

NO. 43719-8

**COURT OF APPEALS, DIVISION
OF THE STATE OF WASHINGTON**

PACIFIC MARINE INSURANCE COMPANY and ROBERT BELL,

Appellants,

v.

STATE OF WASHINGTON, DEPARTMENT OF REVENUE,

Respondent.

BRIEF OF RESPONDENT

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I. INTRODUCTION

This appeal involves a collateral attack upon the final orders entered in a receivership proceeding to liquidate an insolvent insurer under Washington's insurance insolvency laws, chapter 48.31 RCW. In that proceeding, the King County Superior Court determined the ownership interests in the assets available for distribution in the estate of the Pacific Marine Insurance Company (PacMar). Appellant, Robert Bell, is a former officer and director of PacMar. It is undisputed that Mr. Bell is not entitled to any distribution of PacMar's assets under the final orders entered in the liquidation proceeding. The Thurston County Superior Court correctly ruled that those final orders preclude Mr. Bell from establishing ownership of undistributed funds from the PacMar estate in an action brought under Washington's Uniform Unclaimed Property Act, chapter 63.29 RCW.

Mr. Bell claims the final orders entered in the King County liquidation proceeding do not bind him because he lacked adequate notice and opportunity to contest the disposition of the PacMar estate's assets. The trial court correctly declined to review the merits of Mr. Bell's due process challenge, holding that it lacked subject matter jurisdiction over the King County proceeding. Mr. Bell's sole remedy, if any, is to move the King County Superior Court for an order to reopen the receivership.

II. RESTATEMENT OF THE ISSUES

1. **Did the Thurston County Superior Court properly give effect to the King County Superior Court orders regarding the disposition of the undistributed assets of the PacMar estate when it denied Mr. Bell's unclaimed property claim under RCW 63.29.260?**
2. **Does Mr. Bell lack standing to challenge the constitutionality of RCW 48.31.155, which provides for the escheat of unclaimed funds held on behalf of the absent distributees of a liquidated insurer, considering he was not entitled to a distribution from the PacMar estate?**
3. **Did the Thurston County Superior Court correctly conclude that it lacked subject matter jurisdiction over the King County receivership proceeding and the power to readjudicate the ownership interests in the assets of the PacMar estate?**
4. **Should the trial court's summary judgment order be affirmed on the alternative ground that neither PacMar nor Mr. Bell had capacity to sue?**

III. RESTATEMENT OF THE CASE

Robert Bell formed the Pacific Marine Insurance Company (PacMar) in 1980. CP 43. On June 22, 1987, the King County Superior Court placed PacMar in receivership under Washington's insurance insolvency statutes and appointed the Washington State Insurance Commissioner, acting through a delegate, as PacMar's statutory receiver. CP 129. On June 2, 1989, the court declared PacMar insolvent and ordered the receiver to liquidate the business. CP 134.

The liquidation order directed the receiver to assess PacMar's shareholders the "superadded" liability provided for in Const. art. XII, § 2, which imposes personal liability on the shareholders of an insolvent insurer for debts existing when the insurer is deemed insolvent to the extent of the par value of their shares and the amount of their investment. CP 137-38.

PacMar's sole shareholder was the Pacific Marine Holding Company, an entity formed by Robert Bell. CP 43. Two months after the court placed PacMar into receivership, the Pacific Marine Holding Company filed for bankruptcy. CP 337. The receiver filed a claim in the bankruptcy proceeding for \$5,127,588. *Id.* It is unknown whether the receiver recovered any amount from the Pacific Marine Holding Company.

The receiver brought a lawsuit against Mr. Bell seeking to recover tens of millions of dollars of damages that allegedly were caused by his breach of fiduciary duties and misappropriation of corporate assets. CP 257, 336. The lawsuit ultimately was dismissed as a condition of a settlement with the insurance company that provided liability insurance to PacMar's officers and directors. CP 258. The insurer agreed to pay \$5,250,000 (the limits of the policy) to settle the receiver's claims against Mr. Bell and other officers and directors. CP 245. Although the receiver

considered Mr. Bell principally responsible for estimated losses of \$32 million, CP 248-49, he urged the court to approve the settlement, stating the funds were urgently needed to pay claimants and to protect the interests of PacMar's policyholders. *Id.*

During the course of the lengthy receivership, the receiver submitted more than thirty reports on the progress of the receivership.¹ Under the court's supervision, the receiver marshaled and recovered estate assets, notified creditors of the claims-filing deadline, determined the validity, amount and priority of claims, made partial distributions, and settled disputes. CP 154-58, 169.

At the conclusion of the receivership the PacMar estate had \$12,550,648.57 of assets available for final distribution and \$13,676,659.80 in liabilities. CP 175. The receiver proposed to distribute the estate's assets in accordance with the former version of RCW 48.31.280, which establishes prioritized classes of claimants entitled to a distribution of the assets of an insolvent insurer. CP 168-69.² The statute requires that all claims within a class be paid in full before any member of a lower priority class receives any amount. The claims of the shareholders of an insolvent insurer are in the lowest priority class.

