



# Litigation Concerning the Constitutionality of the Prevent All Cigarette Trafficking Act (PACT Act)

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## Summary

The Jenkins Act requires out-of-state sellers of cigarettes to register and file a report with the states in which they sell cigarettes listing the name, address, and quantity of cigarettes sold to state residents. In the past, the states would use this information to collect taxes from the buyers directly. However, with the rise of Internet sales of cigarettes, compliance with the Jenkins Act was very low, and it was estimated that billions of dollars of state and local taxes went unpaid. In 2010, Congress passed the Prevent All Cigarette Trafficking Act (PACT Act), which amends the Jenkins Act, to address this problem. The PACT Act requires remote retailers of cigarettes and smokeless tobacco—that is, retailers who sell without an in-person transaction with the buyer—to pay the state and local taxes of the jurisdiction in which the buyer receives the goods.

Three remote retailers have challenged the PACT Act in federal courts seeking to enjoin enforcement of the act, claiming that forcing remote sellers to pay state and local taxes violates due process. The Supreme Court held in *Quill Corp. v. North Dakota* that the Due Process Clause of the Fourteenth Amendment “requires some definite link, some minimum connection, between a state and the person, property, or transaction it seeks to tax and that the income attributed to the State for tax purposes must be rationally related to values connected with the taxing State.” In *Red Earth LLC v. United States* and *Gordon v. Holder*, the federal district courts for the Western District of New York and the District of Columbia, respectively, issued preliminary injunctions, concluding that the plaintiffs were likely to succeed in demonstrating that the PACT Act violates due process because it subjects the retailers to the taxing authority of foreign states regardless of whether they have the required minimum contacts with the taxing jurisdictions. The Court of Appeals for the Second Circuit upheld the *Red Earth* preliminary injunction, and the United States has appealed the preliminary injunction issued in *Gordon* to the U.S. Court of Appeals for the D.C. Circuit. In *Musser’s Inc. v. United States*, the federal district court for the Eastern District of Pennsylvania rejected the due process argument, concluding that because the PACT Act is federal legislation, the due process requirements of the Fourteenth Amendment, which applies to states, do not apply. The PACT Act, the *Musser’s* court determined, is not different in principle from other federal statutes that incorporate state laws. In any event, the court determined, because the plaintiff took orders over the Internet, it had minimum contacts in the jurisdictions into which it shipped tobacco products.

The Supreme Court stated in *Quill*: “While Congress has plenary power to regulate commerce among the states and may thus authorize state actions that burden interstate commerce, it does not similarly have the power to authorize violations of the Due Process Clause.” In *Gordon*, the district court for the District of Columbia characterized the issue as whether one sale into a taxing jurisdiction satisfied the due process requirement for minimum contacts, and concluded it did not. The U.S. Court of Appeals for the Second Circuit, in upholding the preliminary injunction in *Red Earth*, described the issue as a “close question.”

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## Introduction

The Prevent All Cigarette Trafficking Act<sup>1</sup> (PACT Act) requires remote retailers of cigarettes and smokeless tobacco—that is, retailers who sell cigarettes and smokeless tobacco without a face-to-face transaction with the buyer—to pay all state and local taxes before delivering the purchased goods. Three remote retailers have challenged the PACT Act on the ground that it violates the Due Process Clause. In *Quill Corp. v. North Dakota*,<sup>2</sup> the Supreme Court held that the Due Process Clause of the Fourteenth Amendment “requires some definite link, some minimum connection, between a state and the person, property, or transaction it seeks to tax and that the income attributed to the State for tax purposes must be rationally related to values connected with the taxing State.”<sup>3</sup> In *Red Earth LLC v. United States*<sup>4</sup> and *Gordon v. Holder*,<sup>5</sup> the federal district courts for the Western District of New York and the District of Columbia, respectively, granted preliminary injunctions concluding, among other things, that the plaintiffs were likely to prevail in demonstrating that the PACT Act’s requirement that remote retailers pay the state and local taxes of the jurisdictions to which they send cigarettes and smokeless tobacco violates due process because it does not require minimum contacts. The U.S. Court of Appeals for the Second Circuit upheld the preliminary injunction in *Red Earth*,<sup>6</sup> and the U.S. Court of Appeals for the D.C. Circuit will consider the preliminary injunction in *Gordon* on appeal in the coming months. In *Musser’s Inc. v. United States*,<sup>7</sup> the federal district court for the Eastern District of Pennsylvania rejected the due process argument because, it concluded, the PACT Act is merely a federal statute that requires compliance with state and local laws and does not implicate due process. The PACT Act, the court determined, is no different in principle from other federal statutes that incorporate state law. Moreover, the court determined, the plaintiff had minimum contacts with the jurisdictions into which it shipped tobacco products because it transacted business through its interactive website.

