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COURT OF APPEALS OF THE
STATE OF WASHINGTON, DIVISION TWO

STATE OF WASHINGTON
BY *DM*
DEPUTY

PACIFIC MARINE INSURANCE COMPANY

and ROBERT BELL,

Appellants,

v.

STATE OF WASHINGTON, Through its Divisions, Department of

Revenue and the Insurance Commissioner,

Respondent.

BRIEF OF APPELLANT

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I. INTRODUCTION

This appeal presents the question of whether the State is required to give notice to a known property owner prior to escheat of his property. The issue arises both in the context of (1) noncompliance with the Washington Unclaimed Property Act notice provisions; and (2) a challenge to the constitutionality of former RCW 48.31.155, which provides for escheat without notice.

As is detailed in the Statement of the Case, Appellant Robert Bell owned Pacific Maritime Insurance Company through a holding company. This fact was well known to the State. The State also knew where to find Mr. Bell, and had in fact contacted him when it needed him as a witness on its behalf.

Pacific Maritime Insurance was liquidated by the Insurance Commissioner. At the close of the liquidation proceedings there were undistributable funds left over. Subsequently, additional proceeds owed to Pacific Maritime came into the hands of the Receiver. These funds were all transferred to the State for possible escheat after six years. *No notice of the existence of these additional funds was given to Mr. Bell.* Nonetheless, the State now claims that these funds have escheated by operation of law. Mr. Bell's Complaint for Distribution of Unclaimed Funds was dismissed by the trial court on summary judgment.

II. ASSIGNMENTS OF ERROR AND ISSUES

A. Assignments of Error

1. The trial court erred by granting summary judgment to the State.
2. The trial court erred by denying summary judgment to Plaintiffs Robert Bell and PacMar.

B. Issues Pertaining to Assignments of Error

1. Violation of Due Process Notice:
 - a. Is RCW 48.31.155 unconstitutional on its face under the Due Process Clause of the U.S. Const., Amend. IX, and Article I §3 of the Washington Constitution, by permitting escheat without notice and an opportunity to be heard given to potential owners?
 - b. Did escheat of the disputed funds violate the U.S. Const., Amend. IX, and Washington Constitution Art. I §3, Due Process rights of Mr. Bell and PacMar to notice and an opportunity to be heard, as applied to the facts of this case?
2. Did the escheat of the disputed funds in this case violate the Washington Uniform Unclaimed Property Act, due to the failure of the State to give notice to Mr. Bell and PacMar as required by RCW 63.29.180?
3. Are appellants entitled to recover interest on the disputed amounts held by the State?

III. STATEMENT OF THE CASE

A. Statement of Facts

Robert Bell owned and controlled Pacific Marine Insurance Company (“PacMar”) by his ownership of the stock in Pacific Marine Holding Corporation (“Holding Corp”), which in turn was the sole shareholder of PacMar. CP 43 ¶¶4, 5, 6; CP 68 ¶2; CP 76. This undisputed material fact has been alleged repeatedly by the State of Washington in various court proceedings. CP 58 ¶¶9, 10; CP 63 ¶31; CP 64 ¶35; CP 249; CP 337 ¶12. Mr. Bell’s ownership of PacMar through Holding Corporation is also documented by a Peat Marwick financial statement that is in evidence. CP 54.

In June, 1987, and again by amended order in June, 1989, the King County Superior Court put PacMar into receivership for purposes of statutory liquidation. CP 165-66, ¶¶1-2. The Receiver (State Insurance Commissioner) brought lawsuits against Mr. Bell, against the officers and directors of PacMar, and against PacMar’s financial auditor, Peat Marwick. CP 265 ¶C; CP 56. The lawsuit against Mr. Bell was dismissed with prejudice as part of a July, 1989 package settlement with the PacMar officers and directors. CP 43 ¶5; CP 264, 268 ¶2.

The Receiver proceeded to marshal assets and liquidate the PacMar estate for the benefit of creditors. The King County Superior

Court established an initial claims deadline of October 7, 1989, and charged the receiver with the obligation of providing notice to potential creditors. CP 317, 325. The liquidation process continued over the next decade. By order dated August 21, 1998, the Court set a final deadline of January 31, 1999 for submitting open claims. CP 140-41.

