

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

AON CORPORATION, a Delaware corporation,)	
)	
Plaintiff,)	
)	Case No. 06 CH 16852
v.)	
)	
CERTAIN UNDERWRITERS AT LLOYD'S OF LONDON, <i>et al.</i>,)	Judge Dorothy Kirie Kinnaird
)	
Defendants.)	

ORDER

This matter came before the Court on Defendants Certain Underwriters at Lloyd's, London¹ and Liberty Mutual Insurance Company (U.K.), Ltd.'s (collectively "Defendants Underwriters") Motion for Summary Determination of Disgorgement Issue. The Court has received and reviewed the pleadings.² The Court has also reviewed Defendants Underwriters' Motion and Memorandum in Support, Plaintiff Aon Corporation's Corrected Opposition,

¹ Certain Underwriters at Lloyd's, London subscribing to Lloyd's Policy No. 479/PAON0199P01, with the exception of Syndicate 623.

² The pleadings include: Plaintiff Aon Corporation's Second Amended Complaint, Defendants Certain Primary Underwriters at Lloyd's, London and Liberty Mutual Insurance Company (U.K.), Ltd.'s Answer and Affirmative Defenses, Defendants Certain Excess Underwriters at Lloyd's, London and Liberty Mutual Insurance Company (U.K.), Ltd.'s Answer and Affirmative Defenses, Defendant Syndicate 623 at Lloyd's of London's Answer and Affirmative Defenses, Defendant Agricultural Excess and Surplus Insurance Company n/k/a Great American E&S Insurance Company's Answer and Affirmative Defenses, and Defendant Employers Reinsurance Corporation's Answer and Affirmative Defenses, Defendant Liberty Mutual Insurance Company's Answer, and Plaintiff Aon Corporation's Amended Answers to the Affirmative Defenses of Defendants Certain Primary Underwriters at Lloyd's, London and Liberty Mutual Insurance Company (U.K.), Ltd., Plaintiff Aon Corporation's Amended Answers to the Affirmative Defenses of Defendants Certain Excess Underwriters at Lloyd's, London and Liberty Mutual Insurance Company (U.K.), Ltd., Plaintiff Aon Corporation's Answer to the Affirmative Defenses of Defendant Syndicate 623 at Lloyd's of London, Plaintiff Aon Corporation's Answer to the Affirmative Defenses of Defendant Agricultural Excess and Surplus Insurance Company n/k/a Great American E&S Insurance Company, and Plaintiff Aon Corporation's Answer to the Affirmative Defenses of Defendant Employers Reinsurance Corporation.

Defendants Underwriters' Reply, the Joinders of Defendant Syndicate 623 at Lloyd's of London, Defendant Liberty Mutual Insurance Company (U.S.), and Defendant Employers Reinsurance Corporation, the various exhibits, and the relevant case law. The Court heard oral argument of counsel.³

This case concerns issues of insurance coverage involving the responsibilities of primary and excess insurance carriers for claims under the Certain Underwriters at Lloyd's, London's Combined Directors and Officers, Company Securities Liability, Professional Liability, Fiduciary Liability, Employment Practices Liability, and Blanket Bond Insurance Primary Policy Number 479/PAON0199P01 and Excess Policy Number 621/PAON0299P01, effective July 30, 1999, through July 30, 2002 (collectively "Combined Lines Policies"). The issue before this Court is whether the amounts that Plaintiff Aon Corporation expended in an underlying lawsuit and related Attorneys General Matters are recoverable under the Combined Lines Policies.

I. Daniel Litigation & Interrelated Matters

Aon Corporation ("Aon") is one of the largest insurance brokerages in the United States. In 1999, a class-action lawsuit was filed against Aon in the Circuit Court of Cook County, *Daniel v. Aon Corporation*, Case Number, 99 CH 11893 ("*Daniel*") for Aon's alleged improper actions with respect to its receipt or eligibility to receive contingent commissions. The Daniel plaintiffs alleged that

[t]hrough arrangements the Aon Defendants have with their directly or indirectly owned subsidiaries ... who place Insurance on behalf of Plaintiffs and the Class, the Aon Defendants are in a position to, and do, place Insurance with insurers who rebate to the Aon Defendants and/or their subsidiaries so-called profit sharing or bonus commissions.

³ Since this Motion was argued, the Court has entered Orders dismissing certain Defendants. On July 16, 2010, the Court dismissed Syndicate 2020, Liberty, Syndicate 623, Syndicate 839, and Syndicate 1212 pursuant to Settlement Agreements entered between Aon and each respective Defendant.

Third Amended Complaint at ¶ 3, *Daniel v. Aon*, No. 99 CH 11893 (filed June 23, 2003). Aon was also later sued in a number of federal and state courts, and has been subject to regulatory investigations by the Attorneys General of New York, Connecticut, and Illinois because of the same allegations (collectively “Interrelated Matters”).

The original *Daniel* class-action complaint was filed on August 19, 1999, alleging that Aon failed to disclose to its customers Aon’s opportunity to receive these “kickbacks” from certain insurers. The *Daniel* plaintiffs asserted that Aon’s conduct constituted a breach of fiduciary duty, a violation of the Uniform Deceptive Trade Practices Act, and a violation of the Illinois Consumer Fraud and Deceptive Business Practices Act. The *Daniel* plaintiffs sought among other relief:

...

- B. [A]n order requiring an accounting and disgorgement of kickbacks, or an award of damages and all monetary relief authorized by law as compensation to the named Plaintiff ... and the Class based on the Kickbacks received by Defendants and their affiliates in placing the insurance business of Plaintiff and the Class.
- C. An injunction prohibiting the unlawful practices complained of herein.

...

Complaint at 14, *Daniel v. Aon*, No. 99 CH 11893 (filed Aug. 19, 1999).

On November 2, 1999, an Amended Class Action Complaint for Accounting and Other Relief in the *Daniel* litigation was filed. On February 9, 2001, a Second Amended Class Action Complaint for Accounting and Other Relief was filed. The two amended complaints were substantially and substantively similar to the original complaint, except that the amended complaints contained revised class definitions and, in the Second Amended Complaint, a claim for unjust enrichment was added. The prayers for relief were virtually identical to those in the original *Daniel* complaint.

On January 25, 2002, the *Daniel* plaintiffs moved for class certification. On June 23, 2003, prior to any ruling on class certification, the *Daniel* plaintiffs filed a Corrected Third Amended Class Action Complaint (“*Daniel* Third Amended Complaint”). The *Daniel* Third Amended Complaint was the operative pleading when the *Daniel* litigation settled on March 9, 2005.

