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

_____

REPLY BRIEF FOR APPELLANTS JOYCE CUSTER, ET AL.

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March 31, 2003

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

I. This Court Should Reject AcroMed's Many Arguments Aimed At Avoiding The Merits And Circumscribing The Relief That May Be Granted.

AcroMed devotes the beginning of its brief to a series of arguments that seek to derail this appeal from being heard on its merits and insulate the company from significant liability even if it is. It argues that the appeal is not justiciable and that the issues presented are res judicata; and, failing that, AcroMed seeks to circumscribe, in an unprecedented fashion, the relief that may be granted if the Custer Objectors' appeal succeeds. AM Br. 13-21. Except for the res judicata argument (JA 314), none of these arguments was raised below and, as we now show, none has merit.

A. The Custer Objectors' Appeal Is Neither Moot Nor Unripe.

AcroMed claims that the Custer Objectors' appeal is moot as to the $270,500 indemnification for the *Lloyd* case and not ripe as to the $1 million holdback. As to mootness, AcroMed notes that it has been paid the $270,500, but acknowledges that "[p]ayment of a judgment by a judgment debtor, of course, does not ordinarily moot an appeal." AM Br. 16. It argues, however, that because *class counsel* agreed to the $270,500 indemnification, any claim by a *class member* that the indemnification was improper is now moot. That argument does not present a mootness issue but rather begs the question on the merits: whether the Custer

Objectors' challenge to the Lloyd indemnification is valid. The Custer Objectors maintain that they and the other class members are entitled to $270,500 that was wrongly paid to AcroMed from *their* settlement fund. Since AcroMed has that money, and the class members do not, the claim is not moot.[1]

AcroMed's ripeness claim is also meritless. The company argues that there are three purposes for the $1 million holdback and, because this appeal only concerns one of them, there is no guarantee that, if the Custer Objectors prevail, additional money will be distributed to the class. That assertion, though not outright false, is quite misleading. The three purposes cited by AcroMed are to provide indemnification to AcroMed for (1) claims by class members, like Lloyd, who never had notice and never made a claim on the settlement fund; (2) claims by class members who claimed against the fund but are dissatisfied with the result; and (3) claims by the United States to recoup amounts it has allegedly paid on

[1]The only case cited by AcroMed in support of its mootness argument is *Phillips v. Cheltenham Township*, 575 F.2d 72 (3d Cir. 1978), but that case supports the Custer Objectors' position. In *Phillips*, while the defendant's appeal was pending, the defendant's insurer paid the judgment in plaintiff's favor, thus mooting the appeal because the defendant "lacked any specific injury." *Id.* at 73. The negative pregnant of *Phillips* is that where an appellant continues to suffer the claimed injury, the case is not moot. The equivalent to the insurer's payment in *Phillips* would be payment of the $270,500 indemnification back to the class members — the very result that the Custer Objectors seek but that AcroMed opposes in this appeal.

behalf of class members. As to the first category — claims like Lloyd's — if the Custer Objectors were to prevail in this appeal, AcroMed would not be entitled to indemnification for paying such claims, and, thus, the held-back money would be available for payment to the class.

The second category is an empty set. There exists *no* collateral litigation filed by class members who also filed claims on the settlement fund and none is anticipated. Indeed, neither the petition for indemnification, the order granting indemnification, nor any of counsel's statements at the relevant hearings indicate that the indemnification was needed for this purpose. The only specific uses mentioned for the $1 million holdback were for possible additional payments to Lloyd and the *Kirby* litigation, a case like Lloyd's, in which the plaintiff did not have notice of the *Fanning* settlement and never made a claim on the settlement fund. *See* JA 290, ¶ 8 (sixth-listed item).