¹ The docket is available through the Judicial Information System under the King County Superior Court cause number 87-2-10527-0.

² RCW 48.31.280 was amended in 2001. Laws of 2001, ch. 40, § 1. None of the changes enacted in 2001 are material to any issue in this case.

PacMar's assets were sufficient to satisfy the claims in the higher priority classes, including the estate's administrative expenses, tax liabilities, and claims arising under PacMar's insurance contracts. CP '168-69. Satisfaction of those claims exhausted all but \$4,236.49 of the estate's assets, excluding the amount set aside to cover additional administrative expenses. CP 169-70. No distribution was made to satisfy any of the general creditors' claims, which were numerous and totaled approximately \$1.1 million. CP 157, 175.

On October 12, 1999, the King County Superior Court approved the receiver's final distribution plan. CP 188. The final order provided:

Any unclaimed funds subject to final distribution to a claimant who is unknown or cannot be found which remain in the Receiver's possession after expiration of at least thirty (30) days following issuance of the final distribution payment checks by the Receiver shall be deposited by the Receiver with the Washington State Treasurer in accordance with RCW 48.31.155, and any balance of funds remaining from the administrative retention amount shall be paid over to the Washington State Treasurer in accordance with RCW 48.31.155.[³]

CP 189-90 (Order Approving Final Distribution).

³ The version of RCW 48.31.155 then in effect provided that funds remaining in the receiver's possession at the conclusion of liquidation proceeding shall be deposited with the state treasurer and may be claimed by the person legally entitled to them within six years after the discharge of the receiver, at which point the funds escheat to the state by operation of law. The statute was amended in 2007, changing some references from the state treasurer to the department of revenue. The six-year abandonment period and escheat provision remained unchanged.

The receiver sent out the final distribution checks, disposed of the office equipment, closed PacMar's bank accounts and destroyed its business records, and then petitioned for discharge. CP 200-02.

The court discharged the receiver on January 25, 2000. CP 204-05. The receiver subsequently sent two checks to the Washington State Treasurer. One check represented the amount of uncashed distribution checks totaling \$22,958.56 and was accompanied by a list of seven claimants entitled to the funds. CP 208, 211-13. A separate check in the amount of \$39,862.78 represented the unspent balance of the administrative retention amount. CP 209-10. The receiver informed the treasurer those funds were "undistributable assets of the receivership estate. No claimant is entitled to any of these funds." CP 210.

After the receivership closed, the Insurance Commissioner received additional funds on behalf of the PacMar estate totaling \$38,907.48. CP 221. RCW 48.31.161 provides a procedure for reopening a liquidation proceeding when there is "good cause" to do so, including the discovery of additional assets. However, the receiver determined the administrative costs of providing notice and determining the validity and amount of claims by the estate's general creditors would exhaust the newly available assets, resulting in no additional distribution. CP 223-24. The receiver explained to the court:

At this time, if the estate were reopened, based upon the large number of [general creditor] claims in the receivership, it is the [receiver's] opinion that the costs and expenses to adjudicate the [general creditors'] claims, to issue determinations, to provide notice of hearing and opportunity for objections, to resolve or litigate any claimant disputes, to finalize the claimants' right to assets, to make distributions and to provide accounting reports to the court would at least equal, and most likely exceed, the amount of these newly-recovered assets. Thus, re-opening of the estate would not result in any distribution of assets to claimants.

CP 224.

On December 14, 2001, the King County Superior Court found there was no justification to reopen the receivership and ordered that the funds (minus administrative expenses) be transmitted to the State Treasurer in accordance with former RCW 48.31.155. CP 227. The receiver transmitted a check for \$33,751.97 to the Treasurer's Office. CP 215.

The Treasurer's Office subsequently transferred all of the funds received from PacMar's receiver to the Department of Revenue, which administers Washington's unclaimed property laws. CP 51.

In December 2010, Robert Bell contacted the Department's unclaimed property division to claim the funds retained by the State after PacMar's liquidation. CP 73-76. Mr. Bell asserted he was entitled to the money as PacMar's former owner. CP 76. The Department informed Mr.

Bell the funds were subject to orders entered by the King County Superior Court and that the Department would not disburse them to him absent a court order requiring it to do so. CP 82.

Mr. Bell and PacMar filed a complaint in the Thurston County Superior Court entitled “Complaint for Distribution of Unclaimed Fund.” CP 4. The complaint alleged that the State retained funds from the PacMar liquidation “after payment to all creditors of record,” and that as PacMar’s shareholder, Mr. Bell “is and has been rightfully entitled to the unclaimed funds.” CP 5. Mr. Bell sought a court order requiring the State “to provide an accounting” of the amounts retained following PacMar’s liquidation and to pay such funds to PacMar and Mr. Bell. CP 6.

The complaint identified the defendant as the State of Washington “through its Divisions, Department of Revenue and The Insurance Commissioner.” CP 4. However, the Insurance Commissioner has not appeared in this action. There is no indication in the record that the Insurance Commissioner ever was served with the complaint or any subsequent papers. The Department appeared in this action to defend its decision to deny Mr. Bell’s claim under the unclaimed property laws it administers. CP 12-15 (Department’s Answer to Complaint).

