nexus with the taxing state;
(2) must be fairly apportioned;
(3) must not discriminate against interstate commerce; and
(4) must be fairly related to the services provided by the state.

This four-pronged test provides the current analysis for any case involving state taxation of interstate commerce.

C. Quill Corp. v. North Dakota

On May 26, 1992, the Supreme Court decided Quill Corp. v. North Dakota. The Court again addressed the level of contact required between a mail-order business and a state to permit that state to collect a use tax. Unlike the Bellas Hess holding, however, Quill featured an extensive discussion of due process and Commerce Clause considerations that must be addressed in cases involving the imposition of state taxation upon interstate commerce.

90. Id. The lawsuit arose from a Mississippi statute reading in part: "[t]here is hereby levied and assessed . . . privilege taxes for the privilege of engaging or continuing in business within this state . . . ." Miss. CODE ANN. § 27-65-13 (1990).
91. Complete Auto Transit, 430 U.S. at 289. Here, the Court rejected the rule espoused in Spector Motor Service, Inc. v. O'Connor, 340 U.S. 602 (1951), because its formalistic approach allowed specific words alone to render a statute in violation of the Commerce Clause, thus it "st[ood] only as a trap for the unwary draftsmen." Complete Auto Transit, 430 U.S. at 279.
92. Id. The text of the Complete Auto Transit test reads, in its entirety, as follows:
These decisions have considered not the formal language of the tax statute but rather its practical effect, and have sustained a tax against Commerce Clause challenge when the tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State.
95. Id.
96. Id. at 1909-16. The Court noted that although "every tax that passes contemporary Commerce Clause analysis is also valid under the Due Process Clause, it
The Court's separation of due process and Commerce Clause considerations is significant. In order to survive a constitutional challenge, state taxation must both be authorized under due process mandates and meet Commerce Clause requirements. Due process constrains a state's authority to tax and concerns the "fundamental fairness of government activity." Commerce Clause considerations are pertinent to the goal of unburdened commerce and the freedom of trade in general. The Quill Court attempted to distinguish the requirements of each challenge.

First, the Court addressed the issue of due process in cases of interstate commerce taxation and reiterated the view that "[it] requires some definite link, some minimum connection between a state and the person, property or transaction it seeks to tax." The Court's due process discussion expanded upon the Bellas Hess analysis, noting the substantial evolution of due process jurisprudence in the intervening twenty-five years. Aided by a discussion concerning the instructive procedural holdings of International Shoe Co. v. Washington, Shaffer v. Heitner, and Burger King Corp. v. Rudzewicz, the does not follow that the converse is as well true: a tax may be consistent with Due Process and yet unduly burden interstate commerce."

97. Id. at 1909.
99. Id. at 1913.
100. Id. at 1909-16.
101. Id. at 1909 (quoting Miller Bros. Co. v. Maryland, 347 U.S. 340, 344-45 (1954)).
103. 326 U.S. 310 (1945). In International Shoe, the state of Washington attempted to tax an out-of-state corporation having few contacts with the state. Id. The corporation maintained no offices in the state and employed only a few salespersons who solicited orders from residents. Id. at 315. The corporation then approved and mailed the orders. Id. at 314. From these facts, the Supreme Court held that the corporation was within Washington's in personam jurisdiction because sufficient minimum contacts existed and that bringing suit in Washington did not offend the Court's "traditional conception of fair play and substantial justice." Id. at 320.
104. 433 U.S. 186 (1977). Shaffer involved a shareholder's derivative suit by a plaintiff who sought jurisdiction in Delaware. Id. Although none of the alleged misconduct took place there and none of defendants had any contacts with the state, the Supreme Court held that no in rem jurisdiction existed, stating that "all assertions of state-court jurisdiction must be evaluated according to the standards set forth in International Shoe and its progeny. Id. at 212.
105. 471 U.S. 462 (1985). In Burger King, the Court held that as long as a commercial entity's efforts are "purposefully directed" toward residents in another state, the lack of physical contacts with that state will not prevent personal jurisdiction over the entity. Id. at 476.
Court held that due process does not require a corporation to be physically present within a state to be subject to taxation.\footnote{106} Accordingly, the Court overruled all previous holdings stating otherwise.\footnote{107} Next, the Court addressed the role of the Commerce Clause in state taxation of interstate commerce cases.\footnote{108} Careful to emphasize the purpose of the Commerce Clause as distinct from due process, the Court stated that (1) the substantial nexus requirement serves to limit state burdens upon interstate commerce;\footnote{109} (2) a corporation lacks a “substantial nexus” with a taxing state when the only contacts between them are through the United States mail or common carrier;\footnote{110} and (3) a corporation’s activities may fail to fulfill the requirements for taxation imposed by the Commerce Clause but yet satisfy those requirements imposed by due process.\footnote{111}

