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NO. 55055-1-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

EDWIN HERRING, for himself and as Personal Representative of the
Estate of ROGER HERRING,

Appellant,

v.

TODD SHIPYARDS CORPORATION,

Respondent.

RESPONDENT'S BRIEF

William H. Beaver, Jr., WSBA # 9205
Walter E. Barton, WSBA # 26408
KARR TUTTLE CAMPBELL
1201 Third Avenue, Suite 2900
Seattle, WA 98101-3028
(206) 223-1313
Attorneys for Respondent Todd Shipyards
Corporation

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A. Identity of Respondent

Respondent Todd Shipyards Corporation (“Todd”) submits this brief pursuant to RAP 10.1.

B. Assignments of Error

Todd makes no assignments of error as it has not filed a cross appeal.

C. Statement of the Case

1. Mr. Herring’s Two Actions

Roger Herring worked as an asbestos insulator from 1958 to the mid-1970s. *See* Plaintiff’s Complaint for Personal Injury, CP 113. Mr. Herring filed suit on or about **February 10, 1989**, alleging that he had “developed an asbestos-related disease” and that he had “first learned in August 1986 that he has an asbestos-related disease caused by asbestos exposure.” CP 112–113. Mr. Herring sought damages for “severe personal injury,” including “past and future disability; pain and suffering both physical and emotional; greatly increased risk of further disease; anxiety and fear of further disease; shortening of life expectancy; and interference with normal life.”¹ CP 115. Todd was not

¹ At the time, Mr. Herring could have received damages for his expressed fear of contracting further disease, including cancer due to his asbestos exposure. *See Jackson v. Johns-Manville Sales Corp.*, 781 F.2d 394 (5th Cir.), *cert. denied*, 106 S. Ct. 3339 (1986).

named in the 1989 suit (CP 112), which ultimately settled (CP 131). After being diagnosed with mesothelioma, Mr. Herring filed suit against new defendants in October 2002. In December 2003, Mr. Herring amended his complaint to add Todd as a defendant. CP 7–11.

Mr. Herring’s work at Todd apparently was so insignificant that it took him 14 months to add Todd as a defendant in his second lawsuit and he did not mention Todd among his work sites in either his 1992 or 2003 interrogatory responses. CP 134–136, 338–339.² At best, in a 2004 declaration, Mr. Herring could recall only that he worked on ships at Todd “from time-to-time” during the 1960s and 1970s. CP 348–349.

2. *Todd’s Bankruptcy*

Todd Shipyards Corporation and Todd-Pacific Shipyards Corporation filed a voluntary petition for Chapter 11 reorganization on

² Appellant cites to CP 339 for the assertion that “[o]ne of the places where (Mr. Herring) was dispatched to insulate pipes was Todd Shipyards . . . , where, during the 1960s and 1970s, he worked aboard ships.” Appellant’s Brief at 2. There is no support for such a statement at CP 339. Appellant also asserts:

During the time period (Mr. Herring) was at Todd in the mid-1960s, he was exposed to asbestos both from his own handling and manipulation of asbestos-containing insulation materials and that of other employees of Todd.

Appellant’s Brief at 2. Appellant cites to CP 339, 348 and 582 for this statement. Again, Todd is not mentioned at CP 339. Mr. Herring’s declaration at CP 348–349 never mentions the words “asbestos” or “exposure” or any of its root forms. CP 582 is a page from a scientific article. In short, there is nothing *factual* in the record establishing that Mr. Herring was exposed to asbestos at Todd and, thus, no facts in the record to support Appellant’s assertion that Mr. Herring had an asbestos-related claim of which Todd should have been aware in 1988.

August 17, 1987, in the United States Bankruptcy Court for the District of New Jersey. CP 46 at ¶ 5. The bar date for filing proofs of claims was **June 6, 1988**. CP 46 at ¶ 6; CP 207. The Bankruptcy Court's March 8, 1988 Order (i) Reconfirming Bar Date for the Filing of Proofs of Claim or Interest and (ii) Providing for Supplemental Notice Thereof provided:

ORDERED, that any holder of any claim or interest required to be filed by the preceding decretal paragraphs that fails to properly file such proof of claim or interest on or before the Bar Date shall be (i) forever barred from asserting that claim or interest against the Debtors and from voting on a plan(s) of reorganization in the Debtors' Chapter 11 cases or sharing in any distribution thereunder, and (ii) bound by the terms of any such plan(s) of reorganization confirmed by the Court; and it is further

ORDERED, that the Debtors, or Claudia King & Associates, Inc. ("King") on the Debtor's behalf, on or before March 18, 1988, shall give notice of the Bar Date by mailing a Notice of Bar Date for Filing Proofs of Claim or Interest in the form annexed hereto as Exhibit A (i) to all known stockholders and note holders at their last known addresses as of the date of entry of the Order, as reflected in the books and records of the Debtors, the indenture trustees and the stock transfer agents, and (ii) to all creditors listed on the Debtor's respective Schedules at the addresses stated therein; and it is further

. . . .

ORDERED, that the Debtors shall arrange to be published on or before March 18, 1988 a copy

of the Notice of Bar Date for Filing Proofs of Claim or Interest in the form annexed hereto as Exhibit B once in each of the following newspapers: The New York Times (national edition), The Wall Street Journal (national edition), The Journal of Commerce, The Washington Post, The Newark Star Ledger, The Los Angeles Times, The San Francisco Examiner, The San Pedro News Pilot, The New Orleans Times Picayune, The Seattle Times, The Houston Post, and The Galveston Daily News; and it is further

ORDERED, that the notice of the Bar Date by mail and by publication as provided for herein on or before March 18, 1988 shall be deemed good and sufficient notice of the Bar Date pursuant to Section 1111(a) of the Code and Bankruptcy Rule 3003.

CP 210-211.

On March 16, 1988, and pursuant to the Bankruptcy Court's order, Todd published notice of the bar date in several newspapers, including the Seattle Times, the Seattle Post-Intelligencer, and the national editions of The New York Times and the Wall Street Journal. CP 46-47 at ¶ 6; CP 51-56.³

The Third Amended Joint Plan of Reorganization was dated October 26, 1990. CP 47 at ¶ 7; CP 58-76. The Bankruptcy Court entered the Order Confirming Debtors' Third Amended Joint Plan of Reorganization on December 14, 1990. CP 47 at ¶ 8; CP 78-101.

³ During this time period, Mr. Herring was a resident of Marysville, Washington. CP 329.

Pursuant to the Bankruptcy Court's order, notice of the confirmation hearing was published in the national editions of the Wall Street Journal and The New York Times on November 2, 1990. CP 47 at ¶ 9; CP 103–106. The notice also was published in the Seattle Times and Seattle Post-Intelligencer on the same days. CP 47 at ¶ 9. Notice of entry of the confirmation order was published in the same newspapers on December 28, 1990. CP 47 at ¶ 9; CP 108. In addition, Todd's bankruptcy was widely publicized in Seattle-area newspapers and reported on the television news. CP 49 at ¶ 14; CP 142–157.

Mr. Herring and the fact that he might have *any* claim against Todd was unknown to Todd during its bankruptcy proceedings. Mr. Herring did not file his original 1989 action until after the June 6, 1988 claims bar date, so Todd could not have known of Mr. Herring's legal claims against *any* party, let alone Todd — which, again, was not named as a defendant in the 1989 suit — prior to the date by which all claims had to be asserted in the bankruptcy or be discharged. Mr. Herring was never an employee of Todd or any of its affiliates. CP 48 at ¶ 10. Todd did not learn of Mr. Herring and his claims against it until Todd was named in this action in 2003. CP 49 at ¶ 15.

