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IS THE BUSINESS OF INSURANCE COMMERCE? A RE-EXAMINATION IN THE LIGHT OF MODERN TIMES

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A RE-EXAMINATION IN THE LIGHT OF MODERN TIMES*

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A QUESTION of considerable import which has arisen time and again in recent years, particularly since the enactment of the various federal regulatory acts within the past decade, is whether the business of insurance is commerce. Although not a new question, and by no means unanswered by the courts, it has been a subject of recent reconsideration and in all probability will be reviewed by the United States Supreme Court.

On August 5, 1943, Judge E. Marvin Underwood of the United States District Court of Georgia quashed an indictment in the case of *The United States of America v. South-Eastern Underwriters Association.*[1] The defendants, consisting of one hundred ninety-eight corporations and twenty-seven individuals, were charged with conspiring to fix and maintain arbitrary and noncompetitive rates on fire insurance sold by them in various southern states, in violation of the Sherman Anti-Trust Act.[2] They were further indicted on a charge of conspiring to monopolize trade and commerce in fire insurance in those states in violation of section 2 of the act.[3]

The defendants demurred and challenged the sufficiency of the indictment upon the grounds that (a) it charged no offense against the United States, (b) that the business of fire insurance is not commerce, (c) that the interpretation of the act insisted upon by the government would be a violation of the Fifth, Sixth and Tenth Amendments of the Constitution, and (d) that the court is without jurisdiction of the subject matter.

The entire case turned, as the court put it, "upon the question as

*The opinions expressed herein are those of the author and are not intended to reflect the official attitude of the Office of the General Counsel of the Federal Security Agency or of that Agency.

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[1] ——— F. Supp. ———, 12 U.S. Law Week, 2110 (1943).

[2] 15 U.S.C., 1 et. seq. (1940).

[3] Id., § 2 reads: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished. . . ."

to whether or not the business of insurance is interstate trade or commerce."[4]

THE PROGENITOR CASE, PAUL V. VIRGINIA

In sustaining the demurrer and holding that the business of insurance does not constitute commerce the court relied upon a series of decisions of the United States Supreme Court. The first of this group was *Paul v. Virginia* decided seventy-five years ago in which Mr. Justice Field, writing the opinion, said:

> "... Issuing a policy of insurance is not a transaction in commerce. . . . Such contracts are not inter-state transactions, though the parties be domiciled in different States."[5]

Paul was appointed agent in Virginia for several insurance companies incorporated in New York. He applied for a license to act as such agent within Virginia. An act of that state required insurance companies not incorporated therein before carrying on any business within that state to obtain a license for such purpose. As a prerequisite to obtaining the license it was required to deposit with the state treasurer bonds of a specified character varying in amount from $30,000 to $50,000, depending upon the amount of capital employed.[6] Another act prohibited, under penalty,[7] any person without a license to act as agent for any foreign insurance company.

Paul offered to comply with the provisions of the law save that requiring the deposit of the bonds. Although a license was refused him, he undertook to act for the companies and issued a policy to a resident of Virginia. He was indicted and convicted. The conviction was affirmed by the Virginia Supreme Court of Appeals and a writ of error was granted by the United States Supreme Court.

The second objection urged to the validity of the statute was based upon the commerce clause.[8] Justice Field, after concluding that commerce may be carried on by corporations, said:

> "There is, therefore, nothing in the fact that the insurance companies of New York are corporations to impair the force of the

[4] Also, of interest is the case of Polish National Alliance v. National Labor Relations Board, (C.C.A. 7th, 1943) 136 F. (2d) 175, in which the court giving some consideration to the question, stated the business of insurance was commerce. However, the effect of the court's ruling thereon was minimized by its statement at p. 180 that "the fact, if such it be, that insurance is not commerce" would not require it to reach a different result.

[5] 8 Wall. (75 U.S.) 168 at 183 (1868).

[6] Va. Acts, 1866, c. 96, p. 206.

[7] Id. c. 2, p. 32 at 48.