The Court also endorsed the Complete Auto Transit “substantial nexus” analysis and indicated that a substantial nexus is more than the requirement of “minimum contacts” under due process.\footnote{112} Quill further indicated that the substantial nexus may be satisfied by the physical presence of the corporation within the state’s borders.\footnote{113} But the Court expressly stated that physical presence is not vital to a finding of substantial nexus.\footnote{114}

Clearly, substantial nexus is more easily contrasted than delineated. The Quill Court provided some guidance by affirming its holding in Bellas Hess.\footnote{115} The Bellas Hess “bright-line” test provides a protective shield for out-of-state corporations against state taxation when the corporation’s only contact with the state is through the

\footnotesize{106. Quill Corp. v. North Dakota, 112 S. Ct. 1904, 1911 (1992). Utilizing International Shoe, the Court noted that due process demands that a defendant have “certain minimum contacts with [the state] such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’” Id. at 1910 (quoting International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945)). The Court cited Shaffer to express the idea that a corporation conducting more than a minimal amount of business within a state has “fair warning that [its] activit[ies] may subject [it] to the jurisdiction of a foreign sovereign.” Id. at 1911 (quoting Shaffer v. Heitner, 433 U.S. 186, 218 (1977) (Stevens, J., concurring in judgment)). Finally, the Court cited Burger King in support of the proposition that “jurisdiction . . . may not be avoided merely because the defendant did not physically enter the forum State.” Id. at 1910 (quoting Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476 (1985)).}

\footnotesize{107. Quill, 112 S. Ct. at 1911.}

\footnotesize{108. Id. at 1911-16.}

\footnotesize{109. Id. at 1913.}

\footnotesize{110. Id. at 1912.}

\footnotesize{111. Quill Corp. v. North Dakota, 112 S. Ct. 1904, 1913-16 (1992).}

\footnotesize{112. Id. at 1912, 1913-14.}

\footnotesize{113. Id. at 1914.}

\footnotesize{114. Id. The Court stated that “we have not, in our review of other types of taxes, articulated the same physical-presence requirement that Bellas Hess established for sales and use taxes. . . .” Id.}

\footnotesize{115. Quill Corp. v. North Dakota, 112 S. Ct. 1904, 1914-16 (1992).}
The Court promoted the *Bellas Hess* “bright-line” test as “good law,” that “firmly establishes the boundaries of legitimate state authority to . . . collect sales and use taxes” and “furthers the ends of the dormant Commerce Clause.” The Court embraced the “bright-line” *Bellas Hess* rule because the benefit of its clear guidelines outweighed any objections to its artificial benchmark.

The Court recognized Congress’ power to regulate commerce, but in the absence of concrete legislation governing such transactions, the Court did not further define the standard. The Court indicated that the amorphous “substantial nexus” requires something more than “minimum contacts” but something less than unequivocal physical presence and that only Congress has the authority to place restrictions on such interstate commerce.

Through its holding in *Quill* and its affirmation of *Bellas Hess*, the Supreme Court held that, barring any congressional action on the matter, states will be restricted from taxing out-of-state mail-order houses having only minimal contacts with the state. The holding, although restricted to only mail-order houses, logically would seem to extend to other corporations with a similar lack of contacts.