The gravamen of the *Daniel* Third Amended Complaint was substantially similar to that of the *Daniel* plaintiffs’ earlier pleadings. This Complaint contained five counts: Count I was for Breach of Fiduciary Duty and/or Abuse of Confidential Relationship, and Inducement to Breach Fiduciary Duties and/or Abuse Confidential Relationships; Count II was for Conspiracy to Breach a Fiduciary Duty; Count III was for Violation of the Uniform Deceptive Trade Practices Act; Count IV was for Violation of Consumer Fraud and Deceptive Business Practices Act; and finally Count V was for Unjust Enrichment. In this Complaint, the *Daniel* plaintiffs alleged that:

27. The Aon Defendants’ caused their subsidiaries to breach the duty they owed to Plaintiffs and the Class by any and all of the following: (a) not disclosing the opportunity to receive undisclosed commissions; (b) not disclosing the receipt of undisclosed commissions; (c) not disclosing a conflict of interest concerning the broker’s interest in receiving Kickback; (d) not disclosing a conflict of interest between the broker’s interest in receiving Kickbacks and the insured’s interest in obtaining the maximum possible recovery on insurance claims, and; (e) not disclosing all material information concerning the transaction.

...

29. As a result of the wrongful conduct complained of herein, Plaintiffs and the Class are entitled (a) to have a constructive trust established to receive all commissions that were improperly received and (b) to enjoin the Aon Defendants’ wrongful conduct in the future.

The putative class was defined as follows:

31. ... All persons in the U.S. who directly or indirectly employed the services of a direct or indirect subsidiary of the Aon Defendants to obtain insurance or other similar risk solutions products wherein such subsidiary received or

was eligible to receive consideration in the form of a bonus, commission or profit sharing (other than fixed consideration based solely upon the actual amount charged by the insurer for the insurance and earned upon the commencement of the insurance) that was not disclosed to and agreed upon by the insured.

Significantly, in the *Daniel* Third Amended Complaint's prayers for relief, the *Daniel* plaintiffs no longer sought an award of damages as they had in earlier complaints, but rather sought a disgorgement into a constructive trust and, for two claims, injunctive relief. The prayers for relief in Counts I and II sought, in pertinent part:

...

- B. [A]n order requiring disgorgement into a constructive trust for the benefit of Plaintiffs and the Class of all Kickbacks received by the Aon Defendants and their subsidiaries for placing the Insurance business of Plaintiffs and the Class.
- C. An injunction prohibiting the unlawful practices complained of herein.

...

The prayers for relief in Counts III, IV and V sought, in pertinent part:

- A. An order requiring disgorgement of all improperly received commissions into a constructive trust for the benefit of the named Plaintiffs and the Class based on Kickbacks received by the Aon Defendants and their subsidiaries in placing the Insurance business of Plaintiffs and the Class.

...

On July 18, 2003, for the first and only time, Aon moved to dismiss the *Daniel* Third Amended Complaint. Aon asserted that the *Daniel* plaintiffs had failed to allege sufficient facts upon which relief could be granted. Specifically, Aon argued that the *Daniel* plaintiffs had failed to allege any actual damages. Judge Julia M. Nowicki, who presided over the *Daniel* litigation, disagreed with Aon. In her November 4, 2003, Memorandum of Opinion and Order, Judge Nowicki denied Aon's Motion to Dismiss the *Daniel* Third Amended Complaint with respect to all counts, except for Count III – Violation of the Uniform Deceptive Trade Practices Act. Judge Nowicki granted Aon's motion to dismiss Count III not because the *Daniel* plaintiffs had failed

to allege actual damages, but because the *Daniel* plaintiffs had “not plead that the existence of any future damage or any allegation that satisfies the requirement [for injunctive relief] that [Daniel] Plaintiffs are persons ‘likely to be damaged by a deceptive trade practice.’” *Daniel v. Aon*, No. 99 CH 11893 at 25 (Nov. 4, 2003) (Order Granting in Part the Motion to Dismiss). Judge Nowicki found that the *Daniel* plaintiffs did not need to allege or prove actual damages with regard to Counts I and II. With regard to Count IV, the “[Daniel] Plaintiffs state that they are not seeking return of actual damages, but injunctive relief and disgorgement as a remedy.” *Id.* The *Daniel* “Plaintiffs have adequately alleged damages (funds in a constructive trust) and proximate cause, even though they are unable to state with certainty what each particular [Daniel] Plaintiff has lost in monetary damages.” *Id.* at 26. Finally, Judge Nowicki found that with regard to Count V that the “[Daniel] Plaintiffs have sufficiently alleged that they have conferred a benefit on the Defendants by way of those ‘[k]ickbacks represent[ing] a portion of the premiums paid by class members.’” Moreover, “the very point of the [Daniel] Plaintiffs’ claims is that the contract did not disclose these commissions.” *Id.* at 27.

On July 28, 2004, Judge Nowicki certified a nationwide class based on the *Daniel* plaintiffs’ theory of constructive trust. Judge Nowicki chose to apply Illinois law, absent any specific contract language providing otherwise. Judge Nowicki found that “the state of Illinois is in a unique position to address this issue on a nationwide basis.” *Daniel v. Aon*, No. 99 CH 11893 at 20 (July 28, 2004) (Order Certifying Class). The Order reasoned:

... [T]he plaintiffs have been very selective in their choice of theory of recovery. Their lawsuit employs an uncommon perspective, as it does not incorporate as its foundation the out-of-pocket damages sustained by each individual class member. Rather, the plaintiffs have chosen a constructive trust theory to form their measure of damages, and assert that the plaintiffs’ damages are properly measured by the disgorgement of profits retained by the Aon entities. As stated prior, the plaintiffs assert that the scheme emanated from Illinois and the fruits of the scheme were realized in Illinois. The plaintiffs argue, and this Court cannot disagree, that the

manner in which the complaint is pled in conjunction with the unique theory of recovery makes the choice of Illinois as the forum for resolution of this action all the more appropriate.

Id. at 3.

On March 4, 2005, the Attorneys General of New York, Connecticut, and Illinois each filed a civil action against Aon (collectively the “Attorneys General Matters”). The Attorneys General sought, among other relief, disgorgement of the amounts Aon had improperly collected through its failure to disclose its eligibility to receive contingent commissions. The same day as the Attorneys General Matters were filed, Aon and the Attorneys General entered into a settlement agreement (“Attorneys General Settlement”).

The Attorneys General Settlement required Aon to deposit \$190 million into a fund to be paid, over a thirty month period, to clients who had retained Aon to place, renew, consult on or service insurance, where such placement resulted in contingent commissions or overrides between January 1, 2001, and December 31, 2004. Aon also agreed to institute various business practices, including no longer collecting any form of contingent compensation unless Aon fully disclosed such commission and the client consented in writing. The Attorneys General Settlement stated, in pertinent part:

WHEREAS, the New York Attorney General and the Superintendent have alleged that Aon unlawfully deceived its clients by a) steering clients’ insurance business to favored insurers, b) promising increased retail business to insurers in return for their commitments to use Aon’s reinsurance services, c) suggesting that an insurer raise its quotes for two of Aon’s clients, d) entering into undisclosed “producer funding agreements” whereby insurers directly funded the hiring of Aon brokers, e) entering into secret “pay-to-play” arrangements with insurers whereby Aon obtained undisclosed compensation, f) agreeing with preferred insurers to “freeze out” a competing insurer, g) withholding a lower quote and placing a client with a higher bidding insurer, and h) providing preferred insurers with first looks, last looks and exclusive looks on preferred business;

...