The parties filed cross-motions for summary judgment. CP 16, 27. The trial court denied Mr. Bell’s motion for summary judgment and

granted summary judgment to the Department. CP 343. In a letter ruling, the court stated the only issue before it was whether the plaintiffs had established their claim under Washington's unclaimed property laws to the \$73,614.75 held by the State after PacMar's liquidation. CP 342 (copy attached at Appendix A-1). The trial court concluded that the final orders entered by the King County Superior Court controlled the issue. *Id.*

The trial court refused to address the merits of Mr. Bell's claim that he was deprived of due process in the receivership proceeding, stating: "This court has no subject matter jurisdiction over the King County receivership nor any ability to order any additional remedies as a result of any deficiencies (if any) in that process." CP 342. The trial court held that the plaintiffs were not entitled to "any order allowing plaintiffs to recover additional funds received after the closing of PacMar's liquidation proceedings." *Id.*

IV. ARGUMENT

A. Standard Of Review.

This Court reviews a summary judgment order de novo, performing the same inquiry as the trial court. *Washington Imaging Services, LLC v. Dep't of Revenue*, 171 Wn.2d 548, 557, 252 P.3d 885 (2011). Summary judgment is proper when the relevant facts are undisputed or not reasonably subject to dispute, and the moving party is

entitled to judgment as a matter of law. *Id.* This Court may affirm the trial court's summary judgment order on any ground supported by the record. *Olson Engineering, Inc. v. KeyBank Nat. Ass'n*, 171 Wn. App. 57, 74, 286 P.3d 390 (2012).

B. The Plaintiffs Failed To Establish An Ownership Interest In The Undistributed Funds.

The Thurston County Superior Court correctly refused to go behind the face of the final orders entered in the King County liquidation proceeding in rejecting the plaintiffs' unclaimed property claim.

Washington's Uniform Unclaimed Property Act, chapter 63.29 RCW, establishes a procedure by which property that is presumed abandoned is transferred to the State as custodian for the absent owner, who may claim it at any time. The purposes of the act are to protect the owners' interests, relieve the holders of liability for the property, and give the State use of money that otherwise would be a windfall to the holders. *Seierstad v. Serwold*, 105 Wn.2d 589, 593, 716 P.2d 885 (1986).

A person holding property that belongs to another generally is required to report and deliver it to the Department following the presumptive abandonment period set by statute. RCW 63.29.170 (reporting); RCW 63.29.190 (delivery). The unclaimed property report must describe the property, state the date it became payable to the

apparent owner, and identify “the name, if known, and last known address, if any, of each person appearing from the records of the holder to be the owner of property with a value of more than fifty dollars.” RCW 63.29.170. The Department publishes information about unclaimed property on a searchable online database at <http://ucp.dor.wa.gov>, with instructions on how to file an administrative claim.

When the Department takes custody of unclaimed property, the State assumes liability “for any claim then existing or which thereafter may arise or be made in respect to the property.” RCW 63.29.200(1). The holder may pay the owner itself and reclaim the property from the Department. RCW 63.29.200(2). The Department is required to defend the holder against any subsequent claim and must indemnify the holder against liability. RCW 63.29.200(5).

In order to protect the State from multiple liability for the same claim, the Department takes care to determine claims in accordance with the ownership information provided by the person who reported the property. If a claim is inconsistent with the information reported by the holder, the Department will not disburse the funds absent a court order that establishes the claimant’s interest in the property. The act provides a right of action in the Thurston County Superior Court to contest the Department’s denial of an unclaimed property claim. RCW 63.29.260.

The trial court correctly denied the plaintiffs' claim under RCW 63.29.260 because they failed to establish an ownership interest in any of the funds retained by the state following PacMar's liquidation. According to the court orders that govern the disposition of those funds, the funds either were payable to specific persons (other than PacMar or Mr. Bell) or were not distributable to any claimant.

1. The court orders entered by the King County Superior Court do not entitle the plaintiffs to any portion of the undistributed funds held by the State.

At the conclusion of the receivership, the King County Superior Court ordered the receiver to transfer the remaining funds in her possession to the State in accordance with former RCW 48.31.155. That statute provided:

Unclaimed funds subject to distribution remaining in the liquidator's hands when he or she is ready to apply to the court for discharge, including the amount distributable to a person who is unknown or cannot be found, shall be deposited with the state treasurer, and shall be paid without interest to the person entitled to them or his or her legal representative upon proof satisfactory to the state treasurer of his or her right to them. An amount on deposit not claimed within six years from the discharge of the liquidator is deemed to have been abandoned and shall be escheated without formal escheat proceedings and be deposited with the state treasurer.

Former RCW 48.31.155 (1993) (emphasis added).

The order differentiated the balance of the administrative retention amount from the amounts distributable to claimants who had not negotiated their distribution check. CP 189-90. The February 2000 payment of \$22,958.56 that the receiver made to the State Treasurer represented the amount of uncashed checks that were issued to PacMar's creditors in accordance with the final distribution order entered in the liquidation proceeding. CP 211. The claimants either could not be located or had failed to present a distribution check for payment. CP 200-01. This is the only portion of the amount retained by the State following PacMar's liquidation that were "unclaimed funds" within the meaning of RCW 48.31.155.

