

**IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS  
COUNTY DEPARTMENT, CHANCERY DIVISION**

**ALAN S. DANIEL and** )  
**WILLIAMSON COUNTY AGRICULTURAL** )  
**ASSOCIATION, on behalf of themselves and** )  
**All other persons similarly situated,** )  
 )  
**Plaintiffs,** )

v. )

**AON CORPORATION, AON GROUP, INC.,** )  
**AON SERVICES GROUP, INC., AFFINITY** )  
**INSURANCE SERVICES, INC., K&K** )  
**INSURANCE SPECIALTIES, INC., K&K** )  
**INSURANCE GROUP, INC. (d/b/a K&K** )  
**INSURANCE AGENCY, INC.),** )  
 )  
**Defendants.** )

**No. 99 CH 11893**

**Judge Julia M. Nowicki**

---

**MEMORANDUM OPINION AND ORDER**

This matter comes before the Court on the motion of the Class Representatives and the Settlement Class for Final Approval of the Class Action Settlement Agreement. Also before the Court are the Joint Motion of plaintiffs and Aon to Strike, the Motions of North American Van Lines, Inc. and Allied Van Lines, Inc for Leave to File Documents and for Leave to Supplement the Record in Opposition to Proposed Class Action Settlement, and Dale Johnson Trucking's Proposed Modification of the Release.

**Background**

Plaintiffs filed their class action complaint alleging a scheme whereby Aon designed, implemented, supervised and enforced a policy in which Aon and its subsidiaries and agents collected undisclosed contingent commissions from their policyholders. Plaintiffs bring claims against Aon for breach of fiduciary duty and/or abuse of a confidential relationship and

conspiracy to breach a fiduciary duty. Plaintiffs have chosen a constructive trust theory to define their measure of recovery and assert that the plaintiffs' recovery is properly measured by the disgorgement of profits retained by the Aon entities. This Court certified a nationwide class in this matter in July, 2004.

The Attorneys General of New York, Connecticut and Illinois, as well as the insurance authorities from New York and Illinois (the "Regulatory Agencies"), filed complaints against Aon in early 2005. Aon entered into a settlement agreement with the Regulatory Agencies for \$190 million as well as specified injunctive relief (the "Regulatory Settlement"). The parties in the instant case subsequently reached a settlement agreement in this case in March, 2005 and this Court granted preliminary approval of that agreement. The class plaintiffs and Aon agreed to a \$38 million settlement, in addition to any overflow from the Regulatory Settlement, which the parties estimate will amount to \$49 million, for a total settlement amount of \$87 million. The parties also agreed to an injunction barring Aon from continuing to collect contingent commissions and other business practice reforms. The parties now seek final approval of their settlement agreement. This Court conducted a fairness hearing on final approval in December, 2005 and a supplemental fairness hearing in March, 2006.

### **Discussion**

It is worthwhile to mention at the outset some of the unique features of this case. First, it appears that this lawsuit has been instrumental in reversing a long standing custom in the insurance brokerage industry, e.g., the collection of undisclosed commissions. One of the defenses asserted by Aon is that the collection of undisclosed commissions has been a common practice accepted by the community and, by implication, approved by the various state regulators. This litigation exposed this business practice as deceptive. The various attorneys

general have now made it clear that the formerly “accepted” practice of collecting undisclosed commissions is not permitted by state authorities. As such, the injunctive relief obtained as a part of the settlement of this lawsuit, which prohibits that practice, is significant.

Unlike many consumer class actions where the amount received by individual class members is quite small, a distinctive characteristic of this lawsuit is the sizeable recovery for many of the class members. Thus, this class action presents an ideal situation for absent class members to opt out because it is economically feasible for them to proceed with their own action without any prejudice to losing the benefits of a class action.

Finally, while the objectors have strenuously argued the unfairness of this settlement, not one of them has come close to grappling with the undeniable fact that had this matter gone to trial, the likelihood of a plaintiffs’ victory was somewhat questionable on a class action basis. The Court admonished plaintiffs early and often (and in fact, tried to convince the parties to consider an injunction only settlement early in the case) that the Court was skeptical of plaintiffs’ ability to prove its claims on behalf of the class. The hurdles that plaintiffs faced in this case were immense. The record is well documented with arguments made by Aon that Aon was certain would be favorably received by the courts of review. Nevertheless, plaintiffs were successful in extracting \$87 million from Aon, as well as injunctive relief, on what Aon termed a worthless case. Further proof of the adequacy of this settlement is the negligible number of opt outs.