WHEREAS, the Connecticut Attorney General has alleged that Aon unlawfully deceived its clients by a) steering clients' insurance business to favored insurers; and b) entering into undisclosed "pay-to-play" arrangement with insurers whereby insurers paid undisclosed compensation to Aon;

WHEREAS, the Illinois Attorney General commenced an action against Aon pursuant to the Illinois Consumer Fraud and Deceptive Practices Act (815 ILCS 505/1 et seq.), dated March 4, 2005 (the "Illinois Complaint") and has conducted an investigation related thereto (the "Illinois Attorney General's Investigation")....

Attorneys General Settlement at 1-2. Significantly, in Paragraph 29, this Settlement provided that Aon was prohibited from seeking indemnification from its insurance companies for funds paid pursuant to the Settlement. The Attorneys General Settlement also provided that the law of New York governed the agreement:

41. This Agreement shall be governed by the laws of the State of New York without regard to conflict of laws principles, except that with respect to enforcement actions take by the Connecticut Attorney General, the actions will be governed by the laws of the State of Connecticut without regard to conflict of laws principles and except that with respect to enforcement actions taken by the Illinois Attorney General, the actions governed by the laws of the State of Illinois without regard to conflict of laws principles.
42. Any disputes arising out of or related to this Agreement with respect to either the New York Attorney General or the Superintendent shall be subject to the exclusive jurisdiction of the Supreme Court of the State of New York, County of New York, or to the extent federal jurisdiction exists, the United States District Court for the Southern District of New York. Any disputes arising out of or related to this Agreement with respect to the Connecticut Attorney General shall be subject to the exclusive jurisdiction of the superior court for the judicial district of Hartford. Any disputes arising out of or related to this Agreement with respect to either the Illinois Attorney General or the Director shall be subject to the exclusive jurisdiction of the Circuit Court of Cook County.

Four days later, on March 9, 2005, the *Daniel* plaintiffs and Aon settled the *Daniel* litigation for \$38 million, in addition to any overflow from the \$190 million Attorneys General Settlement ("*Daniel* Settlement"). That settlement included provisions which stated:

14. WHEREAS: The parties desire to fully settle and compromise (i) all claims that were brought, are pending, or that could have been brought by the Plaintiffs or any Class Member in this Court or in any other state or federal court, or in or before any administrative agency or other tribunal, or in any other state or federal court, or in or before any administrative agency or other tribunal, or in any other proceeding, relating to or arising from the alleged conduct giving rise to the claims in Plaintiffs' complaint, including but not limited to the claims and alleged conduct addressed in the Attorney General Settlement Agreement and proceedings referenced therein as well as any other claims in any jurisdiction that have been or could have been brought relating to or arising from the conduct giving rise to Plaintiffs' claims and any related conduct regarding the procurement of and/or commissions for insurance or other risk solutions products (all of which claims and issues are hereinafter referred to as "The Litigation") except for claims which are based upon or arise out of the purchase or sale of Aon securities; and (ii) the individual claims of Plaintiffs Daniel and WCAA.

...

74. **Controlling Law.** This Agreement of Class Action Settlement shall be governed by the law of the State of Illinois.

Daniel Settlement Agreement at 4, 27. The *Daniel* Settlement class was not limited to those clients to whom Aon did not disclose its receipt or eligibility to receive contingent commissions:

For purposes of this Settlement, the definition of the class certified by the Court in its July 28, 2004 Order shall be amended as follows:

All U.S. Policyholder Clients who directly or indirectly employed the services of a direct or indirect subsidiary of Aon to place, renew, consult on or service insurance or other similar risk solutions products between January 1, 1994 and December 31, 2004, wherein Aon received or was eligible to receive Contingent Commissions, including consideration in the form of a bonus, commission or profit sharing (other than fixed consideration based solely upon the actual amount charged by the insurer for the insurance earned upon the commencement of the insurance).

Id. at 15-16.

Judge Nowicki granted the *Daniel* Settlement preliminary approval but a number of objections were raised to that settlement. Despite these objections, on March 30, 2006, Judge Nowicki granted the *Daniel* Settlement final approval. On April 18, 2006, Judge Nowicki

entered a Corrected Memorandum Opinion and Order, which did not alter the end result of the March 30, 2006, Order, but stated, in pertinent part:

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.

...

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 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.

Daniel v. Aon, No. 99 CH 11893 at 1-3 (April 18, 2006) (Corrected Memorandum Opinion and Order Approving Class Settlement).

The April 18, 2006, the Corrected Memorandum Opinion and Order was appealed. On June 19, 2008, the Illinois First District Appellate Court affirmed Judge Nowicki's April 18, 2006, Corrected Memorandum Opinion and Order. *See Daniel v. Aon*, No. 1-06-0240, slip op. (1st Dist. 2008). The Illinois First District Appellate Court noted that the *Daniel* plaintiffs advanced a unique theory of constructive trust and that the *Daniel* plaintiffs' claims against Aon were "based upon Aon's retention of ill-gotten funds."

[T]he Daniel Class's theory of recovery justified the application of Illinois law. At the certification stage of the case, the Daniel Class argued for class certification based upon the somewhat novel and untested theory of a "constructive trust." Under the constructive trust theory, the Daniel Class argued that each member was entitled to a pro rata share of the ill-gotten profits obtained by Aon by way of their contingent commissions. This avoided the problem of

determining the out of pocket expenses of each individual plaintiff. The trial court noted that, because the case was, in effect, the Daniel Class's claim to "his/her/its fair share of the disgorgement of undisclosed commissions," the commissions are in control of Aon [sic], and located in Illinois. Because commissions were under the control of an Illinois defendant, Illinois law applied.

The trial court properly applied the "most significant-relationship test." The unique nature of the theory of recovery alleged in this case downplays the significance of the "location of the injury" factor articulated in Illinois choice-of-law jurisprudence. Further, the Daniel Class brought its claim against Aon based upon Aon's retention of ill-gotten funds. The injury is the result of the contractual relationship entered into by insurance purchasers, insurance brokers, and insurers.

The injury causing conduct most likely occurred in Illinois. While many class members entered into contracts in states other than Illinois, the fraudulent conduct was, as the trial court found, primarily devised and undertaken at Aon's principle headquarters in Illinois.

Daniel v. Aon, No. 1-06-0240, slip op. at 13. The Illinois Supreme Court denied the objectors' request for leave to appeal.

