UNITED STATES BANKRUPTCY COURT
DISTRICT OF MASSACHUSETTS

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| In Re: | ) | Chapter 11 |
| | ) | Case No. 96-13184-JNF |
| SALEM SUEDE, INC., | ) | |
| | ) | |
| Debtor | ) | |
| | ) | |
| In Re: | ) | Chapter 11 |
| | ) | Case No. 96-14692-JNF |
| ZION REALTY CORP., | ) | |
| | ) | |
| Debtor | ) | |

MEMORANDUM OF AMICUS CURIAE UNITED POLICYHOLDERS IN OPPOSITION TO APPROVAL OF DISCLOSURE STATEMENT

Comes now, United Policyholders, amicus curiae, and as its Memorandum of Law in Opposition to Approval of Disclosure Statement, respectfully states as follows:

PRELIMINARY STATEMENT

The proposed plan is designed to shield The Travelers Indemnity Co. from the consequences of its alleged decades-long bad faith attempt to frustrate and deny the expectations of the beneficiaries of the insurance policies it sold to debtor Salem Suede, Inc. However, because the proposed plan cannot be confirmed, this Court should deny approval of the pending disclosure statement.

During oral argument held before the Court on February 12, 1998, in connection with the approval of the joint disclosure statement of debtors Salem Suede, Inc. and Zion Realty Corp. ("Debtors"), it was suggested by the plan proponents that the Manville and Robins cases authorize confirmation of the pending

plan. Under the plan, certain creditors holding independent statutory claims for allegedly fraudulent insurance practices must release the offending non-debtor insurance company in order to receive ratable portions of a fund created for payment of their distinct liquidated judgment claims against the Debtors.

The plan proponents are wrong. Manville and Robins do not stand for any such proposition. The Class 4 creditors' claims pursuant to M.G.L. c. 176D and c. 93A stem from Travelers' alleged breach of its duty of good faith and fair dealing that Travelers' directly owes to the creditors as third-party claimants and not from Travelers' alleged breach of its duty of good faith and fair dealing towards its debtor policyholder. Clegg v. Butler, 676 N.E. 2d 1134, 1139 (1997) ("Clegg"). Because the Class 4 creditors' statutory rights stem directly from Travelers' alleged violation of a duty that Travelers owes to each of them individually as third-party claimants, the M.G.L. c. 176D and c. 93A claims are not derivative of the Debtors' rights under these statutes. Id.

The Debtors' plan can not be confirmed because the release provision is impermissibly coercive, creates unequal treatment of unsecured creditors in violation of Bankruptcy Code section 1123(a)(4), and provides an improper release of a non-debtor third party in violation of Bankruptcy Code section 524(e). Therefore, the plan fails to meet the requirements of Bankruptcy Code section 1129(a)(1).

As the Court correctly implied at oral argument, such a plan violates Section 1123(a)(4) in that it does not treat

similarly situated creditors in an equivalent manner. Further, the pending plan is unlike the Manville and Robins plans, which employed "channelling" injunctions in order to ensure that similarly situated creditors were treated in like fashion without resort to the "self help" mechanisms available in, for example, direct action states. Conversely, the pending plan requires Class 4 creditors, without any consideration, to release independent claims against a non-debtor. Such a plan cannot be confirmed.

## INTEREST OF AMICUS CURIAE

Amicus curiae United Policyholders is a non-profit corporation dedicated to educating policyholders about their rights and duties under their insurance polices. United Policyholders' activities include organizing meetings, distributing written materials, and responding to requests for information from individuals, elected officials, and governmental entities. These activities are limited only to the extent that United Policyholders exists exclusively on donated labor and contributions of services and funds.

Amicus curiae has a vital interest in seeing that the standard form liability insurance policies sold to countless policyholders across the country are interpreted properly and consistently by insurance companies and the courts. As a public interest organization, United Policyholders seeks to assist and to educate the public and the courts on policyholders' insurance rights and their efforts to have them enforced throughout the country.