The Supreme Court stated in *Quill*: “While Congress has plenary power to regulate commerce among the states and may thus authorize state actions that burden interstate commerce, it does not similarly have the power to authorize violations of the Due Process Clause.”<sup>8</sup> It seems from this statement that Congress may not be able to require remote retailers to pay taxes to jurisdictions with which they do not have minimum contacts. It appears, therefore, that the constitutionality of the PACT Act would depend on what constitutes minimum contacts for remote retailers. In *Quill*, in the context of catalogue retailers, the Supreme Court noted that in connection with jurisdiction to adjudicate lawsuits against out-of-state defendants, it has said that the existence of minimum contacts depends on the degree to which the retailer has “purposefully avail[ed] itself of an economic market in forum State”<sup>9</sup> or “purposefully directed” activities at the state’s residents.<sup>10</sup>

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<sup>1</sup> 15 U.S.C. §§375 *et seq.*

<sup>2</sup> 504 U.S. 298 (1992).

<sup>3</sup> *Id.* at 306.

<sup>4</sup> 728 F.Supp. 2d 238 (W.D.N.Y. 2010), *aff’d* 657 F.3d 138 (2d Cir. 2011).

<sup>5</sup> 826 F.Supp. 2d 279 (D.D.C. 2011).

<sup>6</sup> *Red Earth LLC v. United States*, 657 F.3d 138 (2d Cir. 2011).

<sup>7</sup> 2011 U.S. Dist. LEXIS 109629 (E.D.Pa. 2011).

<sup>8</sup> *Quill*, 504 U.S. at 306.

<sup>9</sup> *Id.* at 307.

<sup>10</sup> *Id.* at 308, citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985).

Moreover, in *Quill*, the Supreme Court wrote that due process requires that the tax paid must be rationally related to “values connected with the taxing State.”<sup>11</sup> In another case, the Supreme Court wrote that this requirement means that the state must give something for which it can ask return.<sup>12</sup>

## The PACT Act

Among the purposes of the PACT Act were to require remote sellers of cigarettes and smokeless tobacco to abide by the same laws that apply to law-abiding brick and mortar retailers; to increase the collection of federal, state, and local excise taxes; to discourage cigarette smuggling; and to reduce youth access to inexpensive cigarettes and smokeless tobacco.<sup>13</sup> To increase the taxes collected on remote sales of cigarettes and smokeless tobacco, the PACT Act does two things. First, the PACT Act in effect deems interstate sales to be intrastate sales:

With respect to delivery sales into a specific State and place, each delivery seller shall comply with—

All state, local, tribal, and other laws generally applicable to sales of cigarettes or smokeless tobacco, *as if the delivery sales occurred entirely within the specific state and place*, including laws imposing—

excise taxes;

licensing and tax-stamping requirements;

restrictions on sales to minors; and

other payment obligations or legal requirements relating to the sale, distribution, or delivery of cigarettes or smokeless tobacco.<sup>14</sup>

Second, the PACT Act requires that prior to delivery, a remote seller pay to the state and local government all taxes that apply to sales of cigarettes and smokeless tobacco in the buyer’s locality and apply required stamps or other indicia to indicate that the taxes have been paid.<sup>15</sup>

## Legal Background

Two constitutional provisions govern state taxation of out-of-state businesses doing business within the state: the Commerce Clause and the Due Process Clause of the Fourteenth Amendment.<sup>16</sup> Under the Commerce Clause, state taxes may not be imposed in a manner that

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<sup>11</sup> *Quill*, 504 U.S. at 306.