116. Id. at 1914.
117. Id. at 1916. The Court upheld *Bellas Hess* because its “bright-line” rule works especially well for mail-order houses and because the established rule had “encourage[d] settled expectations and, in doing so, foster[ed] investment by businesses and individuals.” Id. at 1915.
118. Id. at 1915.
119. Id. at 1914.
121. In *Quill*, the Court noted that the underlying issues of the case presented problems that “Congress may be better qualified to resolve, . . . [and] has the ultimate power to resolve.” Id. at 1916. In reaffirming the “bright-line” test of *Bellas Hess*, the Court noted that Congress recognized the tension surrounding taxation of mail-order houses but had failed to pass any legislation to “overrule” *Bellas Hess*. Id. at 1916 n.11. Finally, the Court indicated that no further changes would be made to the judicially created body of law because the final say in the matter fell within the power of Congress. Id.
122. Id. at 1916.
123. In both *Quill* and *Bellas Hess*, the minimal contact occurred through the United States mail or by common carrier. Although this is the only type of contact, to date, that has afforded corporations taxation immunity, it remains to be seen if other substantially similar minimum contacts will provide the same protection.

The Court’s comment in *Goldberg* is insightful with regard to the MinnesotaCare tax on out-of-state health care providers. The *Goldberg* Court intimated that termina-
While the Supreme Court's position on the subject seems quite well-defined at this time, one can speculate as to the prospective effect of the Court's holding upon the sales and use tax imposed upon non-resident health care providers via MinnesotaCare.

IV. MINNESOTACARE: TAXATION OF HEALTH CARE PROVIDERS ENGAGED SOLELY IN INTERSTATE COMMERCE

Ample case law supports the theory that interstate business activities are susceptible to taxation.\textsuperscript{125} Now the question becomes at what point do the activities establish a nexus with the state such as to allow for the imposition of the tax? The Supreme Court's most recent opinion demonstrates that the answer is found by application of Due Process and Commerce Clause analyses.\textsuperscript{126} Under these analyses MinnesotaCare's tax of nonresident health care providers fails to pass constitutional muster.

A. The Cornerstone of MinnesotaCare's Jurisdiction to Tax: Article 9, Section 6

The Minnesota Legislature confronted the issue of taxing health care providers located beyond the state's borders in Article 9 of the Act. The relevant statutory language reads:

A hospital or health care provider is subject to tax . . . if it is 'transacting business in Minnesota.' A hospital or health care provider is transacting business in Minnesota only if it: (1) maintains an office in Minnesota; (2) has employees, representatives, or independent contractors conducting business in Minnesota; (3) regularly sells covered services to customers that receive the covered services in Minnesota; (4) regularly solicits business from potential customers in Minnesota; (5) regularly performs services outside Minnesota the benefits of which are consumed in Minnesota; (6) owns or leases tangible personal or real property physically located in Minnesota; or (7) receives medical assistance payments


\textsuperscript{126} Quill, 112 S. Ct. at 1909-11.
from the state of Minnesota.¹²⁷

The Act also creates the following presumption:

A hospital or health care provider is presumed to regularly solicit business within Minnesota if it receives gross receipts for covered services from 20 or more patients domiciled in Minnesota in a calendar year.¹²⁸

While the statutory language was carefully drafted to comply with previous federal legislation and case law, it diverges from the accepted standard in provision (4) and the associated presumption.¹²⁹ According to the statutory language, the mere solicitation of and subsequent providing of health care services to twenty or more customers from within the state of Minnesota will subject a nonresident health care provider to the two percent gross revenue tax, without any other contacts with Minnesota.¹³⁰ The viability of this particular provision was questioned during the bill’s journey through the legislature.¹³¹ After debating the provision, the clause remained intact in the final version. Applying the appropriate due process and Com-