Only the State was legally entitled to the balance of the administrative retention amount or the amount received after the closure of the estate. Those funds, which totaled more than \$70,000, probably could have satisfied a number of the general creditors' claims. However, the insurance insolvency statutes precluded the receiver from distributing funds to any member of a priority class of creditors unless every member of the class received its proportionate share. RCW 48.31.280. *Cf. American Star Ins. Co. v. Grice*, 123 Wn.2d 131, 134, 865 P.2d 507 (1994) (a principal purpose of the Uniform Insurers Liquidation Act, chapter 48.99 RCW, is to ensure equal treatment of all claimants, foreign

and domestic, within designated priority classes); *Olivine Corp. v. United Capitol Ins. Co.*, 122 Wn. App. 374, 378, 92 P.3d 273 (2004) (same).

Thus, the receiver would have had to adjudicate every claim within the highest remaining priority class before distributing any of the estate's assets to any member of that class.

The remaining assets in the receiver's possession were undistributable not because the person entitled to them was "unknown or could not be found" as contemplated by RCW 48.31.155, but because the receiver and the court had determined that the costs of adjudicating the validity and amount of the claims of PacMar's general creditors would exceed the amount available for distribution. CP 223-24, 227. Further proceedings would have inured only to the benefit of persons entitled to payment of the estate's administrative expenses and would have resulted in the wasteful consumption of judicial resources.

Thus, contrary to the plaintiffs' assumption, the existence of undistributed funds at the conclusion of the PacMar receivership does not mean that "all creditors of record" were paid or that the funds represented a net surplus of assets over liabilities. CP 2. More than one million dollars in outstanding claims remained unpaid when the estate was closed. CP 170 (although "priority (d)" claims were paid in full, "there are not sufficient estate assets to make any distributions to claimants in the lower

statutory priority classes”) (Petition for Order Approving Final Distribution); CP 175 (outstanding liabilities included \$917,820.43 “priority (e)” claims and \$213,427.29 “priority (f)” claims) (“Statement of Assets & Liabilities”).

Neither PacMar, which was the subject of the liquidation proceeding, nor Mr. Bell, whose alleged interest fell within the lowest priority class, *see* RCW 48.31.280, had any legal or equitable interest in any portion of the funds that were remitted to the Treasurer pursuant to the final orders entered by the King County Superior Court. Those funds were either owed to specific persons (February 2000 payment of \$22,958.56) or deemed undistributable to any person (April 2000 and February 2002 payments of \$39,862.78 and \$33,751.97, respectively).

2. The Department was not required to notify Mr. Bell because he was not identified as an apparent owner.

Mr. Bell claims the Department violated RCW 63.29.180 by failing to notify him of its receipt of the funds from the PacMar liquidation. Br. of Appellant at 19. Mr. Bell was not entitled to any such notice.

By November 1st of the year in which a holder files an unclaimed property report, “the Department shall mail a notice to each person whose last known address is listed in the report and who appears to be entitled to

property with a value of more than seventy-five dollars presumed abandoned under this chapter.” RCW 63.29.180. The notice must state that “according to a report filed with the department, property is being held to which the addressee appears entitled.” RCW 63.29.180(4)(a).

The Department was not required to provide Mr. Bell with notice of the funds because Mr. Bell was not identified as an apparent owner on any unclaimed property report filed with the Department. RCW 63.29.180 does not require the Department to search out and notify all persons who might wish to contest ownership of unclaimed funds remitted to the State.

C. Mr. Bell Lacks Standing To Challenge The Constitutionality Of RCW 48.31.155 Because His Interests Were Not Affected By The Escheat Provision.

RCW 48.31.155 provides that funds subject to distribution in the receiver’s possession at the conclusion of a liquidation proceeding escheat to the State by operation of law if they are not claimed by the person legally entitled to them within six years from the date of the receiver’s discharge. Mr. Bell contends the statute is facially unconstitutional in authorizing the escheat of property without notice. Br. of Appellant at 14. Alternatively, Mr. Bell claims the statute is unconstitutional as applied because the Department failed to notify him within the statutory claims period. *Id.* at 16. Mr. Bell is not a proper party to assert this constitutional challenge because RCW 48.31.155 does not affect his interests.

Standing requires that litigants in an action have a direct and substantial interest in the outcome of the litigation. *To-Ro Trade Shows v. Collins*, 144 Wn.2d 403, 414, 27 P.3d 1149 (2001) (trade show promoter lacked standing to challenge statutory licensing requirements for out-of-state auto dealers). Accordingly, a litigant lacks “standing to challenge a statute on constitutional grounds unless the litigant is harmed by the particular feature of the statute which is claimed to be unconstitutional.” *Kadoranian by Peach v. Bellingham Police Dep’t*, 119 Wn.2d 178, 191, 829 P.2d 1061 (1992).