[8] U. S. Constitution, Art. 1, § 8, cl. 3.

argument of counsel. The defect of the argument lies in the character of their business. Issuing a policy of insurance is not a transaction of commerce. The policies are simple contracts of indemnity against loss by fire, entered into between the corporations and the assured, for a consideration paid by the latter. These contracts are not articles of commerce in any proper meaning of the word. They are not subjects of trade and barter offered in the market as something having an existence and value independent of the parties to them. They are not commodities to be shipped or forwarded from one State to another, and then put up for sale. They are like other personal contracts between parties which are completed by their signature and the transfer of the consideration. Such contracts are not inter-state transactions, though the parties may be domiciled in different States. The policies do not take effect—are not executed contracts—until delivered by the agent in Virginia. They are, then, local transactions, and are governed by the local law. They do not constitute a part of the commerce between the States any more than a contract for the purchase and sale of goods in Virginia by a citizen of New York whilst in Virginia would constitute a portion of such commerce."[9]

The foregoing pronouncement by the Court was urged by the government's counsel in the *South-Eastern Underwriters* case, supra, to be dictum.[10] Judge Underwood brushed this contention aside, stating:

> "In all of the above cited cases, the ruling was essential to the case and the reasoning of the court showed most careful analysis and full consideration of the questions now raised. . . ."[11]

A careful reading of the *Paul* decision impels agreement with the Court that the ruling was not merely dicta. It does not appear that the case could have been decided on the first issue alone which was whether the statute was in conflict with Article IV of the Constitution.[12] It was urged that the statute discriminated between Virginia corporations and corporations of other states. The Court found against this contention, holding that corporations have no absolute right of recognition in other states, but depend for such recognition and the enforcement of their contracts upon the assent of such other states and that such assent may

[9] Paul v. Virginia, 8 Wall. (75 U. S.) 168 at 183 (1868).
[10] Government brief, p. 15.
[11] ——— F. Supp. ——— at ——— (1943).
[12] U. S. Constitution, Art. 4, § 2: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

be granted upon such terms and conditions as those states may think proper to impose. This finding clearly could not determine the case in the light of the defendant's objection to the validity of the statute on the ground that it invaded the realm of interstate commerce which was solely a matter under the supervision of Congress. If Paul's contention in this respect was upheld the statute would be invalid and his conviction accordingly set aside. The issue, therefore, of whether insurance was interstate commerce was material to the determination of the case. The Court's finding that the business of insurance was not commerce, although a sweeping one and subject to considerable doubt and criticism, has been rigidly adhered to by the Court in a number of cases subsequently decided by it.

THE PROGENY OF PAUL V. VIRGINIA

In *Hooper v. California*,[13] Hooper was convicted of violating a section of the California Penal Code[14] in procuring insurance for a resident of that state from an insurance company not incorporated therein, without having filed the bond required by a section of the Political Code.[15] The majority opinion,[16] written by Mr. Justice White, in answer to the claim that the contract being one for marine insurance was a matter of interstate commerce and as such beyond the reach of state authority, held:

> "... This proposition involves an erroneous conception of what constitutes interstate commerce. That the business of insurance does not generically appertain to such commerce has been settled since the case of *Paul v. Virginia*, [supra.]
>
> "Whilst it is true that in *Paul v. Virginia*, and in most of the cases in which it has been followed,[17] the particular contract under

[13] 155 U. S. 648, 15 S. Ct. 207 (1895).

[14] Cal. Penal Code, § 439 (1887).

[15] Cal. Political Code, § 623, (1889) provided: "The Commissioner must require every company, association, or individual, not incorporated under the laws of this State, and proposing to transact insurance business by agent or agents in this State, before commencing such business to file in his office a bond, to be signed by the person or firm, officer or agent, as principal, with two sureties to be approved by the Commissioner, in the penal sum of two thousand dollars for each insurance company, association, firm or individual for whose account it is proposed to collect premiums of insurance in this State. . . ."

[16] The minority opinion was predicated on an entirely different point.