II. Procedural Posture

On August 17, 2006, Aon filed the original complaint in this insurance coverage case against its insurers⁴ seeking indemnification for costs paid or to be paid in the *Daniel* litigation and the Interrelated Matters. On March 6, 2007, Aon filed a First Amended Complaint containing four counts: Count I – Declaratory Judgment against Combined Lines Policy Underwriters; Count II – Declaratory Judgment against D&O Policy Underwriters; Count III – Breach of Contract against Combined Lines Policy Underwriters; and Count IV – Breach of Contract Against D&O Policy Underwriters. Aon sought coverage under: (1) the 1999 Combined Lines Policy consisting of a primary policy and several excess policies providing, among other things, coverage for errors and omissions arising out of the performance of

⁴ Certain Underwriters at Lloyd's of London, Liberty Mutual Insurance Company (UK), Ltd.; Zurich Specialties London Limited; Continental Casualty Company; Gulf Insurance Company; Executive Risk Indemnity, Inc.; St. Paul Mercury Insurance Company; Travelers Casualty & Surety Company of America; Steadfast Insurance Company; Employers Reinsurance Corporation; Liberty Mutual Insurance Company; Federal Insurance Company; Reliance Insurance Company; Agricultural Excess & Surplus Lines Insurance Company; Ace Insurance Company, Ltd.; Great American Insurance Company; Ace American Insurance Company; Starr Excess Liability Insurance International Limited; Arch Insurance Company; and Old Republic Insurance Company.

professional services during the policy period of July 30, 1999, to July 30, 2000; and (2) the 2004 Director and Officers Policy (“D&O Policy”) consisting of a primary D&O policy and several excess D&O policies providing directors and officers coverage for certain claims first made during the policy period of August 30, 2004, to August 30, 2005. Aon also alleged that the Interrelated Matters were covered under either the 1999 Combined Lines Policy or, alternatively, the 2004 D&O Policy.

D&O Underwriters⁵ filed a Motion to Dismiss Aon Corporation’s First Amended Complaint. Certain D&O Underwriters⁶ filed a Motion for Judgment on the Pleadings. Defendants Certain Underwriters at Lloyd’s, London⁷ and Liberty Mutual Insurance Company (U.K.), Ltd.⁸ filed a 2-615 Motion to Dismiss. There were two issues that were presented in the Motions to Dismiss and the Motion for Judgment on the Pleadings. First, D&O Underwriters in their Motion to Dismiss and Underwriting Members of Lloyd’s Syndicate No. 1007 in their Motion for Judgment on the Pleadings sought to dismiss Count II and Count IV because the D&O Policies’ Prior and Pending Litigation Exclusion and the Prior Notice Exclusion precluded coverage for the Interrelated Matters. Second, Certain Underwriters at Lloyd’s, London and Liberty Mutual Insurance Company (U.K.), Ltd., in their Motion to Dismiss, sought to dismiss Count I because there existed no actual controversy since Aon had not alleged that primary coverage was exhausted.

On November 29, 2007, this Court granted D&O Underwriters’ Motion to Dismiss, Certain D&O Underwriters’ Motion for Judgment on the Pleadings, and Defendants Certain

⁵ D&O Underwriters included: Certain Underwriters at Lloyd’s of London subscribing to Lloyd’s Policy No. FD0404018 (with exception of Syndicate No. 1007), Great American Insurance Company, Ace American Insurance Company, Arch Insurance Company, and Old Republic Insurance Company.

⁶ Underwriting Members of Lloyd’s Syndicate No. 1007 subscribing to D&O Policy at issue.

⁷ Certain Underwriters at Lloyd’s of London subscribing to Excess Directors’ and Officers’ Liability, Company Securities Liability, Errors and Omissions Liability, Fiduciary Liability, Employment Practices Liability, Blanket Crime, and Computer Crime Insurance Policy No. 621/PAON0299P01.

⁸ Liberty Mutual Insurance Company (U.K.), Ltd. subscribing to Policy No. 621/PAON0299P01.

Underwriters at Lloyd's of London⁹ and Liberty Mutual Insurance Company (U.K.), Ltd.'s Motion to Dismiss.¹⁰ The only remaining count in the First Amended Complaint was Count III – Breach of Contract against Combined Lines Policy Underwriters.

On October 14, 2008, Aon filed a two-count Second Amended Complaint against Certain Underwriters at Lloyd's, London, Liberty Mutual Insurance Company (U.K.), Ltd., Employers Reinsurance Corporation, Liberty Mutual Insurance Company, and Agricultural Excess & Surplus Lines Insurance Company (“Combined Lines Policy Underwriters”). Count I is a claim for declaratory judgment and Count II is a claim for breach of contract. The gravamen of Aon's Second Amended Complaint is that the Combined Lines Policy Underwriters are obligated to reimburse Aon for the amounts paid or to be paid in connection with the litigation and settlement of the *Daniel* litigation and the Interrelated Matters.¹¹ The policies at issue are Certain Underwriters at Lloyd's, London's Combined Directors and Officers, Company Securities Liability, Professional Liability, Fiduciary Liability, Employment Practices Liability, and Blanket Bond Insurance Policy Primary Policy Number 479/PAON0199P01 and Excess Policy Number 621/PAON0299P01, effective July 30, 1999, through July 30, 2002, (collectively

⁹ Certain Underwriters at Lloyd's of London subscribing to Excess Directors' and Officers' Liability, Company Securities Liability, Errors and Omissions Liability, Fiduciary Liability, Employment Practices Liability, Blanket Crime, and Computer Crime Insurance Policy No. 621/PAON0299P01.

¹⁰ See *Aon v. Certain Underwriters at Lloyd's of London*, No. 06 CH 16852 (Nov. 29, 2007) (Order Granting Motions to Dismiss and Motion for Judgment on the Pleadings), which ordered in relevant part:

IT IS, HEREBY, ORDERED AS FOLLOWS:

1. D&O Underwriters' Motion to Dismiss Aon Corporation's First Amended Complaint is granted. Count II and Count IV are dismissed with prejudice for failure to state a claim upon which relief can be granted.
2. Certain D&O Underwriters' (Syndicate 1007) Motion for Judgment on the Pleadings is granted. Judgment on the pleadings is entered in favor of the Syndicate Members and against Plaintiff Aon Corporation on Count II and IV of the First Amended Complaint.
3. Defendants Certain Underwriters at Lloyd's of London and Liberty Mutual Insurance Company (UK), Ltd.'s Rule 2-615 Motion to Dismiss is granted. Count I is dismissed without prejudice, to the extent Plaintiff Aon Corporation has pled it against the Excess Insurers. Plaintiff is granted leave to replead, if and when the primary level of coverage has been exhausted.

¹¹ The Court notes that the Second Amended Complaint is unclear as to what the Interrelated Matters encompass. The Court surmises that the Interrelated Matters include the additional lawsuits filed in federal and state courts and the Attorneys General Matters, all which arose from the same alleged improper conduct by Aon.

“Combined Lines Policies”), which are subscribed to by the other Combined Lines Policy Underwriters.

Combined Lines Policy No. 479/PAON0199P01, provides in pertinent part:

SECTION ONE

I) INSURANCE CLAUSES

...

D. ERRORS AND OMISSIONS LIABILITY

The Underwriters shall pay on behalf of the **Assured** any **Loss** resulting from any **Claim** first made against any of the **Assured** during the **Policy Period** resulting from any **Wrongful Act** committed or alleged to have been committed by the **Assured**, or by any person for whose such **Wrongful Act** the **Assured** is legally responsible, arising out of the conduct of the **Assured's** professional services rendered, or intended or required to be rendered, in the conduct of the **Assured's** business.

...

II) DEFINITIONS

...

D. Assured means:

- (1) the **Company**;
- (2) any **Employee**;
- (3) any of the **Directors and Officers**; and
- (4) any **Trust Assured**.