<sup>12</sup> *MeadWestvaco Corp. v. Illinois Department of Revenue*, 553 U.S. 16, 25 (2008).

<sup>13</sup> 15 U.S.C. §375 note.

<sup>14</sup> 15 U.S.C. §375a(a)(3) (emphasis added).

<sup>15</sup> 15 U.S.C. §375a(d).

<sup>16</sup> *Quill*, 504 U.S. at 305.

unduly burdens or discriminates against interstate commerce.<sup>17</sup> Under the Due Process Clause, states may not impose taxes on a foreign business unless the business has a sufficient connection to the state and the taxes reasonably relate to value that the taxpayer receives from the state.<sup>18</sup> Congress may authorize state activities that would otherwise violate the Commerce Clause, but it may not authorize state activities that would violate the Due Process Clause.<sup>19</sup> The Commerce Clause and the Due Process Clause, therefore, are “analytically distinct.”<sup>20</sup>

The remote retailers have challenged the PACT Act under the Due Process Clause. The due process issue is governed by the Supreme Court’s opinion in *Quill*. In *Quill*, the Court considered whether the State of North Dakota could require an out-of-state mail order retailer to collect a use tax on merchandise sold in the state. The retailer argued that the Due Process Clause required that it have a physical presence in the state in order to satisfy the requirement of minimum contacts. Concluding that the reasoning for state taxation of out-of-state businesses was “comparable” to reasoning for jurisdiction over out-of-state defendants, the Court quoted its opinion in *Burger King Corp. v. Rudzewicz*,<sup>21</sup> in which the Court upheld the jurisdiction of Florida courts over an out-of-state franchisee who remotely conducted business in Florida and had a contract with a Florida corporation:

Jurisdiction in these circumstances may not be avoided merely because the defendant did not *physically* enter the forum State. Although territorial presence frequently will enhance a potential defendant’s affiliation with a State and reinforce the reasonable foreseeability of suit there, it is an inescapable fact of modern commercial life that a substantial amount of business is transacted solely by mail and wire communications across state lines, thus obviating the need for physical presence within a State in which business is conducted. So long as a commercial actor’s efforts are purposefully directed toward residents of another State, we have consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction there.<sup>22</sup>

Because the retailer in *Quill* had directed a “deluge of catalogues” to North Dakota residents, the Court concluded that the retailer had “fair warning” that it would be subject to the tax and that it had purposefully directed its activities at North Dakota residents, unquestionably satisfying the requirement for minimum contacts.<sup>23</sup> Under *Quill*, therefore, the issue is whether the out-of-state business has directed its activities at the taxing state and whether, as a result, it has fair warning that it would be liable for the taxes.

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<sup>17</sup> *Id.* at 305-306.

<sup>18</sup> *Id.* at 306.

<sup>19</sup> *Id.* at 305.

<sup>20</sup> *Id.*

<sup>21</sup> 471 U.S. 462 (1985).

<sup>22</sup> *Quill*, 504 U.S. at 307-308, quoting *Burger King* 471 U.S. at 476 (emphasis in original; quotation marks omitted).

<sup>23</sup> *Quill*, 504 U.S. at 308.

## The Litigation

### *Red Earth LLC v. United States*

In *Red Earth*, the plaintiffs, members of the Seneca Nation of Indians who own and operate tobacco retail businesses that advertise on the Internet and take telephone and mail orders, sought a preliminary injunction against, among other things, enforcement of the PACT Act's requirement that they pay taxes on their sales of tobacco products.<sup>24</sup> The plaintiffs claimed that the PACT Act violates the Due Process Clause because "it subjects them to the taxing jurisdiction of state and local governments without regard to whether they have sufficient minimum contacts with those taxing jurisdictions."<sup>25</sup>

The United States argued that there was no due process problem with the PACT Act because minimum contacts were satisfied by the fact that the plaintiffs maintain websites advertising their products for sale and the fact that plaintiffs ship their goods into the taxing jurisdictions.<sup>26</sup> The district court rejected these arguments.