An Order Approving Final Distribution was entered October 7, 1999. CP 188. All insurance claimants were paid, which constituted approximately 98% of claims (gross amount \$12,558,000), but general trade creditors were not paid. CP 80; CP 169-70 ¶¶13-14; CP 185 ¶5. No objections were made to the Notice of Final Distribution, CP 185 ¶5, and a final Order of Discharge of Receiver and Closure of Estate was entered in the PacMar liquidation on January 25, 2000. CP 204.

Notice of the ongoing liquidation and claims deadlines was not given to Mr. Bell, a British national who had moved to New Zealand in 1987. CP 44 ¶8; CP 68 ¶1. Mr. Bell had not been represented in any of the proceedings since 1988. *Id.* The State did not inform Mr. Bell about the progress of the proceedings despite the fact that it knew where to find him, as is evidenced by the fact that the lawyer for the Receiver interviewed him in 1991 to obtain an affidavit in connection with the Receiver's claim against Peat Marwick. CP 44 ¶6; CP 68. The service list for the August 21, 1998 order shows that Mr. Bell was not served notice of

the final claims deadline. CP 145-152. The State did not even try to argue that it gave Mr. Bell notice of the liquidation claims deadlines, but instead argued that it was not legally obligated to do so. CP 307-08.

The Order Approving Final Distribution provides:

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.

CP 189-90 ¶¶F. According to the Receiver's Certificate of Compliance with Order of Discharge, filed April 19, 2000, the following sums were transmitted to the State Treasurer from the Receiver's attorney's trust account:

- \$22,958.56, sent February 7, 2000, re: "remaining claimants who could not be located"; and
- \$39,862.78, sent April 13, 2000, re: "remaining balance of funds in the estate" after payment of "[t]he last expenses of administration of this estate, including expenses for records destruction, Receiver compensation, and legal expenses," which "have now been paid in full".

CP 208-09 ¶¶4-5; CP 210-213. These funds are hereinafter called the "undistributable funds". The State did not provide Mr. Bell with any

notice of receipt of these undistributable funds from the PacMar estate. CP 44 ¶8.

Long after closure of the PacMar estate, the Receiver received additional funds. CP 221 ¶3. After consultation with legal counsel, the Receiver determined that these newly-recovered funds should be transferred to the State Treasurer per RCW 48.31.155. CP 221 ¶4. The Receiver said that these newly-recovered funds were “general assets of the PacMar estate, . . . not impressed by any trust or other special claim status.” CP 223 ¶7. Although RCW 48.31.161 provides for re-opening a liquidation estate under certain circumstances, the Receiver argued against it here because “the expenses would likely exceed the total sum recovered.” CP 223 ¶9.

In its Order Approving Disposition of Newly Recovered Funds, entered December 14, 2001, the Court agreed. The Court ruled that there is no justification for reopening the liquidation estate, CP 227 ¶1, and it ordered that the newly-recovered funds, less administrative expenses, “shall be transmitted to the Washington State Treasurer in accordance with RCW 48.31.155.” CP 228 ¶2. As a result of this Order, on February 4, 2002, the Receiver (from his attorney’s trust account) sent an additional \$33,751.97 to the State Treasurer from the PacMar liquidation estate. CP 215.

As with the undistributable funds, Mr. Bell received no notice that the State had received any newly-recovered funds. CP 44¶8.

C. Procedural Facts

Mr. Bell began making inquiries in the Fall of 2010 regarding whether there were any funds remaining from the PacMar liquidation. CP 44 ¶9; CP 73-78. In response to his inquiries he received a letter dated November 19, 2010, from James T. Odiorne, Deputy Insurance Commissioner, CP 8-9 (also CP 80), which states:

Many years after the Pacific Marine liquidation estate was closed and the Commissioner discharged as Liquidator, some small amounts were remitted by certain reinsurers. Because there was no longer a liquidation estate to receive them, those funds were deposited with the Washington State Department of Revenue as unclaimed property. Any distribution of those funds is administered by the Department of Revenue pursuant to the laws and regulations applicable to unclaimed property.

CP 80.