RCW 48.31.155 affects the ownership interests of the absent distributees of a liquidated insurer. It applies to persons entitled to a distribution from the estate who had not been paid when the court discharged the receiver. Only the seven claimants who failed to negotiate their distribution checks and were identified to the State Treasurer as persons entitled to payment, *see* CP 211-13, could have claimed the funds during the six-year statutory claims period provided by RCW 48.31.155. No one whose property escheated under the statute is before the Court.

Mr. Bell was not harmed that RCW 48.31.155 provides for the automatic escheat of unclaimed funds held by the state on behalf of the absent distributee of an insolvent insurer after six years. The State never held unclaimed funds on Mr. Bell’s behalf. Mr. Bell is not entitled to

payment because the King County receivership proceeding extinguished his interests in the assets of the PacMar estate.

The Insurance Commissioner is vested with “the title to all of the property, contracts, and rights of action” of the insurer upon entry of an order of liquidation. RCW 48.99.020(2). The nature and effect of the liquidation order was to allow the receiver to marshal PacMar’s assets and to use those assets to satisfy the claims of creditors. *Brown v. ANA Ins. Group*, 994 So.2d 1265 (La. 2008) (“considering that title to all of the [insolvent insurer’s property] was vested with the Commissioner once the order of liquidation was entered, [the purported owner] would have been divested of any alleged ownership interest by the court’s liquidation order”).

Giving proper effect to the final orders entered in the liquidation proceeding, Mr. Bell was not, and is not now, entitled to any portion of the undistributed funds from the PacMar estate. He has no standing to challenge the validity of the escheat provision in RCW 48.31.155.

D. The Trial Court Correctly Held The Final Orders Entered In The King County Proceeding Control Who Owns Any Interest In The Undistributed Assets Of The PacMar Estate.

- 1. The orders entered by the King County Court are res judicata of the ownership interests in the assets of the PacMar estate.**

In providing a right of action in the Thurston County Superior Court to a person aggrieved by the Department's denial of an unclaimed property claim, the Legislature did not authorize a collateral attack on a prior adjudication of the ownership interests in funds held by the State. The final orders entered in the King County receivership proceeding are res judicata of the ownership interests in the funds the State received from the PacMar receiver.

The doctrine of res judicata bars relitigation of a claim that has already been decided, or that could have been decided, in a prior action. *Loveridge v. Fred Meyer, Inc.*, 125 Wn.2d 759, 763, 887 P.2d 898 (1995). For res judicata to apply, a subsequent action must have identity of (1) subject matter, (2) causes of action, (3) persons and parties, and (4) the quality of the persons for or against whom the claim is made. *Rains v. State*, 100 Wn.2d 660, 674 P.2d 165 (1983). This requirement is met here.

The King County Superior Court's order approving final distribution is a final adjudication on the merits of the interests in the assets of the PacMar estate. That order affirmed the appointment of the statutory receiver, approved the final distribution plan, and directed the receiver to deposit the unclaimed and undistributed funds with the State in accordance with RCW 48.31.155. CP 188. The court's subsequent order disposing of the funds the receiver obtained after the closure of the

receivership likewise was a final adjudication on the merits as to those funds. CP 227.

In determining identity of subject matter, courts generally focus on the asserted theory of recovery rather than simply the facts. *Marshall v. Thurston Cnty.*, 165 Wn. App. 346, 353-54, 267 P.3d 491 (2011). Mr. Bell claims ownership of the undistributed funds by virtue of his status as the owner of PacMar's sole shareholder, the defunct Pacific Marine Holding Company. The direct purpose of the liquidation proceeding was to finally and conclusively settle all of the estate's assets and liabilities, including those of PacMar's shareholders. *See* RCW 48.31.260 (rights and liabilities of all interested persons, including "stockholders," are fixed as of the date of the liquidation order). The receiver was vested with the power to marshal and distribute PacMar's assets in accordance with the statutory priority of claims provided by RCW 48.31.280. *Cf. Brown v. ANA Ins. Group*, 994 So.2d 1265 (La. 2008) (entry of liquidation order divests shareholders of any ownership interest and authorizes the statutory receiver to marshal the assets of an insolvent insurer and use them to satisfy the claims of creditors). Thus, the subject matter is identical.

The causes of action also are identical for purposes of *res judicata*. This element is satisfied when the operative facts and the relief sought are substantially the same in both actions. *Sound Built Homes, Inc. v.*

Windermere Real Estate/South, Inc., 118 Wn. App. 617, 630-631, 72 P.3d 788 (2003); Restatement (Second) of Judgments § 24 (1982); Philip A. Trautman, *Claim and Issue Preclusion in Civil Litigation in Washington*, 60 Wash. L. Rev. 805, 817-18 (1997). The purpose of the liquidation proceeding was to marshal PacMar's assets and distribute them in accordance with the statutory priority of claims. In both actions, Mr. Bell's alleged interest arises from his status as the owner of PacMar's sole corporate shareholder. The liquidation proceeding settled all interests in the estate's assets as between PacMar's shareholders and all other claimants, including the assets received on behalf of the PacMar estate after the receiver's discharge.