The court found two problems with the argument that maintaining a website provided minimum contacts. First, not all the plaintiffs have websites.<sup>27</sup> The PACT Act, however, applies to all the plaintiffs whether they have websites or not. Second, the websites are "passive."<sup>28</sup> The court noted that, "The website is akin to a virtual mail order catalog of cigarettes and smokeless tobacco, available for interested customers to view from their home computer (if they specifically seek out the website by doing an Internet search), but with no ability to consummate the purchase over the Internet."<sup>29</sup> Purchasers can merely get information off the website but the purchase is not consummated until the retailer receives a money order.<sup>30</sup> Therefore, a passive website, the court determined, did not satisfy the requirement for minimum contacts.

The court also rejected the United States' argument that a shipment into a state satisfied the minimum contacts requirement. As the court put it, "it would appear that the defendants are urging this Court to conclude that each sale itself creates the minimum contacts necessary to impose a duty to collect taxes on an out-of-state seller."<sup>31</sup> While conceding that such a bright-line rule was appealing, the court rejected it because the Supreme Court and the federal courts of appeals have not adopted the rule and "existing cases suggest the opposite—that a single, isolated sale may not be enough to subject a seller to a foreign jurisdiction."<sup>32</sup> The court could find no cases holding that a single sale satisfied the minimum contacts requirement but found a number of cases holding that a single sale did not satisfy the requirement.<sup>33</sup> Moreover, the court wrote, if a

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<sup>24</sup> *Red Earth*, 728 F. Supp. 2d at 241-242.

<sup>25</sup> *Id.* at 247.

<sup>26</sup> *Id.* at 249.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 250.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 250-251.

single sale were sufficient, the Supreme Court in *Quill* would likely have based its decision on the defendant's sale into the state instead of the defendant's "continuous and widespread solicitation of business" within North Dakota, including a "deluge of catalogues" sent into the state.<sup>34</sup>

Ultimately, the court wrote:

By failing to require any minimum contacts before subjecting the out-of-state retailer to "all state, local, tribal, and other laws generally applicable to sales of cigarettes or smokeless tobacco," Congress is broadening the jurisdictional reach of each state and locality without regard to the constraints imposed by the Due Process Clause. That it cannot do. It would appear that the PACT Act seeks to legislate the due process requirement out of the equation.<sup>35</sup>

The district court granted the plaintiffs' motion for a preliminary injunction. The government appealed to the U.S. Court of Appeals for the Second Circuit, challenging the district court's conclusion that the PACT Act violated the Due Process Clause. The Court of Appeals characterized the issue as "whether Congress can, consistent with constitutional due process, require a vendor to submit to the taxing jurisdiction of any state into which it makes at least one sale, without regard to the extent of that vendor's contact with the state."<sup>36</sup>

The court upheld the district court's preliminary injunction:

The PACT Act requires a seller to collect state and local taxes based on its making of one delivery, but the federal courts have for decades steered away from the question of whether a single sale is enough to satisfy the requirements of due process. The Supreme Court has never found that a single isolated sale is sufficient. Nor has it held that a single sale into a state is insufficient for due process purposes, although its previous holdings suggest as much. Where the underlying constitutional question is close, a court reviewing the issuance of a preliminary injunction should uphold the injunction and remand for trial on the merits. Because the district court reached a reasonable conclusion on a close question of law, there is no need for us to decide the merits at this preliminary stage.<sup>37</sup>

### ***Musser's Inc. v. United States***

In *Musser's*, the plaintiff was a tobacco retailer who did business in all 50 states through an interactive website and the telephone. Like the plaintiffs in *Red Earth*, the plaintiff in *Musser's* sought a preliminary injunction on the ground that the PACT Act requires retailers to pay state and local taxes even though they do not have minimum contacts with the jurisdictions, in violation of the Due Process Clause. The district court denied the injunction under two alternative analyses.

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<sup>34</sup> *Id.* at 251.

<sup>35</sup> *Id.* at 251-252.

<sup>36</sup> *Red Earth LLC*, 567 F.3d at 143.

<sup>37</sup> *Id.* at 145 (internal quotation marks, citations, and ellipsis omitted).