As to the third category — U.S. government claims — AcroMed is not quite right on the facts. To be sure, the government does maintain that it is entitled to a share of some claimants' recoveries; however, PTO 2044 established a separate $1,002,500 million holdback for those claims (JA 288, ¶ 3; JA 290, ¶ 8 (first-listed item)); *see also* JA 281 (AcroMed states that ... "an *additional* reserve of $1 million will be set aside for potential claims against the AcroMed Settlement Fund

by the U.S. Government") (emphasis added). Although PTO 2044 leaves open the possibility that AcroMed could seek indemnification for government claims from the $1 million holdback as well (JA 289, ¶ 6), that possibility is very remote given the weakness of the government's claims and that they have yet even to be asserted against AcroMed. *See Thompson v. Goetzmann*, 315 F.3d 457, 470 (5th Cir. 2002) (rejecting identical government recoupment theory in accord with all relevant precedent and indicating that future assertions of same position would "be met with sanctions ... for baseless or even frivolous litigation"). Indeed, AcroMed's petition for indemnification says that the government has only "threatened to bring [claims] against AcroMed..., which AcroMed believes are meritless." JA 282. In sum, there is no reason for suggesting that the district court would have held back $2 million simply to cover the possible government claim.

Thus, if this Court were to set aside the *Lloyd* indemnification, the district court would have no basis for withholding most, if not all, of the $1 million since its principal purpose — indemnification for *Lloyd*-like claims — would no longer be valid. Additional money could be distributed to the class forthwith.

The cases cited by AcroMed are inapposite because, like most ripeness cases, they concerned situations in which the claimed injury had yet to occur. *See Federation of Teachers v. Ridge*, 150 F.3d 319 (3d Cir. 1998) (union's facial

challenge to recently enacted statute unripe because challenged aspects of statute had never been applied to any union member); *New Hanover Township v. United States Corps of Engineers*, 992 F.2d 470, 472-73 (3d Cir. 1993) (challenge to agency decision unripe because agency had not yet allowed feared injurious activity to occur and thus "no one will experience any impact stemming from the [challenged] decision"). Here, the injury — the failure to pay the $1 million to the class members — occurred when the district court issued PTO 2044 and persists to this day. In *Binker v. Pennsylvania*, 977 F.2d 738, 752-53 (3d Cir. 1992), also cited by AcroMed, a challenge to one provision of a settlement agreement was held unripe because the defendant had not taken the action alleged to be unlawful under the agreement, nor had the district court approved it, which was necessary before that action could be taken. *Binker* would be relevant here if AcroMed had never requested and obtained the $1 million holdback, but only said that it was planning to ask the court for it. Here, by contrast, because the holdback has been both sought and granted, the Custer Objectors' challenge is ripe.

Before proceeding to AcroMed's other points, it is important to recognize that the combined effect of the company's mootness and ripeness arguments would bar objecting class members from *ever* challenging either a holdback or an indemnification in AcroMed's favor. As to the holdback, AcroMed claims that a

class member cannot challenge it until indemnification is actually sought. But if, as with respect to *Lloyd*, AcroMed *does* seek indemnification, then, according to the company, only class counsel may object to it. Such a catch-22 is contrary to the Court's precedents allowing individual class members, not just the named representatives, to challenge class action settlements and their implementation, *e.g., In re Orthopedic Bone Screw Prods. Liab. Litig.* (*Sambolin*), 246 F.3d 315 (3d Cir. 2001); *Carlough v. Amchem Prods., Inc.*, 5 F.3d 707 (3d Cir. 1993), and it should not be countenanced here.

B. Res Judicata Does Not Bar This Appeal.

AcroMed asserts that the issues presented in this appeal are res judicata. Specifically, it says that because the Custer Objectors received notice of the settlement and had an opportunity to challenge the indemnification provision at the fairness hearing, they cannot now challenge that provision or any implementation of it. AM Br. 13-14. That argument misunderstands how the indemnification provision operates. When he approved the settlement, Judge Bechtle did not have a request for indemnification before him, and so he simply warned AcroMed that he would give the provision a "strict and narrow" construction consistent with "the primary and overriding purpose" of maximizing claimants' recoveries. JA 116. Any facial challenge by a class member at the fairness hearing to the

indemnification provision would have been rejected by Judge Bechtle as not ripe. Surely, there would have been no basis then for attacking the potential application of the indemnification provision to collateral litigation such as *Lloyd* and *Kirby*, since no such litigation then existed or was even contemplated. Put differently, the Custer Objectors' objection is not to any and all conceivable recoveries that AcroMed might, in theory, have sought under the settlement's indemnification provision approved in October 1997, but to the indemnification and holdback for collateral litigation like *Lloyd* and *Kirby* — an issue that did not arise, in concrete form, until AcroMed requested indemnification in December 2001.