Todd made diligent efforts to identify and notify potential creditors of its bankruptcy. CP 48 at ¶¶ 12–13. Todd's efforts included

notifying entities and individuals on its accounts receivable and accounts payable registers, notifying everyone who conducted business with Todd, “notifying all unions representing Todd’s employees,” and “identif[ying] its subcontractors as entities to whom it would send actual notice.” CP 48 at ¶ 13.⁴ Michael Marsh, Todd’s Secretary and General Counsel, further attested:

As counsel for Todd during its bankruptcy, I was aware that Todd was required to make a diligent search to discover and notify possible claimants. I was also a member of Todd Shipyards’ management team charged with the responsibility of identifying those entities to which Todd Shipyards would provide actual notice of its bankruptcy filing. However, Todd was not able nor required by the Bankruptcy Court to locate and notify all of its previous employees, the employees of subcontractors or others who conceivably could have claims against Todd. Had Todd been required to somehow retrieve the books and records relating to all of its previous employees, this not only would have been unreasonable, but it would not have turned up Mr. Herring’s name.

⁴ Mr. Herring was a member of the Asbestos Workers Union (“AWU”), Local No. 7. CP 341. It is undisputed that members of the AWU were not Todd employees, but worked at Todd as employees of subcontractors. Appellant seeks to inject a question of fact into this case by reference to declarations that Mr. Marsh submitted in *prior* cases, including a 1996 case involving Todd and Appellant’s counsel, but involving different plaintiffs, and one in a Texas case. See Appellant’s Brief at 5–6, 9–10. In this respect, Appellant placed one such declaration into the record in response to Todd’s summary judgment motion. CP 453–456. Mr. Marsh’s statement in that July 8, 1996 declaration was that Todd had “notif[ied] all unions whose members had worked at Todd Shipyards.” CP 456. Mr. Marsh’s March 17, 2004 declaration *filed in this case* clarifies this statement. Mr. Marsh’s July 8, 1996 declaration and a statement by the Texas court regarding another prior declaration by Mr. Marsh simply are not relevant evidence in this case.

In order to identify Mr. Herring, Todd would have had to identify the employees of the hundreds of subcontractors who have worked for Todd over the years. Not only has Todd never possessed such information, but Todd would not be privy to it even if all the subcontractors could be identified and contacted. In addition, the Bankruptcy Court did not order Todd to undertake such a search.

Todd conducted the most diligent search for creditors which Todd's resources permitted. Any further efforts to locate possible creditors would have been impractical based upon Todd's limited manpower resources, the state of Todd's books and records, and the financial and time constraints imposed upon Todd by Todd's bankruptcy proceedings. For this reason, Todd relied upon published notice, as ordered by the Bankruptcy Court, to inform those persons whose existence was not revealed by Todd's extensive search.

CP 47-48 at ¶¶ 10-13. Mr. Herring presented no evidence to rebut any of Mr. Marsh's statements.

3. *The Proceedings Below*

Todd moved for summary judgment on March 19, 2004, on grounds that Mr. Herring's claims had been discharged in Todd's bankruptcy. The motion was based on three factors: 1) because Mr. Herring had been diagnosed with an "asbestos-related disease" in August 1986 (CP 113), his claim against Todd constituted a prepetition "claim" dischargeable in Todd's bankruptcy; 2) Mr. Herring was an "unknown" creditor entitled only to publication notice of Todd's bankruptcy and the claims bar date; and 3) Todd published effective

notice of its bankruptcy and the claims bar date pursuant to the order of the Bankruptcy Court. CP 21–44. The trial court, the Hon. Linda Lau, granted Todd’s motion on July 21, 2004, specifically finding that “Plaintiff’s claims were discharged in bankruptcy.” CP 641–642.

D. Argument

1. Standard of Review

On a summary judgment appeal, the Court engages in the same inquiry as the trial court. *Degel v. Majestic Mobile Manor, Inc.*, 129 Wn.2d 43, 48, 914 P.2d 728 (1996). Summary judgment is appropriate if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. CR 56(c); *Schaaf v. Highfield*, 127 Wn.2d 17, 20, 896 P.2d 665 (1995). In responding, the non-moving plaintiff, “by affidavits or as otherwise provided in this rule [CR 56], must set forth *specific* facts showing that there is a genuine issue for trial.” *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225–26, 770 P.2d 182 (1989) (emphasis added).

If the plaintiffs, as nonmoving party, can only offer a “scintilla” of evidence, or evidence that is “merely colorable,” or evidence that “is not significantly probative,” the plaintiffs will not defeat the motion.

Margoles v. Hubbart, 111 Wn.2d 195, 199, 760 P.2d 324 (1988).

“Likewise, conclusory statements of fact will not suffice.” *Grimwood v.*

University of Puget Sound, Inc., 110 Wn.2d 355, 359–60, 753 P.2d 517 (1988). Purported issues of material fact must rest on more than “speculation and conjecture.” *Koch v. Mutual of Enumclaw Ins. Co.*, 108 Wn. App. 500, 509, 31 P.3d 698 (2001).

2. *Appellant’s Theory Is Based on a Hypothetical Construct, Not Facts in the Record.*

Appellant has abandoned a number of theories upon which Mr. Herring relied in opposing Todd’s motion before the trial court. Appellant does not dispute that the claim asserted by Mr. Herring against Todd in his 2003 amended complaint and related to his 2002 mesothelioma diagnosis arose prior to the filing of Todd’s bankruptcy petition and, therefore, constituted a “claim” dischargeable in Todd’s bankruptcy. Appellant does not dispute that Todd’s publication notice was sufficient to adequately apprise unknown creditors of its bankruptcy. Appellant does not contend that Mr. Herring was a “future” claimant who, along with other such “future” claimants, should have been afforded special dispensation in Todd’s bankruptcy and whose claims could not be discharged through publication notice.

Rather, Appellant’s only assertion is that Mr. Herring was a “known” creditor, rather than an “unknown” creditor, because his identity conceivably *could* have been discovered by Todd, but was not,

because Todd allegedly failed to conduct a reasonably diligent search for potential creditors. Thus, Appellant contends that Mr. Herring was entitled to actual notice of Todd's bankruptcy and, having failed to receive such notice, his claim could not have been discharged.⁵

Appellant here confuses the burden in opposing a motion for summary judgment with the burden in opposing a motion to dismiss under CR 12(b)(6). A plaintiff may defeat a motion to dismiss by positing a hypothetical scenario that, if true, would preclude dismissal.

“[A]ny hypothetical situation conceivably raised by the complaint defeats a CR 12(b)(6) motion if it is legally sufficient to support plaintiff's claim.” Hypothetical facts may be introduced to assist the court in establishing the “conceptual backdrop” against which the challenge to the legal sufficiency of the claim is considered.

We have held that in determining whether such facts exist, a court may consider a hypothetical situation asserted by the complaining party, not part of the formal record, including facts alleged for the first time on appellate review of a dismissal under the rule. . . . [T]he inquiry on a CR 12(b)(6) motion is whether any facts which would support a valid claim can be conceived.

Bravo v. The Dolsen Cos., 125 Wn.2d 745, 750, 888 P.2d 147 (1995)
(quoting *Halvorson v. Dahl*, 89 Wn.2d 673, 674, 574 P.2d 1190 (1978)).

⁵ Unknown creditors need not receive actual notice of a bankruptcy; publication notice suffices. *New York v. New York, New Haven & Hartford R.R. Co.*, 344 U.S. 293, 296, 73 S. Ct. 299, 301, 97 L.Ed. 333 (1953) (“[W]hen the names, interests and addresses of persons are unknown, plain necessity may cause a resort to publication.”).

However, in opposing a motion for summary judgment, the non-moving party “must set forth *specific* facts showing that there is a genuine issue for trial.” *Young*, 112 Wn.2d at 225–26. A fact, for purposes of a motion for summary judgment, is an event, an occurrence, or something which exists in reality as distinguished from supposition or opinion. *Grimwood*, 110 Wn.2d at 359. A plaintiff may not rely on “conclusory statements of fact” or “speculation and conjecture.” *Id.* at 359–60; *Koch*, 108 Wn. App. at 509.