Mr. Bell followed up with the Department of Revenue (“DOR”), and received the following letter from Patti J. Wilson, Operations Manager, dated December 10, 2010:

The funds currently held as unclaimed property were transferred to the state in response to a King County Court order. According to Revised Code of Washington (RCW) 48.31.155, the funds were to be held in trust for six years and then escheat to the state.

The Unclaimed Property section did not receive information as to whom the proceeds belong; therefore, we require a court

order directing disbursement of the funds. **Unless we are served with a notice of a court proceeding with respect to these funds within 90 days from the date of this letter the funds will permanently escheat to the state as directed in RCW 48.31.155.**

CP 82 (emphasis added). The DOR response was carefully thought out, and was made in accordance with instructions the Department received in a Technical Advisory Request. CP 100-103.¹

This action was commenced within the 90-day period specified in the letter of December 10, 2010, by filing a Complaint for Distribution of Unclaimed Funds on March 17, 2011, in Thurston County Superior Court. CP 4-11. The State DOR appeared and answered. CP 12-15. After *mesne* proceedings, the parties filed Cross-Motions for Summary Judgment, which were heard before the Hon. Lisa Sutton on May 17, 2012. CP 341-342. Judge Sutton denied the plaintiffs' motion, granted summary judgment to the State DOR, and dismissed the complaint. CP 342. Final judgment to this effect was entered June 22, 2012, CP 343-345. This appeal followed.

¹ This advice is consistent with and apparently derived from the time period for challenging an adverse DOR decision under the Washington Uniform Unclaimed Property Act, RCW 63.29.260.

IV. ARGUMENT

A. Standard of Review

Decisions on summary judgment are reviewed *de novo*. *Hisle v. Todd Pacific Shipyards Corp.*, 151 Wn.2d 853, 860, 93 P.3d 108 (2004).

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c). . . .

In a summary judgment motion, the burden is on the moving party to demonstrate that there is no genuine issue as to a material fact and that, as a matter of law, summary judgment is proper. *See Hartley v. State*, 103 Wn.2d 768, 774, 698 P.2d 77 (1985). The moving party is held to a strict standard. Any doubt as to the existence of a genuine issue of material fact is resolved against the moving party. In addition, we consider all the facts submitted and the reasonable inferences therefrom in the light most favorable to the nonmoving party.

Atherton Condominium Apartment-Owners Ass'n Board of Directors v. Blume Development Co., 115 Wn.2d 506, 516, 799 P.2d 250 (1990). A motion for summary judgment "should be granted only if, from all the evidence, reasonable persons could reach but one conclusion." *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982).

In this case the undisputed material facts establish that the State failed to give any notice to Robert Bell or PacMar of the existence and payment to the State of both undistributable and newly-recovered funds, and that Robert Bell and PacMar were reasonably identifiable and known

to the State as interested parties and owners of these funds. The State was not entitled to judgment as a matter of law; to the contrary, under the Washington Uniform Unclaimed Property Act and fundamental principles of Due Process, Robert Bell was entitled to judgment as a matter of law. This Court should reverse with an order to enter judgment in Mr. Bell's favor.

In the alternative, if this Court finds material questions of fact regarding notice or ownership, then granting summary judgment to the State was error, and the case should be remanded for trial.

B. Escheat was Not Legally Permissible in the Absence of Notice and an Opportunity for Hearing

1. Notice and an Opportunity for Hearing are Essential Requisites of Due Process

It is firmly established that reasonable notice to interested parties and an opportunity to be heard are required prior to escheat of property.

In *Taylor v. Westly*, 488 F.3d 1197 (9th Cir. 2007), a stockholder whose shares had been seized by the California State Controller as "unclaimed property" under an escheat statute sued for injunctive relief. In finding a strong likelihood of success on appeal, the Ninth Circuit stated:

Before the government may disturb a person's ownership of his property, "due process requires the government to provide 'notice reasonably calculated, under all

the circumstances, to apprise [the] interested part[y] of the pendency of the action and afford [him] an opportunity to present [his] objections.’ ”

Taylor, supra, 488 F.3d at 1201 (*quoting, Jones v. Flowers*, 547 U.S. 220, 126 S.Ct. 1708, 1713-14, 164 L.Ed.2d 415 (2006), *quoting, Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 94 L.Ed. 865 (1950)). Yet even that facially defective California statute provided better notice than RCW 48.31.155, because it provided for “notice . . . as late as one year after receipt of escheated property, and [that] such notice need only be made via a ‘newspaper of general circulation.’” *Taylor, supra*, 488 F.3d at 1199 n.7 (*citing, Cal.Civ.Proc.Code* § 1531). By way of contrast, RCW 48.31.155 does not contain *any* notice provision to protect the residual owner-shareholders.

