IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 02-3978

IN RE ORTHOPEDIC BONE SCREW PRODUCTS LIABILITY LITIGATION
(MDL 1014)

DANIEL FANNING, on behalf of himself and all others similarly situated; MARGARET SCHMERLING, on behalf of herself and all others similarly situated

v.

ACROMED CORPORATION;
GIBRALTER NATIONAL INSURANCE (Intervenor in District Court)
(D.C. Civil No. 97-cv-00381)

JOYCE CUSTER, ROBERT DENIKEN, REBECCA HILL, MARIE WELLS IACONO, KATHERINE D. MORRIS, AND BRENDA WILLETTE,

Appellants

_____

Appeal from the United States District Court
for the Eastern District of Pennsylvania

_____

BRIEF FOR APPELLANTS JOYCE CUSTER, ET AL.

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February 12, 2003

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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This appeal involves review of post-judgment decisions in a class action within MDL 1014 styled *Fanning v. AcroMed Corporation*, No. 97-381 (E.D. Pa.). In *Fanning*, the district court exercised subject matter jurisdiction under 28 U.S.C. 1332(a). *Fanning* Complaint, ¶ 1. In 1997, the *Fanning* class action settled, and a settlement fund was established. *See In re Orthopedic Bone Screw Prod. Liab. Litig.* ("*Bone Screw*"), 176 F.R.D. 158 (E.D. Pa. 1997), Joint Appendix ("JA") 109.

On December 20, 2001, without notice to the class, the district court entered an order indemnifying defendant AcroMed in the amount of $270,500 with money from the settlement fund. That order also set aside another $1 million from that fund for future indemnification, to the detriment of the class members, including appellants here. Appendix to this Brief ("App.") 1a, 2a (¶¶ 2, 5), JA 288, 289. On December 31, 2001, appellants moved to alter or amend that order under Federal Rule of Civil Procedure 59(e). JA 293. On September 27, 2002, the district court dismissed the Rule 59(e) motion. App. 6a, JA 371. On October 24, 2002, appellants filed a notice of appeal from both the December 20, 2001, order and the September 27, 2002, order. JA 318. The two orders challenged here constitute a final decision as to the indemnification issues decided therein. This Court has jurisdiction under 28 U.S.C. 1291.

STATEMENT OF THE ISSUE

In this personal-injury class action settlement, did the district court misconstrue the settlement agreement and fundamental class action principles in indemnifying the defendant for the current and future costs of collateral litigation against that defendant by claimants not bound by the settlement, where the indemnification reduced dollar-for-dollar the amount of the settlement fund available to the class members?

STATEMENT OF THE CASE

This appeal is brought by six individuals who have valid claims for compensation from the *Fanning* class action settlement fund. They object to the indemnification granted to defendant AcroMed because it denies them and their fellow class members settlement funds that would otherwise be paid to them. For simplicity, this brief refers to the appellants as the "Custer Objectors" after the first-listed appellant, Joyce Custer.

To understand the Custer Objectors' claim that the indemnification is unlawful, it is necessary to describe the underlying class action settlement, and a suit brought in West Virginia state court by a woman named Melissa Lloyd, the costs of which form the basis for AcroMed's claim for indemnification from the settlement fund that the Custer Objectors maintain is unlawful.

I. Proceedings Relating To The Class Action Settlement

A. The Settlement

Since 1994, the district court has presided over MDL 1014, which involves personal-injury suits against various bone screw manufacturers, including defendant-appellee AcroMed Corporation. Because AcroMed and other manufacturers marketed these bone screws for implantation in the spine, or pedicle, the product is sometimes referred to as a "pedicle screw." In late 1996, AcroMed and the Plaintiffs' Legal Committee ("PLC") agreed to a settlement. Thereafter, a class action complaint was filed solely to provide a mechanism for accomplishing the settlement. *See* Complaint in *Fanning v. AcroMed Corporation*, No. 97-381 (E.D. Pa.). The class purported to include all people who had been implanted with an AcroMed bone screw through December 31, 1996, but not those implanted afterwards. *See Bone Screw*, 176 F.R.D. at 170-71, JA 124-25. Melissa Lloyd, who, as noted above, later filed suit against AcroMed in West Virginia state court, was implanted with AcroMed bone screws 17 days before the end of the class period, on December 14, 1996, JA 183, 189, and, thus, according to AcroMed, she was a class member.

The settlement set aside $100 million, plus an undetermined amount in disputed AcroMed insurance proceeds, to pay for class members' personal-injury

claims under a program to be run by a claims administrator. *Id.* at 166 & n.8, 176, JA 112, 137. Individuals seeking a share of the fund were told to register with the claims administrator by May 1, 1997, JA 73 (Pretrial Order ("PTO") 724, ¶ 12), a deadline later extended to May 15, 1997. JA 179. Of great significance to this appeal, the class members were not permitted to opt out, on the theory that AcroMed constituted a "limited fund." *Bone Screw*, 176 F.R.D. at 180-81, JA 149-51.

The settlement agreement contains an indemnification provision, the applicability of which is at issue in this appeal. That provision states that AcroMed "will be indemnified by the AcroMed Settlement Fund, by appropriate petition to the Court, for all reasonable costs and services incurred in defending, settling, or satisfying judgments entered in any claims and proceedings [outside the settlement] involving Settled Claims of Settlement Class Members...." JA 38. The Custer Objectors maintain that this provision does not authorize the indemnification granted by the district court below.

B. The Class Action Notice

The district court preliminarily approved the settlement and adopted a notice plan in January 1997, JA 66-74, about a month after Lloyd's surgery. The notice was directed almost exclusively at people who, unlike Lloyd, had already filed suit

against AcroMed. Thus, a notice packet was sent to all purported class members known to the PLC and to all counsel of record for plaintiffs in MDL 1014. JA 80-81. That packet included the registration form that had to be returned to the Claims Administrator by May 1, 1997. JA 91. AcroMed and the PLC took this very limited approach to personal notice on the ground — wrong, as it turned out — that "it is reasonable to expect 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); *accord* Settling Parties' Proposed Findings of Fact, at 153 (¶ 350) (filed July 3, 1997).

No effort was made to obtain the names and addresses of individual class members who had not yet filed suit and to send them the full notice package. Significantly, no effort was made to notify surgeons who performed pedicle screw operations or to contact hospitals to which AcroMed had sold its product, in order to obtain the names and addresses of class members. Nor were there any advertisements in general medical journals, or those concentrating on surgery, orthopedics, or orthopedic surgery, urging the physicians who read those journals to provide patients who had been implanted with AcroMed bone screws with information about the settlement. *See Bone Screw*, 176 F.R.D. at 178, JA 145.

The only publication notice of the settlement involved short advertisements appearing twice in *USA Today* and once each in *TV Guide*, *Parade Magazine* (an insert in many Sunday newspapers), and a Spanish-language newspaper published in San Juan, Puerto Rico. *Id.* These ads were published between late January and late February 1997. JA 75-76 (Affidavit of Mailing and Publication of Class Action Notice of Settlement). The notice provided very basic information about the class action, including the May 1, 1997, registration cut-off date, but it did not include a tear-off registration form often used in other class actions, or even state that a registration form ought to be requested. Rather, it told class members that they "may request" an "AcroMed Orthopedic Bone Screw Settlement Notice" and provided the PLC's address if they wanted to request one by mail. *See* JA 98. Other forms of publication notice routinely used in other mass tort and consumer class actions were not pursued. Thus, there were no TV or radio ads, no public service announcements, no notice via the internet (for instance, through AOL, Netscape, or some other major service provider), and no notices in local or regional newspapers.

Providing comprehensive notice to the class members would have been important for at least two reasons. First, notice would have given affected people an opportunity to obtain materials relating to the settlement and to file objections if

they thought the settlement was unfair or unlawful. Second, registration with the Claims Administrator was a prerequisite to obtaining cash settlement benefits. Therefore, it was vital that class members receive complete notice of the settlement and its procedures well before the registration deadline.

C. Approval of the Class Action Settlement

On October 17, 1997, the district court, per Judge Louis Bechtle, who had presided over MDL 1014 since its inception, approved the $100 million settlement proposed by the parties. As part of its approval, the court held that the notice to the class met the requirements of Federal Rule of Civil Procedure 23 and due process. *Bone Screw*, 176 F.R.D. at 178-79, JA 145-06.[1] It also certified the class on a non-opt-out basis under Rule 23(b)(1)(B), on the ground that AcroMed was a "limited fund" unable to satisfy the personal-injury claims asserted against it. *Id.* at 180, JA 149. That finding was based in large part on the testimony and report of the PLC's expert, Harvey Rosen. Rosen valued the company at $104 million, which "reflects 'what a willing buyer would pay a willing seller for this company (the cash flows

[1]This Court has since held that, in light of the serious notice problems and delays in implementing the settlement, the district court abused its discretion in strictly enforcing the May 15, 1997, deadline. *In re Orthopedic Bone Screw Prods. Liab. Litig.* (*Sambolin*), 246 F.3d 315 (3d Cir. 2001). In that ruling, the Court indicated in dicta that the *Fanning* notice program did not comport with due process. *Id.* at 327 n.11.

generated) without the financial constraints of the litigation costs and the uncertainty of litigation outcomes.'" *Id.* at 168, JA 119 (relying on Rosen's testimony and quoting his expert report). The district court specifically found that AcroMed's value was $104 million, absent the litigation (*i.e.*, assuming the settlement were approved). *Id.* Thus, the court believed "that the $100 million that AcroMed will pay to settle this litigation is at the outer boundary of what AcroMed can afford to pay." *Id.* at 170, JA 124.[2]

The judgment accompanying the court's opinion approving the settlement contained an anti-suit injunction barring bone-screw litigation against AcroMed. *Id.* at 188, JA 173. Assuming that judgment were valid and not subject to attack on due process grounds, the injunction would have barred suits outside the settlement such as Lloyd's.