The hypothetical that Appellant urges upon the Court here is that Todd could have or would have discovered Mr. Herring had it looked harder; more particularly, that Todd would have discovered Mr. Herring if it had contacted his union, the Asbestos Workers Union (“AWU”). CP 136–137.⁶ There are no “specific facts” in the record that support this premise; rather, it is based wholly on “speculation and conjecture” and rises to no more than a “conclusory statement of fact.” In an effort to avoid this conclusion, Appellant asks the Court to “infer” from the bare facts submitted that Todd would have discovered Mr. Herring had it looked harder. Appellant’s Brief at 9.

⁶ While there is no evidence in the record that Todd notified the AWU of its bankruptcy, it had no legal duty to do so. *See* note 11, *infra*. Plus, with respect to Mr. Herring, Todd did the next best thing or what might even be considered a preferable alternative: Todd notified its subcontractors, which would have included Mr. Herring’s employer. *See* CP 48, 133–134.

A reasonable inference is that if Todd had asked the Local to provide it with the names and addresses of its members who had worked at Todd or if Todd had asked the Local to ask its members who had worked at Todd to notify Todd of their names and addresses, the Local would have done so. Todd thus would have had Mr. Herring's name and address.

Id. This is not an inference, but speculation and guesswork.⁷

The inference itself also must be based on “specific facts” in the record. Appellant has placed no facts in the record demonstrating that — even had Todd contacted the AWU in 1988 and asked it to search its records for members who had ever worked at Todd — the union would have come up with Mr. Herring's name. There is no evidence in the record even suggesting that the union would have searched decades of records for thousands of members to come up with this information. There is no evidence in the record that the union's records would have reflected that Mr. Herring had ever worked at Todd. Appellant has placed no facts in the record demonstrating that had the AWU been contacted by Todd it would have provided Todd with the names and addresses of its members. Appellant has placed no facts in the record demonstrating that the AWU, in fact, would have forwarded any such

⁷ An inference is “a logical and reasonable conclusion of a fact not presented by direct evidence but which, by process of logic and reason, a trier of fact may conclude exists from the established facts.” *Black's Law Dictionary* at 779 (West 1990).

notice from Todd to its members, that Mr. Herring would have received it or that Mr. Herring would have, in turn, contacted Todd and asserted a claim.

The above requested inference is based solely upon the following statement contained in the 1999 declaration of a member of the AWU:

It is my belief that had the union been notified of the Todd Shipyards bankruptcy, it would have notified its members by publication and/or during union meetings, which to my knowledge, was never done.

CP 590 (*see* Appellant's Brief at 6, 10). What this does not say is that the union, in fact, did not provide such notice or that it would have provided such notice to its members or that all members, particularly Mr. Herring, would have received it or would have responded to it. It is interesting that Appellant apparently asserts that publication notice through the union would have been more constitutionally effective than the publication notice ordered by the Bankruptcy Court.

Inferences must be reasonable, not leaps of faith. It was no secret — in fact, it was widely publicized — that Todd had filed for bankruptcy. The process lasted for more than two years. Yet Mr. Larson and other union members put forth by Appellant say they knew nothing about it. The reasonable inference to be drawn from this is that the union knew about Todd's bankruptcy, but did not bother to

inform its membership. There is no reasonable inference to be drawn from the facts in the record that Todd would, in fact, have discovered Mr. Herring had it looked harder. Instead, Appellant wants the Court to accept as true its hypothetical that Todd would have found Mr. Herring.

Further, in order to accept Appellant's hypothetical construct and reverse the trial court, this Court also would have to accept as true an additional, unstated hypothetical premise: that, even had Todd located and contacted Mr. Herring, Mr. Herring would have notified Todd of his claim, thereby rendering him a "known" creditor. There is absolutely no evidence in the record, *i.e.*, no statement from Mr. Herring, to the effect that had Mr. Herring known about Todd's bankruptcy in 1988 he would have notified Todd and asserted a claim. The reasonable inference is that he would not have done so because he did not file his first lawsuit until 1989, did not name Todd in that suit and did not even mention Todd when expressly asked about his claim in 1992 and 2002.

This is important because Todd, upon hypothetically learning of Mr. Herring's identity, still would not have been required to provide him with actual notice of its bankruptcy unless he was a "known" creditor. Appellant asserts that merely learning that Mr. Herring had once worked at Todd would have made Mr. Herring a "known" creditor

for whom — along with every other person who had ever worked at Todd — actual notice would have been required, even though Mr. Herring had not asserted a claim against Todd prior to its bankruptcy. In this respect, Appellant cites only to a single statement from Todd’s briefing to the trial court: “A ‘known’ creditor is someone whose identity is either actually known or ‘reasonably ascertainable by the debtor.’ Due process requires actual notice only to known creditors.” CP 30 (citing *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 476, 489–90, 108 S. Ct. 1340, 1347 (1988)); see Appellant’s Brief at 9.

This is an incomplete statement of the law. What Appellant fails to mention is that there still must be evidence that the person identified is a “creditor,” *i.e.*, someone with a claim against the debtor. See 11 U.S.C. § 101(10)(A). As stated in *Tulsa*:

For creditors who are not “reasonably ascertainable,” publication notice can suffice. Nor is everyone who may conceivably have a claim properly considered a creditor entitled to actual notice. Here, as in *Mullane*,⁸ it is **reasonable** to dispense with actual notice to those with mere “conjectural’ claims.”

485 U.S. at 490, 108 S. Ct. at 1347 (emphasis added).

⁸ *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S. Ct. 652, 94 L.Ed. 865 (1950)

Although an exhaustive, if possible, search by Todd of its employee records, court records and the records of each of its subcontractors, unions, the U.S. Coast Guard, the U.S. Navy and any other entity for whom it built ships might have turned up Mr. Herring's name, to require a debtor to conduct such a search, let alone personally contact the tens of thousands of persons whom such a search would have identified, regardless of whether they had claims or not, would be an onerous burden. Even if in hindsight we can say that such a search may have turned up Mr. Herring's name, it still would not have identified Mr. Herring as a creditor because the existence, nature and extent of his alleged asbestos exposure or any other claim would have remained unknown to Todd. As discussed, *infra*, the law does not require a debtor to provide notice to persons who *might* have claims.

3. *Todd Made a "Reasonably Diligent" Effort to Locate "Known" Creditors.*

Important policy issues are implicated here regarding the delicate balance struck in bankruptcy law between providing compensation when due and protecting the debtor's right to a "fresh start."

Admittedly it may not seem entirely fair to require a party who has no actual notice of a bankruptcy to raise a claim before the bankruptcy court or be forever barred from raising such claims. We must keep in mind, however, that the bankruptcy provisions constitute an attempt to balance various

interests: the interest in the fair and equitable distribution of limited resources and the interest in giving the debtor a fresh start. These interests are better served if a bankruptcy court has all claims before it when distributing a debtor's property.