In *Robinson v. Hanrahan*, 409 U.S. 38, 93 S.Ct. 30, 34 L.Ed.2d 47 (1972), the Supreme Court struck down escheat of the motor vehicle of a defendant charged with armed robbery, because the notice was mailed to the defendant’s home at a time that the State knew he was incarcerated in the Cook County jail. As stated by the Court:

“An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” [*quoting, Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 94 L.Ed. 865 (1950)]. More specifically, *Mullane*

held that notice by publication is not sufficient with respect to an individual whose name and address are known or easily ascertainable.

In the instant case, the State knew that appellant was not at the address to which the notice was mailed and, moreover, knew also that appellant could not get to that address since he was at that very time confined in the Cook County jail. Under these circumstances, it cannot be said that the State made any effort to provide notice which was “reasonably calculated” to apprise appellant of the pendency of the forfeiture proceedings. Accordingly, we . . . reverse the judgment of the Supreme Court of Illinois, and remand for further proceedings not inconsistent with this opinion.

Robinson v. Hanrahan, supra, 409 U.S. at 39-40.

Many other decisions are in accord. *E.g., AW Financial Services, SA v. Empire Resources, Inc.*, 981 A.2d 1114 (Del. SCt. 2009) (considering an amendment that shortens the escheat period for dormant stock from five to three years, the Court says: “The amendment is also substantive because, if applied retroactively, it would divest pre-amendment stockholders of Delaware corporations of a property right by government action without affording them prior notice and an opportunity to be heard. Stated differently, retroactive application would facilitate the taking of property without due process, which is a substantive right.”); *Realty Assocs. of Portland, Oregon v. Women’s Club*, 230 Or. 481, 369 P.2d 747 (Or. S.Ct. 1962) (escheat statutes, “when they provide for notice and an opportunity to be heard, do not violate due process,” but an Oregon

statute providing for escheat of unclaimed property after the winding up of a corporation, which “makes no provision for a judicial proceeding or notice or hearing of any kind,” is “in clear violation of the Fourteenth Amendment.”); *Texas Municipal League Intergovernmental Risk Pool v. Texas Workers’ Compensation Comm’n*, 74 SW2d 377 (Texas S.Ct. 2002) (“Escheat statutes, whether absolute or custodial, are constitutional if they give potential claimants notice after the state acquires the funds and an administrative and judicial hearing to adjudicate claims. *See Connecticut Mut. Life Ins. Co. v. Moore*, 333 U.S. 541, 547, 68 S.Ct. 682, 92 L.Ed. 863 (1948). A state must also use reasonable diligence to discover the potential claimants to the property.”); *Marine Nat. Exchange Bank of Milwaukee v. State*, 248 Wis. 410, 22NW2d 156, 160 (Wis. S.Ct. 1946) (unclaimed bank account escheat statute unconstitutional in the absence of due notice to the depositor or owner of the property).

Washington law is in accord with these fundamental principles:

“When a state seeks to deprive a person of a protected interest, procedural due process requires that an individual receive notice of the deprivation and an opportunity to be heard to guard against erroneous deprivation.” Due process does not require actual notice. “Rather, ... due process requires the government to provide ‘notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.’ ”

Speelman v. Bellingham/Whatcom County Housing Authorities, 167 Wn. App. 624, 631, 273 P.3d 135 (Div. 1 2012) (quoting, *Amundrud v. Court of Appeals*, 158 Wn.2d 208, 216, 143 P.3d 571 (2006), and *Jones v. Flowers, supra*, 547 U.S. at 226).