Amicus curiae's briefs have been submitted to and accepted by numerous high courts across the country. Amicus curiae's briefs on use of drafting and regulatory history to determine the interpretation of the 1985 standard-form pollution exclusion were accepted by the Massachusetts Supreme Judicial Court ("SJC") in Western Alliance Insurance Co. v. Gill, 686 N.E.2d 997 (1997) ("Gill"), in which the court utilized drafting history and adopted the interpretation of the exclusion position provided and advocated by United Policyholders.

United Policyholders has a direct and vital interest in the resolution of the pollution exclusion and insurance policy interpretation issues implicated in the underlying insurance coverage proceeding involving The Travelers Insurance Company ("Travelers").

United Policyholders has previously appeared as an amicus curiae in this proceeding. United Policyholders also has an interest in seeing that insurance companies and others are prevented from improperly using the Bankruptcy Code to subvert policyholders' and third-party claimants' rights and insurance companies' duties of good faith and fair dealing pursuant to statutes such as M.G.L. c. 176D and c. 93A.

United Policyholders believes that the within plan gives the appearance of being a sham designed by Travelers to circumvent its potential liability to the Class 4 claimants under M.G.L. c. 93A. United Policyholders believes that there are good and sufficient reasons under relevant bankruptcy precedent for

the Court to determine that the pending plan can not be confirmed (and therefore should not have acceptances solicited).

United Policyholders is concerned that insurance companies, which have allegedly violated their independent duty of good faith and fair dealing to innocent, injured third-party claimants, not be allowed to misuse the bankruptcy process to escape potential statutory liability to third-parties. Indeed, if liable, Travelers' support for this plan could potentially be construed as further acts of bad faith and unfair claims settlement practice.

The plan proponents should not be allowed through legalistic legerdemain to eviscerate the intent and effect of Massachusetts statutes which hold insurance companies such as Travelers potentially liable for multiple damages for violating their independent duties of good faith and fair dealing to third-party claimants in the handling of their liability claims. There is nothing in the Bankruptcy Code that allows, much less requires, such a result.

## FACTUAL BACKGROUND

The Court is respectfully referred to the record herein, in particular to the transcript of the hearing of February 12, 1998 (hereinafter "Tr. at __"), the Court's opinion and order of October 10, 1997 (hereinafter, "Op. at __"), and the Debtors joint plan of reorganization, dated December 17, 1997 (hereinafter, "the Plan"). In the interest of brevity, the history of the case will not be recited herein.

## ARGUMENT

### THE MASSACHUSETTS SUPREME JUDICIAL COURT HAS HELD THAT THIRD-PARTY BAD FAITH CLAIMS UNDER M.G.L. c. 93A, SUCH AS THOSE INDEPENDENTLY HELD BY CLASS 4 CREDITORS AGAINST TRAVELERS HEREIN, ARE NOT DERIVATIVE OF DEBTORS' INSURANCE POLICY RIGHTS

The Plan improperly requires Class 4 creditors to give up their independent, non-derivative, direct claims against a third-party, Travelers, in order to receive ratable portions of a fund created for payment of their distinct liquidated judgment claims against the Debtors. The proponents of the Plan seek to justify this coercive and improper provision by asserting, incorrectly, that the Class 4 creditors' rights against Travelers are wholly derivative of Salem Suede's rights against Travelers. In fact the Class 4 creditors' rights under M.G.L. c. 176D and c. 93A are wholly independent of Salem Suede's rights against Travelers and are a form of statutorily-provided relief that the Class 4 creditors hold for injuries that they directly and individually suffered allegedly as a result of Travelers' improper actions.

The recent decision in Clegg, demonstrates that third-party bad faith claims brought under M.G.L. c. 176D and c. 93A are not derivative, as has been asserted herein. 676 N.E.2d 1134. Clegg, a third-party injured in an automobile accident, filed litigation against the tortfeasor's insurance company, Utica Mutual Insurance Company ("Utica"), alleging unfair settlement practices in violation of M. G. L. c. 176D, § 3 (9) (f), and seeking damages under M. G. L. c. 93A, § 9 (3). Utica offered its full policy limits on the eve of trial in 1994. Id.