In re Chicago, Milw., St. Paul & Pac. R.R. Co., 974 F.2d 775, 788 (7th Cir. 1992). *See also In re Texaco, Inc.*, 182 B.R. 937, 950 (Bankr. S.D.N.Y. 1995).⁹

The basic premise regarding notice and the concept of “known” and “unknown” creditors has been set forth by the U.S. Supreme Court and oft-repeated: Persons not entitled to actual notice are those whose “interests are either conjectural or future *or*, although they *could be* discovered upon investigation, do not *in the due course of business* come to the knowledge of the [debtor].” *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 317, 70 S. Ct. 652, 659, 94 L.Ed. 865 (1950) (emphasis added). *See also In re XO Communications, Inc.*, 301 B.R. 782, 793 (S.D.N.Y. 2003). What this means, of course, is that even Appellant's hypothetical construct fails. “Although,” according to Appellant, Mr. Herring “could (have been) discovered upon

⁹ As established in *In re Trump Taj Mahal Assocs.*, 156 B.R. 928 (Bankr. D.N.J. 1993), it is immaterial that Mr. Herring was not aware of Todd's bankruptcy. CP 348. “The fact that Helen O'Hara . . . claims that she does not read the legal section of the newspaper and did not read the legal section of the newspaper that published the bar date Order in this case is not controlling.” 156 B.R. at 940.

investigation,” he was an “unknown creditor” entitled only to publication notice because his identity would not have come to the knowledge of Todd “in the due course of business” and because his claim against Todd was “conjectural.” *See In re The Charter Co.*, 125 B.R. 650, 654–55 & n.2 (M.D. Fla. 1991) (noting, in part, that a claim is conjectural if the debtor would have been required to engage in “conjecture or speculation” about whether a particular entity had a claim at the time the debtor compiled its list of creditors).

“While the debtor does have a duty to give notice to known creditors of the bar date, it is not the debtor’s duty to search out each conceivable or possible creditor and urge that person or entity to make a claim against it.” *Id.* at 655. *See also XO Communications*, 301 B.R. at 793; *In re Brooks Fashion Stores, Inc.*, 124 B.R. 436, 445 (Bankr. S.D.N.Y. 1991). “A debtor need not be omnipotent or clairvoyant” and is not required to conduct “impracticable and extended searches [for creditors] . . . in the name of due process.” *In re U.S.H. Corp. of N.Y.*, 223 B.R. 654, 659 (S.D.N.Y. 1998) (quoting *Mullane*, 339 U.S. at 317, 70 S. Ct. at 659). “It is not required that a debtor search for those who might have been or might not have been injured.” *In re The Charter Co.*, 113 B.R. 725, 728 (M.D. Fla. 1990); *Texaco*, 182 B.R. at 955; *U.S.H. Corp.*, 223 B.R. at 659.

A debtor is required only to undertake “reasonably diligent efforts” to identify and personally notify creditors of its bankruptcy. *Menonite Bd. of Missions v. Adams*, 462 U.S. 791, 798 n.4, 103 S. Ct. 2706, 2711 n.4 (1983).

Precedent demonstrates that what is required is not a vast, open-ended investigation. . . . *The requisite search instead focuses on the debtor’s own books and records.*¹⁰ *Efforts beyond a careful examination of these documents are generally not required.* Only those claimants who are identifiable through a diligent search are “reasonably ascertainable” and hence “known” creditors.

Chemetron Corp. v. Jones, 72 F.3d 341, 346–47 (3d Cir. 1995), *cert. denied*, 517 U.S. 1137, 116 S. Ct. 1424 (1996) (citing *Mullane*; emphasis added).¹¹ *See also In re Trans World Airlines, Inc.*, 96 F.3d 687, 690 (3d Cir. 1996); *U.S.H. Corp.*, 223 B.R. at 659; *In re*

¹⁰ This universal standard is reflected in the Bankruptcy Court’s March 8, 1988 Order (i) Reconfirming Bar Date for the Filing of Proofs of Claim or Interest and (ii) Providing for Supplemental Notice Thereof. CP 210–211; *supra*, at 3–4.

¹¹ Appellant is likely to assert that a search of Todd’s books and records would have revealed that AWU members had worked at Todd. Todd does not dispute this. However, such a search would not have identified *Mr. Herring*, and, as the case law demonstrates, Todd was not obligated to provide actual notice of its bankruptcy to every entity or person uncovered in such a search; only to those who had asserted claims or were likely to assert claims against Todd. The AWU was not a “known” creditor. There is no evidence in the record that the AWU had any claim against Todd at the time of its bankruptcy and it is unlikely that the AWU ever would have a claim against Todd, as it did not represent Todd *employees*. Todd owed no debt to the union and the union asserted no claim. The union was no more entitled to actual notice than was Mr. Herring himself. Further, notice to the AWU likely would not have satisfied Todd’s duty to provide actual notice to any union members who were, in fact, “known” creditors, even if the union dutifully passed the notice on to its members.

Envirodyne Indus., Inc., 214 B.R. 338, 348 (N.D. Ill. 1997).

As characterized by the Supreme Court, a “known” creditor is one whose identity is either known or “reasonably ascertainable by the debtor.” An “unknown” creditor is one whose “interests are either conjectural or future or, although they could be discovered upon investigation, do not in due course of business come to knowledge [of the debtor].”

A creditor’s identity is “reasonably ascertainable” if that creditor can be identified through “reasonably diligent efforts.” *Reasonable diligence does not require “impracticable and extended searches . . . in the name of due process.” A debtor does not have a “duty to search out each conceivable or possible creditor and urge that person or entity to make a claim against it.”*

Chemetron, 72 F.3d at 346 (citing *Tulsa, Mennonite Board* and *Mullane*; emphasis added). *See also XO Communications*, 301 B.R. at 793.

[C]laimants must be reasonably ascertainable, *not* reasonably foreseeable. As we read these cases, in order for a claim to be reasonably ascertainable, the debtor must have in his possession, at the very least, some specific information that reasonably suggests both the claim for which the debtor may be liable and the entity to whom he would be liable.

In re Crystal Oil Co., 158 F.3d 291, 297 (5th Cir. 1998) (emphasis in original); *see also XO Communications*, 301 B.R. at 794.

A case on virtually all fours with this matter, *In re Chicago, Rock Island & Pac. R.R. Co.*, 90 B.R. 329 (N.D. Ill. 1987), involved the claim of a former employee of the railroad who suffered from an asbestos-related disease as a result of exposure allegedly caused by the

railroad's negligence. He had worked for the Rock Island line from 1957 through 1979. The Rock Island filed for bankruptcy in March 1975 and finally emerged in June 1984. The bar claims date was set as April 12, 1984. The employee did not file a claim until filing suit for his asbestos-related disease in November 1986.

The court granted the railroad's request to enjoin the employee's action on two independent grounds. The relevant ground here was that the railroad had complied with due process with respect to the employee because, as the court held, he was an unknown claimant entitled only to publication notice of the claims bar date. The court stated:

[T]he court finds that plaintiffs were not creditors known to the Rock Island prior to the bar date. . . . Nonetheless, plaintiffs argue that the Rock Island knew that its employees had suffered asbestos exposure and therefore that the Rock Island knew of their potential claims. However, the court does not find, *in the absence of any indication that a particular claim would ensue*, that plaintiffs can be classified as potential creditors. A trustee has no duty to give notice, other than publication, to non-creditors. Notice by publication was provided in the reorganization plan.

Therefore, the court holds that CPC [Rock Island's successor] did not abridge plaintiffs' due process rights. For the foregoing reasons, the court thus finds that plaintiffs cannot assert their claim against CPC, and plaintiffs . . . are enjoined from further prosecution of their claims against the Chicago Pacific Corporation.

90 B.R. at 330–31 (citations omitted; emphasis added).

Thus, even though the employee was known to the Rock Island and the Rock Island knew that some of its employees had been exposed to asbestos, the court did not require the railroad to provide more than publication notice to the employee because the Rock Island was unaware of the employee's claim; ergo, he was an unknown claimant. *See also In re Rexene Corp.*, 176 B.R. 732, 732–33 (Bankr. D. Del. 1995) (holding employees' claims for injuries resulting from chemical exposure were discharged in bankruptcy as employees were unknown creditors entitled only to publication notice); *Wright v. Placid Oil Co.*, 107 B.R. 104, 106 (N.D. Tex. 1989) (holding that worker injured at debtor's facility was "unknown" creditor: "Placid did not know about Wright's claim because he did not file his lawsuit against Placid in Louisiana state court until June 22, 1987 and did not serve the petition on Placid until December 31, 1987[;]" claims bar date was January 31, 1987).