First, the court rejected the *Red Earth* district court's analysis because it concluded the court in that case erred in analyzing the PACT Act as if the taxes were imposed by a state:

[T]he Act's tax-payment requirement is not being imposed by a state, acting unilaterally, but by Congress, and the legislative due process analysis must reflect the federal character of the legislation. In regulating interstate commerce, Congress has for decades required interstate businesses to comply with state and local law. For example, firearms, distributors, online pharmacies, farmers, distributors of explosives, *inter alia*, have all been required by Congress to ensure that the sale of their products are in compliance with all state and local laws of the states in which they distribute/deliver the products. Federal requirements like these have been found not to offend due process. Interstate businesses are subject to the legislative jurisdiction of Congress, which is free to require compliance with state and local law as a condition of engaging in interstate commerce.<sup>38</sup>

The court's analysis could be interpreted as conflating Congress's authority under the Commerce Clause to allow state regulation of interstate commerce with the separate issue of Congress's authority to allow state taxation of out-of-state businesses that do not have minimum contacts with the taxing jurisdiction.

Second, the court concluded that the plaintiff had minimum contacts in all 50 states because of the interactive nature of its website. The court employed the sliding scale approach developed by the court in *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*:<sup>39</sup>

At one end of the spectrum are situations where a defendant clearly does business over the Internet. If the defendant enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet, personal jurisdiction is proper. At the opposite end are situations where a defendant has simply posted information on an Internet website which is accessible to users in foreign jurisdictions. A passive website that does little more than make information available to those who are interested in it is not grounds for the exercise of personal jurisdiction. The middle ground is occupied by interactive websites where a user can exchange information with the host computer. In these cases, the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the website.<sup>40</sup>

In *Musser's*, the court concluded the plaintiff had purposefully availed itself of doing business in all 50 states because, "[i]ts website does more than post information, or exchange information. Customers can place orders over the Internet, pay for the products over the Internet, and have those products delivered to states in which they live.... [S]elling products over the Internet and knowingly conducting business through the Internet in a state is a sufficient contact to satisfy due process concerns."<sup>41</sup> Thus, it appears that under the court's reasoning, minimum contacts would be satisfied by a single sale if that sale were transacted through an interactive website.

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<sup>38</sup> *Musser's*, 2011 LEXIS 109329 at 14.

<sup>39</sup> 952 F. Supp. 1119 (W.D. Pa. 1997).

<sup>40</sup> *Musser's*, 2011 LEXIS 109329 at 17, quoting *Zippo*, 952 F. Supp. at 1124.

<sup>41</sup> *Musser's*, *id.*

## *Gordon v. Holder*

Gordon, a member of the Seneca Nation of Indians, owns a store and a telephone order business that sells cigarettes and other tobacco products. He has a passive website that directs viewers to call his store to place an order.<sup>42</sup> Like the plaintiffs in *Red Earth* and *Musser's*, Gordon sought a preliminary injunction against enforcement of the PACT Act's requirement that he pay the state and local taxes of the jurisdictions to which he sends tobacco products on the ground that it violates due process because it does not require minimum contacts.

Initially, the district court denied Gordon's motion because it determined it was untimely.<sup>43</sup> Gordon appealed the denial to the U.S. Court of Appeals for the D.C. Circuit (D.C. Circuit). The Court of Appeals reversed and remanded the case to the district court, concluding that the motion was timely.<sup>44</sup> The Court of Appeals offered the following observation to the district court:

The government's suggestion that there can be no Due Process violations when Congress authorizes state levies based on minimum contacts collapses the Due Process and Commerce Clause aspects of Gordon's claims. As the Supreme Court has explained, the inquiries are analytically distinct and should not be treated as if they were synonymous. Even national legislation which can permissibly sanction burdens on interstate commerce—cannot violate Due Process principles of "fair play and substantial justice." Although *Quill* did not deal with excise taxes, there remains an open question whether a national authorization of disparate state levies on e-commerce renders concerns about presence and burden obsolete: *Quill's* analytical approach is instructive.<sup>45</sup>