The trial court found that Utica owed Clegg, the third-party claimant, a duty to settle once it had learned in 1992 that Clegg was totally and permanently disabled. Id. at 1138. The trial court found that Utica's continuing failure to settle with the Cleggs after 1992 constituted an violation of c. 93A, § 9. Id. "The judge awarded the plaintiff James A. Clegg treble damages based on a settlement reached with the insured prior to trial." Id. at 1134 (footnote omitted). "The Clegg's allegation of unfair settlement practices were not relinquished by this settlement. Following a jury-waived trial, the judge ruled that Utica had violated M. G. L. c. 176 D, §3 (9) (f), by failing to effectuate a prompt, fair, and equitable settlement of a claim in which liability was reasonably clear." Id. at 1138.

It is significant that both in the Supreme Judicial Court's recitation of the holdings below and in its own holdings, there is not the slightest hint that Utica's bad faith caused any injuries to the policyholder-tortfeasor. All of the bad faith injuries were sustained by the injured third-party claimant. Indeed, on appeal, Utica unsuccessfully argued that third-party claimants "cannot recover against the insurer for [the insurance companies'] failure to effectuate a settlement under M. G. L. c. 176D, § 3 (9) (f)." Id. at 1138. In rejecting this contention, the Supreme Judicial Court made it manifestly clear that a third-party claimant injured as a result of any insurance company act of bad faith has an independent, not derivative, cause of action under §93A:

> In Van Dyke v. St. Paul Fire & Marine Ins. Co., 388 Mass. 671, 675, 448 N.W.2d 357 (1983), we observed that G. L. c. 93A §9 (1), provides that "any person whose rights are affected by another" party's violation of G. L. c. 176(D), § 3 (9), is entitled to bring an action under c. 93A. ... This broad language entitles any plaintiff to recover under c. 93A, § 9, if his rights are adversely affected or if he suffers "injury" because of another party's breach of his statutory duty. Id. In this context, "injury" simply refers to "the invasion of any legally protected interest of another." Leardi v. Brown, 394 Mass. 151, 159, 474 N.E.2d 1094 (1985), quoting Restatement (Second) of Torts § 7 (1965). The text of G. L. c. 93A, § 9 (1), and our interpretation in Van Dyke are both clear affirmations of third-party rights, and we cannot accept Utica's argument that only insureds are owed a duty of fair dealing when it comes to an insurer's settlement practices. See S. Young, Chapter 93A and the Insurance Industry § 14.04, Chapter 93A Rights and Remedies (Mass. Continuing Legal Educ. 1996 & Supp. 1996). [citation omitted].

Id. at 1138 (emphasis added).

Clegg establishes beyond cavil that an insurance company has an independent duty of good faith and fair dealing towards third-party claimants under c. 93A. As the Court noted, the insurance company's duty of fair dealing is established by statute under c. 176D and "is not limited to those situations where the plaintiff enjoys contractual privity with the insurer." Id. at 1139 (footnote omitted).

The Supreme Judicial Court further held that "c. 93A § 9 (1), confers standing where there is an injury resulting from another's unlawful acts. Standing does not depend on a party's status as an insured or a third party claimant." Id. at 419. The Supreme Court also rejected the argument that "because the

Cleggs and the Butlers [, the tortfeasors,] eventually entered into a settlement, which the Cleggs denote as 'fair and equitable,' that the Cleggs were not adversely affected or injured by Utica's actions. ... [W]hen an insurer wrongfully withholds funds from a claimant, it is depriving that claimant the use of those funds. 'This is precisely the type of damage we have described as appropriately being subject to multiplication in an action . . . under c. 93A.' Schwartz v. Rose, 418 Mass. 41, 48, 634 N.E.2d 105 (1994)." Id.

The above passage underscores the Supreme Judicial Court's holding that injuries and damages addressed under c. 93A include those which are personal to third-party claimants such as the Class 4 creditors herein and are not derivative of those of the policyholder. Instructively, the Supreme Judicial Court refused to reverse the trial court's holding that Utica's allowance of its investigators to approach the Cleggs, the third-party claimants, when Utica knew that they were represented by counsel, and Utica's attempt to contact nurses that treated Mr. Clegg, "were independent violations of G. L. c. 93A." Id. at 1141.