[17] The cases decided between Paul v. Virginia and Hooper v. California while alluding to the Court's determination of the commerce question in the former did not turn on that precise question.

consideration was for insurance against fire, the principle upon which these cases were decided involved the question of whether a contract of insurance of any kind, constituted interstate commerce." [18]

The Court in commenting upon the general rule that the right of a foreign corporation to engage in business within a state other than that of its creation depends solely upon the will of such other state and the exceptions to this rule in so far as it relates to corporations which have become an instrumentality of interstate commerce or their business constitutes such commerce, stated:

"...If the power to regulate interstate commerce applied to all the incidents to which such commerce might give rise and to all contracts which might be made in the course of its transaction, that power would embrace the entire sphere of mercantile activity in any way connected with trade between the States; and would exclude state control over many contracts purely domestic in their nature.

"...The business of insurance is not commerce. The contract of insurance is not an instrumentality of commerce. The making of such a contract is a mere incident of commercial intercourse, and in this respect there is no difference whatever between insurance against fire and insurance against 'the perils of the sea.'" [19]

This holding was again reiterated in the case of *Liverpool and London Life and Fire Insurance Company v. Oliver*,[20] in which a corporation organized under the laws of the Kingdom of Great Britain and doing business within the United States challenged the right of the State of Massachusetts to collect a tax on premiums from business obtained by the company in that state. This was the first case in which a company was directly involved. The previous decisions concerned company agents only.[21]

The next case in which the Court had occasion to maintain its position, albeit dicta, was *New York Life Insurance Company v. Cravens*.[22] Here again a company was involved.

[18] Hooper v. State of California, 155 U. S. 648 at 653, 15 S. Ct. 207 (1895).

[19] Id. at 655.

[20] 10 Wall. (77 U.S.) 566 (1871).

[21] It is interesting to note that even at that early date the Court commented upon the fact that corporations in the form of banking companies, insurance companies, et cetera, play an extensive part in the business of the nation. However, it apparently refused to recede from its position taken in the Paul case.

[22] 178 U. S. 389, 20 S. Ct. 962 (1900).

One of the more important cases on this question to come before the Supreme Court was *New York Life Insurance Company v. Deer Lodge County*. It was there asserted that a tax levied by a Montana county on certain assets of the company was "illegal, unlawful and void for that said defendant was without jurisdiction to levy or collect said tax, and the levy and collection thereof was and is a burden upon interstate commerce contrary to section 8, Article I of the Constitution of the United States."[23] Counsel for the company, which included the illustrious Dean Pound of Harvard Law School, in an endeavor to swing the Court away from the *Paul* case, argued that since all decisions pertaining to the company's business were rendered in New York, the authority of its Montana representative was strictly limited and that applications for insurance were received solely for the purpose of transmission to the home office and the use of the United States mails was essential to practically every step in the transaction of its business.

The majority opinion of the Court, written by Mr. Justice McKenna, adverting to the earlier[24] decisions on the point, stated:

> "If we consider these cases numerically, the deliberation of their reasoning, and the time they cover, they constitute a formidable body of authority and strongly invoke the sanction of the rule of *stare decisis*. This we especially emphasize, for all of the cases concerned, as the case at bar does, the validity of state legislation, and under varying circumstances the same principle was applied in all of them. For over forty-five years they have been the legal justification for such legislation. To reverse the cases, therefore, would require us to promulgate a new rule of constitutional inhibition upon the States and which would compel a change of their policy and a readjustment of their laws. Such result necessarily urges against a change of decision."[25]

[23] 231 U. S. 495 at 499, 34 S. Ct. 167 (1913).

[24] The dissenters were Mr. Justice Hughes, who had a few years before been counsel to the Armstrong Committee investigating insurance company practices in New York, and Mr. Justice Van Devanter.

[25] New York Life Ins. Co. v. Deer Lodge County, 231 U. S. 495 at 502, 34 S. Ct. 167 (1913). Cf. Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U. S. 518, 48 S. Ct. 404 (1928), in which Mr. Justice Holmes writing the dissent concurred in by Mr. Justice Brandeis and Mr. Justice Stone, referring to Swift v. Tyson, 16 Pet. (41 U. S.) 1 (1842), said:

"If I am right the fallacy has resulted in an unconditional assumption of powers by the Courts of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct."