***Fairness and Reasonableness***

Pursuant to 735 ILCS 5/2-806, a settlement agreement in a class action must be approved by the court in its sound discretion. A court must evaluate whether a settlement agreement is

“fair and reasonable and in the best interest of all who will be affected by it.” GMAC Mortgage Corp. of PA v. Stapleton, 236 Ill. App. 3d 486, 493 (1<sup>st</sup> Dist. 1992).

Several factors are relevant in determining whether a settlement is fair and reasonable, including (1) the strength of the plaintiff’s case on the merits, (2) the defendant’s ability to pay, (3) the complexity, length and expense of further litigation, (4) the amount of opposition to the settlement, (5) the presence/absence of collusion in reaching the settlement, (6) the reaction of members of the class to the settlement, (7) the opinion of competent counsel, and (8) the stage of the proceedings and the amount of discovery completed. City of Chicago v. Korshak, 206 Ill. App. 3d 968, 971-72 (1<sup>st</sup> Dist. 1990).

The first factor, the strength of the plaintiffs’ case on the merits, is the most significant factor in evaluating the fairness of a settlement. Steinberg v. System Software Associates, Inc., 306 Ill. App. 3d 157 (1<sup>st</sup> Dist. 1999). A court must balance “the amount of the proposed settlement and the immediacy of a prospective recovery for Class Members against the continuing risks of litigation.” Korshak, 206 Ill. App. 3d at 972. Plaintiffs and Aon argue that there is a significant risk to continued litigation in this case, despite the Court’s certification of the class. Aon maintains that there are compelling arguments questioning the propriety of class certification that it would raise on appeal should this litigation continue as well as a number of defenses Aon would present at trial.

As to the appropriate certification of a nationwide class, Aon made a number of arguments against certification prior to settlement, and if there is not a final approval will continue to make these arguments. First, Aon argued that individualized issues prevail including whether a fiduciary duty exists; the scope and timing of any such fiduciary duty; the content of written contracts between class members and Aon; whether the written contracts were breached;

whether an individual was subjected to the practices at issue; whether Contingent Commissions were disclosed and agreed upon by class members; whether Aon received or was eligible to receive Contingent Commissions in connection with Aon's provision of professional services to class members; differences in knowledge; differences in ratification, consent and voluntary payment; and differences in limitations periods.

Aon also believed that there are potential choice of law issues. Aon notes that in certifying a nationwide class, this Court recognized that the law of the 50 states will likely be applied for policyholders who have written contracts with Aon. Aon argued that the laws of all 50 states differ in a number of ways including (1) different standards for whether a fiduciary or confidential relationship exists; (2) different standards for whether Aon represents the insurer or insured; (3) different standards for whether there is a duty to disclose compensation or commissions like profit sharing; (4) different requirements for proof of damages and/or the remedy of a constructive trust; (5) different requirements for reliance; and (6) differences in statutes of limitation.

Finally, Aon questioned class certification based upon the knowledge class members possessed regarding Aon's receipt of contingent commissions. Aon submitted that some class members expressly agreed to contingent commissions in their written contracts and that some class members were made aware of the contingent commissions through disclosures on fee agreements, invoices, Aon's website and since 1999, through the media. Moreover, Aon argued that the contingent commissions may not have been material to many class members.

Aon also intends to present evidence on ratification and the voluntary payment doctrine should this Court deny final approval of the settlement and this case proceed to trial. Pursuant to the law on ratification, when a plaintiff has knowledge of the facts and nevertheless accepts

benefits for any considerable length of time, the plaintiff will have ratified the conduct from which those benefits came. Hurd v. Wildman, Harrold, Allen & Dixon, 303 Ill. App. 3d 84, 93-94 (1<sup>st</sup> Dist. 1999). Under the voluntary payment doctrine, “money voluntarily paid under a claim of right to the payment, and with knowledge of the facts by the person making the payment, cannot be recovered by the payor solely because the claim was illegal.” Smith v. Prime Cable of Chicago, 276 Ill. App. 3d 843, 847 (1<sup>st</sup> Dist. 1995). Aon maintains that it is capable of submitting evidence to demonstrate that many class members continued to obtain insurance placement or other services through Aon even after learning of Aon’s receipt of, or eligibility to receive, contingent commissions.