In other words, the Supreme Judicial Court recognized that insurance company conduct that is wrongful under M.G.L. c. 176D and c. 93A can result in injuries, as alleged here, that solely impact upon third-parties. As such, an insurance company's statutory bad faith liability to third-party claimants exists independently of any rights that the policyholder may have or injuries that the policyholder independently suffers from

insurance company bad faith conduct. When an insurance company handles a claim in bad faith, it may cause injury to the policyholder. However, the insurance companies' bad faith may also cause independent injury to third-party claimants.[1] The latter type of injury, as well as the former, is addressed by c. 93A and is the alleged source of the Class 4 creditors' claims against Travelers.

THE TREATMENT OF CLASS 4 CREDITORS IMPERMISSIBLY DISCRIMINATES AGAINST THOSE HOLDING INDEPENDENT BONA FIDE M.G.L.c.93A CLAIMS

The nub of the dispute present before the Court was articulated at the February 12 hearing. In describing the holdings of Class 4 creditors the following colloquy was held:

THE COURT: Right now they have claims against the debtor, and they may have claims against Travelers. Those are subject to litigation.

MR. HALEY [2] Correct, Your Honor. So if you value the claims they have against Travelers -- and they may have against Travelers -- and the claims they have against the debtor, the debtor contends that what

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1. The types of independent violations of the insurance company's duty of good faith and fair dealing under c. 93A that were addressed in Clegg also demonstrate that an insurance company's improper conduct towards a third-party claimant violates c. 93A even where it may ultimately be determined that there is no coverage for the underlying claims. Clegg, at 423 (insurance company held liable under c. 93A improper actions toward third-party claimant). The examples given of the insurance company's improper investigatory and settlement conduct toward the third-party claimant also clearly demonstrate that the insurance company can violate third-party rights provided under c. 93A in instances were there those violations cause no injury to the policyholder. Id.

2. Mr. Haley is Counsel to debtor Salem Suede, Inc.

they're getting is equal to 100 per cent of the claims that they have. The claims they have against Travelers, Your Honor, are derivative from the claims they have against the debtor. They're not, and they're not being forced to release those derivative claims if they don't want to.

THE COURT: Well, let's take a look at your plan because I'm not sure that that's a fair characterization . . . .

Tr. at p. 15 (emphasis supplied).

Later at the hearing, counsel wavered somewhat, admitting that the holders of claims against Travelers Insurance Company ("Travelers") under M.G.L. c. 98A were only "in large part [] derivative of their rights against the debtor." Tr. at 26.

The Plan cannot be confirmed because counsel is wrong. The M.G.L. c. 93A claims of the Class 4 Creditors are not derivative of the Debtor's coverage rights. They belong directly to these creditors and in fact can not be brought against the Debtors in any way.

That the Plan proponents would wish matters to be otherwise is understandable. At oral argument, debtor's counsel conflated the opinions of the Second Circuit in MacArthur Co. v. Johns-Manville Corporation, 837 F.2d 89 (2d Cir. 1988), cert. denied, 488 U.S. 868 ("MacArthur") and the Fourth Circuit in the Robins case (presumably as articulated in In re A.H. Robins Co., Inc., 880 F.2d 694 (4th Cir.), cert. denied, 493 U.S. 959 (1989)("Robins"). These cases do not support approval of the pending disclosure statement.

A. The MacArthur Opinion

MacArthur's broad injunction against non-debtor assaults upon Manville's insurance policies and the insurance companies that sold them was predicated upon -- and rightfully so -- the sine qua non that any rights that MacArthur had in Manville's insurance policies were "completely derivative" of Manville's own rights thereunder. 837 F.2d at 92. Such is anything but the case here. In MacArthur, the court specifically stated that:

> The vendor endorsements [contained in Manville's insurance policies, pursuant to which MacArthur sought to assert claims against Manville's insurer] cover only those liabilities resulting form the vendor's status as a distributor of Manville's products. The endorsements are limited by the product liability limits of the underlying Manville policies and are otherwise subject to all of the terms of the underlying policies. MacArthur's rights as an insured vendor are completely derivative of Manville's rights as the primary insured Such derivative rights are no different in this respect from those of the asbestos victims who have already been barred from asserting direct actions against the insurers.