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[2]The $104 million "limited fund" finding was almost certainly incorrect. Approximately five months after the district court approved the settlement, DePuy, Inc. agreed to buy AcroMed for effectively four times the value on which the district court relied for its limited fund finding. *See* JA 221-23 (March 20, 1998, financial report of Janney Montgomery Scott indicating that cost of acquiring AcroMed was approximately $325 million, plus assumption of settlement liability, for aggregate cost of approximately $425 million). The record does not reveal whether the sale of the company was being negotiated while the proposed class action settlement was pending before the district court, whether AcroMed had contacted an investment banker or other financial consultant about the sale value of the company at that time, or whether the PLC ever inquired into any of these critical matters.

In approving the settlement, Judge Bechtle also reviewed the indemnification provision at issue in this appeal. He noted that it "is designed to provide some protection to AcroMed against class members who ...[,] despite the [settlement] agreement, pursue lawsuits in federal or state court or submit claims under the agreement and who do not execute a release and indemnity agreement." *Id.* at 167, JA 115. However, he held "that the primary and overriding purpose of the settlement agreement" is to "assure that class members receive the maximum recovery possible given the circumstances of this case." *Id.* at 167, JA 116. Because "[a]ny monies removed from the settlement for any other purpose would undermine that goal[,]" Judge Bechtle "emphasized that AcroMed's right is limited here to the right to 'request' a court ordered payment. Therefore, the court concludes that the term 'reasonable' will be given a strict and narrow construction upon any requests made for indemnification or payment from the settlement fund." *Id.*

II. Facts Concerning Melissa Lloyd, Her West Virginia Lawsuit, And The District Court's Decision Enjoining That Lawsuit

A. Facts Concerning Ms. Lloyd

On December 14, 1996, Melissa Lloyd, a resident of Apple Grove, West Virginia, was implanted with AcroMed bone screws at Cabell Huntington Hospital in Huntington, West Virginia. Declaration of Melissa L. Lloyd, ¶¶ 1-2, JA 231;

Complaint in *Lloyd v. Cabell Huntington Hospital, et al.*, ¶ 9, JA 189. AcroMed contends that Lloyd is a member of the *Fanning* class because her surgery took place on or before December 31, 1996.

Lloyd did not receive notice of the AcroMed class action settlement. Lloyd Declaration, ¶ 5, JA 232. She received nothing about the settlement in the mail, nor did her doctors or hospital inform her of the settlement. She did not read about the settlement in any of the national publications that contained an ad about the settlement. *Id.* Indeed, she did not hear of the class action settlement at any time prior to the filing of her West Virginia state court suit in April 1999. *Id.* She therefore was never informed of the May 15, 1997, registration deadline imposed by the settlement. *Id.* ¶¶ 2, 5-6, JA 231, 232. Obviously, she did not appear before the district court in *Fanning v. AcroMed*.

After the *Fanning* notice was disseminated, Lloyd began experiencing serious back pain. In early May 1997, she underwent surgery to remove one of her AcroMed bone screws. Lloyd Declaration, ¶ 3, JA 232. On May 26, 1998, she had additional surgery to remove the remaining bone screws and related hardware. *Id.*

B. Ms. Lloyd's West Virginia Lawsuit And AcroMed's Attempts To Derail It

On June 28, 1998, Lloyd retained attorneys Marvin Masters and Anthony Majestro. *Id.* ¶ 4, JA 232. They filed suit on her behalf on April 19, 1999, in the

Circuit Court of Cabell County, West Virginia. Lloyd alleged that her injuries were attributable to AcroMed's product, which she claimed was defectively designed and manufactured, unaccompanied by appropriate warnings, and improperly sold for unapproved "off-label" uses. The complaint sought compensatory and punitive damages under West Virginia common law and the West Virginia Consumer Credit and Protection Act. Complaint in *Lloyd v. Cabell Huntington Hospital, et al.* ¶¶ 9-40, JA 189-95.

After an unsuccessful attempt to remove Lloyd's suit to federal court, *see Lloyd v. Cabell Huntington Hospital, Inc.*, 58 F. Supp. 2d 694 (S.D. W. Va. 1999), AcroMed filed a motion in MDL 1014 to show cause why Lloyd and her lawyers should not be held in contempt for prosecuting the West Virginia action. AcroMed relied on the district court's October 17, 1997, approval of the non-opt-out "limited fund" settlement between AcroMed and all patients who had been implanted with AcroMed's bone screws on or before December 31, 1996, and the anti-suit injunction accompanying it. *See* AcroMed's Motion to Show Cause Why Melissa Lloyd and Her Counsel Should Not Be Found in Contempt of Pretrial Order No. 1117, JA 180.

Messrs. Masters and Majestro and Ms. Lloyd opposed the motion, arguing that, because the AcroMed settlement did not allow class members to opt out, the

MDL 1014 court never obtained personal jurisdiction over Lloyd and could not now enjoin prosecution of her West Virginia suit. Lloyd relied mainly on this Court's decision in *In re Real Estate Title & Settlement Services Antitrust Litigation*, 869 F.2d 760 (3d Cir. 1989), which came to the same conclusion in a case involving an attempt to enjoin an Arizona suit based on a non-opt-out class action settlement in MDL 633. *See also Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 847-48 (1999); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985). They also maintained that the district court had never gained personal jurisdiction over Lloyd because she had not been provided proper notice of the class action settlement. Finally, they noted that, if the district court were to reject the arguments based on lack of personal jurisdiction, the class action settlement did not bind Lloyd because the PLC had not adequately represented her. *See generally* JA 203-19, 253-76. In this regard, they relied principally on the PLC's representations that AcroMed was a "limited fund" valued at $104 million when, in fact, it was worth much more. *See supra* note 2.[3]

On March 23, 2001, the district court held Lloyd and her lawyers in contempt, agreeing with AcroMed that her West Virginia suit was barred by the

[3]Undersigned counsel represented attorneys Masters and Majestro on the contempt motion, while those attorneys continued to represent Lloyd.

Fanning judgment and enjoining further prosecution of that suit. PTO 1978, JA 273. The court did not otherwise punish Lloyd or her lawyers. Judge Bechtle also rejected AcroMed's request for an award of fees and costs for prosecuting the *Lloyd* contempt motion. Although AcroMed did not specifically invoke the indemnification provision of the settlement in its fee request, Judge Bechtle explicitly treated the request as one for indemnification and denied it on the basis of his earlier "strict and narrow construction" holding issued when he approved the *Fanning* settlement. *See id.* at 7-8, JA 278-79. He further noted that indemnification was unavailable for a case like Lloyd's that "should have been anticipated" by AcroMed. *Id.* at 7 n.5, JA 279. AcroMed did not appeal that ruling or ask the district court to reconsider or clarify it.

Thereafter, Lloyd and her attorneys appealed the contempt finding and the injunction against prosecution of the West Virginia action to this Court. After the appeal was fully briefed, the West Virginia action settled, effectively mooting the appeal, which was thereafter dismissed. Dismissal Order in No. 01-1897 (Sept. 18, 2001). When it sought indemnification from the *Fanning* class members described below, AcroMed revealed that it paid Lloyd $200,000 to settle her claim. JA 341.

III. Indemnification Proceedings At Issue In This Appeal

At a district court hearing on December 6, 2001, counsel for AcroMed noted

that it planned to seek indemnification of $270,500 from the *Fanning* class for its costs of defending and settling *Lloyd*. 12/6/01 Tr. 10. Undersigned counsel did not know indemnification would be sought but coincidentally was in the courtroom on matters relating to his ongoing work for individuals who became entitled to share in the settlement as a result of this Court's decision in *Sambolin*, 246 F.3d 315; *see* 12/6/01 Tr. 33-35. He noted that he had been involved in the *Lloyd* contempt matter. He stated his view that indemnification was unwarranted because Ms. Lloyd had not been properly made a member of the settlement class and was therefore not bound by the *Fanning* settlement. *Id.* at 16. He also noted that indemnification would cut into each claimant's recovery, *id.*, which would necessarily injure all class members, including those benefitted by this Court's *Sambolin* ruling. He asked that he be served with a copy of any petition for indemnification that AcroMed might file relating to the *Lloyd* matter. Counsel for AcroMed asserted that undersigned counsel need not be served because he did not have "standing" to challenge such an order.[4]

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[4]About 200 class members previously denied all compensation were provided settlement benefits as a result of *Sambolin*. 12/19/01 Tr. 10. All class members with compensable claims against the settlement fund, including those benefitted by *Sambolin*, had standing to challenge indemnification, as each dollar provided AcroMed would reduce the fund available to the class members. As discussed below, the orders challenged here on appeal have already diminished the (continued...)