E. **Claim** means a demand received by the **Assured** for money, services or other monetary or non-monetary relief, including, without limitation, any civil, criminal, regulatory, arbitration, governmental or administrative proceeding, investigation or inquiry initiated against any of the **Assureds**.

H. **Cost, Charges, and Expenses** means reasonable and necessary legal fees, costs and expenses incurred by the **Assured** in the investigation, adjustment, defense, settlement or other handling and appeal of any **Claim** and cost of appeal, attachments or similar bonds, but excluding:

- (1) salaries, wages, overhead or benefit expenses associated with directors, officers, or employees of the **Company**, unless the Underwriters and the **Company** agree otherwise except as provided in this Section One of this Policy, or
- (2) any amounts incurred in defense of any **Claim** for which any other insurer

(a) has a duty to defend and is providing a defense for such a **Claim**, or

(b) is indemnifying the **Assured** for amounts incurred by the **Assured** in connection with the defense of such **Claim**.

O. **Interrelated Wrongful Acts** means **Wrongful Acts** which are logically or casually connected by reason of any common fact, circumstance, situation, transaction, casualty, event, decision, or series of facts, circumstances, situations, casualties, events, or decisions.

P. **Loss** means damages, settlements, and Costs, **Charges and Expenses** incurred by any of the **Assureds**, but excluding:

...

(2) matters deemed uninsurable under the substantive law governing the final resolution or adjudication of a **Claim**. Notwithstanding any other provision in this policy, the term **Loss** shall include punitive and exemplary damages if such damages are insurable under the law of any jurisdiction pursuant to which this policy may be construed. The law of the jurisdiction most favorable to the insurability of punitive and exemplary damages shall control for the purpose of resolving whether such damages are insurable, and such jurisdiction shall be:

(a) where those damages were awarded or imposed;

(b) where any **Wrongful Act** upon which such damages were awarded or imposed occurred or is alleged to have occurred;

(c) where any **Assured** is incorporated, has its principal place of business, or resides; or

(d) any other jurisdiction which the **Assured** demonstrates applies to this policy.

...

III EXCLUSIONS

...

A. The Underwriters shall not be liable to make any payment in connection with Any **Claim**:

1. based upon, arising out of, directly or indirectly resulting from or in consequence of, or in any way involving:

...

(c) any other **Wrongful Act** whenever occurring, which, together with a **Wrongful Act** which has been subject of such notice, would constitute **Interrelated Wrongful Acts**.

...

XI CHOICE OF LAW IN DISPUTED CLAIM

- A. In the event a **Claim** is made against any Assured in any jurisdiction within the United States, the Underwriters and the Assured agree that the resolution of any dispute concerning the construction, interpretation and meaning of the terms, exclusions, limitations and conditions of this Section One of this Policy shall be determined in accordance with the laws of the State of New York; provided, however, that the substantive law governing the final resolution or adjudication of such **Claim**, and not the laws of the State of New York, shall be applied in determining whether there has been a **Loss**.

Defendant Liberty Mutual Insurance Company (U.K.), Policy Number 621/PAON0199P01, effective July 30, 1999, through July 30, 2002, Defendant Certain Underwriters at Lloyd's, London, Excess Policy Number 621/PAON0299P01, effective July 30, 1999, through July 30, 2002, Defendant Employers Reinsurance Corporation Policy Number EX 100032, effective July 30, 1999, through July 30, 2002, Defendant Liberty Mutual Insurance Company Policy Number 070753-019, effective July 30, 1999 through July 30, 2002, and Defendant Agricultural Excess & Surplus Lines Insurance Company Policy Number ICX2067797, effective July 30, 1999, through July 30, 2002, each subscribe to the language contained in the Combined Lines Policy Number 479/PAON0199P01.

III. The Motion

The issue before this Court is whether the amounts that Aon incurred, and the related defense costs, in the *Daniel* litigation and *Daniel* Settlement and defense costs related to the Attorneys General Matters constitute a "Loss" as defined by the Combined Lines Policies. The costs related to the other actions filed in federal and state court are not at issue in this Motion.

Defendants Underwriters assert that they are entitled to summary judgment because the undisputed facts show that the *Daniel* litigation, including the *Daniel* Settlement, and the Attorneys General Matters, were resolved by way of restitutionary settlements. Restitution does not constitute a “Loss” under the Combined Lines Policies. Aon contends that there are multiple genuine issues of fact that preclude summary determination, including whether the *Daniel* litigation and the Attorneys General Matters sought only disgorgement or also actual damages and whether the disgorgement constituted “ill-gotten gain.”

A choice of law issue also was raised before this Court. Defendants Underwriters assert that with respect to the *Daniel* litigation and the *Daniel* Settlement, Illinois law controls the issue of whether the *Daniel* litigation and *Daniel* Settlement constitute a “Loss.” Illinois law governed the *Daniel* litigation and governs the *Daniel* Settlement, which was the final resolution of the underlying case. Defendants Underwriters also argue that with respect to the Attorney General Matters, New York law governs. New York law governed the Attorneys General Settlement, which was the final resolution of the Attorneys General Matters. Aon disputes that Illinois law governs the *Daniel* litigation and that New York law governs the Attorneys General Matters. Aon contends that the laws of all fifty states should apply to the *Daniel* litigation, and the laws of New York, Connecticut, and Illinois govern each respective Attorney General Matter. However, Aon asserts that the Court need not resolve this choice of law dispute at this time because there exist genuine issues of material fact with the respect to which laws apply.

Summary judgment is properly entered when the pleadings, depositions, admissions and affidavits, viewed in a light most favorable to the non-movant, fail to establish a genuine issue of material fact, thereby entitling the moving party to judgment as a matter of law. *Aetna Cas. & Sur. Co. v. Allsteel, Inc.*, 304 Ill. App. 3d 34, 39 (1st Dist. 1999). While use of the summary

judgment procedure is to be encouraged as an aid in the expeditious disposition of a lawsuit, it is a drastic means of disposing of litigation and, therefore, should be allowed only when the right of the moving party is clear and free from doubt. *Purtill v. Hess*, 111 Ill. 2d 229, 240 (1986). The purpose of a summary judgment proceeding is not to try issues of fact but to determine if any triable issues exist. *Inryco, Inc. v. Multuloc Corp.*, 202 Ill. App. 3d 367, 370 (1st Dist. 1990). A triable issue exists where there is a dispute concerning material facts or where those facts are undisputed but reasonable persons might draw different inferences from those facts. *In re Estate of Hoover*, 155 Ill. 2d 402, 411 (1993).

The Combined Lines Policies define “Loss” as “damages, settlements and Costs, Charges and Expenses incurred by any of the Assureds.” “Loss,” however, excludes “matters deemed uninsurable under the substantive law governing the final resolution or adjudication of a Claim.” Defendants Underwriters assert that the definition of “Loss” does not include the disgorgement of an alleged “ill-gotten gain,” that is, money or property an insured allegedly had no right to receive in the first place. Defendants Underwriters assert that the *Daniel* plaintiffs sought, even in the consumer fraud claim, only disgorgement and injunctive relief, as opposed to actual damages. The *Daniel* plaintiffs, by seeking funds in a constructive trust, made it clear that they were seeking disgorgement as their only monetary remedy. They were not making a claim for individualized damages. Thus, the *Daniel* Settlement was restitution based upon this claim for disgorgement.