Meaningful notice and an opportunity to be heard prior to deprivation of property is also guaranteed by the Washington Constitution, Art. I §3. *Gray v. Pierce County Housing Auth.*, 123 Wn. App. 744, 752, 97 P.3d 26 (Div. 2 2004); *In re Marriage of Ebbighausen*, 42 Wn. App. 99, 102, 708 P.2d 1220 (Div. 3 1985). Washington relies on the rule of *Mullane* in its interpretation of Art. I §3, *Marriage of Ebbighausen, supra*, thus affording concurrent State constitutional grounds for striking RCW 48.31.155 because it permits escheat of property without meaningful notice to “interested parties” and an opportunity to be heard.

2. The Insurance Liquidation Escheat Statute Violates Due Process under the Fourteenth Amendment and Art. I §3 of the Washington Constitution

a. On its Face

The funds in dispute were turned over to the State on the authority of former RCW 48.31.155, which provided at that time as follows:

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,^[2] 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^[2] 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.*

Laws of 1993, ch. 462 §68 (emphasis added). Although the general claims process in liquidation of an insurer contains notice provisions directed at “creditors who may have claims against the insurer,” RCW 48.31.060(1); *see also*, RCW 48.31.185(1) (notice of denial of creditor’s claim), once the liquidation estate is closed there is no provision calculated to provide notice and an opportunity to be heard to the original owners of the insurer, to protect against escheat of their property under former RCW 48.31.155.

Under the strength of the authorities cited in Section B(1) above, this escheat provision is void on its face. The statute permits automatic escheat upon expiration of a time period without any notice or opportunity to be heard whatsoever.

² The statute was amended in 2007 to replace “state treasurer” with “state department of revenue as unclaimed funds,” and to replace the second reference to “state treasurer” with “state department of revenue”. Laws of 2007, ch. 80 §12. In this particular case, even before the amendment, the Treasurer took the view that this language simply meant that the funds should go to the State, and that the Unclaimed Property Section of DOR was the proper place for the funds to go “so the ‘lost’ owners will have some recourse to retrieve their funds.” CP 98 (internal DOR email).

b. As Applied

It cannot be doubted that Robert Bell and PacMar were “interested parties” entitled to notice within the meaning of the Due Process case law on notice. It is well-established that “property rights of a corporation pass on dissolution to its shareholders . . .” *Seierstad v. Serwold*, 105 Wn.2d 589, 594, 716 P.2d 885 (1986) (citing, *Taylor v. Interstates Inv. Co.*, 75 Wash. 490, 135 P. 240 (1913)); accord, RCW 23B.14.050(1)(b). The State knew of Mr. Bell’s relationship with PacMar, and had even alleged that he was the “alter ego” of Holding Corporation, the sole shareholder of PacMar. CP 64 ¶36.

Washington case law recognizes that shareholders have a claim in the residual corporate assets separate and apart from the claims of creditors. See, *Lonsdale v. Chesterfield*, 99 Wn.2d 353, 360, 662 P.2d 385 (1983) (“a creditor of a corporation can satisfy his claim against the corporation out of the assets distributed to shareholders upon dissolution.”). A shareholder’s ownership of the residuum of the estate of the corporate liquidation is based on his or her status as shareholder, not as creditor. The claims of the corporate creditors have a higher priority than the underlying ownership rights of a shareholder, but that has no applicability to any of the money in dispute here. In this case, the undistributable funds could not be distributed to creditors by definition – it

had been attempted and it failed. Counsel for the Receiver apparently agreed, because in transmitting the balance of undistributable funds his letter says, “No claimant is entitled to any of these funds.” CP 49 & 210. As for the newly-acquired funds, the trial court specifically ordered that the liquidation estate would not be reopened to distribute them, and therefore no creditor ever acquired any right to these funds. It is also significant that all creditors who had filed claims were notified prior to final distribution, and the Receiver stated that there were “no objections to the Notice for final distribution.” CP 185 ¶5. As previously noted, the Receiver said that these newly-recovered funds were “general assets of the PacMar estate, . . . not impressed by any trust or other special claim status.” CP 223 ¶7. By the time these undistributable and newly-recovered funds were transferred to the State, the only “interested party” left standing were the original owners – Robert Bell and PacMar.

Under the strength of the authorities cited in Section B(1) above, this escheat provision as applied violates Mr. Bell’s and PacMar’s right to Due Process of law. ALL of the undistributable funds and ALL of the newly-recovered funds were transferred to the State without ANY notice whatsoever being given to Mr. Bell or to PacMar. That does not come close to satisfying fundamental Due Process.