Compare, also, Erie R. Co. v. Tompkins, 304 U. S. 64, 58 S. Ct. 817 (1938),

The majority were of the opinion that the rationale of *Paul v. Virginia* was exhaustive of the general principle and that "it would rack ingenuity to attempt to vary its expression or more aptly illustrate it." The volume of business and the geographical extent thereof did not appear to impress Justice McKenna and those of his colleagues who joined with him for: "Nor does the character of the contracts change by their numbers or the residence of the parties."

Neither did the company's argument that the use of the mails in connection with its business constituted a "current of commerce among the states" move the Court to alter its established view. In answer to this the Court said:

> "...This use of the mails is necessary, it may be, to the centralization of the control and supervision of the details of the business; it is not essential to its character."[26]

Mr. Justice Brandeis in *Bothwell v. Buckbee, Mears Co.*,[27] held a contract of insurance made by a foreign corporation with a citizen of Minnesota was not interstate commerce. The Court, in that case, did not go as far as it did in the *Paul* and *Hooper* cases and hold that the business of insurance was not commerce at all.[28]

In a comparatively recent case, *Western Live Stock v. Bureau of Revenue*, Mr. Justice Stone, citing the *Paul*, *Hooper*, and *Deer Lodge County* cases, supra, stated:

> "That the mere formation of a contract between persons in different states is not within the protection of the commerce clause, at least in the absence of Congressional action, unless the performance is within its protection, is a proposition no longer open to question."[29]

WHAT IS COMMERCE?

In order to determine whether or not the business of insurance is commerce it is necessary to ascertain just what commerce is as defined by the Supreme Court.

which overruled Swift v. Tyson, supra, which had been hallowed by almost a century of existence.

[26] New York Life Ins. Co. v. Deer Lodge County, 231 U. S. 495 at 509, 34 S. Ct. 167 (1913).

[27] 275 U. S. 274, 48 S. Ct. 124 (1927).

[28] On this point, id. at p. 216, the Court said: "A contract of insurance, although made with a corporation having its office in a State other than that in which the insured resides and in which the interest insured is located, is not interstate commerce."

[29] Western Live Stock v. Bureau of Revenue, 303 U. S. 250 at 253, 58 S. Ct. 546 (1938).

The first attempt by the Supreme Court to define the term "commerce" was made in *Gibbons v. Ogden,* in which the Constitution's most distinguished interpreter, Chief Justice Marshall, said:

> "... Commerce undoubtedly is traffic, but it is something more; it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches. . . .
>
> "... It has, we believe, been universally admitted that these words (of the commerce clause) comprehend every species of commercial intercourse between the United States and foreign nations." [30]

This broad and general interpretation has permitted the courts to expand the concept of commerce to include many things which were unknown to and not contemplated by the framers of the Constitution.

By-passing many of the intervening years in which the Supreme Court had occasion from time to time to refer to Chief Justice Marshall's definition and to expand thereon, we arrive at the important case of *Pensacola Telegraph Co. v. Western Union Telegraph Co.,*[31] in which the Court, seemingly in an effort to demonstrate that it was keeping abreast of the times and the advance of civilization with its attendant developments, inventions, and complications arising out of an expanding economy and a growing country, said:

> "The powers thus granted are not confined to the instrumentalities of commerce, or the postal system known or in use when the Constitution was adopted, but they keep pace with the progress of the country, and adapt themselves to the new developments of time and circumstances. They extend from the horse with its rider to the stage-coach, from the sailing-vessel to the steamboat, from the coach and the steamboat to the railroad, and from the railroad to the telegraph, as these new agencies are successively brought into use to meet the demands of increasing population and wealth."

In *International Texabook Co. v. Pigg,*[31a] the plaintiff, a Pennsylvania corporation, sued on a contract providing for installment payments for a course of instruction by correspondence in commercial law. The contract was entered into in Kansas with a citizen of that state through a solicitor of plaintiff. The solicitor not only solicited students to take the various correspondence courses offered by plaintiff but also collected the installment payments. He maintained an office

[30] Gibbons v. Ogden, 8 Wheat. (22 U. S.) 1 at 188, 192 (1824).
[31] 96 U. S. 1 at 9 (1877).
[31a] 217 U.S. 91, 30 S. Ct. 481 (1910).

in Kansas at his own expense. The company had no office of its own in that state. He would remit the collections to the company by mail and it would send its course of instruction to the enrollee through the mail.

