

## **REPLY BRIEF FOR APPELLANT ALEXANDER SAMBOLIN**

The most significant thing about the three responding briefs is that appellee AcroMed Corporation agrees with appellant Alexander Sambolin that he should share in the AcroMed settlement fund. Therefore, this brief responds principally to the Plaintiffs' Legal Committee ("PLC") and Claims Administrator Robert E. Welsh, Jr., who insist that the district court correctly excluded Mr. Sambolin.

Part I below responds to arguments that the May 1997 registration deadline was properly invoked by the district court to deny Mr. Sambolin's claim. We consider together the related questions whether the district court's decision was an abuse of discretion (as to which AcroMed fully agrees with us) and violated constitutional principles of procedural due process and equal protection. Part II shows that appellees have failed to sustain the settlement's notice program against Mr. Sambolin's Rule 23 and due process challenge.

### **I. THE DISTRICT COURT'S REFUSAL TO ALLOW MR. SAMBOLIN TO PARTICIPATE IN THE SETTLEMENT WAS BOTH AN ABUSE OF DISCRETION AND A VIOLATION OF DUE PROCESS.**

The arguments advanced by AcroMed, the PLC, and Mr. Welsh differ from one another. Therefore, we consider them separately.

#### **A. AcroMed's Position.**

Mr. Sambolin appreciates AcroMed's candor and decency in arguing that class members like him who timely filed Proofs of Claim are entitled to share in the

settlement's benefits, and that therefore the district court abused its discretion in barring Mr. Sambolin's claim. But we disagree with AcroMed when it asserts that the district court's decision did not violate due process. AcroMed admits that "[t]here is no rational reason to bar Sambolin from sharing in the settlement," AcroMed Br. 9, "[a]ny other conclusion is unreasonable," *id.* at 10, and the district court's decision was "arbitrary, fanciful or unreasonable" or the product of "improper standards, criteria or procedures." *Id.* (citation omitted). After making those statements, AcroMed cannot defend the constitutionality of the decision below in light of the company's further concession that due process is violated where a deadline is irrational or arbitrary. *Id.* at 18. Put differently, rationality is the hallmark of constitutional regularity, *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 433-37 (1982); *City of Cleburne, Texas v. Cleburne Living Center*, 473 U.S. 432, 439 (1985), and thus AcroMed itself has condemned the result below on constitutional as well as abuse-of-discretion grounds.

In contrast to its factually detailed explanation of why the district court abused its discretion, AcroMed's three-paragraph constitutional defense operates at a very high level of generality. AcroMed Br. 18-19. It says only that the constitution is not violated by the imposition of a reasonable time limit. *Id.* at 18. We agree that statutes of limitation and other time bars may serve legitimate purposes — to provide repose and allow for efficient claim adjudication — but those purposes were not served by

the decision below for the very reasons stated by AcroMed earlier in its brief. *Id.* at 10-15. AcroMed justifies the registration deadline on an alleged need for the Claims Administrator to communicate with registrants and to gather information, *id.* at 19, concerns that *might* apply in many class actions. However, those concerns have no relevance here. By the time the settlement approval became final in April 1998, *see* AcroMed's Appendix ("AA") 104, Mr. Sambolin had already registered. At that juncture, no claim form existed, JA 146A, and so the gathering of information was not yet possible. Therefore, because the denial of benefits here served no rational purpose, it violated due process.<sup>1</sup>

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<sup>1</sup> AcroMed asserts that Mr. Sambolin waived his constitutional arguments concerning the May 15, 1997 deadline. AcroMed concedes that Mr. Sambolin argued below that he did not have constitutionally adequate notice, but asserts that "he did not say that the deadline itself was arbitrary or irrational." AcroMed Br. 20 n.3. That argument is baseless. Mr. Sambolin's constitutional arguments were not made in the abstract, but rather were based on the fact that the May 15, 1997 deadline affected him personally, as the first page of his motion for relief from that deadline demonstrates. JA 193 (referring twice to the May 15 deadline).

**B. The PLC's Arguments In Support Of The Registration Deadline Are Frivolous.**

The PLC offers three specific justifications for rigid application of the May 15, 1997 deadline. It also vaguely suggests that accommodating Mr. Sambolin would delay receipt of benefits for other class members. Each argument is frivolous.

First, the PLC says that registration "defined for the court the size of the class in a time seasonably approximate to the Final Fairness Hearing." PLC Br. 4. That is not true. The class is defined by the settlement agreement to include all people implanted with AcroMed's bone screws on or before December 31, 1996, JA 24, which, according to AcroMed, involves between 100,000 and 117,000 people. AA 77 (Declaration of AcroMed CEO W. Dekle Rountree, Jr.). It is that number against whom the settlement purports to have preclusive effect, and that has nothing to do with the number of registrants. If the PLC meant to say that the registration process provided the court with the number of registrants "seasonably approximate to the Final Fairness Hearing," that tautology is irrelevant.