Aon further identifies several potential obstacles to plaintiffs succeeding at trial. Aon argues that even if a fiduciary duty did exist between plaintiffs and Aon, the general rule is that a fiduciary has no duty to disclose its compensation. See Martin v. Heinold Commodities, Inc., 117 Ill.2d 67, 78 (1987). Aon also argues that under Illinois law, class claims based on an alleged breach of fiduciary duty would be prohibited by the Insurance Placement Liability Act, which bars fiduciary duty-based claims against insurance producers. 735 ILCS 5/2-2201(b); AYH Holdings, Inc. v. Avreco, Inc., 357 Ill. App. 3d 17, 43 (1<sup>st</sup> Dist. 2005). Finally, Aon argues that the claims of earlier class members would be time-barred by the two year statute of limitations. 735 ILCS 5/13-214.4.

Against these difficulties plaintiffs must face in prevailing on the merits, this Court must weigh the benefits provided to the class under the proposed settlement. The settlement agreement provides significant value to class members. The total monetary benefits available to eligible class members in connection with the Daniel action includes the \$38 million agreed to by the parties as well as the overflow from the Regulatory Settlement, which the parties estimate

will amount to \$49 million, for a total settlement amount of \$87 million, less attorneys' fees and \$5 million in administrative costs. In addition, the settlement provides that Aon will implement certain significant business reforms, including the prohibition of contingent compensation, alleged pay-to-play arrangements, alleged bid-rigging arrangements, reinsurance brokerage "leveraging," and inappropriate use of wholesalers. Aon will also implement mandated disclosures to clients related to quotes sought and received, company-wide written standards of conduct, and training on business ethics, professional obligations, conflicts of interest, anti-trust and trade practices compliance, and record keeping. Some objectors believe that since these business reforms are required by the Regulatory Settlement, they provide no value to the settlement in this case. However, plaintiffs and Aon note that their negotiations regarding such business reforms began before Aon entered into the Regulatory Settlement such that they are at least in part derived from the Daniel case. This Court need not make such a determination as it finds that even without the business reforms, the monetary benefits to the class outweigh the risk of continued litigation.

The second factor for the Court to consider is the defendants' ability to pay the agreed upon amount. In this case, Aon's counsel has represented the ability to provide the relief settled upon.

The third factor is the complexity, length and expense of further litigation. At the time this case settled, the parties maintain that there was additional discovery that had yet to be completed. There were a number of outstanding subpoenas for documents as well as notices for depositions of Aon employees. Aon maintains that it would pursue an appeal of class certification as well as any adverse decision after a trial in this matter. In fact, Aon's Rule 308 motion to certify this Court's certification of a nationwide class was fully briefed and pending

before the Court immediately prior to the parties reaching a settlement agreement. As such, without this settlement agreement, ultimate resolution of this case would be years away. Given the lengthy and costly litigation that remains in this case and the complex nature of the claims made, this Court finds that the risk of further litigation would diminish any potential remedy to plaintiffs and weighs in favor of approval.

The fourth factor is the amount of opposition to the settlement. In a class of approximately 1.5 million, only fifty objections have been filed, many of which were withdrawn. Only nine objections, on behalf of approximately eighteen objectors, were presented at the initial fairness hearing. In addition, there were a handful of other objectors who submitted their arguments through briefing alone. This Court notes that ultimately, the only objection that this Court believes has merit is that regarding notice, which resulted in the January 2006 notice. As such, this Court finds that the amount of opposition to the settlement is minimal and weighs in favor of approval.

The fifth factor before the Court is the presence or absence of collusion in reaching the settlement. Both plaintiffs and Aon assert that the parties' negotiations were made at arms length. This case was litigated for five and a half years before the parties reached a settlement, with repeated motions to dismiss, motions for summary judgment and a motion for class certification. No evidence of collusion has been presented to this Court. Therefore, the Court finds that the absence of collusion also weighs in favor of approval of the settlement.

The sixth factor for the Court to consider is the reaction of members of the class to the settlement. Overwhelming support by class members is strong evidence supporting the fairness of a class settlement. *See Mangone v. First USA Bank*, 206 F.R.D. 222, 226-27 (S.D. Ill. 2001). At the time of the additional notice and opportunity to opt out in January 2006, less than 500 opt

outs had been received. Given the large size of the class, which includes approximately 1.5 million members, these opt outs make up only a small portion of the class. And in this case, as alluded to earlier, given the significant recovery of many class members, it is economically feasible for those absent class members to opt out of the settlement and pursue independent claims. Further, this Court notes that there were several large and sophisticated corporations, who were identified as class members, that opted out after the November 2004 notice, yet opted back in to participate in the settlement benefits. These class members include American Airlines, Deere & Company, Exelon Corp., HSBC Finance Corp., Pacific Gas & Electric, Time Warner, Tribune Company, and USA Truck. This Court finds that such support by the class members weighs in favor of approval of the settlement.