¹²⁸. Id. § 295.51(2).
¹²⁹. MinnesotaCare sets forth seven different clauses to determine whether an out-of-state business is “transacting business in Minnesota.” Id. §§ 295.51(1)(1)-(1)(7) (1992). See also supra text accompanying note 127. These clauses are closely modeled after previous case law and federal legislation. For example, the Supreme Court has found that maintaining an office within a state is sufficient to subject a corporation’s business activities to state taxation. Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450 (1959). Also, employing representatives or employees to conduct business within a state has led to similar liability. Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977). Finally, corporate ownership of property physically located within a taxing state has been enough to subject out-of-state corporate business activities to state taxation. National Geographic Soc’y v. California Bd. of Equalization, 430 U.S. 551 (1977).
¹³¹. During the House Taxes Committee Hearings on MinnesotaCare, the ability of article 9, section 6 to withstand a challenge in the courts was questioned. House Taxes Comm., Tape 1 (April 8, 1992). In particular, Senator Glen Olson asked one of the bill’s sponsor’s, “[a]re you saying that hospitals that are located over the border, but are delivering services to Minnesota residents will pay the tax for services provided to Minnesota residents?” Id. After further discussion with no definitive answer supplied, Senator Joe Bertram quipped, “[t]he only thing that I have heard from you folks is that the lawyers are still talking, but there is no actuality that any of these [provisions] are going to be able to be implemented the way that you want them to be implemented.” Id.

Arguably all bills passed into law have the potential to be challenged and struck down for a variety of reasons. In the case of this particular law, however, it seems that Senator Bertram’s remark was on target. Although the objectives of the legislation are commendable, a close analysis of Quill exhibits that the taxation of out-of-state health care providers is beyond Minnesota’s power. Perhaps the bill’s authors were aware of the shortcomings but sought to get a version of the bill passed before the end of the term. As Senator Joanne Benson, one of the co-authors, stated during the hearings, “[t]his is not perfect legislation and it will be rewritten many times, I
merce Clause analyses, the provision fails to withstand a constitutional challenge.

B. Due Process Considerations

The Supreme Court's holding in *Quill Corp. v. North Dakota* is instructive regarding the requirements of due process for state taxation of interstate commerce. The overriding concerns of due process require that before a state can tax interstate commerce there must be a sufficient connection or contact between a foreign corporation's business activities and the state to establish the state's jurisdiction to tax. While there exists no per se requirement of the corporation's physical presence within the taxing state to establish such jurisdiction, more often than not this is how the requirement is satisfied. If the corporation is not physically present within the state, the contact must be sufficient enough to place the corporation on notice that its business activities may subject it to the state's jurisdiction.

In the case of most health care providers, due process requirements will provide only a small hurdle for MinnesotaCare. Any provider physically located within Minnesota, maintaining office space, or employing agents within the state is unequivocally within the state's tax jurisdiction. The difficulty arises when, for example, Hospital XYZ, located solely in Grand Forks, North Dakota, provides health care services to twenty or more Minnesotans within one year.

Under the present language of MinnesotaCare, even assuming that Hospital XYZ maintains no other contacts with Minnesota, the hospital will be subject to a two percent tax on the gross revenues received

suspect, in the next decade. But it is a start and it is an opportunity for this state to be a model for other states and ultimately for the nation.” *Id.*

133. *Id.* at 1909-16.
134. A health care provider that maintains office space within the State of Minnesota and provides services to its residents is within the state's jurisdiction to tax because, in so doing, the provider fulfills all four prongs of the Complete Auto Transit test. *See supra* note 92.
135. In testimony before the Minnesota Legislature, Dr. F. Mark Carter on behalf of the Grand Forks Clinic, Ltd. in North Dakota voiced opposition to enactment of MinnesotaCare. *SENATE TAXES COMM. HEARING ON MINNESOTACARE, TESTIMONY OF DR. F. MARK CARTER* (Apr. 2, 1992). The Grand Forks Clinic has a network of satellite branches located throughout the northwestern region of Minnesota. *Id.* at 1. Carter stated that MinnesotaCare “is going to have a severe negative impact on physician recruitment and retention.” *Id.* This in turn will lead to decreased services to residents of the state who live in the affected area. Carter further argued that, although physicians may pass on the costs to insurers, in reality the cost would be borne by “the salaries of the hard-working primary care physicians who service . . . patients in Northwestern Minnesota.” *Id.*
as a result of the services provided to Minnesota residents. Because Hospital XYZ provided health care services for twenty Minnesotans, it is presumed to have "regularly solicit[ed] business" from Minnesota.