Indeed, the PLC nowhere explains why knowing the number of registrants was important at the time of the fairness hearing, and plainly it was not. The district court gave no indication that it even knew the number of registrants when it approved the settlement. Since the Claims Administrator was not even appointed until January 30,

1998, *see infra* 1a, more than nine months after the April 1997 fairness hearing, it is obvious that the number of registrants had not even been considered or brought to the court's attention at the time of the fairness hearing and nothing in the record suggests otherwise.

Moreover, even if the number of registrants had been known at the time of the fairness hearing, that fact would have been irrelevant to the court's evaluation of the settlement. The settlement provided that AcroMed would put up \$100 million, plus disputed insurance proceeds, regardless of the number of claimants. The court approved the settlement because it believed that amount was the maximum that AcroMed could pay in light of its limited assets, and thus the number of potential claimants was legally irrelevant to that ruling.

Second, the PLC claims that the May 15, 1997 deadline "informed AcroMed of the extent of its potential liability that would be stayed by the court's stay order." PLC Br. 4. Given the cryptic nature of this statement, we will try to explain what we think the PLC means. Under the district court's preliminary approval order, all federal litigation against AcroMed was automatically stayed, but state court litigation was stayed only if the state court plaintiff registered. *See* JA 26. Since AcroMed agrees with Mr. Sambolin that class members who filed timely Proofs of Claim should not be time-barred, it is difficult to understand how further information about the effect

of a stay of litigation, which could only have benefitted AcroMed, can possibly support Mr. Sambolin's exclusion.

Moreover, the PLC's argument makes no sense. The purpose of the district court stay order was to put a hold on *pending litigation*. Plaintiffs in pending cases were sent first-class mail notice because the PLC already knew their location. People in Mr. Sambolin's situation, however, who did not get first-class mail (or any other) notice, were *not* targets of the court's stay order because they had not filed suit against AcroMed. Thus, it is nonsensical to justify the exclusion of Mr. Sambolin and other class members who had never sued AcroMed by reference to an alleged need to determine who was subject to the order staying pending litigation against AcroMed.

Third, the PLC says that absolute adherence to the May 15, 1997 deadline is "consistent with the District Court's effort to afford class members a meaningful time period to consider the settlement." PLC Br. 4. To be blunt, this assertion is gibberish. Registration and consideration of the settlement are two separate activities. It was necessary to set a time frame for class members to evaluate the settlement prior to the April 23, 1997 fairness hearing, and it was sensible to impose a deadline for class members to file written objections to the settlement (April 7) if they wanted the court to consider their objections at the fairness hearing. JA 29. The very fact that the registration date was *after* the fairness hearing (and was later extended by two more

weeks) negates any argument that the time period for considering and objecting to the settlement had any relationship to the proper time period to register for settlement benefits. The vast majority of people who filed claims made no substantive objection to the settlement, and no one — not the court, not AcroMed, not the PLC — has previously suggested that the registration date had any bearing on the objection/fairness hearing process.

Finally, the PLC suggests that affirmance is appropriate because distribution of the fund is "imminent." PLC Br. 6 n.1. Even assuming that this assertion is factually correct, it is irrelevant. The cases make clear that one looks to when Mr. Sambolin registered (*i.e.*, when he did what was required of him), not when the error is ultimately subject to correction, in determining whether reversal is appropriate. *See, e.g., Supermarkets General Corp. v. Grinnell Corp.*, 400 F.2d 1183, 1186 (2d Cir. 1974); *Zients v. LaMorte*, 459 F.2d 628, 630 (2d Cir. 1972); *In re Cendant Corp. Prides Litig.*, 189 F.R.D. 321, 325 (D.N.J. 1999). No one disputes that, in December 1997, when Mr. Sambolin registered, the settlement was not final and the Claims Administrator had not yet communicated with class members, let alone begun assessing claims (indeed, the claim form did not exist for nearly another year). And no one disputes that Mr. Sambolin did nothing to delay the claims evaluation or distribution process. (In fact, everyone concedes that, by filing his Proof of Claim

early, he was more diligent than most claimants). If the rule were otherwise, the delay caused by adjudicating a "late" class member's motion for relief from the due date, however meritorious that motion, would generally be a sufficient reason to deny the claim, and the cases favorable to Mr. Sambolin, such as *Zients*, would likely have come out the other way.