In *In re Allegheny Int'l, Inc.*, 170 B.R. 83 (Bankr. W.D. Pa. 1994), almost two years after Allegheny's and Chemetron Corp.'s Chapter 11 bankruptcy was confirmed, the claimants sued Chemetron, asserting they were former residents of neighborhoods who were injured by exposure to hazardous and radioactive material deposited at two disposal sites by Chemetron. 170 B.R. at 85–86. The district court,

reversing the bankruptcy court, dismissed the claims, holding that the claimants were unknown creditors entitled only to publication notice of the bankruptcy filing and bar date and, thus, their claims were discharged upon confirmation of the reorganization plan. *Id.* at 90.

Even where a debtor knows there is a possibility of a claim by a creditor, if the creditor's claim is merely conceivable, conjectural or speculative, the debtor is not required to give actual notice to the debtor. . . . [A]bsent some course of dealing or some communication between a debtor and potential claimant indicating the viability of a claim, a creditor is not reasonably foreseeable.

Id. at 88.

The Third Circuit affirmed in *Chemetron, supra*, one of the leading cases in this area. The Court of Appeals rejected the bankruptcy court's "reasonably foreseeable test" (which is on a par with the requirement Appellant would impose here), citing *Mullane* and stating that a debtor "cannot be required to provide actual notice to anyone who potentially could have been affected by [its] actions; such a requirement would completely vitiate the important goal of prompt and effectual administration and settlement of debtors' estates." 72 F.3d at 348.

Among the 21 plaintiffs, only two had actually occupied homes in the vicinity of the waste disposal sites between 1965 and 1975 when Chemetron owned them. The other plaintiffs, much like Mr. Herring,

had only visited the properties from time to time. *Id.* at 341. The court determined the claimants were “scattered across Ohio and as far away as Texas. We are hard-pressed to conceive of any way the debtor could identify, locate, and provide actual notice to these claimants.” *Id.* at 347.

It has been suggested that Chemetron could have conducted a title search on all properties surrounding the sites to determine all persons who might have lived in the area during the twenty years between Chemetron’s operation of the sites and the Chapter 11 proceeding. We decline to chart a jurisprudential course through a Scylla of causational difficulties and a Charybdis of practical concerns.

Id. The court called the “causational difficulties . . . manifold and apparent.” *Id.* A requirement to “notify all reasonably foreseeable claimants . . . would rise and fall on potentially attenuated and certainly ambiguous causal nexi.” *Id.*

[W]hile we might be urged to bring these determinations under *Mullane*’s “reasonably calculated under the circumstances” umbrella, we hesitate to thrust the judiciary into a domain where decisions turn on rarely pellucid and often disputed scientific studies, requiring different varieties of technical expertise from case to case. . . .¹²

¹² In a similar vein, if Todd were required to provide actual notice to its past and present employees, as well as past and present subcontractor employees who had worked at Todd, and yet do so only to the extent it was reasonable, it would have had to determine which of those workers to whom to provide notice. Most likely, it would have been those who were most readily identifiable and had the longest tenure — classes that would not have included Mr. Herring. And, particularly with respect to asbestos-related claims, the potential for which Appellant asserts Todd should have been aware, this would have required Todd (in 1987) to apply “often disputed

Id. at 348.

The Third Circuit also expressed “grave” concerns about the “broad notice requirement” imposed by the bankruptcy court, which the Court of Appeals found “would have come to no avail in this case.” *Id.* Likewise, as already noted, there is no evidence in the record that the inquiry Appellant would have the Court require here would have identified Mr. Herring as a potential creditor.

[W]e decline to impose any Orwellian monitoring requirements on Chemetron and similarly situated corporations. . . .

Such an investigation, which would be required by the bankruptcy court’s finding that claimants are known creditors, clearly contradicts both the caselaw cited above and common sense. Debtors cannot be required to provide actual notice to anyone who potentially could have been affected by their actions; such a requirement would completely vitiate the important goal of prompt and effectual administration and settlement of debtors’ estates. . . .

In reaching this result, we are not unsympathetic to the alleged injury suffered by the claimants in this case.¹³ We stress that our holding addresses the burden placed on the bankruptcy debtor to provide actual notice to potential claimants, not the merits of a timely and properly

scientific studies” to assess which among thousands upon thousands of workers would be most likely to file asbestos-related claims.

¹³ Such considerations do not even enter into this case. Mr. Herring and Appellant have now settled two lawsuits involving multiple defendants related to Mr. Herring’s alleged asbestos exposure, including settlements reached after Todd was dismissed from the case. CP 131; Appellant’s Brief at 7 n.3. Thus, it can be presumed that Mr. Herring and Appellant have been adequately compensated.

filed tort suit. Where a debtor has sought the protection of bankruptcy law, however, procedural protections such as the bar claims date apply. These provisions cannot be circumvented by forcing debtors to anticipate speculative suits based on lengthy chains of causation.

Id. at 347–48. *See also Crystal Oil*, 158 F.3d at 297 (“[T]he Third Circuit held that such efforts need generally include only a careful search of the debtor’s own records, and that environmental claimants whose claims are not discoverable therein or otherwise apparent are not ‘known creditors’ for bankruptcy purposes.”) (citing *Chemetron*).

In *Charter*, 125 B.R. at 655, the district court, in reversing the bankruptcy court, found that it was not enough that Charter “knew that there was at least *a possibility of a claim* being made by” one of its largest customers, Petroleos Mexicanos (“Pemex”), to conclude that Pemex was a known creditor.

Even assuming that Charter knew there was a possibility of a claim by Pemex, Charter was not required to give actual notice to creditors with merely conceivable, conjectural or speculative claims. A reasonably diligent effort by Charter to identify and notify creditors would not necessarily include notifying every possible creditor, no matter how speculative their claim might be.

Id. at 656.¹⁴

¹⁴ Although the district court remanded the matter to the bankruptcy court for a new trial because the bankruptcy court had, in part, “failed to determine whether reasonably diligent efforts would have uncovered Pemex’s claim,” *id.* at 653, this

In *Envirodyne*, 214 B.R. at 348, the court expressly rejected claimants' assertion that the debtor should have conducted a more thorough search that might have turned them up, holding:

[A]ppellants were unknown creditors to appellee Clear Shield. Appellee Clear Shield conducted a review of their books and records and interviewed its employees in order to prepare its schedules and statement of financial affairs and to determine what claims existed against it. There was no possible way for appellee Clear Shield to ever run across the names of appellants Eisenberg and Servall since they were never customers of appellee Clear Shield and therefore there was no reason to conclude that they should be considered creditors. Clear Shield's records showed that appellant St. Cloud did not owe Clear Shield any money nor did Clear Shield owe St. Cloud any money. Accordingly, there was no reason for appellee Clear Shield to have to give actual notice to appellant St. Cloud since it was not a creditor. Appellee Clear Shield used reasonably diligent efforts to determine who constituted their known creditors. There was no reason for appellee Clear Shield to have had to search out appellants and create reasons for appellants to make a claim against it.

The case law is rife with similar examples of "unknown"

element of the case is not relevant here. Rather, *Charter* demonstrates that just because an entity may be known to a debtor does not mean that entity is a "known" *creditor* entitled to actual notice of the debtor's bankruptcy; the debtor must also know that the entity has a claim. *See infra*. Based upon the test Appellant would have the court impose here, it would — contrary to *Charter* and the unanimous case law — require Todd to have provided actual notice to persons such as Mr. Herring, once their identities were discovered, who possessed only "a possibility of a claim," *i.e.*, one that was "merely conceivable, conjectural, or speculative."

creditors who properly received publication notice even though the debtor had a prior or existing commercial relationship with the claimant or had notice that the claimant had been injured. One of the basic premises upon which the courts have relied is whether, in fact, the purported “known” creditor has asserted a claim against the debtor.