Before the district court on remand, the government made two arguments in response to Gordon's due process claim: "(a) because the PACT Act is a federal law, Gordon need only have minimum contacts with the United States, not any individual state; and (b) even if minimum contacts with each state are required, each of Gordon's tobacco sales into a state satisfies minimum contacts with that state."<sup>46</sup> In support of the first argument, the government cited Supreme Court cases in which, it claimed, the Court found that in situations in which Congress required interstate businesses to comply with the laws of the jurisdiction to which they shipped their products, the interstate businesses were not subject to the jurisdiction of any particular states.<sup>47</sup> The court distinguished those cases because the statutes at issue "merely required individuals to comply with existing state laws, [but] the PACT Act appears to impose a new, independent duty on the delivery seller by requiring that they ensure that the applicable state and local taxes are paid."<sup>48</sup> Furthermore, the court believed the U.S. Court of Appeals for the D.C. Circuit had rejected this argument by stating, in remanding the case back to the district court, that "'while Congress has plenary power to regulate commerce among the States and thus may authorize state actions that burden interstate commerce, it does not similarly have the power to authorize violations of the Due Process Clause."<sup>49</sup>

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<sup>42</sup> *Gordon*, 826 F. Supp. 2d at 283.

<sup>43</sup> *Gordon v. Holder*, 2011 U.S. Dist. LEXIS 139201 (D.D.C. September 5, 2011).

<sup>44</sup> *Gordon v. Holder*, 632 F.3d 722, 724 (D.C. Cir. 2011).

<sup>45</sup> *Id.* at 725-726.

<sup>46</sup> *Gordon*, 826 F. Supp. 2d at 288.

<sup>47</sup> *Id.* at 288-289.

<sup>48</sup> *Id.* at 289.

<sup>49</sup> *Id.*, quoting *Gordon v. Holder*, 632 F.3d 722, 725-26 (D.C. Cir. 2011).

The court discussed the opinion in *Musser's* and wrote that, in concluding that the PACT Act was like federal statutes requiring compliance with state law, the *Musser's* court “collapses the Due Process and Commerce Clause aspects” of the PACT Act challenge, as the D.C. Circuit found the government did when the court rejected the government’s similar argument.<sup>50</sup>

Before addressing the government’s argument that each of Gordon’s sales establishes minimum contacts, the court reviewed “the seminal due process cases setting forth the personal jurisdiction law upon which *Quill* built.”<sup>51</sup> The court reviewed *International Shoe Co. v. Washington*,<sup>52</sup> in which “the Supreme Court framed the relevant [due process] inquiry as whether a defendant had minimum contacts with the jurisdiction such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.”<sup>53</sup> Next, the court outlined the reasoning in *Burger King Corp. v. Rudzewicz*,<sup>54</sup> in which the Court held that personal jurisdiction can be found “[s]o long as a commercial actor’s efforts are purposefully directed toward residents of another State.”<sup>55</sup> The district court quoted the Supreme Court’s opinion in *Burger King*:

Jurisdiction is proper . . . where the contacts proximately result from actions by the defendant himself that create a substantial connection with the forum State. Thus where the defendant deliberately has engaged in significant activities within a State, or has created continuing obligations between himself and residents of the forum, he manifestly has availed himself of the privilege of conducting business there, and because his activities are shielded by the benefits and protections of the forum’s laws it is presumptively not unreasonable to require him to submit to the burdens of litigation in that forum as well.<sup>56</sup>

The district court wrote that the *Burger King* Court “noted that a single act can support jurisdiction so long as it creates a substantial connection with the forum.”<sup>57</sup> However, acts which “create only an attenuated affiliation with the forum” are not sufficient because litigation in the forum is not reasonably foreseeable.<sup>58</sup>

The district court explained that in *World-Wide Volkswagen Corp. v. Woodson*,<sup>59</sup> the Supreme Court elaborated “that the foreseeability that is critical to due process analysis . . . is that the defendant’s conduct and connection with the forum state are such that he should reasonably anticipate being haled into court there.”<sup>60</sup> This focus on foreseeability, the Supreme Court wrote, “gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.”<sup>61</sup>

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<sup>50</sup> *Id.* at 289 n. 10.

<sup>51</sup> *Id.* at 289.

<sup>52</sup> 326 U.S. 310 (1945).

<sup>53</sup> *Gordon*, 826 F. Supp. 2d at 290 (internal quotation marks and citations omitted; brackets in original).

<sup>54</sup> 471 U.S. 462 (1985).

<sup>55</sup> *Gordon*, 826 F. Supp. 2d at 290.

