



# Legal Beat

By MICHAEL SEAN QUINN

## Slavery & Insurance

*Examining slave insurance in a world 150 years removed*

Recently, in March 2000, Aetna, the nation's largest health insurer, was criticized for participating in slave insurance 150 years ago. Aetna apologized and expressed its "deep regret" over participating in this "deplorable practice."

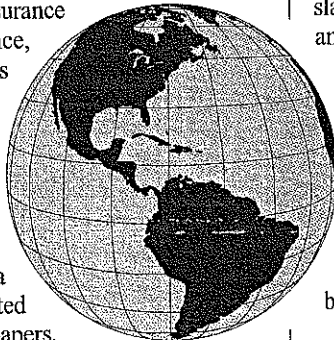
### THE QUESTION

Obviously, slavery was a deplorable practice, as was the slave trade, and American slavery was the worst of all New World variations. Nevertheless, that granted, I was puzzled as to why life insurance on slaves was so morally wretched, even though it occurred in a morally unacceptable context.

Life insurance on slaves doesn't seem very different, after all, from key person (formerly key man) life insurance which businesses sometimes take out on senior executives and other employees. Of course, in our time, as a general rule, executives consent to the existence of such insurance; yet key person life insurance does create a certain moral hazard. (A failing business might be tempted to have a senior executive killed in order to get the life insurance.)

Of course, property insurance on slaves is a completely different matter. If an insurer issued specifically property insurance on slaves, it would have to acknowledge that human beings were being treated simply as objects, and this is morally objectionable. Naturally, I wanted to know which insurance Aetna issued. I was especially puzzled because the Aetna apology was unclear on the point. Some newspapers described the insurance as life insurance, while others described it as property insurance.

I phoned Alfred LaBarge, the Aetna spokesman quoted in various newspapers, to inquire and to obtain a copy of the sample policy. Alas, LaBarge did not return my call. I therefore went to the books to try to find out about the relationship between insurance and slavery in the



American south. Unfortunately, there does not exist an authoritative history of insurance in America. Fortunately, there are histories of slavery and the law. Unfortunately, nothing is said about insurance law. Consequently, I went to the cases.

### LIFE INSURANCE

There are a smattering of reported cases about life insurance upon slaves. My big worry was moral hazard. Fortunately, no reported cases consider this issue. The fact that there are no reported cases suggest that it was perhaps not a big problem.

From an insurance standpoint, the cases are fairly routine. In one case, the life of a slave was insured so long as he was not engaged in an occupation more dangerous than being a laborer in a tobacco warehouse and so long as he was not south of New Orleans. The man died when he fell off a riverboat traveling north from New Orleans so that he could work on a sugar plantation. The insurer refused to pay upon the grounds that he was on his way to a more dangerous occupation. The Louisiana Supreme Court ruled that the slave was not involved in that occupation yet and was not south of New Orleans, and so the insurance applied.

In another case, insurance agents sued on a note in South Carolina. The note was exchanged in Massachusetts for life insurance upon a slave. In Massachusetts, insurance upon slaves was void by statute. Consequently, the South Carolina Supreme Court held that the note was unenforceable, because Massachusetts law applied.

The court also noted that there was some evidence that the insurer had not charged the agent's account for the unpaid premiums. (Apparently, the agent had guaranteed the premium.)

In another case, a slave escaped and

was then shot to death by a properly deputized member of a posse. The insurance policy contained exclusions for death resulting from "insurrection, riot, or civil commotion, or any military or usurped authority, or by the hands of justice[.]"

The North Carolina Supreme Court held that the death of the slave was not part of any insurrection, riot, or civil commotion, that it quite obviously did not result from military action, and that it did not result from justice, because there was no valid judicial order in place. Consequently, North Carolina Mutual Life had to pay. The act of the deputy was shocking, of course, but the insurance law decision was correct, although moral hazard problems lurk in the shadows.

### PROPERTY INSURANCE

There are also several cases involving property insurance. Interestingly, all of these cases arose in the context of the slave trade. Insurance in this context must have been quite common. The fact that many anti-slavery maritime states outlawed insurance upon slaves-in-transit suggests that the practice was common, and therefore economically important.

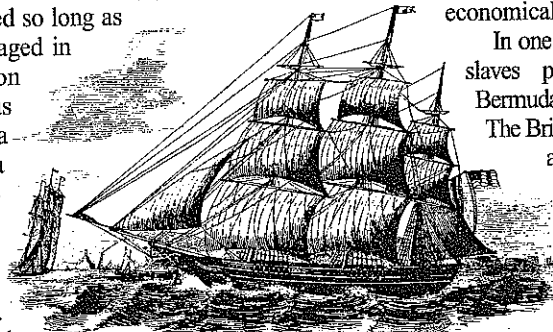
In one case, a ship carrying slaves put into Hamilton, Bermuda for repairs in 1835.

The British government freed all 78 slaves on board, and one slave owner made a claim for \$26,000 resulting from the loss of his 38 slaves. The insurance company denied coverage on the grounds that the vessel was unseaworthy.

The Court of Appeals of Law of South Carolina held, in 1838, that the jury correctly decided that the ship was seaworthy and that the loss of the slaves was attributable to actions of the Chief Justice of Bermuda and therefore fell within the coverage.

By far the most complex case of this sort is a group of cases that first came before the Louisiana Supreme Court in 1845. All of these cases are clustered around one of them, styled, ironically enough, *McCargo v. New Orleans Insurance Company*. (There were several cases because there were a lot of slaves on one ship; they were owned by different people, but all apparently insured under the same policy. Of course, this fact suggests that slave policies were broked through ship masters, who no doubt received some sort of commission.)