AcroMed's res judicata argument is put to rest by *Binker v. Pennsylvania*, 977 F.2d at 752-53, discussed above, in which this Court affirmed the approval of a settlement between a class of state police officers and the Commonwealth of Pennsylvania to remedy the effects of the Commonwealth's unlawful mandatory retirement policy. The Court rejected an argument advanced by two officers who claimed that one paragraph of the settlement agreement might allow the defendant to deny them settlement benefits because they had exercised their right to appeal. Because the officers had not yet requested disbursement of their benefits, and thus the feared denial had not occurred, the Court held the appeal unripe. However, the Court made clear that if and when an injury did occur, the officers could then

mount their challenge. *Id.* at 753. Under *Binker*, had the Custer Objectors challenged the indemnification provision at the time of the fairness hearing, the challenge would not have been ripe because its implementation had yet to affect them (and might never affect them). Now that the indemnification and holdback have been ordered, *Binker* permits the Custer Objectors to pursue their challenge. For these reasons, the district court's approval of the settlement in October 1997 has no res judicata effect on the Custer Objectors' appeal from the indemnification and holdback order of December 2001.

C. AcroMed's Attempt To Limit This Court's Ability To Redress The Injury Caused By PTO 2044 Is Unavailing.

Without citation to any authority, AcroMed argues that if the Custer Objectors are correct that the indemnification and holdback are improper, this Court nevertheless should refrain from reversing the order imposing them. Rather, according to AcroMed, the district court should reduce the indemnification as to the Custer Objectors only, allowing AcroMed to retain the vast majority of a concededly unlawful windfall. AM Br. 19.

AcroMed's position is without merit. When objectors challenge a settlement or its implementation on grounds equally applicable to all class members, courts universally implement the relief on an across-the-board basis. Thus, in *Georgine v. Amchem Products, Inc.*, 83 F.3d 610 (3d Cir. 1996), *aff'd sub nom. Amchem*

Products, Inc. v. Windsor, 521 U.S. 591 (1997), neither this Court nor the Supreme Court remotely suggested that reversal of settlement approval would apply only to the handful of appellants, rather than the hundreds of thousands, if not millions, of class members. Indeed, the Court did just the opposite — it gave its ruling across-the-board effect. *Id.* at 635. So, too, with this Court's landmark decision in *In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litigation*, 55 F.3d 768 (3d Cir. 1995), where the objectors' appeal wiped out the settlement for the entire class of millions of vehicle owners.

This principle applies equally to settlement implementation matters such as this one. In *Sambolin*, where only one person appealed the denial of his claim, this Court understood that reversal would apply to all those similarly situated, *see* 246 F.3d at 324, and, in fact, the district court required that all such persons reap the benefit of Sambolin's victory. *See* 12/19/01 Tr. 10. To do otherwise here would be absurd: If this Court rules that indemnification for claims made by persons like Lloyd is not authorized, the district court should be required to implement that ruling as a matter of stare decisis and not pretend, as AcroMed urges, that the ruling never occurred.

Indeed, the case for across-the-board implementation is stronger here than in *Georgine* and *General Motors*. First, in cases involving settlement approval, the

adversely affected persons generally have notice that their claims have been tentatively settled, and so, at least in theory, they can come forward on their own to challenge the settlement's approval. Here, of course, *no one* was notified of AcroMed's petition for indemnification or its request for a holdback, except for class counsel and the claims administrator, both of whom AcroMed already knew agreed to the relief sought.[2]

Second, in cases like *Georgine* and *General Motors*, some class members may have disagreed with the objectors, believing that the settlement was favorable to them. (Indeed, that is what the district court in both *Georgine* and *General Motors* believed). Here, by contrast, it is inconceivable that any claimant on the settlement fund would oppose the Custer Objectors' position, since its adoption would increase everyone's take from the settlement fund.