On December 17, 2001, AcroMed filed a petition seeking $270,500 in indemnification from the settlement fund for the cost of defending and settling the *Lloyd* litigation. JA 280. The petition also asked the court to hold back another $1 million to indemnify AcroMed for future collateral suits like Lloyd's. JA 281. The petition specifically mentioned a case called *Kirby* that apparently seeks $10 million in damages. *Id.* The petition also noted that some of the $1 million may be requested to reimburse AcroMed for additional amounts that may be paid under the *Lloyd* settlement. *Id.* The PLC did not oppose the indemnification request. Undersigned counsel was not served with the petition, and, despite his repeated efforts to obtain service, neither AcroMed, the PLC, nor the Claims Administrator informed undersigned counsel that the petition had been filed. Indeed, no class member was served with the petition; to the Custer Objectors' knowledge, the only persons served were the PLC and the Claims Administrator, parties that AcroMed knew already consented to the relief requested in the petition.

On December 19, 2001, the district court, per the Honorable Ronald L. Buckwalter, who was assigned MDL 1014 after Judge Bechtle retired, held a hearing regarding distribution of proceeds from the *Fanning* settlement fund and

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[4](...continued)
payout to each class member and will continue to do so in the future unless reversed.

related matters, at which undersigned counsel appeared by telephone (having been told of the hearing by the Claims Administrator that morning). Just before the hearing, undersigned counsel was faxed a proposed order (which later became PTO 2044), which recited that AcroMed had filed an unopposed petition for indemnification. The proposed order stated that AcroMed would be paid $270,500 from the settlement fund as indemnification for its costs in *Lloyd*. *See* PTO 2044, ¶ 2, JA 288. That same order also held back $1 million to "be available to cover indemnification in the form of [future] settlements and judgments, as well as attorneys' fees and defense costs incurred by AcroMed," *id.* ¶ 5, JA 289, money that otherwise would have been paid to the class members. *See id.* ¶ 8, JA 290 (sixth listed item; specifically listing the *Kirby* case as basis for indemnification). During the hearing, undersigned counsel noted that he had not been served with the Petition for Indemnification and was unaware that one had been filed until just prior to the hearing. He entered an objection based on the prior objection made at the December 6 hearing and noted that at least one of his clients objected to the indemnification. 12/19/01 Tr. 19. Thereafter, the Court signed PTO 2044 as proposed.

On December 31, 2001, the Custer Objectors filed a motion to alter or amend PTO 2044 under Federal Rule of Civil Procedure 59(e). They explained

that they were seeking relief under Rule 59(e) because, given the truncated nature of the prior proceedings, the court had not had a full opportunity to consider views contrary to AcroMed's on the indemnification issue. JA 299-300. The Custer Objectors made three basic arguments: (1) that the district court, per Judge Bechtle, had previously construed the indemnification provision narrowly in a manner that required the court to deny indemnification for costs in *Lloyd*; (2) that such indemnification was not warranted because Lloyd was not a *Fanning* "Settlement Class Member" and did not possess a "Settled Claim" within the meaning of the indemnification provision; and (3) that AcroMed's interpretation of the settlement's indemnification provision was at odds with class action principles because, by making the defendant indifferent to collateral attack, such a provision would encourage defendants to enter into class action settlements that violate class members' rights. JA 301-10.

Nearly nine months later, on September 27, 2002, without any discussion, the district court dismissed the Rule 59(e) motion "without prejudice." JA 317. The court did not explain its use of the term "without prejudice." The court's $270,500 indemnification — which has been paid to AcroMed and reduced each class member's recovery from a distribution made in December 2001 — is unquestionably final. The $1 million holdback similarly harms each class member

because, without it, $1 million could be distributed to the class members forthwith. This appeal followed.

STATEMENT OF RELATED CASES

1. This appeal presents the same or similar issues regarding the adequacy of the *Fanning* class action notice as were presented in *Sambolin*, 246 F.3d 315 (No. 99-2054). *Sambolin* was argued before Chief Judge Becker and Circuit Judges Nygaard and Ambro on September 13, 2000, and was decided on April 16, 2001.

2. This appeal presents the same or similar issues before this Court in No. 01-1897 in the *Lloyd* contempt appeal. That appeal was settled before argument or decision.

STANDARD OF REVIEW

All facts relevant to this case are undisputed, and the only issues presented are questions of law subject to plenary review. The questions regarding the construction of the *Fanning* settlement agreement are pure issues of law, *Pennwalt Corp. v. Plough, Inc.*, 676 F.2d 77, 79 (3d Cir. 1982), as are the underlying questions that bear on that construction, namely, the constitutional rights to opt out, *see In re Real Estate Title & Settlement Services Antitrust Litig.*, 869 F.2d 760 (3d Cir. 1989), and to adequate class action notice. *See Greenfield v. Villager Industries, Inc.*, 483 F.2d 824 (3d Cir. 1973); *see also In re Prudential Insurance*

Co. America Sales Practice Litig., 278 F.3d 175, 180 (3d Cir. 2002).

SUMMARY OF ARGUMENT

Under AcroMed's interpretation of the *Fanning* indemnification provision, the company would be entitled to reimbursement for all costs of defense, all settlements, and all judgments arising from claims even by persons who are not bound by the *Fanning* settlement because they were not provided (1) a right to opt out, (2) constitutionally adequate notice, and/or (3) adequate representation, *i.e.*, the minimal due process protections necessary to bind them to a class action judgment. *See, e.g., Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985); *In re Real Estate Title & Settlement Services Antitrust Litig.*, 869 F.2d 760 (3d Cir. 1989). Under that view, settling class action defendants — knowing that they would not suffer financially even if their settlement agreements were subject to collateral attack — would have little incentive to enter into agreements that protect absent class members' constitutional rights. As this Court has held, that result would "threaten[] the vitality of the class action mechanism," whose constitutionality depends on due process protections for absent class members that provide incentives to defendants to enter into lawful settlements. *Id.* at 769-70.

The Custer Objectors are entitled to relief from the district court's indemnification order for three related reasons. **First**, as Judge Bechtle said in

giving the *Fanning* indemnification provision a "narrow" construction, providing reimbursement to AcroMed is not "reasonable" under that provision because it would "undermine th[e] goal of maximizing recovery for the claimants," contrary to the purpose of the settlement. JA 175-76. Moreover, the need for AcroMed to obtain "reasonable" indemnification was premised on its supposed status as a "limited fund" against which all deserving persons would be required to claim. But since non-opt-out settlements such as *Fanning* are not lawful, *see Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), and because, as a factual matter, AcroMed was not a limited fund, AcroMed's indemnification was not "reasonable."

Second, the indemnification sought by AcroMed is not warranted because Lloyd was not a "Settlement Class Member" and the claims that she advanced in West Virginia state court were not "Settled Claims" within the meaning of the *Fanning* indemnification provision. As this Court held in *In re Real Estate Title & Settlement Services Antitrust Litigation*, 869 F.2d 760 (3d Cir. 1989), a class action court that resolves substantial money damages claims, such as those foreclosed by the non-opt-out settlement in *Fanning*, does not obtain jurisdiction over an absent class member such as Lloyd, unless she is given a right to opt out. In addition, Lloyd was not provided actual or constructive notice of the *Fanning* settlement, which was constitutionally required before her claims could be released. Lloyd

never received actual notice, and the notice program — consisting solely of first-class mail notice to people who had already sued AcroMed or were otherwise known to the PLC, and a few small ads in national publications — was far too perfunctory to meet the demands of due process. For the same reasons, the $1 million holdback, whose purpose is to indemnify AcroMed for cases like Lloyd's, should also be reversed.

Finally, as indicated above, if AcroMed's view of the indemnification provision is sustained, defendants would be more likely to insist on unlawful settlements knowing that the prospect of collateral attack is no deterrent to such settlements. That position would subvert the due process rights of absentees and should be rejected as violative of class action principles.

ARGUMENT

I. The Indemnification Sought By AcroMed Is Not "Reasonable" Within The Meaning Of The Settlement Agreement's Indemnification Provision.

Under the *Fanning* settlement, AcroMed has a right to request payment from the settlement fund

> for all *reasonable* costs and services incurred in defending, settling, or satisfying judgments entered in any claims or proceedings involving Settled Claims of Settlement Class Members . . . that are not terminated as a result of this Agreement or that are filed in the future despite this Agreement.

Settlement Agreement, ¶ IV.D.3.d. and b., App. 8a, 9a (emphasis added), JA 38, 39.