In any event, the PLC's assertion is factually incorrect. Payment is *not* "imminent," nor would paying Mr. Sambolin and others undermine the distribution plan. The Claims Administrator has only recently sent out claim determination letters. Those letters provisionally report how many "points" each claimant has earned. They specifically state that a dollar amount cannot be determined because of possible attorney's fees and subrogation deductions. Welsh Br., Addendum 44b-45b. Indeed, Mr. Welsh's brief makes clear that the government's Medicare subrogation interests are not even close to being resolved. Welsh Br. 12. And because each claimant has the right to appeal the Claims Administrator's assessments, including the recent "point" determinations, to the district court, *id.* 45b; JA 42 (¶ 20), and presumably from there to this Court, final dollar determinations are far off in the future. Thus, the PLC's assertion that distribution is imminent is simply not true, and Mr. Welsh's brief does not contend otherwise.

In sum, the PLC's arguments are not only without merit, but they are obvious

make-weights which draw into question the PLC's adequacy as representative for the class as a whole and further underscore the error below.

**C. The Claims Administrators' Arguments Concerning The Need To Assist Subrogation Claimants Are Without Merit.**

The Claims Administrator embraces none of the PLC's arguments. Instead, he appears to defend the decision below based solely on an alleged need to assist third-party health insurers, including the U.S. government, in perfecting their subrogation claims. Before responding to these arguments, some background is necessary to put them in context.

Although insurers with potential subrogation claims against bone-screw patients were not parties to the AcroMed class action, the class action settlement purported to bind all such subrogation claimants and require them to make claims to protect their interests. *See* JA 24 (class definition). Recognizing (quite correctly) that the district court did not have jurisdiction over them, some large health insurers objected to their inclusion in the settlement. Those insurers soon recognized, however, that they should submit to the jurisdiction of the court because, rather than having to chase potential insureds around the country, the settlement provided them an opportunity they would never otherwise have: They could use the settlement apparatus as an inexpensive collection process. Using their legal arguments as leverage, the subrogation claimants were able to get favorable treatment. Although the district

court originally set May 1, 1997 as the deadline for subrogation claimants, JA 43, as it had for patient registration, that deadline was never enforced. Indeed, the district court later approved a separate settlement agreement that *waived* the deadline for subrogation claimants. Welsh Br., Addendum 6b.

This background is important because it shows that the Claims Administrator's arguments revolve solely around protection of third-party interests, not the legal claims of the injured patients. Thus, Mr. Welsh's arguments can be rejected on the simple ground that it is fundamentally unfair to abrogate the rights of bone-screw patients, whom the settlement was intended to benefit, to serve the needs of health insurers, who are not parties and to whom neither the PLC, AcroMed, or the court owe any duties in this litigation.

In any event, Mr. Welsh's argument is wrong on its own terms. He claims vaguely that it was necessary to conduct a so-called "sequential" evaluation process, under which patient registration by May 1, 1997 was intended to precede consideration of subrogation claims. Although Mr. Welsh's brief is unclear on this point, he appears to argue that it was necessary for patients to register first to provide the insurers information that would allow them to go after their insureds. *But that sequential evaluation process was obviously not within the contemplation of the settlement.* As noted above, the due date for subrogation claims was originally the

same as the registration deadline for bone screw patients, making it literally impossible for Mr. Welsh's "sequential evaluation" justification to have been the actual justification for the May 1, 1997 (or the extended May 15, 1997) implantee registration deadline.

Aside from this fundamental error, Mr. Welsh does not explain why it was necessary to adhere strictly to the May 15, 1997 deadline as the actual events of this case unfolded. To repeat: Mr. Sambolin registered in December 1997 prior to when the settlement became final in April 1998. Mr. Welsh was not even appointed by the court until January 30, 1998, *see infra* 1a, about a month and a half *after* Mr. Sambolin registered. Thus, it is inconceivable that the "lateness" of Mr. Sambolin's registration could possibly have affected the assessment of subrogation interests. Indeed, when Mr. Sambolin registered in December 1997, certain subrogation claimants were still prosecuting appeals to this Court. It was not until March 31, 1998 that the district court approved the subrogation settlement agreement, Welsh Br., Addendum 1b, causing the subrogation claimants to dismiss their appeals. That occurred a month and a half *after* Mr. Sambolin registered. Moreover, it was not until April 14, 1998, that Mr. Welsh first communicated with registrants. *See infra* 3a-7a. That letter — which was sent to Mr. Sambolin because he was a registrant — makes clear that Mr. Welsh had not even begun assessing claims by then. *Id.* Thus, even if

Mr. Welsh's "sequential" evaluation argument has force with respect to some claimants (*i.e.*, it was important for registration to predate the filing of the full claim form), it cannot possibly apply to Mr. Sambolin's situation.