This conclusion is not only unjustified but also violates the underlying due process principles. In the above hypothetical, Hospital XYZ is located beyond the boundaries of Minnesota. Thus, something other than the physical presence of the corporation must satisfy the notice requirement of state taxation jurisdiction. Second, the hospital maintains no personnel, office space, property, or agency in Minnesota. This leaves only the existence of "solicitation" as a possible basis for claiming that the hospital has a connection with the state. Assuming that Hospital XYZ has not undertaken an extensive advertising campaign, the existence of its "solicitation" rests solely on MinnesotaCare's statutory presumption based on the number of Minnesotans provided health care services. This connection is tenuous at best.

In Quill Corp. v. North Dakota, the Supreme Court stated that a business "engaged in continuous and widespread solicitation of business within a State... has 'fair warning that its activities may subject..."


137. Id. § 295.51(4) (1992).

138. Although never defined in MinnesotaCare, it is apparent that solicitation is very closely connected to substantial nexus. Thus, it is crucial to establish the proper definition of solicitation in determining constitutional challenges. The Supreme Court has held that an out-of-state corporation lacks a sufficient nexus with a taxing state unless it invades or exploits that state's consumer market. Miller Bros. Co. v. Maryland, 347 U.S. 340, 347 (1954). In Miller Bros., a Delaware corporation was found not to have exploited Maryland's consumer market even though it had (1) advertised on radio and in print in Maryland; (2) mailed sales flyers to former customers in Maryland; and (3) delivered some purchases, using its own vehicles, to common carriers in Maryland. Id. at 341-42. The Court emphasized the fact that sales were made without the use of agents in Maryland and with "no solicitation other than the incidental effects of general advertising." Id. at 346-47 (emphasis added).

Conversely, the Supreme Court has held that a Georgia-based corporation employing ten salespersons conducting continuous solicitation in Florida established a sufficient nexus to justify a Florida state tax. Scripto, Inc. v. Carson, 362 U.S. 207 (1960). In support of its position, the Court cited the fact that property was purchased by Florida residents and entered into the state and that the only aspect of the sale that was not local in character was the acceptance of the sales order. Id. at 211.

MinnesotaCare appears to be more closely analogous to the situation in Miller Bros. Nonresident health care providers will not likely employ agents to solicit out-of-state health services to Minnesotans such as was the case in Scripto. Further, no tangible property would be brought back into the state by residents who have received such services. Finally, it appears that mere advertising by radio, television, or printed media will not, in the absence of more, be enough to evoke the statutory presumption of solicitation.

it to the jurisdiction of [that state].”\textsuperscript{140} Although Quill involved a mail-order house whose solicitation with the taxing state occurred solely through the United States mail or by common carrier, the Court’s reasoning is equally applicable to this situation.

Solicitation by the foreign corporation must be proven by specific facts.\textsuperscript{141} Under MinnesotaCare, proof of solicitation exists only by virtue of the statutory presumption. The presumption is utilized to prove the ultimate fact. The statute itself defines solicitation through the presumption, namely that because twenty or more Minnesotans were served, solicitation exists.\textsuperscript{142} The reasoning is circular and, in fact, no solicitation whatsoever is established. Due process dictates that something more than MinnesotaCare’s presumptive language is required to establish Minnesota’s jurisdiction to tax out-of-state health care providers.