<sup>56</sup> *Id.*, quoting *Burger King*, 471 U.S. at 475-476 (ellipsis in original).

<sup>57</sup> *Id.* (internal quotation marks and citations omitted).

<sup>58</sup> *Id.* (internal quotation marks and citations omitted).

<sup>59</sup> 444 U.S. 286 (1980).

<sup>60</sup> *Gordon*, 826 F. Supp. 2d at 290 (internal quotation marks and citations omitted).

<sup>61</sup> *Id.*

Finally, the district court discussed *Quill*:

Addressing *Quill*'s due process challenge, the Supreme Court summarized its earlier due process jurisprudence, stating that "[t]he Due Process Clause requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax . . . and that income attributed to the State for tax purposes must be rationally related to values connected with the taxing State."<sup>62</sup>

In *Quill*, "[t]he Court found that *Quill*'s mail order business had minimum contacts with North Dakota sufficient to meet the requirement of due process because there was no question that *Quill* purposefully directed its activities at North Dakota residents, that the magnitude of those contacts is more than sufficient for due process purposes, and that the use tax is related to the benefits *Quill* receives from access to the State."<sup>63</sup>

The district court found that the *Quill* standard was not met in *Gordon*. "[T]he Court cannot say that *Gordon*'s business purposefully avails itself of the benefits of [the] economic market of the states into which he sells his products or that it purposefully directed its activities at residents of these states."<sup>64</sup> Moreover, even if a single sale in a state could provide the requisite "minimum connection," the district court did not "find that the tax on *Gordon*'s products is rationally related to the values connected with the taxing State."<sup>65</sup> Quoting the Supreme Court in *MeadWestvaco Corp. v. Illinois Dept. of Revenue*,<sup>66</sup> the district court stated that fulfillment of this requirement depends on "whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits provided by the state—that is, whether the state has given anything for which it can ask return."<sup>67</sup> "The Court cannot determine what, if any, protection, opportunities, [or] benefits *Gordon* receives from the state into which he delivers his products, aside from the fact that his buyer resides there."<sup>68</sup> Accordingly, the court found that the PACT Act may violate due process.<sup>69</sup> "In sum, this Court concludes that *Gordon* has a likelihood of success on his claim that due process is not satisfied by a single sale of cigarettes into a state."<sup>70</sup>

## Conclusion

In authorizing state taxation of out-of-state businesses in the PACT Act, Congress appears to have exercised its authority under the Commerce Clause to subject out-of-state businesses to state laws that would otherwise violate the Commerce Clause. However, if the PACT Act subjects out-of-state businesses to the taxing authority of states with which they do not have minimum contacts, it appears that its provisions may not comport with the requirements of the Due Process Clause.

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<sup>62</sup> *Id.* at 291, quoting *Quill*, 504 U.S. at 303 (brackets and ellipsis in original).

<sup>63</sup> *Id.* (internal quotation marks and citations omitted).

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* (internal quotation marks and citation omitted).

<sup>66</sup> 553 U.S. 16, 24-25 (2008).

<sup>67</sup> *Gordon*, 826 F. Supp. 2d at 291.

<sup>68</sup> *Id.* at 292 (internal quotation marks and citation omitted; brackets in original).

<sup>69</sup> *Id.* at 292-293. The district court noted that its conclusion was consistent with the conclusion of the district court in *Red Earth* and discussed that opinion with approval.

<sup>70</sup> *Id.* at 293.

The courts in *Red Earth* and *Gordon* analyzed the constitutionality of the PACT Act under the Due Process Clause exclusively and considered whether the PACT Act authorized state taxation of retailers that do not have minimum contacts with the taxing jurisdiction. The opinion in *Musser’s* may be interpreted as conflating the Commerce Clause and the due process analyses to conclude that the PACT Act does not implicate due process.

Even applying the due process analysis exclusively, however, it is not clear whether higher courts will conclude that a single sale into a jurisdiction satisfies the due process requirement of minimum contacts. As the U.S. Court of Appeals for the Second Circuit noted in reviewing the preliminary injunction in *Red Earth*, whether one sale into a jurisdiction satisfies the due process requirements for minimum contacts is a “close question.”

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