- *Crystal Oil*, 158 F.3d at 297-98: The court affirmed the bankruptcy court’s finding that the Louisiana Department of Environmental Quality was an “unknown” creditor even though the LDEQ had contacted the debtor prior to its bankruptcy and informed it of a possible contamination problem at a site owned by the debtor’s predecessor. A search by the debtor of its records at that time failed to disclose that its predecessor had owned the site. “The bankruptcy court held that this inquiry was reasonably diligent, because the only records that would have revealed the connection were ancient ones in long-term storage.” *Id.* at 298.

- *Trans World Airlines*, 96 F.3d at 690: “The Bergers admit that TWA did not know of their defamation claim until they filed their compulsory counterclaim This admission is fatal. When TWA gave notice of the claims bar date, the Bergers were unknown creditors entitled solely to publication notice.”

- *Chicago, Milwaukee*, 974 F.2d at 788: The court noted there was nothing in the record indicating the debtor had knowledge of the claim at issue. “[W]e are . . . hesitant to hold that a party becomes a known creditor upon the mere release or threatened release of a hazardous substance.”

- *In re GAC Corp.*, 681 F.2d 1295, 1300 (11th Cir. 1982): The court found a class of securities claimants to be “unknown” creditors where, although the claimants had purchased the securities at issue, they no longer held them at the time of the debtor’s bankruptcy. “[T]he trustees only had actual knowledge of Novak’s claim; possible claims by others who no longer held debentures were merely speculative. Furthermore, the trustees contend that it would have been extremely burdensome and costly to determine the names and addresses of all persons who had purchased but no longer held debentures, and Novak has failed to show facts to the contrary.”

- *XO Communications*, 301 B.R. at 794–95: The court held that an entity with a “long-standing business relationship” with the debtor was an “unknown” creditor where there was no evidence in the debtor’s “books and records” indicating any outstanding debts owed by the debtor to the claimant or “that facts existed that would have alerted the Debtor that (a) Claim might possibly be asserted against it[.]”

- *In re Eagle-Picher Indus., Inc.*, 278 B.R. 437, 454, 455–56 (Bankr. S.D. Ohio 2002): The court found that a long-time customer of the debtor was an “unknown” creditor because, although the claimant was known to the debtor, the debtor was not aware of any claims against it by the claimant. “[T]he question is not answered by the debtor’s knowledge of the identity of Caradon. . . . There is no evidence in the record before us to show that, pre-confirmation, Eagle-Picher knew that Caradon would assert the Georgia claims. . . . ‘[R]easonably ascertainable’ means, not just that Caradon’s identity as a creditor was known, but that Caradon had made known to Eagle-Picher the claims against Eagle-Picher that it asserted in the Georgia suit. . . . It is because Caradon never did anything to assert the Georgia claims against Eagle-Picher prior to confirmation, though they certainly existed throughout the entire period of the bankruptcy, that we hold that Caradon was an unknown creditor.”

- *In re Union Hosp. Ass’n of The Bronx*, 226 B.R. 134, 139 (Bankr. S.D.N.Y. 1998): The court found that contribution and indemnity claimants, sued by former patients of the debtor, were “unknown” creditors. “No matter how hard the debtor searched its own books and records, it would not have discovered the potential claims for contribution and indemnity Debtors cannot be required to provide

actual notice to anyone who potentially could have been affected by their actions; such a requirement would completely vitiate the important goal of prompt and effectual administration and settlement of debtors' estates."

- *U.S.H. Corp.*, 223 B.R. at 659–60: The court held that the debtor was not required to provide actual notice to homebuyers. "It was not the duty of U.S. Home to search out 'each conceivable or possible creditor.'"

- *In re Texaco*, 182 B.R. at 954–55: The court found that property owners near the debtor's salt water storage pits were "unknown" creditors with respect to their claims related to groundwater contamination.

- *In re Trump Taj Mahal Assocs.*, 156 B.R. 928, 932, 940 (Bankr. D.N.J. 1993): The court held that a casino customer injured in a fall and who had submitted an incident report to the casino was an "unknown" creditor. "Like the employee in *Rock Island*, the O'Haras were one of several hundred potential claimants. . . . As the Taj points out, although many people in O'Hara's position threaten to file suit against the Taj, only a nominal number, if any, actually bring suit. . . . Thus, the O'Haras' claim, although conceivable, was speculative and conjectural."

- *In re Hunt*, 146 B.R. 178, 182 (Bankr. N.D. Tex. 1992): The court found an entity with which the debtor had prior dealings to be an “unknown” creditor. “The Debtors need only to have made reasonably diligent efforts to uncover the identities and claims of any creditors; they were not required to search out each conceivable or possible creditor. Plaintiffs failed to establish that (the debtors) knew of Plaintiffs’ claims Plaintiffs never notified either Debtor of the existence of any claim against them.”

- *Wright*, 107 B.R. at 106: “Without notice of Wright’s claim, Placid could not have been expected to provide actual notice to him.” *Cf. In re S.N.A. Nut Co.*, 198 B.R. 541, 544 (Bankr. N.D. Ill. 1996) (finding that vendor “was known by the Debtor to be at least a potential creditor” where vendor had “threaten[ed] to hold Debtor liable for damages”).¹⁵

¹⁵ Appellant cites two Internal Revenue cases — and no other authority — to support its assertion that Todd failed to undertake “reasonably diligent” efforts to identify its creditors. Appellant’s Brief at 12–13. Neither case is on point, particularly with respect to bankruptcy law where — as detailed above — a debtor’s duties are far different from the IRS’s responsibility to locate taxpayers, especially as outlined in the cases cited by Appellant. *See Trump*, 156 B.R. at 939 (“[T]he instant case requires this court to interpret the Federal Rules of Bankruptcy Procedure. The (New Jersey) court, however, interpreted New Jersey state law. Therefore, the (New Jersey) court’s holding does not address the issue now before this court.”). Otherwise, Appellant has failed to cite a single bankruptcy case where, on facts parallel to those at issue here, the debtor’s efforts were found deficient and/or the claimant was deemed to be a “known” creditor.

Based on these authorities and many more, Mr. Herring was an “unknown” creditor entitled only to publication notice of Todd’s bankruptcy and the bar claims date in newspapers of national circulation, nothing more. The mere fact that Mr. Herring had worked at Todd from “time to time” some 20 years earlier did not make him a “creditor,” known or otherwise. Although, as in *Rock Island*, Todd knew before it filed for bankruptcy that workers had been exposed to asbestos at its facilities, it did not know and could not have known the identities of all potential claimants, including Mr. Herring, whether they had been injured, the extent of their injuries, and whether they would, in fact, file claims against Todd. Todd also had no reason to anticipate that in the future a large number of asbestos-related claims might be filed against it or know who might file them. CP 49 at ¶ 16. Such claims as they existed in 1987, including Mr. Herring’s, can be described at best as only “conceivable, conjectural or speculative.” *Charter*, 125 B.R. at 655.¹⁶

¹⁶ Appellant apparently suggests that because Todd was aware that asbestos-related workers’ compensation claims had been filed by some employees, *all* Todd and subcontractor employees were “known” creditors whom Todd should have ferreted out and notified. As *Rock Island* and other cases hold, however, it is not enough that a debtor knows that *some* of those with whom it has dealt have filed claims against it or that some workers have been exposed to hazardous substances; rather, the debtor must have reason to know that the particular entity or individual involved — to be considered a “known” creditor — has a claim against the debtor.

[T]he debtor must have in his possession, at the very least, some specific information that reasonably suggests both the claim for which the debtor may be liable and the entity to whom he would be liable.

Todd does not suggest that it would have been unreasonable to notify the AWU of its bankruptcy. What would have been unreasonable, however, would have been to require Todd to take the steps that necessarily would have had to follow — if Appellant’s conceit is accepted — to ferret out all of the Roger Herrings in the Todd universe. What this Court must not lose sight of in this case is that Appellant would have this Court require Todd to have done to identify, locate and notify Mr. Herring, also would have required Todd to identify, locate and notify every other person who had ever worked at Todd or even set foot in one of its shipyards — and some who had done neither.¹⁷ The Court cannot consider Mr. Herring’s case in isolation. What Todd

Crystal Oil, 158 F.3d at 297.