3. Escheat without Notice Violated the Washington Uniform Unclaimed Property Act

The Washington Uniform Unclaimed Property Act (“WUUPA”), ch. 63.29, RCW, also applies here. The WUUPA applies to “[i]ntangible property distributable in the course of a dissolution of a business association,” RCW 63.29.110, “[i]ntangible property and any income or increment derived therefrom held in a fiduciary capacity for the benefit of another person,” *id.* § .120, and “[i]ntangible property held for the owner by a . . . state or other government, governmental subdivision or agency . . .,” *id.* § .130. The payments made from the Receiver’s lawyer’s trust account to the State fit within all these categories.

The DOR’s December 10, 2010, advice to Mr. Bell that escheat would be complete unless he commenced a court proceeding within ninety days is consistent with relevant provisions of WUUPA. Under WUUPA, a person, like Mr. Bell here, may assert a claim with DOR to recover their funds held by the State. RCW 63.29.240(1). In the event the claim is not accepted, the claimant is to proceed as follows:

A person aggrieved by a decision of the Department or whose claim has not been acted upon within ninety days after its filing may bring an action to establish the claim in the superior court of Thurston County naming the Department as a defendant. *The action must be brought within ninety days after the decision of the Department or within 180 days after the filing of the claim if the Department has failed to act on it.*

RCW 63.29.260 (emphasis supplied). Consistent with this statute, Mr. Bell and PacMar filed this suit “within ninety days” “in the superior court of Thurston County naming the Department as a defendant.”

Unlike former RCW 48.31.155, WUUPA does contain notice provisions. *See*, RCW 63.29.180. The problem for the State is that there is absolutely no evidence that it complied with those notice provisions, which require not merely publication of a notice in a newspaper of general circulation for unclaimed property, but further:

(3) Not later than September 1st, immediately following the report required by RCW 63.29.170, 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(3). As already noted, “property rights of a corporation pass on dissolution to its shareholders . . .” *Seierstad v. Serwold, supra*, 105 Wn.2d at 594; *accord*, RCW 23B.14.050(1)(b). The State knew that Mr. Bell was an interested party in PacMar – indeed, it had alleged he was the alter ego of PacMar’s sole shareholder in a lawsuit it had brought against him. CP 64 ¶36. The State knew where to find Mr. Bell, but it never notified him that it was holding undistributable and newly-recovered funds belonging to PacMar.

The trial court erred as a matter of law by granting summary judgment to the State, since it was in violation of the notice provisions under the WUUPA.

C. Escheat is Not Permissible When the Owner is Known or Reasonably Identifiable

As noted above, the funds in dispute were turned over to the State on the authority of former RCW 48.31.155, which applies only to “[u]nclaimed 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” *Id.* (emphasis added). It has been repeatedly held in the context of escheat of decedents’ estates that “it is not the policy of the state to absorb private property if the legal heirs of a decedent are discovered.” *In re Smith’s Estate*, 179 Wash. 287, 297, 37 P.2d 588 (1934) (quoting, *inter alia*, *In re Sullivan’s Estate*, 48 Wash. 631, 640, 94 P. 483 (1908)). By analogy, where the rightful owner of the undistributed funds and newly-recovered funds is readily identifiable and his whereabouts are already known to the State, escheat is not available as a matter of law.

Because the State knew that Robert Bell was the true owner of the residuum of the PacMar estate, and it knew where to contact him, the

statutory prerequisite of property belonging “to a person who is unknown or [who] cannot be found” was not triggered. While it is true that these funds were “unclaimed” within the liquidation proceeding, the State knew or should have known that, upon notice to Mr. Bell, they would not be “unclaimed”. Accordingly, the fundamental requisites for triggering an escheat under former RCW 48.31.155 do not apply here as a matter of law, and the trial court committed reversible error by granting summary judgment to the State.