In their summary judgment briefing below, the plaintiffs argued the parties were not identical for purposes of res judicata, stating: "Plaintiffs were not parties to the King County receivership action—the estate and the receiver did not provide them with notice of the availability of funds or of the claims notice and bar orders." CP 238. The contention that PacMar was not a party to the receivership or that it lacked notice of its own liquidation is nonsensical. PacMar was the subject of the liquidation proceeding. *See* Restatement (Second) of Judgments, § 34(1) (1982) ("A person who is named as a party to an action and subjected to the jurisdiction of the court is a party to the action.").

Mr. Bell also was a party to the proceeding by virtue of the receiver's appointment. A person who is represented by a party is bound by a judgment as though he or she were a party. Restatement (Second) of Judgments § 41(1) (1982). A person is represented by a party who is "[a]n official or agency invested by law with authority to represent the person's interests." *Id.*, at § 41(1)(d). A receiver has authority to represent the estate of an insolvent insurer and the interests of those who are its beneficiaries. RCW 48.31.040(4) (entry of rehabilitation order "by operation of law vests title to all assets of the insurer" in the receiver); *cf. De Muth v. Kleeb*, 114 Wash. 607, 195 P. 996 (1921) (as the representative of creditors' rights, actions of bankruptcy trustee has conclusive effect and binds creditors); *Nevada v. United States*, 463 U.S. 110, 103 S. Ct. 2906, 77 L. Ed. 2d 509 (1983) (Indian tribes bound by orders establishing priority of claims in water rights litigation notwithstanding federal government's representation of conflicting interests of tribes, private parties, and local governments); *Department of Ecology v. Yakima Reservation Irr. Dist.*, 121 Wn.2d 257, 293-94, 850 P.2d 1306 (1993) (tribes bound by consent decree obtained by federal government to settle water rights litigation).

Finally, the quality of the parties is the same. "Identity of parties is not a mere matter of form, but of substance." *Rains*, 100 Wn.2d at 664

(finding this element met where one suit named members of commission in their individual capacities and subsequent action named the state and commission as defendants). In substance, Mr. Bell claims an ownership interest in the assets of the PacMar estate as the owner of the sole shareholder of the insolvent insurer. The statutory receiver, however, represented the interests of Mr. Bell and all other persons interested in the assets of the PacMar estate during the receivership proceeding.

Mr. Bell argues the receiver's failure to notify him of the claims-filing deadline or the receipt of additional funds following the closure of the receivership deprived him of due process. Br. of Appellant at 17. The trial court correctly declined to address the merits of that argument.

In determining whether a person whose interests were represented by another should be bound by a judgment, the question is whether the represented party had notice of the court's appointment of the executor, administrator, guardian, receiver, or similar beneficiary manager. Restatement (Second) of Judgments § 41, at 397. A receiver's actions cannot be collaterally attacked by a person who had notice of the receiver's appointment and failed to object. *Ganoung v. Chinto Mining Co.*, 26 Wn.2d 566, 567, 174 P.2d 759 (1946); *Golden v. McGill*, 3 Wn.2d 708, 102 P.2d 219 (1940) (order approving final accounting and distribution of estate assets precluded litigation of any claim that could

have been raised in probate proceeding by person with notice of the proceeding) (summarizing cases); *In re Ostlund's Estate*, 57 Wash. 359, 106 P. 1116 (1910) (decree of distribution following probate conclusively resolved all potential claims by children of deceased, where notice of the proceeding was published as required by statute).

It is undisputed that Mr. Bell had notice of the receiver's appointment. Mr. Bell participated in the receivership, through counsel, at least during the first year of the receivership. CP 44 ("I had counsel for a short time in the various lawsuits, but I did not have a lawyer in any of the proceedings referenced herein since approximately 1988."); CP 330 (receiver's first report to the court, reporting cooperation by PacMar's former officers following entry of rehabilitation order). Mr. Bell also provided a sworn statement in a lawsuit the receiver brought on PacMar's behalf against the accounting firm that allegedly aided Mr. Bell in concealing his improper self-dealing. CP 68; CP 249 (receiver's report describing accounting firm's probable liability for helping Mr. Bell disguise his ownership and control of various entities).

Mr. Bell was the defendant in a lawsuit filed by the Insurance Commissioner "as Receiver for and on behalf of Pacific Marine Insurance Company, a Washington Corporation and Property Marine Insurance Company, Ltd., its Australian subsidiary." CP 56. The first paragraph of

that lawsuit described the court's appointment of a receiver and the receiver's authority to act "for and on behalf of Pacific Marine Insurance Company pursuant to the authority vested in him by RCW 48.31.40 and RCW 48.31.123, by the common law and by the power inherent to the position of Receiver." CP 56-57.

As a person with notice of the pendency of the receivership, Mr. Bell had the opportunity to monitor the progress of the receivership. The receiver acts under the court's supervision, and must file periodic accountings. RCW 48.31.040(5). According to the court docket, the PacMar receiver filed more than thirty reports with the court at regular intervals during the receivership, which lasted more than twelve years.