¹⁷ Plaintiffs in asbestos-related cases filed by Appellant’s counsel against Todd have included a Navy inspector; Navy, Coast Guard and Merchant Marine seamen; a daughter, a son and a grandson of former Todd employees; the wife of a subcontractor employee; a plumber employed by a local plumbing company who visited Todd from time to time to work on pipes inside buildings; and an employee of a piping supply vendor who visited the Harbor Island shipyard on occasion to inspect pipe. Taken to its logical extremes, Appellant’s theory would have required Todd to exercise “reasonable diligence” to locate each and every one of these plaintiffs, all of whom were allegedly exposed to asbestos at or from Todd’s Harbor Island or other shipyards prior to its bankruptcy. However, for example, had one of these persons been injured in an accident near the time of Todd’s bankruptcy, Todd would not have been required to provide him or her with notice of its bankruptcy even if it had knowledge of the accident and injury, so long as the person had yet to assert a claim against Todd. *See Trump*, 156 B.R. at 940. As the cases hold, a debtor is not required to assume that it will be sought to be held liable for someone’s injury or to assume that someone has been injured. *See id.* “It is not required that a debtor search for those who might have been or might not have been injured.” *Charter*, 113 B.R. at 728.

would be required to do to identify Mr. Herring, it would be required to do to identify any other similarly situated person.

To accept Appellant's premise would be to require Todd to have made efforts to locate and contact each of the tens of thousands of people (or their families) who had worked for, worked at or visited one of Todd's shipyards in the preceding 72 years, regardless of whether these people were known to have claims against Todd or not. Appellant asks this Court to impose upon Todd a requirement to have gone beyond its books and records and to have identified every member of every union that had ever sent members to any of Todd's facilities, and then to "search out each (one) and urge that person or entity to make a claim against it." *Charter*, 125 B.R. at 655; *XO Communications*, 301 B.R. at 793. As a matter of law, Todd was not required to do so and the Bankruptcy Court certainly did not require Todd to do so.

For Todd to have discovered Mr. Herring, Todd would have had to search beyond its own books and records and into the books and records of its subcontractors for periods dating back 20 years or more, assuming such records still existed and it would have been given access to the records. Or, as Appellant contends, Todd: 1) should have simply assumed that every member of Mr. Herring's union — and every member of every other union whose members had ever worked at Todd

— had a nascent (though unasserted, “conjectural and speculative”) claim against Todd; 2) should have gone beyond its own books and records to identify: a) every member of the AWU, b) every member of every other union, past and present, who had ever worked at Todd (or have asked the unions to do so), and c) every other person who had ever worked at Todd in any capacity or been to Todd for any reason; 3) should have strived to then locate every one of these persons; and, 4) should have sent each person identified and located actual notice of its bankruptcy, regardless of whether they had asserted claims against Todd.

Such a task would have been far more burdensome than the title search rejected by the Third Circuit in *Chemetron* and no such inquiry has ever been required by a bankruptcy court in any case. Todd has been in business since 1916 and has had shipyard operations in Seattle, Tacoma, Portland, Los Angeles, San Francisco, Houston, Galveston, New Orleans, New Jersey, Alabama, South Carolina and Maine. *See* C. Bradford Mitchell, *Every Kind of Shipwork: A History of Todd Shipyards Corporation, 1916-1981* at 289 (1981). Todd built and repaired hundreds of combat vessels during and after World War I, World War II, the Korean War and the Vietnam War, and commercial vessels when the country was not at war. *See id.* It has operated its

present facility on Harbor Island in Seattle for more than 80 years. CP 46. Its employees have numbered in the tens of thousands just since World War II and many thousands of additional subcontractor employees such as Mr. Herring have worked at its facilities over many decades. Appellant suggests that Todd not only should have identified each and every one of these workers, but contacted them as well, as that is the only way that all of the Roger Herrings who have ever worked at Todd could receive what Appellant contends would be adequate notice of Todd's bankruptcy.

The law does not require such an effort.

The issue is not whether the creditor is known to the (debtor) but whether the creditor's name and address can be readily ascertained by the (debtor), making it feasible to send the creditor the notice directly Apart from the cost of finding the creditor's name and address, the sheer number of potential creditors in relation to the size of their claims may make it excessively costly to provide direct notice to all of them. The cost of direct notice in such a case might eat up the debtor's estate, especially when the claims are discounted to reflect their actual value. . . .

Notice by publication may thus be entirely appropriate when potential claimants are numerous, unknown, or have small claims (whether nominally or, as we have just pointed out, realistically)—all circumstances that singly or in combination may make the cost of ascertaining the claimants' names and addresses and mailing each one a notice of the bar date and processing

the responses consume a disproportionate share of the assets of the debtor's estate.

Fogel v. Zell, 221 F.3d 955, 963 (7th Cir. 2000) (Posner, C.J.) (citation omitted).¹⁸

In fact, Todd — even had it notified the AWU — had no realistic or reasonable way of identifying Mr. Herring, from among thousands of candidates, as a “known” creditor simply because he may have worked briefly for a subcontractor some 20 years earlier. Given the passing of time and the nature of Mr. Herring's alleged work at Todd, there would have been no way for Todd to limit its search for the specific purpose of locating possible creditors in Mr. Herring's situation.

Todd does not take the position that Mr. Herring's status as an unknown creditor relieved Todd of the need to make a diligent search to discover “known” creditors. Such a search was in fact conducted and the evidence demonstrates that Todd followed and indeed exceeded the notice requirements set forth by the U.S. Supreme Court. Todd made “reasonably diligent efforts” to identify creditors and spread the word about its bankruptcy. Even though Todd was not a seller or manufacturer of asbestos products to which Mr. Herring allegedly was

¹⁸ The court in *Fogel* found that the claimant in that case, the City of Denver, was a “known” creditor entitled to actual notice. But in contrast to the facts here, Denver was one of the debtor's largest customers whose identity and purchase records were expressly known to the debtor. *See id.*

exposed and did not anticipate large numbers of asbestos claims at the time it filed its bankruptcy, Todd did not merely make a cursory examination of its records to locate claimants. Todd notified those on its accounts receivable and accounts payable registers, notified everyone with whom Todd had done business, including its subcontractors and all unions who represented Todd's employees. CP 48.¹⁹

This is all that is required. "The requisite search . . . focuses on the debtor's own books and records. Efforts beyond a careful examination of these documents are generally not required." *Chemetron*, 72 F.3d at 347. An "unknown creditor" is one whose "interests are either conjectural or future or, although they could be discovered upon investigation, do not in the due course of business come to the knowledge of the [debtor]." *Mullane*, 339 U.S. at 317, 70 S. Ct. at 659. Even though Mr. Herring worked at Todd, was a union member and was allegedly exposed to asbestos, these factors do not transform Mr. Herring into a "known" creditor, *i.e.*, someone who had asserted a claim against Todd and who would have been identified upon a "reasonably diligent" review of Todd's books and records.

¹⁹ Unions with bargaining contracts, as opposed to unions that merely represented subcontractor employees, were potential creditors.

Washington law also comports with the U.S. Supreme Court's notion of who is a "reasonably ascertainable" claimant and, thus, who is entitled to actual notice. RCW § 11.40.040(1), part of the state's probate code, echoes *Mullane, Tulsa*²⁰ and decades of federal jurisprudence, providing:

For purposes of RCW 11.40.051, a "reasonably ascertainable" creditor of the decedent is one that the personal representative would discover upon exercise of reasonable diligence. The personal representative is deemed to have exercised reasonable diligence upon conducting a reasonable review of the decedent's correspondence, including correspondence received after the date of death, and financial records, including personal financial statements, loan documents, checkbooks, bank statements, and income tax returns, that are in the possession of or reasonably available to the personal representative.