But Mr. Welsh's argument is not correct with respect to *any* class member who timely filed a Proof of Claim. The Proof of Claim was not approved by the district court until January 6, 1999, JA 146A, and Mr. Sambolin filed a complete form shortly thereafter. JA 222-42. The district court twice extended the deadline for filing Proofs of Claim because of delays caused by *other* class members in providing information. That information was absolutely necessary to make subrogation determinations because, unless the Claims Administrator finds that the bone screw recipient is eligible for relief, the subrogation claimant obviously has no right to recover. And because tentative point determinations were just recently sent to claimants, more than nine months after the Proof of Claim deadline, the subrogation claimants' "rights" would have been fully protected if the court had treated timely filed Proofs of Claim as timely registrations.<sup>2</sup>

This common sense conclusion is supported by Pretrial Order No. 1765, issued

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<sup>2</sup>In fact, as Mr. Welsh admits, the registration form was wholly inadequate for the United States to identify Medicare beneficiaries, because the form did not call for the registrant's Medicare number, Welsh Br. 12, which was called for *only* on the Proof of Claim form. JA 231 (Part V).

by the district court on April 19, 1999, almost two years after the registration date. That order approved the subrogation claim form, stated that subrogation claimants could rely on Proof of Claim information, and suggested that such information could be made available for inspection and copying at Mr. Welsh's office. Welsh Br., Addendum 33b. Thus, subrogation claimants could, and in fact did, rely on information submitted on or before the June 15, 1999 Proof of Claim deadline in perfecting their claims. In sum, it is sophistry to suggest that strict adherence to the registration May 15, 1997 due date was necessary to protect the subrogation claimants' interests when it was not until two years later that information critical to evaluation of subrogation claims was available.<sup>3</sup>

Finally, one other fact fatally undermines Mr. Welsh's argument that the May 15, 1997 deadline was necessary to protect the health insurers. *Mr. Welsh himself*

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<sup>3</sup> The statistics provided by Mr. Welsh show that it was counterproductive for subrogation claimants to rely on the registration form, rather than the Proof of Claim, in making their claims. Subrogation claimants filed 220 claims alleging an interest in the recoveries of registrants. Welsh Br. 16. However, only 171 of those registrants filed Proofs of Claim, meaning that at least 49 subrogation claims were filed for no reason, since there is no basis for subrogation absent an approved Proof of Claim. *Id.* Mr. Welsh also says that there are over 1,100 "active subrogation claims." *Id.* We are not certain what this statement means. However, since there are only 171 "active subrogation registrants that submitted a subrogation claim and whose underlying insured submitted a corresponding claim form," *id.*, it is clear that the enormous effort to assist the subrogation claimants has resulted in very little benefit and significant delay unrelated to late registration by bone screw patients.

*proposed that late registrants be compensated* (albeit with an unjustified 20% reduction as a "worst case scenario"). JA 189. His brief acknowledges this policy in passing, Welsh Br. 14, and nowhere suggests that he believes that it would have undermined settlement administration. That fact alone demonstrates the error of Mr. Welsh's argument to this Court: Until February 19, 1999, when the district court held that May 15, 1997 was an absolute deadline, JA 148-49, Mr. Welsh thought that "late-filers" should be compensated, presumably leaving ample opportunity for subrogation claimants to make claims vis a vis such "late-filers."

Having rebutted the arguments advanced by the PLC and the Claims Administrator, we address one final point in Mr. Welsh's brief that affirmatively strengthens Mr. Sambolin's position. Mr. Welsh acknowledges that Mr. Sambolin's claim, if approved, would be more valuable than the average claim, because he suffered a broken screw, his pain progressed from moderate to severe after the implant operation, and his implants were surgically removed. Welsh Br. 19. We have been informed that Mr. Sambolin's point score is, in fact, significantly greater than average, because most claimants did not experience greater pain after being implanted with AcroMed's device. *Id.*

These facts are important in assessing the rationality of the decision below as the following hypothetical illustrates. Assume that Mary Jones, an average AcroMed

settlement claimant, timely filed her registration form on May 1, 1997. However, she was one of the many dilatory claimants who, despite having notice, failed to file her Proof of Claim by the April 1, 1999 due date. Rather, she filed her Proof of Claim on June 15, 1999, which was timely only because of the district court's two extensions. Thus, along with many others, Ms. Jones was arguably responsible for holding up the claims process. Like a majority of claimants, Ms. Jones' pain did not increase as a result of her implant surgery; rather, it was moderate before the bone screw surgery and moderate afterward. Moreover, she has no proof that her screws broke, and she has never had them removed. Under the settlement, Ms. Jones will be compensated because she timely filed her registration form. She will be compensated even though her damages claim appears weak because there is *no* evidence that AcroMed's bone screws worsened her condition.