Id. 837 F.2d at 92.

No one can suggest that the independent claims of the Class 4 creditors, which can only be brought against Travelers, and which in no way implicate the estate, are the functional equivalent of asbestos claims in direct action states.[3]

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3. The nature of direct action statutes is varied. For the convenience of the Court and the parties, annexed hereto as Exhibit A is a draft of the annual Supplement to Eugene R. Anderson, et al., Insurance Coverage Litigation (1997). The authors are members of Anderson Kill & Olick, P.C., counsel to United Policyholders.

Realization on the 93A claims by these creditors will in no measure obviate the Debtors' obligations on the underlying judgments. Accordingly, to tie the two together is impermissible.

Indeed, this Court has correctly observed that the rights of the Class 4 creditors arise out of distinct statutory provisions from those enabling the Debtors. As the Court stated:

> M.G.L. c. 93A §2 declares as unlawful any "unfair or deceptive acts or practices in the conduct of any trade or commerce." Consumers are afforded a private right of action under §9, and persons engaged in trade or commerce are provided with a private right of action under §11. Thus [the Class 4 creditors] are §9 plaintiffs whereas FCC and the Debtors are §11 plaintiffs.

Op. at 80-81.

The Court continued its analysis, and effectively put a bullet into the pending Plan, concluding that:

> M.G.L. c. 176D, §3(9) outlines unfair methods of competition and unfair or deceptive acts or practices in the business of insurance. Only a plaintiff under M.G.L. §9 [such as the Class 4 creditors] can maintain a private right of action under M.G.L. c. 176D, §3(9).

Op. at 82-83.

Accordingly, MacArthur is inapplicable, and the Plan cannot be confirmed.[4]

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4. Two pre-Clegg Massachusetts cases refer in passing to 93A claims as "derivative", but both involve policyholder lawsuits in which it was held that no insurance coverage was available for the underlying injury and no acts independent of the denial of coverage were alleged. Accordingly, the 93A claims were dismissed. Frohberrg v. Merrimack Mutual Fire Insurance Company, 612 N.E. 2d 273 (Mass. App. Ct. 1993); LoCicero v. Hartford Insurance Group, 518 N.E. 2d 530 (Mass. App. Ct. 1988). We have found no authority which suggests that the independent statutory claim of a non-

(continued...)

B. Robins

Similarly, in Robins, the confirmed plan contained a so-called "channeling injunction" which compelled all persons holding bodily injury claims relating to Robins' manufacturing and distribution of Dalkon Shield intrauterine devices to assert those claims against a trust (the "Robins Trust") which the plan established. In addition, the Robins plan contained a discharge of the debtor coupled with a broad release of various "persons" (in the bankruptcy sense) making contributions to the Robins Trust, including members of the Robins family and Aetna Insurance Company.

However, as the Robins disclosure statement makes clear, although this release was of "all claims that [claimants] possess or may possess against any Person based upon or related in any manner to the Dalkon Shield[]", the release "[did] not apply to any insurer (including [] Aetna) . . . if, but only if, such claims cannot be asserted or brought over against the Trusts, Robins, the Successor Corporation, any Affiliates thereof, or any other Person intended to be protected by the injunction in the Plan" (as such capitalized terms were defined in the Robins plan). See Robins Disclosure Statement at page 42. (A copy of the relevant pages of the Robins disclosure statement are annexed hereto as Exhibit B).

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4.(...continued)
policyholder is derivative. Indeed, Clegg, a 1997 decision of the Supreme Judicial Court, makes clear that insurance companies' duty of good faith and fair dealing towards third-party claimants is independent of insurance companies' separate duty of good faith and fair dealing towards their policyholders.