As noted above, in approving the settlement, Judge Bechtle held that, even though this provision "is designed to provide some protection to AcroMed," "the primary and overriding purpose of the settlement agreement" is to "assure that class members receive the maximum recovery possible given the circumstances of this case." *Bone Screw*, 176 F.R.D. at 167, JA 115, 116. Because "[a]ny monies removed from the settlement for any other purpose would undermine that goal[,]" Judge Bechtle "emphasized that AcroMed's right is limited here to the right to 'request' a court-ordered payment. Therefore, the court concludes that the term 'reasonable' will be given a strict and narrow construction upon any requests made for indemnification or payment from the settlement fund." *Id.*, JA 116.

Thereafter, Judge Bechtle denied AcroMed's request for its costs of defense for prosecuting the *Lloyd* contempt motion, relying on his earlier "strict and narrow construction" holding. *See* JA 278 n.4. He further noted that indemnification was unavailable for a case like Ms. Lloyd's that "should have been anticipated" by AcroMed. JA 279 n.5. AcroMed did not appeal or request reconsideration or clarification of that ruling.

Although these two rulings do not bar *all* indemnification under the

settlement agreement, they do support the Custer Objectors' position here. Just as Judge Bechtle said in approving the *Fanning* settlement and in denying fees in *Lloyd* itself, providing reimbursement for AcroMed here would "undermine th[e] goal of maximizing recovery for the claimants," contrary to the "overriding" purpose of the *Fanning* settlement, without any countervailing benefit (such as would be the case if a "double dipping" class member accepted payment under the settlement *and* brought suit outside it). Thus, as Judge Bechtle held in the *Lloyd* contempt proceeding, providing reimbursement for AcroMed's settlement and defense costs in *Lloyd* now cannot be considered "reasonable."

There is another, even more compelling reason why indemnification cannot be considered "reasonable" within the meaning of the settlement agreement's indemnification provision. That provision, as Judge Bechtle indicated (JA 116), was premised on the notion that AcroMed was a "limited fund," the same premise that the settling parties used to justify class certification on a non-opt-out basis under Rule 23(b)(1)(B) . Put differently, as AcroMed views it, the indemnification provision was part and parcel of the settlement's limited fund rationale because it required that *all* claims — those inside *and* outside the settlement — be satisfied from the *Fanning* settlement fund. It is now clear that mass-tort limited fund class action settlements such as *Fanning* are unlawful, *see Ortiz v. Fibreboard Corp.*,

527 U.S. 815 (1999); *In re Diet Drugs Prods. Liab. Litig.*, 1999 U.S. Dist. Lexis 14881 (E.D. Pa. Sept. 27, 1999) (Bechtle, J.) (relying on *Ortiz* to reject non-opt-out "limited fund" settlement indistinguishable in all relevant respects from *Fanning*). That reality undermines AcroMed's view of the indemnification provision and renders "unreasonable" any claim for indemnification for cases, such as Lloyd's, in which a plaintiff who had made no claim on the fund sues despite the purportedly mandatory character of the settlement.

Moreover, as a factual matter, AcroMed is not, and was not, the limited fund that it was claimed to be at the *Fanning* fairness hearing. The district court specifically found that AcroMed's value was $104 million absent the litigation (*i.e.*, assuming the settlement were approved). *Bone Screw*, 176 F.R.D. at 168, JA 119. As noted earlier, that finding was based on the testimony and report of the PLC's expert, Harvey Rosen. Rosen valued the company at $104 million, which, he claimed, "reflects 'what a willing buyer would pay a willing seller for this company (the cash flows generated) without the financial constraints of the litigation costs and the uncertainty of litigation outcomes.'" *Id.* (relying on Rosen's testimony and quoting his expert report). Thus, the court's "limited fund" holding, and the concomitant holding that the settlement was fair, was premised on its view that the $100 million settlement was at the "outer boundary of what AcroMed can

afford to pay." *Id.* at 170, JA 124.

But the $104 million "limited fund" finding was wrong, as the company was worth far more than $100 million. Approximately five months after the district court approved the settlement, DePuy, Inc. agreed to buy AcroMed for approximately four times the value on which the district court relied for its limited fund finding. *See* Doc. 7517 (Dec. 15, 1999) (Exhibit 4 to Opp. of Attys. Masters and Majestro to AcroMed's Motion for Order to Show Cause) (March 20, 1998 financial report of Janney Montgomery Scott indicating that the cost of acquiring AcroMed was approximately $325 million, plus assumption of the settlement liability, for an aggregate cost of approximately $425 million), JA 221-23. *Cf. Ortiz*, 527 U.S. at 839, 859-60 (at a minimum, limited fund settlement under Rule 23(b)(1)(B) requires relinquishment of all or substantially all of company's value). Whether the PLC provided adequate representation in light of these important facts is taken up in Part II.C below. But for present purposes one thing is certain, and only one thing matters: There is overwhelming reason to doubt that AcroMed was a $104 million "limited fund" that could pay no more to satisfy personal-injury claims.

Because AcroMed was not truly a "limited fund," it did not need to (and in fact did not) raid the settlement fund to defend Lloyd's case. Indeed, even before

the class settlement became final, AcroMed settled the appeals of 54 objectors for "a substantial payment" from outside the supposed limited fund. S. Elizabeth Gibson, *Case Studies of Mass Tort Limited Fund Class Action Settlements & Bankruptcy Reorganizations* 153 (Federal Judicial Center 2000).[5] That payment raises the obvious question: "If the company had devoted all that it had to the settlement, where did the additional funds come from?" *Id.* at 158. Thus, the indemnification provision was not a necessary adjunct to the settlement since AcroMed — having money to pay claimants from outside the settlement fund — was not the "limited fund" it claimed to be.[6]

For all of these reasons, AcroMed's *Lloyd* indemnification, and the $1 million holdback for future claims like Lloyd's, were not "reasonable." The

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[5]The appeal by those 54 objectors to this Court was dismissed before briefing on February 12, 1998. *See* Order of Dismissal in No. 97-1840. The *Fanning* settlement became final on April 3, 1998. PTO 1423, JA 13.

[6]The $1 million holdback is unreasonable in its entirety because neither AcroMed nor the Claims Administrator has identified any risk of claims that may legitimately be subject to indemnification, *i.e.*, claims made by persons who have been paid under the settlement *and* also have sued outside of it. To the contrary, AcroMed's request for the $1 million holdback relied on the *Kirby* case and "the prospect of litigation" by individuals "like Lloyd and Kirby" "who claim that they did not receive notice of the AcroMed Settlement and are not bound by" it. JA 281. AcroMed also referred to the possibility of claims by class members who "are dissatisfied with their awards" from the settlement fund, *id.*, but, to our knowledge, no such litigation has ever existed.

district court's decision should therefore be reversed.

II. Indemnification For *Lloyd* Is Improper Because Ms. Lloyd Was Not Properly Made A Member Of The "Settlement Class" And Did Not Possess "Settled Claims" Within The Meaning Of The *Fanning* Indemnification Provision.

The *Fanning* indemnification provision applies only to costs, settlements, and judgments arising from "Settled Claims" of "Settlement Class Members." App.8a, JA 38. The district court erred in granting indemnification because it wrongly assumed that the Rule 23(b)(1)(B) non-opt-out certification bound Ms. Lloyd and that therefore the *Fanning* judgment applied to her. However, if, as the Custer Objectors maintain, the settlement did not bind Lloyd, then Lloyd was not properly made a part of the *Fanning* "Settlement Class" and did not possess "Settled Claims." For a class action judgment to have binding effect on claims of a purported class member, the class member must have been provided (1) notice and an opportunity to be heard, (2) a right to opt out (if the matter involves money damages), and (3) adequate representation. *Fanning* failed in each respect.

A. Lloyd Was Not A "Settlement Class Member" Possessing "Settled Claims" Because *Fanning*'s Denial Of The Right To Opt Out Meant That The MDL 1014 Court Never Obtained Personal Jurisdiction Over Lloyd.

Ms. Lloyd was not a "Settlement Class Member" and did not possess "Settled Claims" because the MDL 1014 court did not acquire personal jurisdiction

over her. It is undisputed that Lloyd never voluntarily submitted herself to the jurisdiction of the court during the *Fanning* class action proceeding. Nevertheless, AcroMed maintains that the district court's certification of a non-opt-out class in *Fanning* altered the ordinary rules of personal jurisdiction and provided the MDL 1014 court with personal jurisdiction over Ms. Lloyd. Not so.

The question whether Judge Bechtle's non-opt-out certification subjected Lloyd to the jurisdiction of MDL 1014, without her knowledge and consent, is governed principally by this Court's decision in *In re Real Estate Title & Settlement Services Antitrust Litigation*, 869 F.2d 760 (3d Cir. 1989), which involved a collateral attack on a prior class action settlement. In that earlier class action, the plaintiffs alleged that certain title companies had fixed prices in violation of the federal antitrust laws, and they sought injunctive relief and money damages. *See id.* at 763. As in MDL 1014, various cases were consolidated in a multi-district litigation — MDL 633 — in district court in Philadelphia. The MDL 633 court thereafter certified the class on a non-opt-out basis under Rules 23(b)(1) and (2) and approved a settlement in which the defendants agreed to alter their future conduct. This Court affirmed the settlement in an unpublished order. *See In re Real Estate*, 869 F.2d at 764 (describing underlying class action settlement).