Here was a case which involved a private contract of a local nature, yet the Court found that the plaintiff was engaged in interstate commerce. In holding that a Kansas statute which required foreign corporations to perform certain conditions precedent to doing business within that state directly burdened the interstate business of plaintiff, Mr. Justice Harlan speaking for the majority, said:

> "It is true that the business in which the International Textbook Company is engaged is of a somewhat exceptional character, but, in our judgment, it was, in its essential characteristics, commerce among the states within the meaning of the Constitution of the United States. It involved, as already suggested, regular and, practically, continuous intercourse between the Textbook Company, located in Pennsylvania, and its scholars and agents in Kansas and other States. That intercourse was conducted by means of correspondence through the mails with such agents and scholars . . . this mode—looking at the contracts between the Textbook Company and its scholars—involved the transportation from the State where the school is located to the State in which the scholar resides, of books, apparatus and papers, useful or necessary in the particular course of study the scholar is pursuing. . . . Intercourse of that kind, between parties in different States—particularly when it is in execution of a valid contract between them—is as much intercourse, in the constitutional sense, as intercourse by means of the telegraph—'a new species of commerce'. . . ."[32]

One would rightfully assume on the basis of the sweeping language in the foregoing opinion that the Court was drawing away from its views in the *Paul* case and was ready, when confronted with the issue, to recognize the business of insurance as commerce.[33] However, the Court,

[32] The International Textbook Co. v. Pigg, 217 U. S. 91 at 106, 30 S. Ct. 481 (1910).

[33] It is well known that insurance agents forward applications for policies to the company's home office by mail and that the policies are mailed by the company to its agents or direct to the applicants. Thereafter there is correspondence between the company and the insured with respect to premium notices, loans, proofs of loss, proofs of death, reports of the company's financial condition, etc. This intercourse would seem to grow out of and in execution of the contract between the insurer and the insured.

when put to the test, found itself ineluctably bound to its views in the *Paul* case,[34] and reiterated what it there said in the *Deer Lodge County*[35] and *Bothwell* cases,[36] previously discussed herein. Both of these cases were before the Court after it had decided the *International Textbook* and *Pensacola Telegraph* cases.

In the *Deer Lodge County* case counsel for the insurance company directed the Court's attention to its decision in the *International Textbook* case. The Court, however, sought to distinguish its holding in the latter on the ground that there the transaction involved transportation of property and not "mere personal contracts" such as insurance which is not commerce "at all." The answer to such a tenuous distinction is found in the facts in the *International Textbook* case. The transaction involved therein, a contract for a course of study in commercial law, required nothing more in the way of transportation of property than is involved in a transaction whereby a policy of insurance is purchased at an agreed price (premium) from a company located in another state. The purchase of a policy also involves the transportation of property over state lines—the mailing of the policy and future correspondence relating to the policy which is the contract between the parties. To place the distinction upon the basis which the Court did is to overlook the development and growth of the modern insurance corporation, its part and force in the nation's economic life and to cloister oneself against realities.

In a case involving the Fair Labor Standards Act,[37] *Kirschbaum Co. v. Walling*, it was held that employees of a building owner who did the work of maintaining and operating the building in which the tenants were principally engaged in the production of goods for interstate commerce were engaged in an "occupation necessary to the production"[38] of goods in interstate commerce. The rationale of the court was that without light, heat and power the tenants could not engage in the production of goods for interstate commerce. Of course it could be said, as did the Court, that since the act included persons engaged "in any process or occupation necessary to the production" and because the persons engaged in maintaining a building were engaged in a process or occupation necessary to enable the actual producers to pro-

[34] 8 Wall. (75 U. S.) 168 (1868).
[35] 231 U. S. 495, 34 S. Ct. 167 (1913).
[36] 275 U. S. 274, 48 S. Ct. 124 (1927).
[37] 29 U. S. C., § 201 et seq. (1940).
[38] Kirschbaum Co. v. Walling, 316 U. S. 517 at 524, 62 S. Ct. 1116 (1942).

duce the goods to be used for interstate commerce, such persons were within the ambit of the act. It is to be noted that such reasoning was applied in a situation where the persons employed for such purposes were the employees not of the producers of the goods but of the owner of the building in which the producers rented space.