Any person who can demonstrate a legal interest in the receivership estate or a reasonable suspicion of negligence or malfeasance by the receiver related to the receivership may move the court for an order to inspect the estate's records. RCW 48.31.025(3). In addition, any interested person may at any time apply for an order terminating the rehabilitation proceeding. RCW 48.31.040(3).

Having failed to avail himself of the process available to those claiming an interest in a receivership estate, Mr. Bell cannot now collaterally attack the receiver's actions.

2. The doctrine of collateral estoppel precludes the plaintiffs from relitigating the issue of their interest in the assets of the PacMar estate.

Even if res judicata did not preclude the plaintiffs' claim, the doctrine of collateral estoppel does. Collateral estoppel prevents a second litigation of issues between parties. It applies when four elements are met: (1) identity of issues, (2) a final judgment on the merits, (3) identity of parties, and (4) application of the doctrine does not work an injustice.

Rains, 100 Wn.2d at 665.

Not only are the claims identical in both actions, but so is the central determinative issue. As discussed above, the issue in both actions is whether Mr. Bell is entitled to any ownership interest in the assets of the PacMar estate. The final orders entered in the King County Superior Court finally and conclusively determined all ownership interests in those assets. The statutory receiver acted on behalf of all beneficiaries of the assets of the insolvent insurer, including Mr. Bell, who claims an interest as PacMar's shareholder. The application of the doctrine of collateral estoppel will not work an injustice on Mr. Bell. He had an opportunity to litigate his claim in the receivership, which lasted a dozen years. Mr. Bell participated in the receivership early on, but then withdrew for his own reasons. He did not claim an interest in the PacMar estate until more than a decade after the court entered the final order of liquidation.

Mr. Bell's due process claim related to the disposition of the estate assets is an impermissible collateral attack on the final orders entered in the receivership proceeding. "A collateral attack may be maintained only against a final order or judgment which is absolutely void, not merely erroneous or voidable, and then only on the basis of fraud going to the very jurisdiction of the court." *Mueller v. Miller*, 82 Wn. App. 236, 250-51, 917 P.2d 604 (1996) (citations omitted). A judgment is void when the court does not have subject matter jurisdiction or lacks the inherent power to enter the order involved. *Marley v. Dep't of L&I*, 125 Wn.2d 533, 886 P.2d 189 (1994). Mr. Bell does not even attempt to meet this standard.

It is undeniable that King County had subject matter jurisdiction over the PacMar liquidation. *See* RCW 48.31.111; RCW 48.31.131(1) (providing for abatement of all actions against insurer upon appointment of the receiver); *Ginsberg v. Katz*, 27 Wn. App. 593, 597, 619 P.2d 995 (1980) ("A basic premise of receivership law is that possession by the court of the res gives that court power to determine all questions concerning the ownership and disposition of property."). "If the court had jurisdiction, its judgment, unappealed from, is final as between the parties, however erroneous it might have been." *Smith v. Hopkins et al.*, 10 Wash. 77, 79, 38 P. 854 (1894) (shareholders could not collaterally attack receiver's appointment in defense to an action brought by the receiver to

recover the assets of an insolvent insurer).

The trial court correctly concluded it lacked subject matter jurisdiction to disturb the orders entered by the King County Superior court or to reopen the receivership proceeding. Mr. Bell's sole remedy for alleged deficiencies in that proceeding, if any, is to petition the King County Superior Court to reopen the receivership.

E. Neither PacMar Nor Robert Bell Has Capacity To Sue.

This Court may affirm the trial court's summary judgment order on the additional ground that neither PacMar nor Mr. Bell had capacity to bring this suit.

PacMar's corporate existence was terminated more than a decade ago as a result of the liquidation proceeding. CP 204 (Order of Discharge of Receiver and Closure of Receivership Estate). A dissolved corporation lacks capacity to sue. *Follett v. Clark*, 19 Wn.2d 518, 521, 143 P.2d 536 (1943); *Inducon Corp. v. Crowley Maritime Corp.*, 53 Wn. App. 872, 771 P.2d 356 (1989) (administrative dissolution precluded corporation from maintaining an action in court). As a result of the liquidation proceeding, PacMar ceased to exist for all purposes and could not maintain an action in court. *Cf. Flint Cold Storage v. Dep't of Treasury*, 285 Mich. App. 483, 776 N.W.2d 387 (2009) (affirming summary judgment order dismissing unclaimed property claim by dissolved corporation).

Moreover, Robert Bell has no standing to act on PacMar's behalf. When a corporation is placed in receivership its officers cease to have authority to act for it. *Texas Mut. Ins. Co. v. Stutes*, 77 So.2d 43 (La. Ct. App. 1954). Mr. Bell was divested of his power to act on behalf of PacMar when the court placed it in receivership. The receiver alone was the proper party to bring suit by or on behalf of PacMar.

Like PacMar, the Pacific Marine Holding Company is a defunct corporation that lacks capacity to sue. CP 337 (bankruptcy proceeding filed on August 4, 1987). Only the bankruptcy trustee was entitled to bring an action on behalf of that entity, not Mr. Bell. Mr. Bell lacks standing to claim assets that purportedly belong to the Pacific Marine Holding Company, PacMar's sole shareholder.