By contrast to all the hundreds of Ms. Joneses in this settlement, Mr. Sambolin will never receive a dime unless this Court reverses the decision below. And yet, under any notion of due process and equal protection, Mr. Sambolin is far more deserving than Ms. Jones. He registered after May 15, 1997, but well before settlement administration began, and he filed a complete Proof of Claim well before the original (let alone the extended) deadline. Thus, unlike Ms. Jones, his actions did nothing to undermine settlement administration. On the merits, Mr. Sambolin's

injuries manifested shortly after his surgery, he suffered a broken screw, and his pain went from moderate to severe (becoming a near invalid, JA 245). Because Mr. Sambolin has a convincing argument that AcroMed's product caused his injuries, the decision below purports to extinguish what would have been a very strong tort claim. In sum, rejection of Mr. Sambolin's claim as time-barred is not a proper exercise of judicial discretion nor can it be justified under the Due Process Clause, which prohibits the kind of irrational result countenanced by the district court.

**II. BECAUSE THE SETTLEMENT'S NOTICE PROGRAM DID NOT COMPORT WITH RULE 23 OR DUE PROCESS, THE DISTRICT COURT'S RELIANCE ON THE REGISTRATION DEADLINE WAS IMPROPER.**

This section responds to appellees' arguments regarding the legality of the notice program. We reiterate that the Court need not reach this broad challenge to the notice program if it agrees that application of the May 15, 1997 deadline to claimants who filed timely Proofs of Claim was an abuse of discretion or violated due process. Before responding to appellees' particular points, two overarching assertions warrant a brief reply.

First, the settling parties suggest that defects in notice are immune from attack because no one challenged notice at the fairness hearing. AcroMed Br. 20; PLC Br. 14. That suggestion is frivolous. The objectors who appeared at the fairness hearing had received notice by first-class mail because they had pending suits against

AcroMed. Those people did not challenge the notice program because they had notice. By contrast, individuals who challenge a notice program will only have learned of the settlement after the court-imposed deadline. As a result, the law allows them to mount such a challenge in a subsequent proceeding because proper notice is constitutionally required before a judgment can be given binding effect. *See, e.g., Schroeder v. City of New York*, 371 U.S. 208 (1962); *Hansberry v. Lee*, 311 U.S. 32 (1940).

Second, AcroMed and the PLC argue that, because the class was certified on a non-opt-out basis under Rule 23(b)(1)(B), the “best practicable” standard for notice in an opt-out class action is not applicable here and that some lesser standard applies. PLC Br. 7; AcroMed Br. 25. In so arguing, the appellees rely on cases such as *Walsh v. Great Atl. & Pac. Tea Co.*, 726 F.2d 956, 963 (3d Cir. 1983), which states that, *for purposes of assessing the overall fairness of a settlement*, notice in a (b)(1) case “need only be such as to bring the proposed settlement to the attention of representative class members who may alert the court to inadequacies in representation, or conflicts in interest among subclasses, which might bear upon the fairness of the settlement.”

We agree that, because a proper Rule 23(b)(1) class certification does not allow opt outs, the notice with regard to class certification and the overall settlement terms approval need only provide information to a cross-section of the class that is broad

enough to assure that the court has before it arguments and evidence on all sides of the issues. But here the class action notice had another, altogether different role: initiating a claims process to adjudicate and extinguish the class members' valuable property rights. No case of which we are aware holds that a lesser standard for notice is permissible in a "limited fund" class action where, absent notice, class members' causes of action would be eliminated without compensation. To the contrary, the "best practicable"/"due diligence" standard urged by Mr. Sambolin has its origins in *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306 (1950), which, although not technically a "limited fund" class action, involved beneficiaries' rights to an accounting of limited trust assets. *Mullane* thus is directly analogous to the purported limited fund class action here. *See also Ortiz v. Fibreboard Corp.*, 119 S. Ct. 2295, 2314-15 (1999) (strongly suggesting, in context of purported limited fund class action, that Due Process Clause requires actual notice *and* right to opt out before rights of absent class members can be extinguished). Indeed, in this case, given the considerable value of the tort claims subject to forfeiture, if anything, heightened, rather than diluted, due process protection is appropriate.<sup>4</sup>

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<sup>4</sup> Gauging Mr. Sambolin's due process rights by a lesser standard is particularly improper in light of the settlement's dubious legality. In approving the AcroMed settlement, much of the district court's analysis relied on the Fifth Circuit's decision in *Ahearn v. Fibreboard Corp.* that the Supreme Court forcefully repudiated in *Ortiz*. (continued...)