The validity of the Court's rationale and conclusion has been questioned.[39] In fact, these maintenance and service employees were engaged in keeping the building habitable and were performing certain services which are essential in order for a landlord to acquire and retain tenants. Such maintenance and services while beneficial to the tenants would appear to be merely incidental to their use of the space occupied by them. However, what is important, in connection with the consideration of the subject of this paper, is the fact that the opinion revealed the Court's broad thinking on the subject of interstate commerce and its willingness to expand the commerce concept to take in activities of a local nature which indirectly and remotely contribute to making it possible to carry on an activity interstate in character.

Further evidence of such willingness on the part of the Court is found in the case of *Wickard, Secretary of Agriculture v. Filburn.*[40] In that case a small wheat grower who grew wheat for consumption on his own farm was held liable to the marketing penalty under the Agricultural Adjustment Act of 1938.[41] The Court, Mr. Justice Jackson speaking, held that a local activity, though not regarded as commerce, "may still, whatever its nature, be reached by Congress if it exerts a substantial *economic* effect on interstate commerce, and this irrespective of whether such effect is what might at some earlier time have been defined as 'direct' or 'indirect.'"[42]

In a very recent case, *National Labor Relations Board v. J. L. Hudson Co.*, the Sixth Circuit Court of Appeals considered the question of whether the National Labor Relations Act[43] was applicable to a retail department store located in Detroit, Michigan.

It was established that in 1942 the store purchased merchandise of the cost of $43,864,289 and that over eighty percent thereof was shipped to it from outside the state. A comparatively insignificant

[39] Lichtenstein, "Commerce—Power to Regulate Sale and Production of Goods," 21 CHI-KENT L. REV. 103 (1942).

[40] 317 U. S. 111, 63 S. Ct. 82 (1942).

[41] 7 U. S. C., Supp. I, § 1340 (1940).

[42] Wickard, Secretary of Agriculture v. Filburn, 317 U. S. 111 at 125, (3 S. Ct. 82 (1942). Italics supplied.

[43] 29 U. S. C., § 151 et seq. (1940).

amount, $300,000 in value, was shipped to it from foreign countries. Only one and six-tenths percent of its total sales were sold and shipped to customers outside the state. In shipping such out of state sales, the store used the parcel post, the railway express, trains and interstate truck lines. One-sixth of its advertising costs through the various media was expended for circulation in states other than Michigan.

Upon the basis of these facts, the court found that the activities of the store although "intrastate in character when considered separately," were "so closely and substantially related to interstate commerce that their control is essential or appropriate for the protection of interstate commerce from burden or obstruction. . . ."[44]

Reasoning by analogy, it would seem that the same conclusion may be reached with respect to the insurance company which maintains offices in various states, employs the postal services, the railroad, and advertises through the media of national radio hookups, newspapers, magazines and pamphlets and whose vast premium and investment income is received from persons and property located in other states many of which are far removed from its home office. An even stronger case, as will presently be seen, can be made for the position that such an insurance company is engaged in and its activities affect interstate commerce.

Thus it would appear that the Supreme Court has discarded the restrictive criteria of "transportation of property" and "direct" effect upon interstate commerce for the purpose of determining whether an activity was in or affected interstate commerce. The modern concept is that if an activity, although local in character, exerts a substantial economic effect upon interstate commerce, irrespective of whether such effect is direct or indirect, it is subject to federal regulatory action.[45]

THE ADMINISTRATIVE VIEWPOINT

The National Labor Relations Board in *The Matter of John Hancock Mutual Life Insurance Company and American Federation of Industrial and Ordinary Insurance Agents Union No. 21571, etc.* and in *The Matter of John Hancock Mutual Life Insurance Company*

[44] National Labor Relations Board v. J. L. Hudson Co., (C.C.A. 6th, 1943) 135 F. (2d) 380 at 382.