Thereafter, while a petition for a writ of certiorari in MDL 633 was pending

in the Supreme Court, two Arizona school districts brought suit in Arizona state court seeking money damages under Arizona state law based on the same wrongful conduct that was the subject of MDL 633. *See id*. at 764. The defendant title companies, like AcroMed in the *Lloyd* contempt matter, then returned to the district court in Philadelphia asking it to enjoin the Arizona action on res judicata grounds, *i.e.*, that the judgment in the MDL 633 settlement barred the Arizona action from going forward. *See id.*

The district court granted the injunction. *Id.* This Court reversed, holding that the district court in MDL 633 never obtained personal jurisdiction over the non-resident school districts even though it had certified a nationwide non-opt-out class (which, by definition, included the Arizona school districts) and approved a nationwide settlement between that class and the defendant title companies. *Id.* at 765. The Court noted that a mandatory certification might have been sufficient to provide personal jurisdiction over non-residents in a settlement in which purely injunctive claims were released. *Id.* at 768. However, where substantial monetary claims were purportedly foreclosed by the settlement, a non-opt-out class certification did not provide personal jurisdiction over the non-resident school

districts. *Id.* at 766-68.[7]

In so holding, this Court relied on the Supreme Court's decision in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985). *See In re Real Estate*, 869 F.2d at 766-67. In *Shutts*, a Kansas state court had certified a nationwide class of plaintiffs who sought interest on gas royalties allegedly owed them by defendant Phillips Petroleum. The Supreme Court concluded that certain minimal due process protections were required before absent class members could be subject to the jurisdiction of the Kansas state court. *Shutts*, 472 U.S. at 810-13 & n.3. Those minimal protections include, *Shutts* held, adequate representation by the class representatives, adequate notice, and, where the class members' claims are wholly or predominantly for money damages, an opportunity to opt out. *Id.* at 812.

Because the class members in *Shutts* had all been provided notice by first-class mail and an exclusion form allowing them to opt out of the class, the Court concluded that the Kansas court had personal jurisdiction over the absentees. *Id.* at 813. In the Court's view, because notice and an opportunity to opt out allowed class members to exclude themselves and to litigate the matter in the forum of their

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[7] The Ninth Circuit later held that the same non-opt-out MDL settlement did not afford consumers in Arizona and Wisconsin due process and, therefore, did not have binding effect on their claims for money damages. *Brown v. Ticor Title Ins. Co.*, 982 F.2d 386, 392 (9th Cir. 1992), *writ dismissed as improvidently granted*, 511 U.S. 117 (1994).

choice, those class members who did not opt out had provided their implied consent to the Kansas court's jurisdiction. *See id.* Reasoning from the *Shutts* analysis, *In re Real Estate* concluded that, where opt-out rights are *not* provided, a district court does not have personal jurisdiction over non-consenting non-resident class members in cases involving claims for money damages. *See* 869 F.2d at 767; *accord Carlough v. Amchem Prods., Inc.*, 10 F.3d 189, 200 (3d Cir. 1993).

Lloyd's situation was nearly indistinguishable from that of the school districts in *In re Real Estate*. As in *In re Real Estate*, a nationwide non-opt-out settlement purporting to resolve the class members' money damages claims was approved by a federal district court. Thereafter, Lloyd, a non-resident purported class member, filed suit in her home state seeking money damages based on claims that were the subject of the nationwide class action, just as the school districts in *In re Real Estate* filed suit for antitrust damages claimed to have been extinguished in the nationwide settlement. Thus, personal jurisdiction was lacking over Lloyd, just as it was lacking over the non-resident school districts in *In re Real Estate*.

To be sure, *In re Real Estate* declined to address whether its holding applied to class actions in which certification was based on a limited fund rationale, 769 F.2d at 768 n.8, the asserted basis for the Rule 23(b)(1)(B) certification in the *Fanning* settlement. Nonetheless, *In re Real Estate* applies with full force in the

limited fund context for two reasons. First, the minimal due process protections set forth in *Shutts* apply to *all* attempts to bind absent plaintiffs where the claims are "wholly or predominately for money judgments." *Shutts*, 472 U.S. at 812 n.3. It is undisputed that the *in personam* personal-injury claims of the class members released in the AcroMed settlement are claims "wholly ... for money judgments," and there is no doubt that Lloyd's West Virginia claims over which AcroMed insisted that MDL 1014 had jurisdiction were claims "wholly... for money judgments." *See* JA 195-96 (Ms. Lloyd's West Virginia complaint).

Second, if there were any doubt on this score, the Supreme Court's decision in *Ortiz v. Fibreboard*, 527 U.S. 815 (1999), eliminates it. In *Ortiz*, the Court struck down a limited-fund non-opt-out asbestos personal-injury class action settlement on the ground that the class should not have been certified under Rule 23(b)(1)(B). In concluding that Rule 23(b)(1)(B) could rarely, and possibly never, be applied to individualized tort claims, the Court "sound[ed] a warning of the serious constitutional concerns that come with any attempt to aggregate tort claims on a limited fund rationale." 527 U.S. at 845.

Among the constitutional concerns discussed in *Ortiz* was the mandatory class action's inherent conflict with the traditional Anglo-American legal principle that individuals are entitled to their own day in court before they can be bound to a

judgment or their rights are extinguished. *Id.* at 846 (citing *Richards v. Jefferson County*, 517 U.S. 793, 798-99 (1996); *Martin v. Wilks*, 490 U.S. 755, 762 (1989); *Hansberry v. Lee*, 311 U.S. 32, 40 (1940)). In articulating that principle, *Ortiz* turned to an explanation of *Shutts*, which, *Ortiz* reiterated, demands notice and the opportunity to opt out, as well as adequate representation, before absent class members can be bound to a class action judgment that resolves substantial damages claims. *Ortiz*, 527 U.S. at 847-48 & n.24. *Ortiz*'s forceful reaffirmation of *Shutts* demonstrates that Lloyd's rights to due process would have been violated if the AcroMed class action settlement had been held to bar her West Virginia action for money damages. In light of *Ortiz*, it is now beyond debate that the principles enunciated in *Shutts*, which formed the basis for this Court's decision in *In re Real Estate*, apply with full force to purported limited fund certifications under Rule 23(b)(1)(B).[8]

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[8]Under *Ortiz*, it is quite possible that non-opt-out personal-injury class actions are impermissible under any circumstance. 527 U.S. at 832-48. At the very least, any exception to ordinary personal jurisdiction principles may not stray beyond "the traditional varieties of representative suit encompassed by Rule 23(b)(1)(B) ... involving 'the presence of property which call[ed] for distribution or management[....]'" *Id.* at 834 (quoting J. Moore & J. Friedman, 2 Federal Practice 2240 (1938)); *see also id.* (noting that "'Classic' limited fund class actions 'include claimants to trust assets, a bank account, insurance proceeds, company assets in a liquidation sale, proceeds of a ship sale in a maritime accident suit, and others'") (quoting 1 Newberg § 4.09, p. 4-33). In sum, *Ortiz* underscores the holdings of

(continued...)

Although this Court need go no further than the precedents discussed above to reverse the district court's decision on the indemnification question, it bears mentioning that Lloyd's situation regarding the opt-out right is even more compelling than that presented in *In re Real Estate*. First, Lloyd was an *individual* absentee for whom it would have been very inconvenient and costly to litigate in Philadelphia. By contrast, although out-of-state litigation was undesirable for the complaining school districts in *In re Real Estate*, it would have constituted a rather mundane business expense, particularly because their case was being financed by the Arizona Attorney General. *See* 869 F.2d at 764. Indeed, this Court acknowledged those facts in *In re Real Estate*, but nevertheless held that due process rights should not be accorded piecemeal, depending on the particular litigant's financial position. *Id.* at 767 n.7.

Second, and on a related note, the school districts in *In re Real Estate* had notice of the original class action and an opportunity to object to the settlement. Indeed, this Court noted that the school districts appeared in the MDL 633 proceeding in Philadelphia to request exclusion from the class, but held that such an appearance did not constitute consent to that court's jurisdiction so as to require

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[8](...continued)
Shutts and *In re Real Estate* that, when *in personam* money damages claims are involved, jurisdiction can be obtained only by providing an opt-out right.

the school districts to litigate in Philadelphia. *Id.* at 770-71. Here, by contrast, Lloyd had no notice of the class action, Lloyd Decl., ¶¶ 2, 5, JA 231, 232, and she made no appearance in MDL 1014, thus underscoring the district court's lack of personal jurisdiction over her.

In sum, because Lloyd was not provided the right to opt out and the district court never otherwise obtained personal jurisdiction over her, she was never a part of the *Fanning* "Settlement Class" nor did she possess "Settled Claims," *i.e.*, claims of individuals properly made a part of the settlement class. The district court therefore erred in granting indemnification for the *Lloyd* matter and in holding back $1 million for claims such as Lloyd's, in which the party bringing suit against AcroMed never consented to the jurisdiction of the MDL 1014 court.