### **A. Actual Notice Was Required.**

Mr. Sambolin's opening brief acknowledged that there are many cases prior to *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), which allow a class action to have binding effect where there is constructive, rather than actual, notice, as long as the notice was the best practicable under the circumstances. However, beginning with *Shutts*, and followed by *Martin v. Wilks*, 490 U.S. 755, 762 (1989), *Richards v. Jefferson County, Ala.*, 517 U.S. 793, 799-801 (1996), and *Ortiz*, 119 S. Ct. at 2314-15, the Supreme Court has taken a stricter approach, appearing to require actual notice at least where, as here, failure to receive notice results in the loss of significant property rights.

The PLC simply cites the pre-*Shutts* cases that we already acknowledged. In addition, AcroMed cites *Silber v. Mabon*, 18 F.3d 1449 (9th Cir. 1994), which held, in the context of a class member's late opt-out request, that *Shutts* did not adopt an actual receipt requirement, although it considered the issue a "difficult question." *Id.* at 1453. The problem with *Mabon* is that it ignores the actual language of *Shutts*,

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(...continued)

*See* JA 81-82, 90-93, 96-98, 104-05. That fact was not lost on the district court. Shortly after *Ortiz* was decided, Judge Bechtle rejected a "limited fund" non-opt-out class action settlement indistinguishable in all relevant respects from the AcroMed settlement, relying entirely on *Ortiz*. *See In re Diet Drugs Prods. Liab. Litig.*, 1999 U.S. Dist. Lexis 14881 (E.D. Pa. Sept. 27, 1999).

which explicitly stated that an absent class member must "*receive* notice" before he or she may be bound to a class action judgment. 472 U.S. at 812 (emphasis added).<sup>5</sup>

Moreover, the appellees do not counter this Court's decision in *Carlough v. Amchem Prods., Inc.*, 10 F.3d 189 (3d Cir. 1993), which held that a federal class action court may, in some circumstances, enjoin a competing state-court class action, but only *after* the state-court plaintiffs have received notice and an opportunity to opt out of the federal action. *Id.* at 200 (relying on *Shutts*). AcroMed simply ignores the case. The PLC concedes that *Carlough* requires the "receipt" of opt-out forms, but then says that such a requirement has no bearing on "whether one must actually receive notice to be bound by a judgment." PLC Br. 8 n.3. That statement is a non-sequitur. *Carlough* held that the federal court could only enjoin the state court class action, *i.e.* bind the absent members of the state court class, if the state court class members received notice *and* the right to opt out, recognizing that notice was a logical antecedent to exercising an opt-out right. 10 F.3d at 200. In so holding, this Court relied on *Shutts* and italicized its requirement of "receipt" of the opt-out form before the class member could be bound. *Id.*

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<sup>5</sup> Interestingly, despite rejecting an actual notice requirement, *Mabon* adopted abuse-of-discretion factors for assessing late claims that support reversal here based on the facts discussed in our opening brief and in Part I above. *See Mabon*, 18 F.3d at 1455.

**B. Even If Constructive Notice Is Appropriate In Some Circumstances, The Notice Here Was Not Adequate.**

**1. The Inadequacy Of The First-Class Mail Notice.**

Even if actual notice is not required in all cases, the notice program here was not sufficient to bind absent class members like Mr. Sambolin who did not receive notice. AcroMed defends the limited first-class notice program here on the ground that it did not maintain a general list of implantees. AcroMed Br. 30. But its CEO's affidavit states that it *did* have a limited list of patients who had had contact with the company. AA 76. Since that list would have likely included additional, non-litigant class members who had problems with the product, it was inexcusable not to have sent notice to those individuals by first-class mail.

Beyond that, appellees argue that they did not have to enlist the aid of hospitals and doctors because, as targets of bone-screw-related suits, they would not have been cooperative. (Importantly, though, AcroMed concedes that their customers could have been contacted without difficulty. AcroMed Br. 30). In the first place, the real reason that the PLC limited notice mainly to those who had already sued AcroMed was *not* a perceived lack of cooperation it would get from hospitals and doctors; rather, it was the grievously wrong belief "that the vast majority of individuals who have compensable claims against AcroMed already initiated litigation against it." PLC's Mem. in Support of Jt. Motion for Approval of the Proposed Settlement Agreement,

at 33 (Mar. 31, 1997) (Docket Entry No. 5372).