[45] Upon this Mr. Justice Jackson in Wickard v. Filburn, 317 U. S. 111 at 123, 63 S. Ct. 82 (1942), said: "The Court's recognition of the relevance of the economic effects in the application of the Commerce Clause . . . has made the mechanical application of legal formulas no longer feasible."

and Industrial Insurance Agents' Union Local No. 84, etc.[46] adopted a realistic attitude by taking cognizance of the fact that insurance was a business of considerable magnitude and a *force majeure* in the economic sphere. The Federation of Insurance Agents filed a petition in which it was alleged that a question affecting commerce had arisen concerning the representation of employees in the East St. Louis, Illinois, district office of the company, a Massachusetts organization. In the case second-named, supra, a petition was filed by the Industrial Insurance Agents' Union Local of the United Office and Professional Workers of America concerning representation of employees in the Hoboken, New Jersey, district office of the company.

The National Labor Relations Board on the issue of "commerce" found:

> "...that the questions concerning representation which have arisen, occurring in connection with the operations of the company . . . have a close, intimate, and substantial relation to trade, traffic, commerce, and transportation among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce."[47]

Because the board's findings of facts point up the ramifications of the insurance business, its interrelationship with other businesses which fall within the ken of commerce, and the effect it has on our economic life, a recital of some of the findings would be beneficial and of interest in connection with the consideration of the problem herein discussed.

It was found that on December 31, 1937, the company had more than eight million policies in force with a total face amount of over four billion dollars and that its policyholders, who resided in all the states of the United States and in foreign countries, numbered approximately five million, six hundred thousand. From 1929 to 1938, the dividends paid amounted to over fifteen million dollars per year. The company's assets, derived from premium payments and earnings on its investments, were invested in a large number and variety of securities. Each policyholder was the owner of a proportionate share of those assets and through its investment program the company afforded each policyholder a diversity of investments not usually available to individual investors through direct purchase of securities. It also was

[46] 26 N.L.R.B. 1024, cases Nos. R-1747 and R-1748 (August 23, 1940).
[47] Id., case No. R-1748 at 1031.

found that on December 31, 1938, the company's assets totaled $924,000,000 and that most of its cash was on deposit in commercial banks throughout the country. From 1934 to 1938, the company annually had available for investment over $136,000,000.

The diversity of its investments and the extent of its interests in other businesses were established by the fact that in 1938 it invested more than $18,000,000 in public utility bonds, more than $14,000,000 in bonds purchased from companies engaged in the business of financing automobile sales on a nation-wide basis and large manufacturing and packing corporations, its investment in real estate mortgages was over $163,000,000 and of this amount over $9,000,000 was invested in such property as hotels, general stores, office buildings, department stores, auto sales show rooms, storage garages, warehouse buildings and auto service stations.[48]

The board after finding the foregoing facts said:

> "The nature and extent of the facilities which insurance companies afford to the commercial life of the nation are so well known as to require neither proof nor discussion. Insurance companies generally, and the Company in particular, as stated by it in its Agent's Manual, perform a 'distinguished public service . . . through wide distribution of funds under a program of diversified investment.' The amount of money annually invested by insurance companies in commercial enterprises of almost every description is huge; that its withdrawal from the money market would seriously impair that free flow of capital and credit which is essential to the commercial life of the United States is beyond question.
>
> "The prominent place of the Company in the insurance business in the United States is clear from the foregoing. So also is it clear that the Company, by its loans totalling hundreds of millions of dollars to industry and railroads, to power companies, telephone companies, and other public utilities, to companies engaged in large scale financing of automobile sales, and to other commercial enterprises, makes a contribution to the nation's commercial and industrial life and transportation systems which, if disturbed, would paralyze much of the nation's commercial life."[49]

[48] The board also found the company had fifty-one general agents in thirty-one states and the Territory of Hawaii; 369 district offices in thirty-four states, the District of Columbia and the Territory of Hawaii; that it employed sixty-eight agents and four correspondents in the various states to manage its real estate interests; that it had forty-eight loan companies in twenty-three states and the District of Columbia through whom its mortgage investments are made.