C. Commerce Clause Considerations

Even assuming that the tax provision meets due process requirements, another hurdle must be cleared before the state may impose the tax. The tax must also withstand Commerce Clause challenges which, according to the Supreme Court, typically provide a more stringent test.\textsuperscript{143} The Commerce Clause analysis serves to limit state burdens on interstate commerce and is guided by the four-pronged Complete Auto Transit test.\textsuperscript{144}

\textbf{1. Application of the Complete Auto Transit Test}

In 1977, the Supreme Court held that a state tax on interstate business activities would survive a Commerce Clause challenge only if the tax meets four requirements.\textsuperscript{145}

The first requirement from Complete Auto Transit is that the taxed business activity must have a substantial nexus with the taxing state.\textsuperscript{146} Although the exact meaning of this term is somewhat nebulous, it falls somewhere between actual physical presence and “slightest presence.”\textsuperscript{147} Because the focus of the nexus requirement

\begin{itemize}
  \item \textsuperscript{140} Id. at 1911 (citing Shaffer v. Heitner, 433 U.S. 186, 218 (1977)).
  \item \textsuperscript{141} See supra note 138.
  \item \textsuperscript{142} MINN. STAT. § 295.51 (1992).
  \item \textsuperscript{143} The Court stated that “a corporation may have the ‘minimum contacts’ with a taxing State as required by the Due Process Clause, and yet lack the ‘substantial nexus’ with that State as required by the Commerce Clause.” Quill, 112 S. Ct. at 1913-14; see also supra note 112 and accompanying text.
  \item \textsuperscript{144} See supra note 92 and accompanying text.
  \item \textsuperscript{145} Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977). See supra notes 89-93 and accompanying text.
  \item \textsuperscript{146} Id.
  \item \textsuperscript{147} In National Geographic the Court expressly rejected the California Supreme Court’s ‘slightest presence’ standard of constitutional nexus.” National Geographic
\end{itemize}
is to limit state burdens on interstate commerce, the term need not be specifically defined to be effectively applied. Although a corporation’s activities may have a connection with a taxing state, any state taxation may be prohibited upon a finding that the nexus between the two does not justify the burden.\textsuperscript{148}

Applying the hypothetical involving Hospital XYZ located in Grand Forks, North Dakota, the MinnesotaCare tax fails to survive a Commerce Clause challenge. The hospital is not physically located within the state of Minnesota; hence, the substantial nexus must be established in a different manner. One possible method by which this may be accomplished is by arguing that XYZ is present because it advertised or solicited. Even so, it is unlikely that the hospital’s general solicitation, without proof that XYZ specifically targeted Minnesota, would satisfy the nexus requirement.\textsuperscript{149}

The Commerce Clause analysis could include every health care facility in close proximity to Minnesota that provides a convenient or necessary outlet for health care for Minnesotans. Merely providing services to more than twenty people could be legally considered as creating a substantial nexus for Minnesota to obtain jurisdiction to tax.\textsuperscript{150} But this argument will not stand in light of previous Commerce Clause decisions. The mere fact that twenty Minnesota residents leave the state to receive health care creates neither a substantial nexus between the health care provider and Minnesota nor justifies taxation of the service.\textsuperscript{151}


\textsuperscript{149} A similar question was raised in Quill. See infra notes 168-174 and accompanying text.

\textsuperscript{150} MINN. STAT. § 295.51 (1992).

\textsuperscript{151} In Quill, the Supreme Court stated that the state tax was illustrative as an undue burden on interstate commerce. Quill, 112 S. Ct. at 1913 n.6. The state law imposed a duty to collect a use tax upon each out-of-state vendor that advertised
The second *Complete Auto* requirement is that the tax be fairly apportioned.\(^{152}\) For a tax to be fairly apportioned, the tax burden must reflect a proportional relationship to the fraction of interstate activity taking place within the taxing state.\(^{153}\) Thus, if a corporation transacts fifteen percent of its gross sales in a particular state, a tax of fifteen percent on total gross sales would be fairly apportioned.\(^{154}\) MinnesotaCare narrowly defines gross revenues of nonresident health care providers to include only income generated from services provided to individuals living in Minnesota.\(^{155}\) All taxed revenue is generated by Minnesota residents and the two percent tax is a fair reflection of a nonresident corporation’s interstate activity conducted with Minnesota residents.\(^{156}\) Thus, the MinnesotaCare two percent tax on gross revenues\(^{157}\) satisfies the requirement of fair apportionment.