Thus, it becomes evident that some claims simply do not fit within the ambit of a channeling injunction, including those of the Class 4 creditors arising out of M.G.L. c. 93A. No one can reasonably claim that Travelers' potential liability to the Class 4 creditors under that statute is in any way assertable against the Debtors. The Robins court carefully explained what it was doing:

> We think the ancient but very much alive doctrine of marshalling is analogous here. A creditor has no right to choose which of two funds will pay his claim. The bankruptcy court has the power to order a creditor who has two funds to satisfy his debt to resort to the fund that will not defeat other creditors.

880 F.2d at 701.

Unfortunately for the plan proponents, the case at bar is the exact opposite of Robins. Here, the Plan proponents want to satisfy two claims, distinct as to the alleged tort-feasor, from a single fund by paying one in full but demanding a plenary release of the independent other claim against a non-debtor third-party. This is not the same as preventing a creditor from choosing between two funds from which to seek payment on a single claim, as was the case in Robins and MacArthur. Indeed, arguably the Class 4 creditors could properly be enjoined from seeking independent recovery from Travelers on their underlying damage claims against the estate, were those claims to be properly satisfied under the Plan. However, that is neither the intent

nor the purported impact of the Plan.[5] Accordingly, the Plan proponents' reliance upon Robins and MacArthur is misplaced, as other authority easily confirms.

C. Elsinore

The MacArthur and Robins opinions were harmonized by Bankruptcy Judge Gambardella of the District of New Jersey in her opinion in In re Elsinore Shores Associates, 91 B.R. 238 (Bankr. D.N.J. 1988) ("Elsinore"). In that case, the debtor proposed a plan of reorganization which provided for several mandatory releases of non-debtors by creditors receiving consideration under the plan. Indeed, the Elsinore plan contained an article remarkably similar to that in the within proposed plan:

> 25.5 Effect of Voting. By voting to accept the Plan, each holder of a Claim of [sic] Equity Interest shall be deemed, as of the Effective Date, to release and discharge [certain non-debtor affiliate corporations] and all present and former employees, officers, directors and stockholder [sic] thereof, and all present and former employees, officers, directors, stockholders and partners of the Debtors from any and all claims.

Elsinore, 91 B.R. at 246. Similarly, those entities were to receive a "discharge" pursuant to the confirmation order. Id.

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5. The opinion of the First Circuit in Monarch Life Insurance Company v. Ropes & Gray, 65 F.3d 973 (1st Cir. 1995) does not require a different result. That case held only that "the issue of the bankruptcy court's power to enter . . . [an] 'incidental' injunction was precluded, having been conclusively resolved in the confirmation order which [the subsequent plaintiff suing a protected party] neither opposed nor appealed." Id. at 983. The court specifically stated that it "express[ed] no view on the soundness of the precedents cited in the confirmation order [including Robins], nor on their applicability to the particular Plan [at issue]". Id. 65 F.3d at 983-84.

The court first provided a thorough recitation of the general law under Section 524(e) of the Bankruptcy Code, and the limitations on plans which contain coercive, non-consensual releases of non-debtor third parties, citing In re Monroe Well Service, Inc., 80 B.R. 324 (Bankr. E.D.Pa. 1987)("Monroe Well") and In re AOV Industries, Inc., 792 F.2d 1140 (D.C.Cir. 1986)("AOV"). See also Matter of Specialty Equipment Companies, Inc., 3 F.3d 1043 (7th Cir. 1993)(appeal of confirmed plan containing consensual releases deemed moot upon substantial consummation).

Judge Gambardella next focused upon the same legal concepts that render the within plan unconfirmable: Both the Monroe Well and AOV courts had concluded that "equality of treatment of members of a class as contemplated by §1123(a)(4) is not provided by permitting each creditor of that class to opt to provide a release and receive the same pro rata distribution on its claim." 91 B.R. at 251.

The reason that Section 1123(a)(4) is not satisfied by such a provision is that

> [i]t is disparate treatment when members of a common class are required to tender more valuable consideration -- be it their claim against specific property of the debtor or some other cognizable chose in action -- in exchange for the same percentage of recovery.