In *McCargo*, a ship left Virginia with a large number of slaves. A male slave was



Many of the court documents involving the slave insurance trade that survive today involve the perilous passage many slaves were forced to make from Africa to America.

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caught in the female ship hold. He led a successful revolt of some sort, during which there was one casualty. The slaves chopped off the head of the overseer, threw his corpse overboard, and then sailed to the Bahamas.

There, the British authorities freed all of the slaves except those involved in the murder of the overseer, and the vast majority of them departed. The slave owners sought coverage, which the insurer denied.

As it has always been the case in insurance (and always probably will be) once the insurer decided that coverage should be denied, it did so upon every reason it could think of. Consequently, New Orleans Insurance denied coverage for a lot of reasons: (1) insurance never commenced since slaves were loaded at a port other than the one warranted; (2) the ship was not seaworthy for lack of sufficient guard on the slaves; (3) the insurrection of slaves constituted a breach of warranty; (4) slave insurrection constituted an excepted risk; (5) the voyage was abandoned by going to the Bahamas; (6) departure of slaves constituted an excepted risk, namely "elopement," i.e., voluntary departure; (7) the insurrection by the slaves constituted an act of piracy, which is an excepted risk; and (8) liability was excluded under the policy because it arose in performance of criminal acts.

Some of these issues were trivial, while some were extremely important. One of the important issues was seaworthiness. An incompetent crew renders a vessel unseaworthy. The insurer maintained that there was insufficient guard on the slaves and hence the vessel was unseaworthy. The jury resolved this question against the insurers, however.

Another crucial issue concerned the nature of the insurance itself. Foreign interference was a significant risk that was insured against, but the insureds warranted the coverage to be "free from elopement, insurrection, and natural death." The principle question in the case concerned insurrection.

As is common in property insurance cases, the court found a way to say that what appeared to be a warranty wasn't really a warranty. However, it was treated as an exclusion, and the Louisiana Supreme Court held that there certainly was an insurrection and that the coverage was therefore defeated.

The policyholders argued that the insurrection was not the proximate cause of the loss. Instead, they claimed that the acts of the British government in the Bahamas were the cause of the loss. The Louisiana Supreme Court showed little patience with this argument. To be sure, insurrection was not the immediate cause of the loss, but it was part of the causal process and therefore coverage-defeating. Courts today still grapple with analogous issues.

In addition, the court said that when the

slaves turned the ship from its route to New Orleans and headed for the Bahamas, they had abandoned the voyage for which insurance was issued. The policyholders argued that it was not their fault that the destination was changed and hence they did not abandon the voyage. The court rejected this argument, and pointed out that slave owners are legally responsible for the acts of their slaves.

In the end, the Louisiana Supreme Court reversed the Commercial Court of New Orleans on the issue of insurrection. As a legal decision, this holding was virtually compelled by the facts. On the other hand, when this lengthy decision is viewed as a political document, the court was clearly quite hostile to slavery as an institution.

The court observed that slavery is contrary to natural law, that it was completely predictable that slaves would try to escape ("Who would not, after all?"), and that, from the point of view of the fundamentals of insurance law, cargo was not usually insurable against "inherent vice" and that the desire for liberty on the part of slaves was very much like an inherent "vice." In other words, the court was fundamentally unsympathetic to the interests of slave owners.

### POLITICAL INCORRECTNESS

Some legal scholars are conjecturing that insurance was one of the business institutions that made the slave trade possible. Perhaps this is true. At the same time, there is another hypothesis that might be worth exploring which could also be true.

If property insurers in the 19th century were anything like property insurers today, they insisted upon warranties, representations and inspections designed to reduce the probability of injury to the property insured. Today, Hartford Steamboiler, Factory Mutual and Industrial Risk, as well as Kemper, all inspect boilers, pressure vessels, machinery and other insured objects.

Similarly, other property insurers require firewalls, sprinklers and the inclusion of various design features in buildings. Insurers that cover elevators issue specifications and inspect them. Workers' comp insurers inspect plants for safety. Marine insurers have all sorts of requirements and they inspect. Some of these activities make the workplace safer.

It is worth considering, after it is taken as axiomatic that slavery in the American southern states was deplorable and that the slave trade was profoundly reprehensible, whether insurance may have at least mar-

ginally improved the situation under some circumstances.

First, insurers may have required representations as to the living and working conditions of slaves. Presumably those representations would have required that the slaves live and work under conditions which would reduce, and perhaps minimize, the probability of having to pay under the policy. Probably, those representations would require conditions which would be life enhancing, at least to some degree.

Second, insurers probably required warranties as to living and working conditions that would void coverage if they were false.

Third, I would not be surprised if some insurers actually inspected the living and working conditions of the ships, plantations and factories when they insured the slaves who were to be there.

Of course, these measures were probably not designed to protect lives, and they were not pervasive. After all, natural death was an excluded risk under slave transport insurance. Consequently, misery in the shiphold, where slaves-to-be were packed in like sardines, was not mitigated.

### CONCLUSION

It would be interesting to know what the unreported court cases look like. This could be determined by reviewing trial court records in southern states for litigation between slave owners and insurance companies involving policies covering slaves. Unfortunately, history buffs tell me that many of the courthouses in which those records would have been stored were burned in the course of the Civil War.

It would also be interesting to get a look at the claims files of insurance companies which covered slaves during the first 60 years of the 19th century. Unfortunately, I haven't the faintest idea of where to look for those records, and my bet is they are mostly gone with the wind. ■

*Quinn is an Austin shareholder in the law firm of Sheinfeld, Maley & Kay. He is mostly involved in litigation problems involving insurance coverage. Many of the problems upon which he works involve conduct of lawyers. He testifies from time to time on insurance related issues and on issues pertaining to the conduct of lawyers.*