Defendants Underwriters cite and rely upon several cases to support their position that under Illinois law, restitution payments do not constitute an insurable loss. *See Local 705 Int’l Bhd. of Teamsters Health & Welfare Fund v. Five Star Managers, LLC*, 316 Ill. App. 3d 391 (1st Dist. 2000) (holding that the return of money that had been illegally transferred from the insured

health and welfare fund to its sister pension fund was not a “loss” because “loss” requires a deprivation, and that when the insured gives up something to which it was not legally entitled, there is no deprivation); *Level 3 Commc'ns, Inc. v. Fed. Ins. Co.*, 272 F.3d 908 (7th Cir. 2001) (holding that the settlement of a securities fraud lawsuit was the equivalent of a constructive trust and that it, therefore, did not constitute an insurable “loss”); *Reliance Group Holdings, Inc. v. Nat'l Union Fire Ins. Co.*, 594 N.Y.S.2d 20 (App. Div. 1993) (settlement of a suit for breach of fiduciary duty and the imposition of a constructive trust “was essentially equivalent to a determination, reached through agreement of the parties, that Reliance had been unjustly enriched in the amount of \$21.1 million through its actions” and thus there was no “loss,” based on the well-established principle that one may not insure against the risk of being ordered to return money or property that has been wrongfully acquired).

Defendants Underwriters further contend that it would be against Illinois public policy to allow Aon to pay restitution or fund a constructive trust with insurance proceeds. In Illinois, a constructive trust is a restitutionary remedy imposed on public policy grounds in situations where a fiduciary in possession of money or property would be unjustly enriched if he were permitted to retain it. *See Pottinger v. Pottinger*, 238 Ill. App. 3d 908, 916 (2d Dist. 1992) (“[A constructive trust] is a restitutionary remedy designed to restore to a plaintiff property of which he has been unjustly deprived and to take from the defendant property which, if retained, would unjustly enrich him.”). Defendants Underwriters assert that the purpose of the remedy is to fortify the fiduciary relationship by removing any temptation on the part of fiduciaries to take advantage of a conflict of interest. It would be against public policy to allow insurance proceeds to reimburse payments made in restitution or to fund a constructive trust because then the insured retains its ill-gotten gain.

Aon contends that there are genuine issues of material fact precluding summary judgment. First, there is a genuine issue of material fact as to whether the claims in the *Daniel* litigation as reflected in the *Daniel* Settlement were solely for disgorgement. The numerous pleadings and other documents over the course of this litigation show that the *Daniel* plaintiffs pursued multiple claims seeking different types of remedies, including claims for actual damages. If the *Daniel* plaintiffs were seeking actual damages in addition to restitution, then Aon is entitled to indemnification and defense costs. Aon asserts that there exists factual questions as to whether: (1) the *Daniel* plaintiffs asserted claims, and sought relief, beyond a claim for disgorgement; (2) the *Daniel* plaintiffs abandoned their claims for actual damages and waived their right to recover actual damages at the time that the case settled (assuming this Court is only to consider the state of the case at the time of settlement); and (3) the *Daniel* Settlement is a “mixed” claim or settlement. If the Court concludes that the *Daniel* litigation was a “mixed” claim, a genuine issue of material fact exists as to the amount of settlement, costs, charges, and expenses that are attributable to the covered and uncovered portions under the Combined Lines Policies.

If the Court finds that disgorgement was the only remedy sought at the time of the settlement, then Aon argues it is entitled to defense costs prior to the filing of the *Daniel* Third Amended Complaint. Aon believes that because the prior *Daniel* complaints sought actual damages rather than restitution, it should be compensated for the costs it expended defending these prior complaints. Furthermore, Aon argues there remains an issue of material fact to whether the disgorgement was “ill-gotten” and thus precluded under the Combined Lines Policies. Finally, with respect to the Attorneys General Matters, there is genuine question of

material fact as to whether the Attorneys General Matters sought only disgorgement, and not actual damages, and whether the contingent commissions constituted ill-gotten gains.

Because of the underlying decision in the *Daniel* litigation, it is now necessary to determine whether there is insurance coverage where a settlement seeks disgorgement into a constructive trust. There is little case law in Illinois and other jurisdictions addressing this issue. However, the Court must first address choice of law issue. Aon asserts that the laws of all fifty states apply in the *Daniel* litigation and the laws of New York, Connecticut, and Illinois apply to each respective Attorney General Matter. Defendants Underwriters contend that pursuant to the choice of law provision contained in the Combined Lines Policies, the Court should apply the laws of Illinois in the *Daniel* litigation and the laws of New York in the Attorneys General Matters. As Judge Nowicki and the Illinois First District Appellate Court noted, the *Daniel* litigation and the *Daniel* plaintiffs' theory of recovery was novel and untested. Thus, Illinois was in a unique position to apply its law to this theory of disgorgement into a constructive trust.

Aon previously argued that the laws of all fifty states applied in the *Daniel* litigation. Judge Nowicki, however, applied Illinois law. The Illinois First District Appellate Court, while not specifically discussing Aon's argument to apply the laws of all fifty states, noted that "the trial court properly applied the 'most significant-relationship test.' The unique nature of the theory of recovery alleged in this case downplays the significance of the "location of the injury" factor articulated in Illinois choice-of-law jurisprudence." *Daniel v. Aon*, No. 1-06-0240, slip op. at 13 (1st Dist. 2008). When the *Daniel* litigation settled, the parties agreed that the laws of Illinois would govern it. Finally, with respect to the Attorneys General Matters, the Attorneys General Settlement provides in Paragraph 42 that "[a]ny disputes arising out of or related to this Agreement with respect to either the New York Attorney General or the Superintendent shall be

subject to the exclusive jurisdiction of the Supreme Court of the State of New York”

Furthermore, the Combined Lines Policies’ choice of law provision provides: “... that the substantive law governing the final resolution or adjudication of such Claim, and not the laws of the State of New York, shall be applied in determining whether there has been a Loss.”

This Court finds that the substantive law governing the *Daniel* litigation and *Daniel* settlement is Illinois law. The substantive law that governs the Attorney General Matters is New York law. There is no basis in law or reason to apply the laws of all fifty states to this litigation. Furthermore, it is unclear how the analysis would be different if the laws of all fifty states applied instead of the laws of Illinois or New York. Accordingly, Illinois law applies to this insurance coverage dispute with respect to the *Daniel* litigation and *Daniel* Settlement and New York law applies to this insurance coverage dispute with respect to the Attorneys General Matters.

Next, with respect to whether the nature of the claims in the *Daniel* litigation were solely for disgorgement or were a “mixed” claim for disgorgement and actual damages, the Court finds that the *Daniel* litigation sought only disgorgement into a constructive trust. The *Daniel* Third Amended Complaint was the operative complaint at the time of the *Daniel* Settlement. The *Daniel* Third Amended Complaint sought disgorgement into a constructive trust and injunctive relief. Therefore, the relief sought is restitutionary and not an insurable loss.