The seventh factor to consider is the opinion of competent counsel. The experienced counsel for both plaintiffs and Aon consider this settlement to be fair, reasonable and in the best interest of all parties. It is important to note that this settlement was reached only after the parties vigorously litigated this case for well over five years before proceeding to arm's length settlement negotiations. *See Korshak*, 206 Ill. App. 3d at 974. As such, this Court finds that counsels' favorable opinion of the settlement agreement weighs in favor of approval.

The final factor to consider is the stage of the proceedings and the amount of discovery completed. "The stage of proceedings at which settlement is reached is important because it indicates the extent to which the trial court and counsel were able to evaluate the merits of the case and assess the reasonableness of the settlement." *Korshak*, 206 Ill. App. 3d at 974. This case has been heavily litigated for years, consisting of motions to dismiss, summary judgment motions and class certification. In the context of this litigation, Aon has produced well over half a million pages of documents as well as the millions of records AlixPartners LLC gathered

regarding contingent commission payments and used to develop and allocate the Daniel fund. In addition, some depositions, including the deposition of Meade Monger of AlixPartners, were completed. This Court finds that the discovery conducted between the parties and the evidence presented to the Court is sufficient to allow this Court to evaluate the fairness of the settlement.

Although this Court recognizes that there is always the possibility of a better settlement, “that is not the standard by which class action settlements should be measured. Rather, ... [the] [c]ourt’s role is limited to determining whether the Settlement is fair, reasonable, and adequate.” Mangone, 206 F.R.D. at 227. Taking into consideration all of the factors discussed above, including the potential weaknesses of plaintiffs’ case and the risk of further litigation, the defendants’ stated ability to pay, the expense in continuing with the litigation, the relatively small amount of opposition to the settlement in connection with the overwhelming support of the class members and class action attorneys, the lack of evidence of collusion in reaching the settlement and the exchange of information between the parties, this Court finds that the proposed settlement agreement is fair and reasonable.

### ***Objections***

Although there has been comprehensive briefing and extended oral arguments regarding the objections made to this settlement, in the end, the objections fall within seven basic categories: (1) that the notices did not provide an adequate opportunity to opt out or include sufficient information; (2) that the class definition is not “ascertainable;” (3) that the settlement consideration and benefits are inadequate; (4) that the release is overbroad; (5) that plaintiffs and their counsel cannot adequately represent the entire class; (6) the proposed class could not be certified in light of Avery v. State Farm; and (7) the requested attorneys fees were excessive.

(1) First, the objectors make several arguments with respect to the notices. The objectors argue that the notices were constitutionally deficient such that class members were not provided with adequate notice or with a meaningful opportunity to opt out. Three notices have been provided to the class members, a publication notice in November 2004, a direct mailing notice in June 2005, and a direct mailing notice in January 2006. The January 2006 notice provided class members with an unconditional opportunity to opt out or object to the settlement. After the January 2006 mailing, there has not been any serious objection to notice. Accordingly, the Court finds that these notices were more than sufficient under Due Process and applicable law to provide the class with notice of the settlement. Therefore, objections as to the sufficiency of the notice are overruled.

Objectors also object to the content of the notices maintaining that they did not provide sufficient information for class members to decide whether to opt out or object to the class settlement, did not inform class members of a distribution plan, and failed to inform class members of the MDL litigation. It is not necessary that a notice provide “a complete source of settlement information.” Fischer v. Madway, 485 A.2d 809, 811 (Pa. Super 1984). Aon submitted the affidavit of Kinsella/Novak Communications Ltd (“KNC”) stating that “the Notice effectively notified the Class about all of the important aspects of the Settlement.” Kinsella Aff. ¶ 31. Moreover, the notice provided that class members could contact the settlement administrator, class counsel, or a website for further information. This Court finds such information to be sufficient and overrules the objections as to the content of the notices.

(2) Second, the objectors argue that the class is not ascertainable and policyholders cannot determine whether they are in the class. This Court has already found the class to be sufficiently identifiable when it granted class certification in July 2004. The Court again addressed the class