[49] 26 N.L.R.B. 1024, case No. 1748 at p. 1029 (1940). According to the

The Wage and Hour Division of the Department of Labor has said that the activities of most employees of insurance companies are so closely interwoven with activities in interstate commerce, including the constant use of the mails and other instrumentalities of commerce, as to be a part of such commerce.[50]

CONCLUSION

It thus appears very clearly that there is nothing sacrosanct about insurance or the contract of insurance and that it is a pure commercial enterprise and transaction which is a potent force in the everyday business world. That insurance companies control tremendous pools of capital and that the handling of these reservoirs of wealth has a considerable impact upon the capital and securities markets and correspondingly reacts upon the national economy cannot be gainsaid.

When the *Paul* case was decided the business was "to a great extent local; that is, conducted through the domestic contracts by stock companies. The great and commanding organizations of the present day had hardly begun the amazing developments which have made them the greatest associations of administrative trusts of the business world."[51] Modern insurance is essentially in character national and international.

INSURANCE ALMANAC for 1943, at the close of 1942, the aggregate amount of insurance in force of 209 life companies was $128,833, 795, 649 and the combined dividends paid to policy-holders in the year was $436,678,255.

TIME MAGAZINE, 77 (Oct. 4, 1943) reports that United States life insurance companies have $36,000,000,000 in assets, the world's second greatest pool of private capital and in the first eight months of 1943 they wrote $5,531,393,000 worth of new business. That 67,000,000 United States citizens own policies worth an approximate total of $133,000,000,000. If the figures of the various fire, casualty and marine companies were added, the total sum of insurance in force and the assets controlled directly or indirectly by the companies would be even more staggering.

[50] U. S. Dept. of Labor, Wage and Hour Div., 1st Annual Rep., p. 19 (1939); 2 C.C.H. Labor Law Service, § 23,560.084. Observe that reference is made to the use of the mails. In New York Life Ins. Co. v. Deer Lodge County, 231 U. S. 495, 34 S. Ct. 167 (1913), it was urged, without avail, that the use of the mails was essential to practically every step in the transaction of the company's business.

[51] Argument of the company's counsel in New York Life Ins. Co. v. Cravens, 178 U. S. 389, 20 S. Ct. 962 (1900), quoted from New York Life Ins. Co. v. Deer Lodge County, 231 U. S. 495 at 507, 34 S. Ct. 167 (1913). Interestingly enough, in all of the cases from Paul v. Virginia to New York Life Ins. Co. v. Deer Lodge County, the companies and their agents were urging that the business of insurance was commerce. In 1892 a bill (H.B. 9629) which had been drafted at the direction of the President of the Union Central Life Insurance Company was introduced in Congress to provide for federal supervision but failed to become law. Again in 1897 a

This expansion has brought about a situation in which the home office is located in a state in one part of the continent while the insurance is in force and the risk insured is located in a state in another part of the continent.[52] Surely, this is an affirmative phase of interstate commerce.

similar bill was introduced in the United States Senate which also failed of passage. Contrast the present attitude of insurance companies toward federal supervision. See "Effects of Federal Supervision," CASUALTY INSUROR, 3 (Aug. 1943); "Federal Supervision of Insurance," MANAGEMENT REV. 352 (Sept. 1943); "More Legislation by Fiat," NAT. UNDERWRITER, life ins. ed., (Sept. 10, 1943); EASTERN UNDERWRITER, Part 2, pp. 1, 18, 20, 22 (Oct. 1, 1943); EASTERN UNDERWRITER, pp. 1, 3, 30 (Oct. 8, 1943).

[52] In many instances the home offices are located in foreign lands. Numerous British, Canadian and Japanese companies do and have done business in the United States, e.g. Liverpool, London and Globe Insurance Company, North British and Mercantile Insurance Company, Great-West Life of Canada, Sun Life Assurance Company of Canada, and the Tokio Fire and Marine Insurance Company. For a complete list of such foreign companies see the INSURANCE ALMANAC (1942). The Sun Life Assurance Company of Canada, one of the largest life insurance companies in the world, recently announced that its investment in United States Government Bonds alone totaled $137,636,161. See EASTERN UNDERWRITER, p. 23, col. 2 (Oct. 8, 1943).