Under the third *Complete Auto Transit* requirement, the tax must not discriminate against interstate commerce.\(^{158}\) This requirement prohibits state taxation that provides a direct commercial advantage to three or more times in one year in the North Dakota. *Id.; see also infra* note 168. Using this rationale, it is difficult to conclude that Minnesota can premise the MinnesotaCare tax liability on the out-of-state furnishing of health services to twenty or more Minnesotans.


153. *Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 273 (1978). In *Moorman*, the Court stated that “the income attributed to the State for tax purposes must be rationally related to ‘values connected with the taxing State.’” *Id.* (quoting *Norfolk & Western Ry. v. State Tax Comm’n*, 390 U.S. 317, 325 (1968)). The Court further held that the Iowa single-factor formula and the commonly used three-factor (property, payroll and sales) formula for determining tax liability are both valid unless proven otherwise by “clear and cogent” evidence. *Id.* at 274.

154. The Supreme Court subsequently established a two-component test requiring both internal and external consistency to satisfy fair apportionment. *Container Corp. v. Franchise Tax Bd.*, 463 U.S. 159, 169 (1983). Internal consistency requires a tax formula that, if applied by all states, would result in no more than all of a corporation’s income being taxed. *Id.* The external consistency component extended the view espoused in *Moorman* by requiring state apportionment formulas to “actually reflect a reasonable sense of how income is generated.” *Id.*

155. *Minn. Stat.* § 295.50(3)(a)(4) (1992). Specifically, gross revenues are defined as “total amounts received in money or otherwise by . . . a nonresident health care provider for covered services . . . provided to an individual domiciled in Minnesota.” *Id.*

156. Because Minnesota has limited itself to taxing only revenue generated within its borders, even a higher flat tax rate would, arguably, be fairly apportioned. *See Standard Pressed Steel Co. v. Department of Revenue*, 419 U.S. 560, 562-64 (1975) (upholding a tax apportioned exactly to only the intrastate activities being taxed). The MinnesotaCare tax satisfies the twin requirements of internal and external consistency by avoiding the pitfall of multiple taxation by providing a tax credit to health care providers that are subject to taxation on the identical services by another state. *Minn. Stat.* § 295.54 (1992).


http://open.mitchellhamline.edu/wmlr/vol19/iss4/5
local businesses, thereby discriminating against those in other states. The "practical effect of [the] challenged tax" is the touchstone in determining discrimination. In any case, the MinnesotaCare tax cannot be characterized as discriminatory because it taxes resident and nonresident health care providers identically.

The fourth Complete Auto Transit test factor requires that the tax be fairly related to the services provided by the state. Fair relation is closely tied to the existence of a substantial nexus and requires that the measure of the tax be "reasonably related to the extent of the contact [with the taxing state]." Generally, state taxes satisfy this requirement when a corporation derives some benefit, although not necessarily directly, from a society or community, including police and fire protection and the use of a well-trained work force.

In the case of nonresident health care providers, each of these benefits is absent. A hospital outside of Minnesota receives no benefit from Minnesota police or fire fighters. Arguably, the hospital may benefit somewhat from the use of Minnesota workers, but this possibility diminishes rapidly with its distance from the border. The reason why these services do not benefit nonresident health care providers is simply because the providers have no physical link with Minnesota. Yet MinnesotaCare presumes a physical link by attaching significance to the fact of twenty or more Minnesotans receiving health services. Even if 200 Minnesotans received such services, many, if not all, nonresident health care providers would likely receive no benefit from the state. Minnesota's misplaced reliance on the receipt of out-of-state health care services does not render the MinnesotaCare tax fairly related to any state-provided services.

An example may best illustrate this point. Assume, for instance,
that a world renowned clinic is located in Eau Claire, Wisconsin. Assume also that the clinic provides medical treatment to people from all over the United States; thus its services encompass interstate commerce. Under MinnesotaCare, if twenty Minnesotans seek medical treatment at the Eau Claire clinic, the two percent tax goes into effect regardless of whether the clinic has any other contacts with the state of Minnesota.