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[2]AcroMed concedes that the Custer Objectors' counsel requested notice of its petition for indemnification (which AcroMed refused to provide), but then says that counsel "lacked standing to object to indemnification in the only capacity in which he was then before the court." AM Br. 20 n.3. That is not accurate. Counsel acknowledged that *Ms. Lloyd* did not have standing to object to indemnification because she was not a class member and had made no claim on the fund. However, counsel was "then before the court" regarding the *Sambolin* matter, and all individuals benefitted by *Sambolin*, like all other claimants, are injured by any order that reduces the amount of the settlement fund available to claimants. *See* Custer Objectors' Opening Brief 14 & n.4.

II. AcroMed's Arguments On The Merits Are Groundless.

A. The Decision Below Does Not, As AcroMed Maintains, Reflect "The Plain Language" Of The Settlement Agreement.

The settlement agreement authorizes "reasonable" indemnification regarding the "Settled Claims" of "Settlement Class Members." AcroMed claims that this definition applies here because Lloyd was implanted with AcroMed's bone screws on or before December 31, 1996, and her state court claims related to those screws. AM Br. 22. AcroMed's analysis is wrong for several reasons.

1. AcroMed makes almost no effort to show that the indemnification of the costs of the *Lloyd* litigation is "reasonable." In AcroMed's view, the only question is whether the *amount* paid to Lloyd — $200,000 — was reasonable (AM Br. 27), but nothing in the settlement agreement requires, or even suggests, such a cramped reading of that term. To the contrary, Judge Bechtle's prior decisions in this very litigation indicate otherwise. In approving the settlement, Judge Bechtle made clear that "reasonableness" would be viewed not simply as to whether the amount sought by AcroMed was not excessive compared to settlements in individual tort litigation (as AcroMed apparently views the issue), but, rather, whether indemnification would undermine the settlement's goal of maximizing claimant recovery in light of the ostensibly non-opt-out, limited-fund nature of the settlement. *See* JA 116 (stating that "any monies removed from the settlement

fund for [indemnification] would undermine" "the primary and overriding purpose of the settlement" of maximizing claimant recovery). It is difficult to see how it is "reasonable" to require the claimants, who were told that they had no right to opt out, to pay AcroMed's costs in the *Lloyd* litigation to the tune of $270,000, when the claimants received, on average, less than $22,000 minus fees and costs.[3] It undermines the goal of the *Fanning* settlement to make those who did not challenge it, and, thus, played by AcroMed's rules, subsidize AcroMed's individual settlements with those who collaterally attacked it.

In addition to the "strict and narrow construction" given the indemnification provision when the settlement was approved, Judge Bechtle applied that provision in the context of the *Lloyd* litigation itself. As will be recalled, Judge Bechtle denied AcroMed's request for fees and expenses as unreasonable under the indemnification provision. JA 278-79 & nn.4-5. If that request for reimbursement of AcroMed's district court litigation costs alone was unreasonable, then surely AcroMed's far larger request for litigation *and* settlement costs for the appeal of

[3]Approximately 4600 claimants shared $100,000,000, which comes to a gross average payment of about $21,700, less fees and expenses for both class counsel and claimants' individual counsel.

the very same matter cannot be deemed reasonable.[4]

Moreover, as explained in our opening brief (at 23-26), given that AcroMed was not, in fact, a limited fund and that the non-opt-out "limited fund" settlement here was not lawful, there is no basis now for finding that the *Lloyd* indemnification was reasonable. AcroMed simply ignores this argument. The PLC asserts that the limited-fund finding should be honored because it was supported by fairness hearing testimony from two witnesses for the settling parties (*i.e.,* not adversary parties, but parties who had agreed to settle the case on a limited-fund basis), and that finding should not be revisited here. PLC Br. 2. But the Custer Objectors do not seek to overturn the limited-fund finding insofar as it served as the basis for approval of the *Fanning* settlement. They seek only a ruling on the question whether the *Lloyd* indemnification was "reasonable," and there is no reason for this Court, in making that determination, to ignore the undisputed

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[4]AcroMed claims that Judge Bechtle did not, in fact, treat its request as one for indemnification. AM Br. 6-7. That is not so, as PTO 1978 shows. JA 278 & n.4. Indeed, in a letter requesting that the PLC acquiesce in the indemnification at issue in this appeal, AcroMed conceded that "Judge Bechtle ruled in PTO 1978 that expenses incurred by AcroMed in connection with the *Lloyd* contempt proceeding were not 'extraordinary' and therefore not indemnifiable." JA 284. Only the fact that Judge Bechtle already denied indemnification for its litigation costs in the district court can explain why AcroMed did not seek indemnification of those costs when it returned to Judge Buckwalter and limited its costs request to appellate costs alone.