B. Lloyd Was Not A "Settlement Class Member" Possessing "Settled Claims" Because The MDL 1014 Court Never Obtained Personal Jurisdiction Over Lloyd As A Result Of The Constitutionally Defective Notice Program.

Indemnification was improper for another reason: The *Fanning* notice program was constitutionally inadequate and did not bind absentees, such as Lloyd, who did not receive notice of the settlement. Notice is a prerequisite for a court to obtain personal jurisdiction over a party. *Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80 (1988); *Shutts*, 472 U.S. at 812; C. Wright & A. Miller, 4 *Federal Practice and Procedure* § 1074, p. 456 (2d ed. 1987) ("The decisions of the

Supreme Court make it clear that the requirement of reasonable notice must be regarded as part of the due process limitations on the jurisdiction of a court") (citing, *e.g., Shutts*). Because notice was inadequate, the district court never had power over Lloyd and could not make her a part of the "Settlement Class" or purport to release her supposedly "Settled Claims."

The *Fanning* notice program involved first-class mail notice to people who had already sued AcroMed (or were otherwise known to the PLC) and limited publication notice. Thus, we address two distinct, but related, issues: (1) Whether the first-class mail program was constitutionally adequate, and (2) Whether the publication notice was reasonably calculated to apprise class members of the *Fanning* settlement. The answer to both questions is "no."

Before considering these issues, we address two overarching points. First, our analysis of the *Fanning* notice program is guided by this Court's decision in *Sambolin*, which severely criticized that very program. 246 F.3d at 327 n.11. *Sambolin*'s statements were dicta because the Court did not reach the due process issue and instead held that the district court's unyielding application of the settlement registration deadline, in the face of hundreds of "late" claims from people who lacked notice, was an abuse of discretion. However, *Sambolin*'s dicta were strong indeed. The unanimous panel noted that "we would be remiss if we

would not express our concerns about the notice program used in this class action," *id.*, and went on to catalogue the many failures of the notice provided and what measures should have been taken to provide adequate notice. The Court concluded that "[w]hile all of these efforts may not be required by due process, we are inclined to believe that some combination of them would help to bring the notice program closer to 'the best notice practicable,'" *id.*, leaving no doubt that the "best notice practicable" due process requirement was not met in *Fanning*.

Second, it is important to appreciate the magnitude of the notice program's failure, measured by the number of injured people it did not reach in a timely manner. In briefing in *Sambolin*, the Claims Administrator acknowledged rejecting the claims of 534 registrations who had missed the May 15, 1997 deadline, but registered with the settlement as of February 14, 1999. *Sambolin*, 246 F.3d at 320; *see* MDL 1014 Docket Entry Nos. 7516-7542, 7547, 7549-7552, 7554-7556, 7558-7559, 7561-7565, 7568, 7570-7571, 7574, 7579, 7582 (appeals of individual class members from Claims Administrator's decision denying compensation on that ground). Moreover, there are other purported class members, such as Lloyd, who were implanted with AcroMed's bone screws on or before December 31, 1996, but were not even injured at the time of the notice program, and for whom, therefore, the notice program was meaningless. Lloyd Decl., ¶ 3, JA 232; *cf. Amchem Prods.,*

Inc. v. Windsor, 521 U.S. 591, 628 (1997) (severely questioning constitutionality of binding "future" injury claimants to class action settlement).

Further, the MDL 1014 docket does not reveal the full extent of the notice problem. Class members who first learned of the settlement after the May 1997 deadline may simply have given up, especially after learning that the district court was enforcing the deadline virtually without exception. *See* PTO 1930, JA 264. We will never know how many potential *pro se* claimants were simply told by the Claims Administrator's Office that "it's just too late," because, on April 6, 1999, the district court instructed the Claims Administrator not even to accept, let alone consider, new registrations. *See* PTO 1754, JA 179. We will never know how many potential claimants consulted lawyers only to be told the same thing. And we will never know the true number of "future" claimants, *i.e.* individuals implanted on or before December 31, 1996, but who have yet to manifest injury under state law. Suffice it to say that the hundreds of class members explicitly shut out of the settlement likely comprised the tip of a sizable iceberg.

Moreover, the consequences of preclusion by the *Fanning* settlement are enormous. *Fanning* was not a small-claims "coupon" case or a securities case involving a few dollars per share. Rather, it purported to foreclose serious personal-injury claims. As the district court noted, of the four bone-screw cases tried to

verdict against AcroMed prior to *Fanning*, two resulted in plaintiffs' victories averaging $561,000, and settlements averaged $131,000. *Bone Screw*, 176 F.R.D. at 169-70, JA 121-22. Nor is *Fanning* like the now-rejected *Georgine* and *Ortiz* asbestos class actions, where lack of notice made it impossible to object (and, in *Georgine*, to opt out), but the claimants' rights to seek compensation were preserved in perpetuity. *See Ortiz*, 527 U.S. at 825-27; *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 620-21 (3d Cir. 1996) (noting settlement's waiver of time-bar for future claims), *aff'd Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 628 (1997). In *Fanning*, if the judgment were deemed binding, people lacking notice, like Lloyd, would be deprived of any compensation.

1. The First-Class Mail Notice Program Violated Due Process.

The *Fanning* notice packet was sent to all purported class members already known to the PLC and to all counsel for plaintiffs in individual MDL 1014 suits. No further attempt was made at first-class mail notice. As noted earlier, AcroMed and the PLC deemed this sufficient because of a very basic error: They claimed that "it is reasonable to expect 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); *accord* Settling Parties'

Proposed Findings of Fact, at 153 (¶ 350) (filed July 3, 1997). As demonstrated by the hundreds of class members denied compensation by the district court because they lacked notice, *see Sambolin*, 246 F.3d at 320, and the thousands of others who likely have *still* not received notice, the settling parties' views were plainly wrong.

Because publication notice is a poor substitute for individual notice, *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 315 (1950), notice by first-class mail is preferred. The applicable standard is straightforward:

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.

Id. at 314. Thus, potential claimants must be informed personally of the existence and ramifications of the action if their whereabouts can be ascertained with due diligence. *Id.* at 317-18; *see also Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173-75 (1974) (Rule 23(c)(2), incorporating *Mullane* due process standards, "leave[s] no doubt that individual notice must be provided to those class members who are identifiable through reasonable effort").

The *Fanning* first-class notice program made a mockery of the "due diligence"/"reasonable effort" standard. The PLC made *no* effort to find its clients on an individual basis; instead, the PLC simply sent notice to individuals *already*

known to the PLC. And because the PLC thought that the "vast majority" of its clients had sued, the class action settlement was envisioned primarily as a form of mandatory joinder as to people who had notice because they had already claimed against AcroMed. But because this mandatory joinder was accomplished in the form of a non-opt-out class action, it came with a gift for AcroMed: res judicata against all other people implanted with its bone screws, whether or not they had notice.

As this Court explained in *Sambolin*, many tools were available to the settling parties to identify people who had not already sued AcroMed. 246 F.3d at 327 n.11. The most obvious was AcroMed's customer list: the hospitals and/or doctors who purchased AcroMed's bone screws and implanted them in class members. One of AcroMed's customers was Cabell Huntington Hospital, where Lloyd had her surgery. JA 189 (¶ 9). That hospital had a record of Lloyd's whereabouts (and the whereabouts of her doctors), as would any hospital regarding patients who underwent major surgery there. If the notice program had required full notice packets to be sent to all of AcroMed's customers (or, at the very least, all hospitals at which surgeries took place), hundreds, if not thousands, more AcroMed bone screw recipients would have received notice.

Other efforts to identify class members for first-class mail notice were also

readily available. One option was through the medical community. A "Dear Doctor" letter explaining the settlement and enclosing the full notice packet could have been sent, at a minimum, to orthopedists and orthopedic surgeons, and perhaps also to internists who would be following AcroMed patients in the months and years after surgery. Such a letter would urge physicians to provide a copy of the notice to their potentially affected patients and would also provide an address and phone number for the class member to contact for the full packet.

The purpose of taking these minimal steps would have been to create a database of personal information to effect first-class notice, similar to lists that are routinely compiled in securities cases from stock transaction records. *See Eisen*, 417 U.S. at 166 n.5. In many such cases, shares are held in "street name" by brokers or other financial institutions, and notice must be provided to the beneficial stock owners whose rights are affected by the class action. Therefore, class counsel make arrangements for brokers to notify the class members or to provide the names and addresses of the beneficial owners, so that class counsel can notify their clients. *See Manual for Complex Litigation Third* § 30.211, p. 226 (1995); *Newberg on Class Actions* § 8.08, p. 8-29 (2d ed. 1992) (class counsel obtain names and addresses by subpoena if brokers are uncooperative). That is exactly the sort of process that should have occurred in *Fanning* with the class members' health care

providers because such efforts are "reasonably calculated" to identify class members and thus necessary to meet the bare minimum "due diligence" efforts required by *Mullane*. *See Sambolin*, 246 F.3d at 327 n.11.