The tax would discriminate against the clinic itself and generally against interstate commerce because Minnesota would be attempting to tax a business activity having only a very attenuated connection, if any, with the state. Another clinic in Wisconsin, not serving twenty patients from Minnesota, would not be subject to this tax. Only when twenty Minnesota residents cross state lines does the tax apply. Although MinnesotaCare proposes to tax only health care provided to Minnesotans, it nonetheless violates the Complete Auto Transit test because the clinic derives little or no benefit from Minnesota, which implies that the tax is not fairly related to any state-provided services.\(^\text{166}\) Hence, it cannot be said that Minnesota "has given anything for which it can ask return."\(^\text{167}\)

2. Quill Corp. v. North Dakota

In Quill, North Dakota attempted to collect a use tax from any out-of-state "retailer"\(^\text{168}\) that engaged in three or more advertisements in the state within a twelve-month period.\(^\text{169}\) The district court struck down the tax finding that no substantial nexus or state-pro-

\(^{166}\) For a tax to be fairly related to services provided by a state, the taxed corporation must enjoy some benefit from state services. The objective of this requirement is to "ensure that a State's tax burden is not placed upon persons who do not benefit from services provided by the State." Goldberg v. Sweet, 488 U.S. 252, 266-67 (1989). Such services, however, need not directly benefit a corporation to be justified. Id. at 267. The focus is placed on the "wide range of benefits provided to the taxpayer, not just the precise activity connected to the interstate activity issue." Id. Thus, if a corporation is not physically located in a state and has only minimal contacts with the state, a tax upon the corporation will have difficulty meeting this requirement.


\(^{168}\) The North Dakota statute defines retailer as "every person who engages in regular or systematic solicitation of a consumer market in the[e] state." N.D. CENT. CODE § 57-40.2-01(6) (1993). Such solicitation is further defined as three or more advertisements within a 12-month period. N.D. ADMIN. CODE § 81-04.1-01-03.1 (1988). Thus, as the Supreme Court noted, if allowed to stand, the North Dakota use tax statute would have allowed the state to impose the tax on "a publisher who included a subscription card in three issues of its magazine, a vendor whose radio advertisements were heard in North Dakota on three occasions, and a corporation whose telephone sales force made three calls into the State." Quill Corp. v. North Dakota, 112 S. Ct. 1904, 1913 n.6 (1992).

\(^{169}\) Quill, 112 S. Ct. at 1908.
vided services existed between North Dakota and Quill. In affirming the trial court, the Supreme Court intimated that the broad scope of the state's statutory definition of retailer was illustrative of how such a tax may well burden interstate commerce.

MinnesotaCare also establishes a broad definition of "regularly soliciting business from potential customers in Minnesota." Twenty Minnesota patients receiving health services at any facility outside Minnesota's borders will subject the facility to the MinnesotaCare tax even in the absence of any other contact with the state. Such a low threshold is closely analogous to that imposed by North Dakota in Quill. In light of the Court's disposition on a similar issue in Quill, MinnesotaCare's definition may likely fail to withstand a constitutional challenge under the Commerce Clause.

V. CONCLUSION

Perhaps the future will see widespread acceptance of government-subsidized health insurance whether funded by the federal government or by the states. In any event, Minnesota is to be commended for its attempt to establish a workable system while others only talk about making such attempts. As with all new forms of legislation, however, the drafters must be cognizant of the many intricacies involved in the federal system of government.

MinnesotaCare does an admirable job of creating workable financing for the health insurance subsidies. Nonetheless, it fails to satisfy the stringent requirements imposed by the Commerce Clause upon state taxation of interstate commerce. The recent holding in Quill Corp. v. North Dakota reinforces the view that states may not ignore the requirements of the dormant Commerce Clause. In that respect, MinnesotaCare has failed.

This attempt to tax out-of-state health care providers is beyond the reach and power of a state. Minnesota can claim no "substantial nexus" to such health care providers, and a simple statutory presumption is not enough to remedy the deficiency. Although sound in its other respects of financing, the portion of the statute utilizing the twenty patient threshold to invoke the tax will not withstand constitutional challenge under the Commerce Clause.

170. Id.
171. Id. at 1913 n.6.
173. Id.
174. See supra note 168.