The principle that escheat is inapplicable when the rightful owner is known is established by *In re Smith's Estate*, 179 Wash. 287, 37 P.2d 588 (1934). In *Smith's Estate*, the State filed a petition for escheat after no heirs appeared to claim a decedent's estate for 18 months, under the authority of Rem. Rev. Stat. § 1357, which provided: “If at the expiration of eighteen months after the issuance of letters of administration no heirs shall have appeared and established their claim thereto, the court having jurisdiction of such estate shall render a decree escheating all the property and effects of such decedent to the state of Washington.” *Id.* at 293. After the 18-month period, a claimant appeared with evidence that the decedent had a surviving brother. *Id.* at 290-91. In rejecting the State's claim, the Washington Supreme Court says:

But what right has the state to such relief under the record in this case and under these statutes, as heretofore construed? It is plain the statute deals with property of a definite kind or class. *It speaks only of property within this state possessed by a person who dies intestate, leaving no heirs. Until it is shown that the property in question is that kind of property, there is nothing to escheat, no title to vest in the state.*

Id. at 293 (emphasis added).

Similarly, what right has the State to the PacMar residuum? “Escheats being disfavored in the law,” *In re Estate of Lillie*, 106 Wn.2d 269, 284, 721 P.2d 950 (1986), the statutory grant of power must be narrowly construed. The State has the burden of proving its escheat claim. *Smith’s Estate, supra*, 179 Wash. at 294. The statute permits escheat only of “unclaimed funds . . . distributable to a person who is unknown or cannot be found . . .” former RCW 48.31.155. Funds likely to belong to person who is known to the State and who has already been located by it hardly fall within the purview of the statute in the first place. Once again, it is well to remember that “it is not the policy of the state to absorb private property” if the rightful owner is discoverable. *Smith’s Estate, supra*, 179 Wash. at 297.

It was error to grant summary judgment to the State, permitting it to escheat property when the owner of that property was neither unknown or unable to be found. If this decision is upheld, it sets a precedent for State absorption of private property that was never intended by the

Legislature, and that flies in the face of the guarantee against government taking of property without Due Process.

D. Entitlement to Interest

The WUUPA provides for the payment of interest on money as follows:

If the property claimed was interest-bearing to the owner on the date of surrender by the holder, the department also must pay interest at the legal rate or any lesser rate the property earned while in the possession of the holder. Interest begins to accrue when the property is delivered to the department and ceases on the earlier of the expiration of ten years after delivery or the date on which payment is made to the owner. No interest on interest-bearing property is payable for any period before June 30, 1983.

RCW 63.29.240(3)(b).

Accordingly, Mr. Bell is entitled to ten years of legal-rate interest measured from the date of recovery.

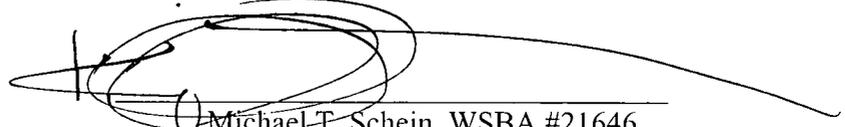
V. CONCLUSION

It is absolutely required that the State notify interested parties prior to depriving them of valuable property by escheat. It is undisputed that Mr. Bell and PacMar were interested parties with respect to both the undistributable and newly-recovered funds out of the PacMar estate, entitled to notice under WUUPA and Due Process. It is undisputed that Mr. Bell was the true beneficial owner of PacMar, entitled to the residuum

of the PacMar estate. Accordingly, summary judgment should have been granted to Appellants, not to the State.

For all the foregoing reasons, Appellants respectfully request that this Court: (1) reverse summary judgment to the State; (2) remand with instructions to enter judgment as a matter of law in favor of Mr. Bell and PacMar, for the full amount of the undistributable and newly-acquired funds, plus interest under RCW 63.29.240(3)(b).

DATED this 13th day of December, 2012.

A handwritten signature in black ink, appearing to be "Michael T. Schein", written over a horizontal line. The signature is somewhat stylized and loops back to the left.

Michael T. Schein, WSBA #21646
Kevin P. Sullivan, WSBA #11987

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CERTIFICATE OF SERVICE

I, Mina Shahin, legal assistant at SULLIVAN LAW FIRM, hereby certify that on the date set forth below I caused a copy of the within BRIEF OF APPELLANTS to be sent by U.S. Mail, first class postage prepaid, and by email, to counsel of record for Respondent at the following addresses:

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Subscribed and sworn to under penalty of perjury of the laws of the State of Washington.

DATED this 14 day of December, 2012.



Mina Shahin

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