The best evidence that such notification procedures are practicable, and thus required by due process, is that they are used regularly in modern class action practice. *See In re Nissan Motor Corp. Antitrust Litig.*, 552 F.2d 1088, 1098 & n.11 (5th Cir. 1977) (citing cases involving various situations in which court required ascertainment of names and addresses of class members if "capable of being identified from business or public records"). As noted above, class counsel in securities cases regularly contract with third parties to develop accurate, comprehensive class lists. So too, for example, in cases brought by vehicle owners against their manufacturers, where, although a complete list of class members is not available to the settling parties, they investigate the records of the defendant or the states' motor vehicle registration departments to compile as complete a class list as possible. *See, e.g., In re General Motors Corp. Pickup Truck Fuel Tank Prod. Liab. Litig.*, 55 F.3d 768, 781 (3d Cir. 1995); *In re Nissan*, 552 F.2d 1088.

Similarly, in asbestos class actions, the settling parties undertook campaigns to enlist dozens of labor unions in identifying their members, to whom full notice packets were sent by first-class mail. *See Carlough v. Amchem Prods., Inc.*, 158

F.R.D. 314, 320-21 (E.D. Pa. 1993) (employing 50 national and international unions and 40 trade organizations whose current and retired members were likely class members, as well as using mailers to union local officials); *see also id.* at 323 (sending notification to attorneys to identify prospective clients); *Ahearn v. Fibreboard Corp.*, 1995 U.S. Dist. Lexis 11532, *294 (¶ 422) (E.D. Tex. July 27, 1995) (notice to unions at the "national, regional, state, and local levels, whose memberships might include members of [the] ... Class, or whose members might be able to assist in the notification effort"); *see also id.* at *301 (¶ 130) (outreach effort resulted in tens of thousands of notice packets going to potential class members and a small notice being sent directly to 1.3 million union members).

Also illustrative of the practicability of outreach efforts that were ignored in *Fanning* are *Bowling v. Pfizer, Inc.*, 143 F.R.D. 141 (S.D. Ohio 1992), and *In re Telectronics Pacing Sys., Inc.*, 2001 U.S. Dist. Lexis 4035 (S.D. Ohio Mar. 8, 2001), which, like *Fanning*, involved class members implanted with defective medical devices. In *Bowling*, the settlement involved both domestic and foreign heart valve implantees. The district court directed notice by first-class mail to domestic and Canadian implantees who had already filed suit or made a claim against the defendant and to other class members whose whereabouts were known. Order Concerning Notice to the Settlement Class in *Bowling v. Pfizer*, No. C-1-91-

256 (Docket Entry No. 44, Jan. 23, 1992), JA 319-20.[9] The actual mailed notice was far more expansive because the defendant contracted with the Medic Alert Foundation, which contacted hospitals where the defendant's valve had been used. From there, a list of implantees' names and addresses was assembled and class members were notified by mail. *Id.* (district court order approving notice); *see* JA 482-87 (Affidavit of Bob Smith in *Bowling v. Pfizer*, No. C-1-91-256 (filed in Docket Entry No. 162, May 29, 1992)). The hospital-generated list greatly expanded the reach of the first-class notice to domestic implantees in *Bowling*; creating such a list in *Fanning* was eminently practicable, but no attempt was made.

As for foreign implantees in *Bowling*, because there was no analogous Medic Alert list of implantees' names and addresses, the district court required extensive mailings to all U.S. embassies abroad, JA 385-426, and all international health ministries. JA 321, 428-44. In addition, mailings containing the court-approved notice specifically sought the support of foreign hospitals and cardiologists to encourage class members to register for settlement benefits. Order [Amending Prior Order Re Notice] in *Bowling v. Pfizer*, No. C-1-91-256 (Docket Entry No. 56, Feb. 21, 1992), JA 466 (¶ 5); *see also* JA 471-72 (letter to hospitals and cardiologists).

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[9]The notice orders and affidavit in *Bowling* are not published. The same is true for the Special Masters' reports in *Telectronics* to which we refer. They are therefore reproduced at the end of the joint appendix.

Relevant trade publications and associations in the area of cardiology and cardiovascular surgery were also targeted for notice to enlist their readers in the overall effort to identify class members. JA 351-52 (court-approved letter), JA 354-69 (list of organizations and journals). Cardiologists and cardiovascular surgeons and the publications that they read were identified as means to locate class members in *Bowling*, just as orthopedists and orthopedic surgeons should have been — but were not — identified in *Fanning*. *See Sambolin*, 246 F.3d at 327 n.11.

Similarly, the *Telectronics* class action illustrates not only the inadequacies of the *Fanning* notice, but, in particular, the efficacy of the additional procedures endorsed in *Sambolin*, where this Court rejected as "unconvincing"AcroMed's argument that doctors and hospitals should not have been used to convey individualized notice because, as potential targets of suit, their interests were adverse to the interests of their patients. 246 F.3d at 327 n.11. *Telectronics* demonstrates the accuracy of *Sambolin*'s conclusion. There, an initial notice sent directly to class members resulted in many "undeliverable" returned envelopes. *See* Eighth Report of Special Master, at 5 (filed July 17, 2000), in *In re Telectronics Pacing Sys., Inc.,* MDL 1057, Master File No. C-1-95-87 (S.D. Ohio) (reproduced at JA 488). The settlement's Special Master then contacted the patients' doctors

and was able to obtain a large number of previously "lost claimants." *Id.*, JA 492.[10]

As the poor results of the notice campaign in this case show, a far more comprehensive individualized notice was required by due process. Without doubt, other steps "reasonably calculated" to reach class members were available and should have been used. *See Sambolin*, 246 F.3d at 327 n.11.

2. The Publication Notice Was Also Inadequate.

The *Fanning* publication notice was just as inadequate as the efforts at individual notice, if not more so, again underscoring that unnotified absentees like Melissa Lloyd did not receive the notice required by due process to make them "Settlement Class Members." Although the district court trumpeted the

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[10]As the Special Master put it:

> With the consent and approval of counsel for the parties, the Special Master has identified names and addresses of physicians serving the potential claimants who may not yet have been notified of the Class Action Settlement. The Special Master's office has sent letters to approximately 1,197 physicians requesting up-to-date address information of these potential claimants. The response from the physicians contacted has been very good. Based upon information received from approximately 400 physicians, follow up letters and Notices of the Class Action Settlement have been sent to approximately 1600 potential claimants. Of these persons notified, approximately 540 have filed claims.

Id.; *see also* Special Master's Report, at 10 (2/15/01), in *In re Telectronics Pacing Sys., Inc.,* MDL 1057, Master File No. C-1-95-87 (S.D. Ohio) (reproduced at JA 504).

"widespread and comprehensive notice of this settlement ... all over the country," 5/22/99 Tr. at 35, with all respect, that characterization does not square with reality. The "widespread and comprehensive" notice consisted of small advertisements of the settlement twice in *USA Today*, and once each in *TV Guide*, *Parade Magazine*, and a Spanish-language newspaper in San Juan. Nothing about the placement or size of these ads was likely to attract a bone screw recipient's attention. The *USA Today* ad appeared in the "Marketplace" section of the paper, JA 97-98, which readers naturally would assume contained ads for goods and services, and the one-time Puerto Rico notice appeared "in small text on page 50." *See Sambolin*, 246 F.3d at 318. And none of the ads contained a tear-off registration form that the Claims Administrator could have used to register claimants, which would have made registration far easier and might well have called the notice to the attention of implantees and/or their friends, family, and doctors. *Compare* JA 344 (in *Bowling* settlement, newspaper notice contained simple tear-off form calling for name and address, which registered class members for share of cash settlement benefits). *See Sambolin*, 246 F.3d at 327 n.11.

The district court believed that these minimal steps were "the best notice practicable under the circumstances." *E.g.*, JA 71. That view is demonstrably incorrect. It was practicable to place notices in local and regional newspapers; it

was practicable to place notices on the internet; it was practicable to run radio and television advertisements; and it was certainly practicable (and virtually costless) to undertake a free-media campaign involving public service announcements in print media, radio, and/or television. And whatever one might think of the advisability of using *all* of these means of notification together, it was inexcusable not to use some of them in addition to the minimal notice that actually took place. *See Sambolin*, 246 F.3d at 327 n.11 (indicating practicability of various additional means of notice).

In sum, the publication notice here was a formality. The Supreme Court could have been speaking about the *Fanning* settlement when it warned that "when notice is a person's due, process which is a mere gesture is not due process." *Mullane*, 339 U.S. at 315; *see also Greenfield v. Village Indus., Inc.*, 483 F.2d 824, 830 (3d Cir. 1973) (two-time publication in *Wall Street Journal* and *Philadelphia Evening Bulletin* "was insufficient notice under any standard of fairness, justice, or due process").