Appellant would have the Court here impose a reasonable diligence rule in bankruptcy that the federal courts themselves do not impose and that is far broader than the comparable rule set forth in Washington law. There is no purpose forwarded by Appellant, nor is one apparent, for such a distinction.

²⁰ The Supreme Court in *Tulsa* construed the reasonable diligence standard under the "nonclaim statute" in Oklahoma's probate code, which then required only publication notice. The ruling in *Tulsa*, along with *Mullane* (which concerned appropriate notice with respect to common trust fund settlements), provided the foundation for the notice standard adopted by the Supreme Court in bankruptcy cases in *New York v. New York, New Haven & Hartford R.R. Co.*, 344 U.S. 293, 296, 73 S. Ct. 299, 301 97 L.Ed. 333 (1953).

4. *The U.S. District Court Has Held a Similar Suit to Have Been Discharged in Todd's Bankruptcy.*

The U.S. District Court for the Southern District of Texas in *Williams v. Todd Shipyards Corp.*, Civ. No. H-95-4592, slip op. (S.D. Tex. Apr. 3, 1997), CP 194–204, decided the same issue now before this Court. In *Williams*, Todd moved for summary judgment on the grounds that plaintiffs' asbestos-related claims had been discharged in Todd's bankruptcy. The court initially denied Todd's motion, but allowed Todd to supplement the record with respect to certain plaintiffs "with evidence of . . . the reasons why Todd could not give actual personal notice to Clements as an employee who had worked at Todd between 1939 and 1951; and why the notice Todd gave was reasonably calculated, under all the circumstances, to apprise Clements of the pendency of the bankruptcy action." CP 160, 181, 194. Todd supplemented the record with an affidavit by Michael Marsh. CP 194. The court then granted Todd's motion. CP 195.

Specifically, the court held — as the trial court did here — that under bankruptcy law the plaintiffs' claims arose before Todd's bankruptcy petition was filed and that Todd provided legally sufficient notice under concepts of due process to advise Mr. Clements of its bankruptcy proceedings. The court earlier had noted that Mr. Clements

had “worked as a Boilermaker for Todd . . . from 1939 to 1951.” CP 161. In finding that Todd had undertaken “reasonably diligent efforts” to identify potential creditors (*see* CP 199–200), the court did not require Todd to have conducted a more thorough review that might have identified Mr. Clements as a former employee and a potential creditor.

The court found:

Todd has produced competent summary judgment evidence, in the form of an affidavit by counsel Michael Marsh (“Marsh”), that it conducted a “diligent search to discover possible claimants. . . . Todd notified individuals on its accounts receivable and accounts payable registers, notified everyone with whom Todd had done business and notified all unions whose members had worked at Todd.²¹ Finally, Todd provided notice by publication in a manner which was approved by the Bankruptcy Court.”

Todd has produced competent summary judgment evidence that Earl Clements last worked at Todd in 1951, forty years before Todd’s reorganization plan was confirmed Todd’s evidence is that, given the passing of time and the nature of Clements’ work at Todd, “[t]here would have been no way for Todd to limit its search for the specific purpose of locating possible claimants in Earl Clements’ situation.”²²

. . . .

²¹ It is this latter aspect of Mr. Marsh’s affidavit in the *Williams* case with which Appellant takes issue. Appellant’s Brief at 5–6, 9–10. However, the court correctly did not delve into the question of whether notice to the unions, which would have included any union representing Mr. Clements (a former employee), *i.e.*, “all unions representing Todd’s employees” (CP 48), would have filtered down to Mr. Clements and, therefore, satisfy Todd’s duty to notify Mr. Clements of its bankruptcy.

²² *See* CP 47–48.

Under the standard set out in *Mullane* and applied in *Chemetron*, by notifying individuals on its accounts receivable and accounts payable registers, everyone with whom it had done business, and all unions whose members had worked at Todd, and by providing publication notice in national and local newspapers, Todd made reasonably diligent efforts to identify claimants of its bankruptcy and provided constitutionally sufficient notice, reasonably calculated, under the circumstances, to apprise interested parties of the pendency of its bankruptcy action and administration thereof.

CP 200–201, 202–203 (citations to record omitted).

In short, on the same facts as presented here, the Texas District Court found that Todd had made a reasonably diligent effort to identify “known” creditors; an effort that did not identify Mr. Clements and would not have identified a former employee such as Mr. Clements or a former subcontractor employee such as Mr. Herring. The court found that Todd had conducted a “reasonably diligent” search, not because it might have found Mr. Clements, but because Todd had complied with the requirement to search its books and records for potential creditors. This, despite the fact that the search, which was not designed with individuals such as Mr. Clements and Mr. Herring in mind, did *not* identify Mr. Clements, a former employee.

E. Conclusion

Todd filed for bankruptcy in August 1987 and the Bankruptcy Court set June 6, 1988, as the claims bar date. CP 46. Mr. Herring was never an employee of Todd Shipyards. CP 48. However, some 20 years before Todd's bankruptcy, Mr. Herring worked at Todd "from time-to-time" for Todd subcontractors. CP 348. Mr. Herring alleged that he was exposed to asbestos during this work. CP 118-121. In 1986, Mr. Herring was diagnosed with an "asbestos-related disease." CP 113. Mr. Herring did not file a lawsuit with respect to his alleged asbestos exposure and "asbestos-related disease" until February 1989; even then he did not name Todd as a defendant. CP 112. Mr. Herring asserted no claim against Todd regarding his alleged asbestos exposure at Todd and his "asbestos-related disease" until 2003. CP 118.

Bankruptcy law requires that a debtor make "reasonably diligent efforts" to identify its creditors. *Menonite Bd. of Missions*, 462 U.S. at 798 n.4. "The requisite search . . . focuses on the debtor's own books and records. Efforts beyond a careful examination of these documents are generally not required." *Chemetron*, 72 F.3d at 346-47. Under these standards, Todd conducted a reasonably diligent search of its books and records and sent notice of its bankruptcy and the claims

bar date to all parties who had or whom Todd believed might have claims against Todd.

This did not include Mr. Herring because a review of Todd's books and records did not and would not have uncovered Mr. Herring's name and because Mr. Herring had asserted no claim against Todd. Todd was not required to look further to ferret out persons whose claims were "merely conceivable, conjectural or speculative." *See Charter*, 125 B.R. at 656. "While the debtor does have a duty to give notice to known creditors of the bar date, it is not the debtor's duty to search out each conceivable or possible creditor and urge that person or entity to make a claim against it." *Id.* at 655.

Under the facts and the law as it applies to this case, Mr. Herring was an "unknown" creditor. As such, he was entitled only to publication notice of Todd's bankruptcy and the claims bar date, which Todd provided pursuant to the Bankruptcy Court's order. In fact, Mr. Herring is precisely the sort of individual for whom the courts have held publication notice suffices.

Based upon the foregoing, Todd respectfully requests that the decision of the trial court be affirmed.

DATED this 16th day of March, 2005.

A handwritten signature in cursive script, appearing to read "William H. Beaver", written over a horizontal line.

William H. Beaver, WSBA # 9205
Walter E. Barton, WSBA # 26408
Attorneys for Respondent Todd
Shipyards Corporation

NO. 55055-1-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

EDWIN HERRING, for himself and as Personal Representative of the
Estate of ROGER HERRING,

Appellant,

v.

TODD SHIPYARDS CORPORATION,

Respondent.

CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of March, 2005, I caused to
be served a copy of Respondent's Brief by Legal Messenger on the
following:

Janet Rice
Schroeter Goldmark & Bender
810 Third Avenue, Suite 500
Seattle, WA 98104


Nancy Randall

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