facts that bear on that question. *See Southco, Inc. v. Kanebridge Corp.*, ___ F.3d ___, 2003 WL 1563983 (3d Cir. Mar. 26, 2003) (prior decision on preliminary injunction not binding with respect to later determination on merits, even on the exact same legal issue, and court was therefore required to consider new evidence that bore on that question).[5]

2. AcroMed makes two arguments as to whether Lloyd, when she filed her West Virginia lawsuit, was a "Settlement Class Member" who presented "Settled Claims." First, AcroMed simply asserts that Lloyd fits these definitions because her surgery occurred during the class period, and she filed a bone-screw-related suit against AcroMed. To be sure, Lloyd was implanted during the class period, and her suit concerned defects in AcroMed's bone screws. But beyond those historical facts, the question whether Lloyd was, in fact, a "class member" and, even more important, whether the class action settlement "settled" her claims, are issues that require an understanding of background law to determine what the settlement agreement means.

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[5]Significantly, AcroMed does not dispute the facts or the conclusion that AcroMed was not, in reality, the $104 million limited fund that it was represented to be at the *Fanning* fairness hearing. As noted in the text, the PLC simply recites that two witnesses, upon whose testimony the district court relied, attested to the company's supposed value. PLC Br. 2. However, even the PLC does not contest the facts set forth in the Custer Objectors' brief demonstrating that the company was worth far more than the settling parties claimed.

On that score, Lloyd was not properly made a member of the settlement class, nor were her claims settled by the *Fanning* judgment. As explained in our opening brief (at 27-53), the district court never obtained jurisdiction over Lloyd and had no power to settle her claims because the settlement denied Lloyd her constitutional right to opt-out, *see In re Real Estate Title & Settlement Services Antitrust Litigation*, 869 F.2d 760 (3d Cir. 1989); *see also Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 847-48 (1999); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985), and because the settling parties' efforts to notify Lloyd of the *Fanning* settlement were constitutionally deficient. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950); *Sambolin*, 246 F.3d at 327 & n.11. Neither AcroMed nor the PLC makes any effort to counter those legal propositions, and we need not repeat them here.[6]

Second, in a reprise of its res judicata argument, AcroMed asserts that the question of Lloyd's status as a class member was already adjudicated when Lloyd

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[6]AcroMed does claim that the Custer Objectors' arguments on jurisdiction and notice are "irrelevant" because as "between AcroMed and the Custer Objectors, the AcroMed Settlement Agreement is a valid and binding contract." AM Br. 25. To quote AcroMed, "so what?" *See id.* That point begs the question, which is not whether the settlement agreement is "valid and binding," but whether the settlement agreement permits indemnification of claims like Lloyd's. For the reasons stated in the text, the settlement agreement does not have the meaning AcroMed ascribes to it.

was held in contempt in PTO 1978. Once again, AcroMed fundamentally misunderstands the law of preclusion. The contempt dispute was solely between Lloyd and AcroMed. The Custer Objectors were not parties to that dispute and, thus, *nothing* in that dispute — which, we note, Lloyd settled on appeal for $200,000 — can have preclusive effect on the Custer Objectors. To hold otherwise would violate not only basic res judicata principles but the Custer Objectors' rights to due process. *See, e.g., Richards v. Jefferson County, Ala.*, 517 U.S. 793 (1996); *Baker v. General Motors Corp.*, 522 U.S. 222, 237 n.11 (1998).

3. Even if this Court were to agree with AcroMed that the indemnification provision can be understood by looking only within the four corners of the agreement, and ignoring the relevant background law, AcroMed's argument would still fail. Another provision of the settlement agreement, Section XI. B. 1., confirms the Custer Objectors' view that the indemnification provision does not apply to AcroMed's expenditures in the *Lloyd* case:

> No Settlement Class Member shall recover, directly or indirectly, any sums from AcroMed or any Released Party other than those received under the Compensation Program.