The actual content of the notice was also abysmal. Although the notice did include the registration deadline, it neither warned of the consequences of that deadline nor told class members how they could obtain the registration form. Indeed, the notice did not even mention the existence of a registration form, much

less say how to file one. The notice described the class action and settlement in the most general terms. Its only reference to the availability of additional information was in tiny print at the bottom of the notice, where readers were told that, if they had not received "the AcroMed Orthopedic Bone Screw Settlement Notice, you may request one by writing to the PLC, [address stated here]." *See* JA 98. The notice provided no telephone number to call for more information, let alone a toll-free number, which is standard procedure in modern class action settlement practice. *See, e.g., Carlough*, 158 F.R.D. at 321; *Ahearn*, 1995 U.S. Dist. Lexis 11532, *294 (¶ 422); *Parade Magazine*, Feb. 2, 2003, at 6 (class action settlement notice providing three methods for obtaining full notice packet: toll-free number, website, or writing to the settlement administrator); *Parade Magazine*, Mar. 5, 2000, at 6 (same); *cf.* JA 344 (publication notice providing class members with address and fax number for sending in tear-off registration form in *Bowling* settlement). *See Sambolin*, 246 F.3d at 327 n.11.

At first blush, it may appear incongruous to attack the content of a notice that Lloyd, and others in her situation, never saw. However, AcroMed claims that all implantees received *constructive* notice and thus are "Settlement Class Members" bound by the settlement and its indemnification provision. Therefore, this Court may properly ask not only whether the manner of notice program was

constitutional, but also whether, if the notice had reached bone screw recipients like Lloyd, its content was constitutionally adequate to bind them to the settlement terms (because, after all, the fiction of constructive notice rests on the assumption that they did in fact see the notice). *See Twigg v. Sears, Roebuck & Co.*, 153 F.3d 1222, 1226-29 (11th Cir. 1998) (upholding collateral attack by class member who had not received notice on ground that content of notice was inadequate to inform him that his claims had been included in class settlement); *cf. Sambolin*, 246 F.3d at 327 n.11 ("The notice also did not warn readers of the serious consequences of missing the registration deadline: losing one's right of action with no chance to share in the settlement fund").

Because both mailed and publication notice were inadequate, the district court did not have personal jurisdiction over individuals, including Lloyd, who did not receive notice of the settlement. Lloyd was therefore not a "Settlement Class Member" with "Settled Claims." The indemnification order should be reversed for that reason as well.

C. The District Court's Indemnification Was Also Improper Because Absent Class Members Such As Lloyd Were Not Provided Adequate Representation.

To be a bound to the *Fanning* judgment, and thus to be a "Settlement Class Member" with "Settled Claims" under the indemnification provision, the absentees

must have been provided adequate representation. *In re Real Estate*, 869 F.2d at 769. As explained earlier (at 24-25), the PLC led the district court to believe that, absent the litigation, AcroMed was worth only $104 million. But the company was worth hundreds of millions more, and that additional value went not to the class members but instead to the few shareholders of the closely-held company when it was purchased by a large conglomerate. The record is bereft of any explanation for this huge discrepancy. There is no evidence that the PLC even asked AcroMed during the class action negotiations whether it was for sale, whether AcroMed planned to sell the company once the litigation was behind it, or whether AcroMed had obtained valuations of the company from investment bankers or other financial experts. Such an inquiry was the bare "due diligence" minimum for the PLC, which claimed in effect to be buying a large portion of AcroMed's present value for the class. In any event, because the PLC had a duty to provide adequate representation "at all times," *Shutts*, 472 U.S. at 811, once the PLC learned of AcroMed's sale it surely was required to bring it to the court's attention and seek an explanation of the discrepancy, if not an alteration of the settlement.

In the same vein, the PLC was well aware that AcroMed had paid a substantial sum to bone screw implantees who objected to the settlement from *outside* the settlement fund, Gibson, *supra*, at 157-58, making a mockery of

ArcoMed's limited fund rationale. At that point, too, PLC had a duty to the class to question the $100 million settlement.

For these reasons as well, absentees such as Lloyd were not "Settlement Class Members" bound to the *Fanning* judgment and the indemnification should be reversed.

III. ACROMED'S INTERPRETATION OF THE INDEMNIFICATION PROVISION IS AT ODDS WITH RULE 23 AND SOUND CLASS ACTION PRACTICE.

AcroMed claims that, under the *Fanning* settlement, it is entitled to reimbursement of all its costs in post-settlement bone screw suits filed against the company, even assuming that the plaintiffs in those cases are not bound by the settlement because it did not comport with due process. AcroMed takes that position even in cases, like Lloyd's, where the absentee had no notice of the settlement and made no claim on the settlement fund. That position must be rejected as at odds with Rule 23 and sound class action practice.

As discussed above, a class action judgment is not binding on purported class members unless the absentees are provided minimum procedural protections (notice, an opportunity to be heard, and, in cases involving damages, an opportunity to opt out) and minimum substantive fairness protections from the class representatives and their counsel ("adequate representation"). *See, e.g., Shutts*, 472

U.S. at 812; *Matsushita Elec. Indus. Co., Ltd. v. Epstein*, 516 U.S. 367, 388 (1996) (Ginsburg, J., concurring); *Hansberry v. Lee*, 311 U.S. 32, 40 (1940); *In re Real Estate*, 869 F.2d at 766-67. AcroMed's interpretation of the indemnification provision flatly conflicts with these fundamental class action principles. At bottom, AcroMed's position is that it is entitled to reimbursement for all suits outside the settlement, even if the litigants who brought those suits have every right to maintain them because they are not bound by the settlement. That position carries with it two related consequences, both intolerable.

First, endorsement of AcroMed's view would mean that a settling defendant, with indemnification protection, would have greatly diminished incentive to assure that the terms of the settlement are consistent with due process. If, as AcroMed maintains, the indemnification provision is a "free pass," it would be indifferent to suits such as Lloyd's, because rather than defending such suits, it could pay a "reasonable" settlement (thus avoiding a ruling on the validity of the *Fanning* settlement) and be reimbursed for all of its costs. Thus, according to AcroMed, even if the non-opt-out aspect of *Fanning* were unlawful (as *Shutts*, *In re Real Estate*, and *Ortiz* make clear*),* or even if the notice program did not meet due process requirements (as this Court indicated in *Sambolin*), Rule 23 would allow a defendant to bargain for an indemnification clause entitling it to all costs incurred in

suits brought by people who lacked those fundamental protections.

In *In re Real Estate*, the Court responded to defendants' concerns about collateral review of class action judgments. Judge Becker could have been talking about this very case when he explained that such review is necessary to the legitimacy of the class action device:

> Ever since *Hansberry v. Lee* was decided in 1940, collateral attacks have been considered to be a necessary part of the class action scheme. Rather than threatening the vitality of the class action mechanism, the fact that some plaintiffs will be able to extricate themselves from class action judgments if subsequent courts find them to be inadequately represented is integral to the constitutionality of the class action procedure. . . .
>
> Moreover, as the Court explains in *Shutts*, it is partly up to the defendant to safeguard the interest of the absent plaintiffs. If the defendant wishes to achieve maximum preclusive effect, it is up to the defendant to ensure that the class is appropriately certified, and the absent members are adequately represented. Far from wreaking havoc on the class action mechanism, we believe that our holding will foster results that most fairly balance the interests of absent class members and defendants alike.

In re Real Estate, 869 F.2d at 769-70 (citations omitted). Under AcroMed's interpretation of the *Fanning* indemnification provision, however, defendants would have little reason "to safeguard the interest of the absent plaintiffs" because they would suffer no financial consequences if they failed to do so. That position obviously will undermine due process protections and should not be countenanced.

Second, allowing settling defendants boundless indemnification means that

claimants' recoveries will be diminished. In this case, "only" $1,270,500, or about $275 each for the approximately 4600 claimants, is presently at stake. However, more generally, class members operating under AcroMed's view of indemnification truly will have had no idea how much of a settlement belongs to them at the time the settlement is proposed. A settlement claimed to be worth $100 million to the class that is the target of legitimate attack could easily become a $50 million settlement. Most perniciously, settlements that are most vulnerable to attack — that are least protective of class members' rights — are the ones most likely to evaporate. That manifestly unfair result is the polar opposite of the principle upheld in *In re Real Estate*. And it is at odds with the explicit basis for Judge Bechtle's holding here that the settlement's indemnification provision be given "a strict and narrow construction" and why, in PTO 1978, he rejected AcroMed's claim for fees and costs in the *Lloyd* contempt proceeding in an effort to preserve the fund for deserving class members. We ask this Court to adhere to that principle here.

CONCLUSION

The decision below should be reversed.

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February 12, 2003

CERTIFICATE OF COUNSEL

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_____
Brian Wolfman

February 12, 2003

CERTIFICATE OF COMPLIANCE WITH FRAP 32(a)(7)

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I state that this brief complies with the type-volume limitations of Rule 32(a)(7)(B) and contains 13,132 words according to WordPerfect 7, the word-processing program used to prepare this brief. I further state that the brief was prepared in 14-point Times New Roman proportional font

_____
Brian Wolfman

APPENDIX

CERTIFICATE OF SERVICE

I hereby certify that, on February 12, 2003, I caused to be served by regular U.S. mail two copies of the foregoing brief on each of the following counsel who have entered an appearance in this appeal:

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