91 B.R. at 251, quoting AOV, 792 F.2d at 1152.

Both AOV and Monroe Well contained consensual release provisions, and each recognized that Bankruptcy Code Section 1123(a)(4) does not require decimal-perfect equality of treatment. AOV, 792 F.2d 1154; Monroe Well, 80 B.R. at 335.

However, the Elsinore plan's releases were designed to be effective, ipso facto, upon confirmation, and the court accordingly denied approval of the debtors' disclosure statement.

Here, the Plan makes no provision for payment of the claims of the Class 4 creditors who do not grant Travelers a release. Indeed, as debtor's counsel makes clear, a non-releasing Class 4 creditor is to receive nothing under the Plan. Tr. at 26-27. The demand of the Plan to Class 4 creditors is clear: To receive a payment from the estate, you must first give up your valuable, independent, non-derivative 93A claim against Travelers.

The Plan can not be confirmed because such a provision is impermissibly coercive, creates unequal treatment of creditors in violation of Bankruptcy Code section 1123(a)(4), and provides for an improper release of a non-debtor third party in violation of Bankruptcy Code section 524(e). Therefore, the Plan fails to meet the requirements of Bankruptcy Code section 1129(a)(1).

## CONCLUSION

United Policyholders is gravely concerned that the proposed joint plan is being impermissibly utilized by Travelers to wrongfully escape a potential statutory liability which is wholly separate and distinct from any liability assertable against the Debtors. The Plan proponents' assertion that the Class 4 creditors' 93A claims are derivative of those creditors' claims against the Debtors is self-serving and baseless.

The Plan has the appearance of having been concocted in order to avoid the potential statutory liability which the Commonwealth, in its wisdom, imposes upon insurance companies guilty of fraudulent insurance practices. The form of the underlying injury giving rise to the improperly addressed insurance coverage claim is essentially meaningless because the Class 4 creditors' 93A claims do not derive from the injury. Rather, they derive in their entirety from Travelers' alleged misconduct towards the Class 4 creditors.

This Court has expressly found violations of M.G.L. c. 93A by Travelers, and has pointedly observed that "[t]o the extent that a fact finder determines that coverage exists, Travelers' conduct may be considered all the more reprehensible and warrant multiple and punitive damages." Op. at 100-101. United Policyholders believes that insurance coverage does exist for the damages suffered by the Class 4 claimants. As Clegg demonstrates, however, insurance company liability for bad faith towards third-parties can exist even where coverage is ultimately not found.

We urge the Court to preserve the independent statutory rights of the Class 4 creditors. Because the proposed release of Travelers violates Bankruptcy Code Section §524(e), implicating Bankruptcy Code Section 1129(a)(1), we similarly urge the Court to deny approval of a disclosure statement for an unconfirmable plan.

Lastly, aside from the obvious impropriety of the Plan, United Policyholders is concerned that approval of the Plan will

generally encourage insurance companies to engage in acts of bad faith claims handling or settlement practices towards third-party claimants once a policyholder-tortfeasor comes within the aegis of the Bankruptcy Courts. Approval of the Plan might suggest that insurance companies can continue to act in possible bad faith towards third-party claimants secure in the knowledge that any liability or penalty for insurance companies' actual violations of third-party creditors' rights under c. 93A will simply "disappear" in the bankruptcy proceeding. Such a result would be inconsistent with public policy underlying both the Bankruptcy Code and the Massachusetts statutes set forth herein.

WHEREFORE, United Policyholders, amicus curiae, urges the Court to deny approval of the pending disclosure statement.

Dated: Philadelphia, Pennsylvania
February 27, 1998

Respectfully submitted,

UNITED POLICYHOLDERS

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UNITED STATES BANKRUPTCY COURT
DISTRICT OF MASSACHUSETTS

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| In Re:<br><br>ZION REALTY CORP.,<br><br>Debtor | Chapter 11<br>Case No. 96-14692-JNF |

CERTIFICATE OF SERVICE

I hereby certify that at my direction true and correct copies of the foregoing documents, were mailed via first class mail, postage prepaid, to the following:

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