Aon makes much of the fact that in the first three *Daniel* complaints the *Daniel* plaintiffs requested “an award of damages” and that the *Daniel* plaintiffs alleged that they suffered actual damages. Aon asserts that these prior requests for “an award of damages” raise a genuine issue of material fact as to whether the *Daniel* plaintiffs sought claims that were potentially covered under the Combined Lines Policies. Aon, relying on *Pan Pacific Retail Properties, Inc. v. Gulf*

Ins. Co., 471 F.3d 961 (9th Cir. 2006), contends that the Court should not limit its inquiry to the operative pleadings at the time of the settlement, but rather review the procedural history of the underlying litigation.

In *Pan Pacific*, the Ninth Circuit Court of Appeals found that there were genuine issues of material fact as to the nature of the claims reflected in the settlement and whether any of these claims may have sought nonrestitutionary compensation for injuries in an underlying shareholder lawsuit based upon the conflicting evidence in the record. Before the settlement, the underlying class action had been approved and all the claims had been dismissed except for the direct claims. The *Pan Pacific* court surmised that it was possible that a portion or most of the settlement was motivated by concerns of potential exposure on appeal of the dismissed claims and that the settlement may have occurred to eliminate any lingering exposure from the dismissed claims. *Id.* at 967. In addition, an alternative damages theory was advanced on the remaining claims and the Ninth Circuit found that the submission of evidence to support this alternative damages theory also raised a genuine issue of material fact as to whether the settlement contained nonrestitutionary amounts. *Id.* at 969.

This Court finds *Pan Pacific* distinguishable from the facts in this case. Unlike *Pan Pacific*, where the possibility that the dismissed claims would be revived on appeal may have motivated settlement, in the *Daniel* litigation no such possibility existed. The *Daniel* Third Amended Complaint did not have any claims seeking actual damages that could be dismissed. Aon did not move to dismiss any of the prior *Daniel* complaints until the *Daniel* Third Amended Complaint, where the *Daniel* plaintiffs were seeking only disgorgement into a constructive trust and an injunction. The only claim that was dismissed from the *Daniel* Third Amended Complaint was Count III because the *Daniel* plaintiffs failed to allege sufficient facts of future

harm. In fact, one of the reasons that Aon moved for dismissal was because the *Daniel* plaintiffs had not alleged actual damages. The *Daniel* plaintiffs maintained in their response to Aon's motion to dismiss, that they were only seeking disgorgement and injunctive relief. Judge Nowicki, denying Aon's motion to dismiss, with exception of Count III, found that the *Daniel* plaintiffs did not need to allege actual damages because they were seeking disgorgement into a constructive trust and an injunction.

Furthermore, unlike *Pan Pacific*, where the plaintiff provided an alternative theory of damages for the remaining claims, there is no evidence that the *Daniel* plaintiffs advanced an alternative theory of damages after the dismissal of Count III on the remaining claims in the *Daniel* Third Amended Complaint. Nor is there any evidence that the alternative theory of damages was presented prior to the *Daniel* Settlement. If the trier of fact accepted the *Daniel* plaintiffs' characterization of damages, the only purported damages would be disgorgement. Aon asserts that in Judge Nowicki's April 18, 2006, Corrected Memorandum Opinion and Order approving the *Daniel* Settlement, her statement that "the monetary benefits made available through this settlement are not intended to, and do not represent, a particular amount of contingent commissions that were received by Aon," is evidence that the *Daniel* Settlement was not for disgorgement or constructive trust. *Daniel v. Aon*, No. 99 CH 11893 at 1 (April 18, 2006) (Corrected Memorandum Opinion and Order Approving Class Settlement). This Court disagrees with Aon's assertion that the statement is determinative proof, or even raises a genuine issue of material fact, that the *Daniel* Settlement was not to settle a claim solely for disgorgement. Judge Nowicki stated in her Memorandum Opinion and Orders, with respect to the motion to dismiss and motion for class certification, that the *Daniel* plaintiffs were seeking a unique theory of recovery of disgorgement into a constructive trust as a measure of damages and

not individual out-of-pocket damages. Had the parties not settled, the *Daniel* plaintiffs would have been defending this disgorgement into a constructive trust theory of recovery, and not actual damages, before a trier of fact.

The Court also disagrees with Aon's contention that it is entitled to defense costs prior to the *Daniel* Third Amended Complaint simply because the former *Daniel* complaints contained allegations that the *Daniel* plaintiffs suffered actual damages. Unlike duty to defend policies, which require the insurer to defend claims even if they are only arguably entitled to coverage, policies requiring the insurer to reimburse damages and defense costs related to wrongful acts entitle the insured to costs only when the underlying claims are covered by the policy. *In re Kenai Corp.*, 136 B.R. 59, 64 (S.D.N.Y. 1992). Thus, defense costs are only recoverable for covered claims. Restitution of ill-gotten funds does not constitute "damages" or a "loss" as those terms are used in insurance policies. *Vigilant Ins. Co. v. Credit Suisse First Boston Corp.*, 10 A.D.3d 528 (N.Y. App. Div. 2004). Therefore, if the loss here is not recoverable, the defense costs are also not recoverable.

Aon relies on *Unified W. Grocers, Inc., v. Twin City Fire Ins. Co.*, 457 F.3d 1106 (9th Cir. 2006), to support its position that the *Daniel* Settlement is not solely restitutionary because it included individuals that knew and consented to the payment of the contingent commissions. In *Unified W. Grocers*, the Ninth Circuit Court of Appeals found that there was a genuine issue of fact as to whether there was a covered claim that was separable from the uncovered claim. The underlying complaint alleged willful conduct, which was not a covered loss, and negligent conduct, which was a covered loss. The Ninth Circuit Court of Appeals found that the underlying complaint did not necessarily restrict all potential recovery because the calculation of total damages was not based upon the amount wrongfully acquired, but on the amount of unpaid

debt. *Id.* at 1115. The damages alleged in the underlying complaint did not unavoidably originate from intentional and willful conduct by the insured, thus there was a genuine issue of fact as to whether the underlying complaint was a mixed claim. *Id.* at 1114. When an underlying complaint contains a mixture of covered and uncovered losses, the insurer is obligated to allocate the reimbursement of funds between the two types.” *Id.* at 1115.

Unified W. Grocers is inapposite to the facts here. Unlike *Unified W. Grocers*, where the theory of liability was based whether the conduct was willful or negligent, the *Daniel* plaintiffs’ claim for disgorgement into a constructive trust was not dependent upon a level of culpability or even a finding of actual damages. The potential liability in the *Daniel* Third Amended Complaint arose out of Aon’s alleged failure to disclose its eligibility to receive contingent commissions. There is no question that the sole basis for which Aon paid the *Daniel* Settlement was the *Daniel* plaintiffs’ claim that Aon was required to return the monies which it was not entitled to possess in the first place. Such a payment can hardly be termed a loss. Accordingly, the Court finds that there exists no genuine issue of material fact as to the nature of the claims settled in the *Daniel* litigation.