More fundamentally, this “non-cooperation” argument makes little sense in light of the success of other similar notice programs. As explained in our opening brief (at 45), securities class actions routinely enlist brokerage houses to identify the beneficial owners of stock held in “street name,” even though they are potential targets of the very class actions in which the records are being sought. Indeed, when brokers are uncooperative, class counsel is routinely expected to obtain the information by subpoena so that the clients can be notified. *See Manual on Complex Litigation Third* § 30.211, p. 226 (1995); 2 *Newberg on Class Actions* § 8.08, p. 8-29 (3d ed. 1992). Thus, even assuming that medical professionals would be uncooperative, the PLC had a duty to locate their clients through court compulsion.

In any event, despite appellees’ vague allegations, there is no reason to think that the health care providers would have been uncooperative. In the *Bowling v. Pfizer* class action, discussed in our opening brief (at 47-49), hospitals and doctors were contacted on a worldwide basis, even though some of them were also targets of related litigation. That notice program was enormously successful, locating thousands of U.S. class members, JA 435-36, and many more from around the world. *See* Opening Br. 48-49. The same type of program could have been used with the

hospitals and doctors that purchased AcroMed bone screws.<sup>6</sup>

Indeed, there was far less reason to fear lack of third-party cooperation here than there was in *Bowling* or in most securities class actions. The AcroMed settlement immunized health care providers from liability arising from the very types of lawsuits that were asserted against them by AcroMed bone screw recipients. JA 39 (notice explaining comprehensive release of health care providers); AA 86-91, 79-86 (Declaration of AcroMed's CEO explaining critical importance of providing immunity to its customers as part of class settlement). Therefore, there is no basis to believe that *any* hospital or doctor with information that could have been used to notify class members would ignore a request for assistance, let alone that there would be the massive resistance that appellees claim would have occurred.

Mr. Welsh also argues that, because some registrants were confused about whether they carried AcroMed bone screws, and about 13% of the registrants were

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<sup>6</sup> The PLC claims that there was a pre-existing FDA-mandated patient registry in the *Bowling* case, and because there is no such registry here, the PLC had no duty to try to create one. PLC Br. 12. The PLC is flatly wrong. The medical device at issue in *Bowling* was taken off the market in 1986, *Bowling v. Pfizer, Inc.*, 143 F.R.D. 141, 147 (S.D. Ohio 1992), and the FDA regulation requiring patient tracking cited by the PLC was not promulgated until 1993. *See* 58 Fed. Reg. 43447 (Aug. 16, 1993). Thus, although the *Bowling* defendants had voluntarily collected some information about some patients, there was no comprehensive registry (FDA-mandated or otherwise), which is precisely why the notice program identified class members through hospitals and doctors.

rejected because they had screws made by another company, no further attempts at locating class members should have been attempted. Welsh Br. 18-19. This argument makes no sense. Contacting hospitals and doctors on *AcroMed's customer lists* obviously would be more, not less, likely to target people with *AcroMed* screws. But even if Mr. Welsh is correct that non-AcroMed bone-screw patients located by additional notice would have mistakenly registered at the same 13% rate, that does not remotely support the argument that notice was sufficient here. If we assume that contacting hospitals and doctors would have drawn 2000 additional registrants, with 13% being non-AcroMed implantees, the result would be 1740 new, legitimate registrants able to claim against the AcroMed fund, demonstrating the value of additional notice.

## **2. The Inadequacy of the Publication Notice.**

Appellees' arguments against further publication notice are also flawed. Their principal argument is that small notices in a few national publications were legally sufficient because the settlement also received considerable publicity in the press. First of all, there is not a shred of evidence to support AcroMed's statement that the paucity of formal notice "reflected a reasoned judgment regarding the publicity surrounding the settlement." AcroMed Br. 26. As noted above, the PLC endorsed a minimal notice program because it believed (wrongly) that virtually everyone with a

potential claim had already sued AcroMed. That was AcroMed's justification as well. *See Settling Parties' Proposed Findings of Fact*, at 153 (¶ 350) (filed July 3, 1997).