JA 52 . The purpose of this provision is undoubtedly similar to the purpose that Judge Bechtle identified when he gave the indemnification provision a "strict and narrow" construction: It assures that AcroMed does not use its funds in a way that

undermines the goal of treating all class members on a fair and equitable basis. However, this provision is undermined, and its purpose thwarted, by the position taken by AcroMed in this appeal.

AcroMed maintains that Lloyd is a "Settlement Class Member," but it acknowledges, contrary to section XI. B. 1., that Lloyd did, in fact, "recover ... sums from AcroMed ... other than those received under the Compensation Program." Thus, either AcroMed violated the settlement agreement when it paid money to Lloyd, or, as the Custer Objectors maintain, section XI. B. 1. does not apply here because Lloyd was not, in fact, a "Settlement Class Member." In other words, a holding that Lloyd was not a "Settlement Class Member" would not only correctly reflect that the district court never had jurisdiction over her, but it is the only interpretation that enables the settlement's indemnification provision to be reconciled with section XI. B. 1.

B. AcroMed Is Unable To Harmonize Its Interpretation Of The Settlement's Indemnification Provision With Sound Class Action Principles.

In their opening brief (at 53-56), the Custer Objectors explained why AcroMed's position — that it is entitled to indemnification for all costs in all post-settlement bone-screw litigation, even for cases like Lloyd's where the plaintiff lacked notice and made no claim on the settlement fund — cannot be reconciled

with sound class action principles. We showed that, under AcroMed's view, defendants would be encouraged to enter into class settlements that fail to protect absentees' due process rights — a position in stark conflict with this Court's decision in *In re Real Estate*, 869 F.2d at 769-70. AcroMed responds conclusorily that settling defendants' incentives to enter "legitimate, enforceable settlements will not be diminished" because "no one wants to buy a lawsuit." AM Br. 26-27.

Not so. What we said still goes: In a world where AcroMed's interpretation prevails, a settling defendant "would have greatly diminished incentive to assure that the terms of the settlement are consistent with due process." Custer Objectors' Opening Br. 54. If the district court's ruling stands, AcroMed will be no worse off even if (as now the PLC and AcroMed all but concede) Lloyd was denied due process, and AcroMed will be indemnified for all of its expenses from the $1 million holdback if it chooses to settle similar litigation, such as *Kirby*, or even if it loses such litigation at trial. If a settling class action defendant will be indemnified for whatever is deemed "reasonable," that defendant will have little concern if the class settlement were to come under collateral attack. Put in AcroMed's terms, it may be that defendants don't want to *buy* lawsuits, but the point here is that they won't care about lawsuits if they can force someone else to pay for them.

AcroMed ends its brief by belittling the amounts at stake. It says that the

Lloyd indemnification takes only $59 from each claimant (AM Br. 28), but that assertion does not include the $275 per claimant injury when the hold back is considered, nor does it include the unlimited indemnification that AcroMed's position would portend in this case and other class settlements. In any event, $275 is a fair sum to many of the *Fanning* claimants, including the Custer Objectors. That amount certainly means far more to each claimant than the $1.27 million indemnification and holdback means to AcroMed, whose parent company's net worth as of the end of the last fiscal year was $22.7 billion. *See* http://search.hoovers.com/cgi-bin/hol_search?siteid=HBN&which=company&query_string=Johnson+%26+Johnson&dir_top_id=7 (Balance sheet for Johnson & Johnson).

So, why does AcroMed care? AcroMed is fighting this case so hard because it knows that, without an all-encompassing indemnification, it will have to assure that its settlements comport with due process or else pay the consequences. This Court should make sure that AcroMed pays the consequences in this case, so that, in the future, AcroMed and other settling defendants will do a better job than AcroMed did here in meeting the demands of due process. In doing so, the Court will assure that the Custer Objectors, and claimants generally, will not be required to give up any portion of their settlement to indemnify defendants that do not

protect the rights of all absentees.

CONCLUSION

The decision below should be reversed.

Respectfully submitted,

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March 31, 2003

CERTIFICATE OF COUNSEL

I, Brian Wolfman, counsel of record in this appeal, am a member of the bar of this Court.

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March 31, 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 4597 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

March 31, 2003

CERTIFICATE OF SERVICE

I hereby certify that, on March 31, 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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