Aon, citing *Unified W. Grocers*, asserts that because the *Daniel* Settlement expanded the class as defined by the *Daniel* Third Amended Complaint, to include those clients to whom Aon disclosed the eligibility to receive contingent commissions, then a portion of the *Daniel* Settlement is a covered “Loss.” The Court disagrees. *Unified W. Grocers* did not address the situation of whether when a settlement of an underlying action contained insurable and uninsurable components the insurer is obligated to indemnify the purported insurable portions of a settlement. The Court has not found and Aon has not provided any case law where the expansion of a putative class in a settlement agreement would make an otherwise uncovered loss

into a covered loss under an insurance policy. The *Daniel* Settlement arose from Aon's alleged failure to disclose its eligibility to receive contingent commissions. Simply expanding the putative class in a settlement agreement does not change the nature of the claims settled. Accordingly, the Court finds there exists no genuine issue of material fact that the nature of the claims settled was for disgorgement, notwithstanding the defined putative class.

With respect to whether the alleged disgorgement was "ill-gotten gain," Aon asserts that if the amounts sought in the lawsuit are amounts that Aon was in fact entitled to receive, then the *Daniel* Settlement would constitute a "Loss" and thus be covered. Aon also contends that its conduct in receiving undisclosed contingent commissions, even if proven true, would not be unlawful, because no court has found that the practice of collecting undisclosed contingent commissions to be improper. Thus, there is a genuine issue of material fact as to whether the contingent commissions received by the *Daniel* plaintiffs were unlawful and thus, precluded under the Combined Lines Policies. This Court disagrees.

Insurability does not depend on whether a claim has merit, but rather what the settled claim sought. *See, e.g., Level 3 Commc'ns, Inc. v. Fed. Ins. Co.*, 272 F.3d 908 (7th Cir. 2001); *Reliance Group Holdings, Inc. v. Nat'l Union Fire Ins. Co.*, 594 N.Y.S.2d 20 (App. Div. 1993). Judge Nowicki and the First District Appellate Court found that the *Daniel* plaintiffs had brought their claim against Aon based upon Aon's retention of ill-gotten funds. This Court will not make a finding or a determination of whether Aon's alleged actions in the *Daniel* litigation were "ill-gotten gains" or unlawful. The lawfulness of collecting contingent commissions was not at issue in the *Daniel* litigation and is not relevant here. It was the *Daniel* plaintiffs' allegation that Aon failed to disclose its eligibility to receive the contingent commissions and the retention thereof that gave rise to Aon's potential liability.

With respect to whether Aon is entitled to defense costs in the Attorneys General Matters, the same analysis as above applies. The issue is whether the nature of the claims settled in the Attorneys General Settlement constitutes a “Loss” under the Combined Lines Policies. The Attorneys General Settlement prohibited Aon from seeking indemnification from its insurance companies for any amounts payable under it. *See Attorneys General Settlement* at ¶ 29. The Court finds that the defense costs associated with the Attorneys General Matters are not covered because the Attorney General Matters are not a “Loss” under the Combined Lines Policies.

Aon asserts that there is a genuine issue of material fact as to whether the Attorneys General Matters sought only disgorgement, thus whether the nature of the claims settled were restitutionary. Aon makes much of the fact that the New York Attorney General and the Illinois Attorney General sought both disgorgement and actual damages. The New York Attorney General’s complaint included a prayer for relief that requested, among other relief, that Aon “disgorge all profits obtained, including fees collected, and pay all restitution, and damages caused, directly or indirectly by the fraudulent and deceptive acts complained of herein.” *People of the State of New York v. Aon Corp.*, Mar. 4, 2005, p. 42. The Connecticut Attorney General’s Complaint sought, among other relief, “[a]n order requiring Defendant to pay restitution to the State of Connecticut and to each and every person or entity of any sort that made payments for insurance ...” *Blumenthal v. Aon Corp.*, Mar. 4, 2005, p. 31. The Illinois Attorney General’s Complaint requested, among other relief, that the court “award the People of the State of Illinois restitution and actual damages.” *People of the State of Illinois v. Aon Corp.*, Mar. 4, 2005, p. 20. The Court finds that the mere mention of “actual damages” in the Attorney General Matters is insufficient to raise a genuine issue of material fact as to whether the nature of the claims settled were for disgorgement and restitution or for actual damages.

Aon has recognized that its conduct with respect to the contingent commissions was improper. Aon's Chairman and CEO, Patrick G. Ryan, issued a statement acknowledging the improper conflicts of interests, which was attached to the Attorneys General Settlement. That statement said:

As these investigations have revealed, Aon and other insurance brokers and consultants entered into contingent commission agreements and other arrangements that created conflicts of interests. I deeply regret that we took advantage of those conflicts. This conduct violated the longstanding principle embodied in our Code of Conduct and Aon's Values Statement that our clients must always come first. Such conduct was improper and I apologize for it.

Aon believes that these investigations have done the industry a great service. Aon looks forward to working with regulators, insureds, insurance companies, and other stakeholders to put in place new business practices for the entire industry that eliminate the improper practices exposed by these investigations.

Attorneys General Settlement at 19.

There is no question that Aon entered into settlement with the Attorneys General to resolve the underlying claims against Aon for its alleged failure to disclose the eligibility to receive contingent commissions. How the claim, judgment order, or settlement is worded is irrelevant. An insured incurs no loss within the meaning of the insurance contract by being compelled to return property that it has stolen, even if a more polite word than "stolen" is used to characterize the claim for the property's return. *Level 3 Commc'ns, Inc.*, 272 F.3d at 911.

Based upon the record, the Court finds that there exists no genuine issue of material fact. The Court finds that the nature of the claims settled in the *Daniel* Settlement and the Attorneys General Settlement were claims for disgorgement. Aon's claim for coverage for the *Daniel* Settlement and the related defenses costs and the defense costs for the Attorney General Matters do not constitute a "Loss" under the Combined Lines Policies. Accordingly, Defendants

Underwriters have no obligations to indemnify Aon for the *Daniel* Settlement and to reimburse the defenses costs related to the *Daniel* litigation and Attorneys General Matters.

IT IS, HEREBY, ORDERD THAT:

1. Defendants Certain Underwriters at Lloyd's, London and Liberty Mutual Insurance Company (U.K.), Ltd.'s Motion for Summary Determination of Disgorgement Issue is granted. Summary judgment is found in favor of Defendants Certain Underwriters at Lloyd's, London and Liberty Mutual Insurance Company (U.K.).

2. Certain Underwriters at Lloyd's, London and Liberty Mutual Insurance Company (U.K.) are not obligated to indemnify and pay the defense costs to Plaintiff Aon Corporation for the *Daniel* Settlement and are not obligated to pay the defense costs for the Attorneys General Matters.

3. This matter is set for status on January 4, 2011 at 11:00 AM.

December 3, 2010

ENTERED
JUDGE DOROTHY KIRIE KINNAIRD-0276
DEC 03 2010
DOROTHY BROWN
CLERK OF THE CIRCUIT COURT
JEFFERSON COUNTY, IL
Judge Dorothy Kirie Kinnaird No. 276