Second, the press articles referred to by AcroMed and Mr. Welsh are from early to mid-December 1996, *see* AA 59-71, shortly after the parties reached an informal understanding, but *before* the settlement's terms were public. Indeed, the settlement agreement was not signed until January 8, 1997, JA 23, about a month *after* publication of the articles cited by appellees, and the court did not approve a notice containing the registration deadline until January 16. JA 31. Therefore, the articles submitted by AcroMed simply announce the parties' understanding and the aggregate settlement amount; they do not, because they could not, say anything about the settlement's specific terms, how a class member can obtain more information, or even that a claims procedure would be established; and, critically, they do not, because they could not, announce the May 1997 registration deadline. Thus, it is inconceivable that these newspaper articles augmented the notice effort and brought the registration deadline to the class members' attention.<sup>7</sup>

Finally, Mr. Welsh concedes that his comprehensive Lexis search does not

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<sup>7</sup> Mr. Welsh has provided no evidence suggesting that even one class member registered after learning of the case through press reports. On the other hand, hundreds of class members registered "late" because they did not have notice. JA 199-216.

reveal a single press report in Puerto Rico, Welsh Br. 20, making this argument irrelevant as to Mr. Sambolin.

Aside from arguing that press reports may properly substitute for formal notice under the “best practicable” standard, appellees do not challenge Mr. Sambolin’s basic position. They do not argue that it was impracticable to place notices in regional or local newspapers (as is done in many class actions), in medical journals read by orthopedists and orthopedic surgeons (much as was done in *Bowling*, JA 294-95, 297-312, 393-412), or on television and radio (as in other mass-tort class actions). They do not argue that it was impracticable to place notices on the internet, and they wholly ignore the suggestion of public service announcements and the kind of “free media” campaign used effectively in other cases. *See* Opening Br. 52, 54.

AcroMed’s only response is that additional notice would have been costly, and that the notice programs in *Amchem* and *Ortiz* cited in our opening brief are not fair comparisons because the funds there were much larger. AcroMed Br. 28-29. Aside from ignoring “free media” notices, this argument overlooks what was done in other cases, such as *Bowling*, which *is* comparable to this case. *Bowling* involved about 55,000 class members, *Bowling v. Pfizer, Inc.*, 143 F.R.D. 141, 147 n.3 (S.D. Ohio 1996), while this case involved more than 100,000. *Bowling* involved an \$80 million cash fund, amounting to a few thousand for each claimant, *id.* at 149, while this case

involves more than \$100 million, with up to \$30,000 or more for some claimants.<sup>8</sup> But the settling parties in *Bowling* understood that, in light of the difficulty of reaching medical device implantees, they were legally required to go far beyond the ineffectual notice efforts here.<sup>9</sup>

We acknowledge that cost properly can be taken into account. Our opening brief (at 53) stated that it was the *kind* of notice in cases like *Amchem*, *Ortiz*, and *Bowling*, not necessarily the *amount* of notice, that should have been employed here. In any event, the settling parties can hardly rely on cost as a justification for the paltry notice here, because they have not presented cost figures. If we assume that it cost \$15,000 for the first-class mail notice (approximately 7,000 notices, JA 32-33, at about \$2 each) , and \$485,000 for the advertisements, for a total of \$500,000, the cost of notice would have been less than one-half of one percent of the fund, not nearly

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<sup>8</sup> *Bowling* also involved a \$75 million medical research fund, but the money in that fund was not distributed to class members and they did not have to file claims to benefit from it. 143 F.R.D. at 149.

<sup>9</sup> AcroMed's reliance on the notice in *In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 145, 115, 169 (2d Cir. 1987), is puzzling, since the notice there went well beyond the notice here. That was so even though the class members' claims in *Agent Orange* were of very doubtful value. See *In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 187 (2d Cir. 1987) (affirming grant of summary judgment to defendants on claims by class members who opted out). Here, on the other hand, the property interest at stake is of great value, as evidenced by the average verdict and settlement amounts in AcroMed bone screw litigation. JA 76-77. Thus, under the *Mathews v. Eldridge* balance, see Opening Br. 28-31, far more notice should have been afforded here than in *Agent Orange*.

enough given the substantial property rights at stake. If properly spent, even just \$1,000,000 (less than 1% of the fund), although inadequate, would have gone a long way toward providing the kind of notice that would have reached Mr. Sambolin and similarly situated class members. Adequate publication notice — employing, for instance, greatly enhanced newspaper notice, electronic media, public service announcements, and notice to governments and social service agencies — even if costing several millions of dollars, easily could have been “financed” from interest on the fund, which underscores both the practicability of additional notice and the inadequacy of what was done here.

## CONCLUSION

For the reasons stated above and in our opening brief, the decision below should be reversed and the matter remanded with instructions that Mr. Sambolin's claim be considered on its merits.

Respectfully submitted,

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Brian Wolfman  
Alan B. Morrison  
Amanda Frost  
Public Citizen Litigation Group  
1600 20<sup>th</sup> Street, N.W.  
Washington, D.C. 20009

Attorneys for Appellant  
Alexander Sambolin

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