V. CONCLUSION

The trial court correctly dismissed the plaintiffs' complaint with prejudice. The final orders entered in the King County Superior Court receivership proceeding determined the ownership interests in the assets of the PacMar estate. Neither PacMar nor Mr. Bell is entitled to any distribution from the PacMar estate under those orders. The Thurston County Superior Court correctly concluded it lacked jurisdiction to disregard the orders or to reopen the receivership proceeding. Thus, this Court should affirm the trial court's summary judgment order.

RESPECTFULLY SUBMITTED this 22nd day of February, 2013.

ROBERT W. FERGUSON
Attorney General

A handwritten signature in cursive script that reads "Rosann Fitzpatrick".

ROSANN FITZPATRICK
Assistant Attorney General
WSBA No. 37092
Attorneys for Respondent

APPENDIX A-1

Superior Court of the State of Washington
For Thurston County

Paula Casey, Judge
Department No. 1
Thomas McPhee, Judge
Department No. 2
Christine A. Pomeroy, Judge
Department No. 3
Gary R. Tabor, Judge
Department No. 4



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Chris Wickham, Judge
Department No. 5
Anne Hirsch, Judge
Department No. 6
Carol Murphy, Judge
Department No. 7
Lisa L. Sutton, Judge
Department No. 8

May 18, 2012

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ATTORNEY GENERAL'S OFFICE
REVENUE DIVISION

LETTER OPINION

Re: *Pacific Marine Insurance Co et al v. State of Washington*
Thurston County Cause No. 11-2-00655-4

Dear Counsel:

This matter came before the court on plaintiffs' motion for summary judgment. Plaintiff Pacific Marine Insurance Company is a defunct insurer that was liquidated under Washington's insolvency statutes following a receivership proceeding in King County Superior Court. Plaintiff Robert Bell also asserts an ownership interest in the PacMar estate due to his shareholder status in the former parent corporation. The court heard 1 hour of oral argument on May 17, 2012 and took this matter under advisement. The court has reviewed all of the pleadings filed including the history of the King County receivership, which the State provided as background information. This letter opinion follows.

The parties agree that the issue before this court is simple—who has ownership of the unclaimed property currently held by the Washington State Treasurer in the amount of \$73,614.75 or, alternatively stated, did the State properly deny plaintiffs' request to return the money to them as rightful owners. The parties' briefs amply set out their legal positions and the Court will not recite them in detail.

Plaintiffs made a number of procedural arguments related to the lack of notice of the receivership and final distributions, which they claim they did not know about during the

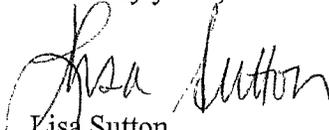
receivership process. *See* affidavit of Robert Bell, p. 3. Paragraph 8. Plaintiffs also claim that such lack of notice constitutes a violation of due process that precludes the State from denying plaintiffs' request to return the property to them under the escheat statute, RCW 63.29.260.

This court has no subject matter jurisdiction over the King County receivership nor any ability to order any additional remedies as a result of any deficiencies (if any) in that process. The only issue before this court is the application of RCW 63.29.260 with respect to the \$73,614.75 held by the State. Thus, the final orders entered in the receivership control. Whether or not Mr. Bell was properly a "claimant" in the PacMar estate, or not, is not an issue this Court can or should decide. Nor should this court decide the nature of any notice, or not, PacMar or Mr. Bell should have received in the receivership matter.

Plaintiffs point to statements by state officials (internal communications between the State Treasurer and Dept. of Revenue). Plaintiffs claim those statements (about what should be done with the remaining property) bind the State. This argument is not well taken under the case law relating to when estoppel applies to the State, or whether the State's denial of plaintiffs' claimed ownership interest is proper, which is the only issue now before this Court.

Under the summary judgment standard, CR 56, plaintiffs have failed to meet their burden to establish that they are entitled as a matter of law to recover the remaining property held by the State, payment of interest, or any order allowing plaintiffs to recover additional funds received after the closing of PacMar's liquidation proceedings. For these reasons, plaintiffs' motion for summary judgment is denied and their complaint is dismissed with prejudice. The State is directed to prepare an Order consistent with this ruling.

Sincerely yours,


Lisa Sutton
Superior Court Judge

LS/dkr

cc: Court File

PROOF OF SERVICE

I certify that I served a copy of this document, via email and U.S. Mail, postage prepaid, through Consolidated Mail Services, upon the following:

Kevin P. Sullivan
The Sullivan Law Firm
701 Fifth Avenue, Suite 4600
Seattle, WA 98104
k.sullivan@sullivanlawfirm.org

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 22nd day of February, 2013, at Tumwater, WA.



Julie Johnson, Legal Assistant

WASHINGTON STATE ATTORNEY GENERAL

February 22, 2013 - 4:09 PM

Transmittal Letter

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Court of Appeals Case Number: 43719-8

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- Personal Restraint Petition (PRP)
- Response to Personal Restraint Petition
- Reply to Response to Personal Restraint Petition
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Comments:

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