

No. 43719-8-II  
COURT OF APPEALS OF THE  
STATE OF WASHINGTON, DIVISION TWO

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PACIFIC MARINE INSURANCE COMPANY

and ROBERT BELL,

Appellants,

v.

STATE OF WASHINGTON, Through its Divisions, Department of

Revenue and the Insurance Commissioner,

Respondent.

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DIVISION II  
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**REPLY BRIEF OF APPELLANTS**

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## I. REPLY ARGUMENT

### A. The “Collateral Attack” and “Res Judicata” Arguments Completely Misstate the Case

This is not a “collateral attack” on the receivership action in King County Superior Court. This case accepts the outcome of the receivership action, which ordered that undistributed funds, left-over administrative funds, and newly-recovered funds, all be sent by the receiver to the State of Washington as a custodian for the rightful owners. Having accepted that outcome, this case then presents three main questions: (1) *As between the State and Mr. Bell / PacMar, who has the greater ownership interest in these funds?* (2) *Is the absence of notice of escheat under RCW 48.31.155 a deprivation of Due Process?* and (3) *Would escheat violate the Washington Uniform Unclaimed Property Act (“WUUPA”)?*

#### 1. Ownership of the Disputed Funds was not Determined in the Prior Action

In rushing to analyze the four elements of res judicata, we sometimes overlook the most fundamental prerequisite for its application: **“[T]he issue to be precluded must have been actually litigated and necessarily determined in the prior action.”** *City of Arlington v. Central Puget Sound Growth Mngmt. Hearings Bd.*, 164 Wn.2d 768, 792, 193 P.3d 1077 (2008) (emphasis added); *Shoemaker v. City of Bremerton*, 109 Wn.2d 504, 508, 745 P.2d 858 (1987). In this case, the King County

Superior Court did not determine ownership in the undistributed funds, the left-over administrative funds, or the newly-recovered funds, other than to call them “funds of the [PacMar] estate.” CP 205. Instead, it ordered them to be sent to the State in trust under the escheat statute, which allows for later determination of ownership. Therefore, the short answer to the State’s res judicata and collateral estoppel arguments is – *so what?* All parties accept the outcome of the King County receivership, but that does not tell us what to do with the funds that are left over. It is those funds that are the subject of this dispute.

This point is made clear by examining the closing orders that created the funds that are in dispute here. The King County Superior Court adjudicated rights to the funds it was able to distribute. But by the plain language of its closing orders, it did not adjudicate rights to the undistributed funds, the left-over administrative funds, and newly-recovered funds. Instead, in its Order Approving Final Distribution of October 7, 1999, it ruled:

E. The Receiver is authorized to give notice to recipients of the final distribution payments that a failure to cash the recipient’s distribution check within thirty (30) days of issuance may result in forfeiture.

F. 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. This shows that, even with respect to the un-cashed checks for which King County had previously adjudicated priority rights for purposes of distribution, that adjudication *was not* carried into the final order. Instead, the final order states that those interests were *subject to forfeiture*, under the provisions of RCW 48.31.155 (unclaimed funds and escheat).

The next significant order is the January 25, 2000, Order of Discharge of Receiver and Closure of Receivership Estate, which states:

2. Counsel to the Receiver shall transfer the *funds of the estate in trust* to the Washington State Treasurer pursuant to statute.

CP 205 (emphasis added). This shows that the King County Superior Court has ruled that the left-over funds now in dispute are *funds of the PacMar Estate*, not of anybody else. While these funds could theoretically have become State funds by operation of a constitutional escheat statute, ownership had not “been actually litigated and necessarily determined” at the time of the King County final order, *City of Arlington, supra*, 164 Wn.2d at 792, and therefore the State’s res judicata argument fails as to the unclaimed and the left-over administrative funds.

The argument likewise fails with respect to the newly-recovered funds. Indeed, with respect to these funds, the State's argument that ownership was adjudicated by King County runs expressly contrary to the following representations to the court made by the State's own receiver in its Petition for Order Approving Disposition of Newly-Recovered Funds:

7. . . . [A]ll [newly-recovered] funds . . . are general assets of the PacMar estate, not impressed by any trust or other special claim status.

\* \* \*

9. Petitioner does not believe that a reopening of this estate is necessary or justified. The newly-recovered funds should be transferred to the Washington State Treasurer pursuant to statute and the closing orders in this case. The total recovered . . . would not be adequate to provide any further distributions to claimants due to the costs and expenses which would be incurred and charged against such funds as a priority prior to any distribution . . . .

\* \* \*

WHEREFORE, the Petitioner requests that the Court enter an Order approving this Petition and providing that the newly-recovered assets . . . be transmitted to the Washington State Treasurer pursuant to the prior Order of this Court regarding excess assets and in accordance with RCW 48.31.155.

CP 223-24.

On December 14, 2001, the King County Superior Court approved this Petition and ordered that the newly-recovered funds be transmitted to the Treasurer pursuant to the cited statute. CP 216-17. It follows that the King County Superior Court accepted the State's request that the

receivership *not be reopened*, that it *not adjudicate rights to the newly-recovered funds*.

Each of the letters remitting funds to the State clearly articulate that the funds are “undistributable assets of the receivership estate” of “Pacific Marine Insurance Company,” “Unclaimed Assets from Receivership Estate of Pacific Marine Insurance Company . . .,” or “recoveries on behalf of the receivership of PacMar.” CP 210, 211, 215, 217. Thus, the receiver sent all these disputed funds to the State as custodian for PacMar, the presumptive rightful owner, pursuant to RCW 48.31.155.

If the State is serious about res judicata or collateral estoppel, the nearest thing to a final determination in King County was that all the disputed funds are unencumbered general funds of the PacMar estate, clear of any receivership. Thus, at the outset, res judicata and collateral estoppel not only do not help the State’s argument, but they create another ground for upholding PacMar’s claim.

**2. Neither Res Judicata Nor Collateral Estoppel Apply Because the Issues and Claims are Not Identical**

We address this only because the State rests so much of its case on res judicata and collateral estoppel.

All four identities are required to be established to invoke res

judicata: (1) subject matter, (2) claim or cause of action, (3) persons and parties, and (4) the quality of the persons for or against whom the claim is made. *City of Arlington, supra*, 164 Wn.2d at 791-92.

The doctrine of collateral estoppel differs from res judicata in that, instead of preventing a second assertion of the same claim or cause of action, it prevents a second litigation of issues between the parties, even though a different claim or cause of action is asserted.

*Rains v. State*, 100 Wn.2d 660, 665, 674 P.2d 165 (1983). Thus, the questions before the court in determining applicability of collateral estoppel are:

(1) Was the issue decided in the prior adjudication identical with the one presented in the action in question? (2) Was there a final judgment on the merits? (3) Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication? (4) Will the application of the doctrine not work an injustice on the party against whom the doctrine is to be applied?

*Rains v. State, supra*. The party asserting a defense of res judicata or collateral estoppel has the burden of proving each of these four elements.

*Luisi Truck Lines Inc. v. Washington Utilities and Transp. Comm'n*, 72 Wn.2d 887, 894, 435 P.2d 654 (1967).

While the State addresses much of its argument to identity of parties and privity, both res judicate and collateral estoppel founder on the necessary elements of identity of subject matter, issues and claims. The subject matter in the King County receivership action is not identical

to the subject matter of the present action. While there is no single test for determining whether the subject matter is identical, courts focus on differences in both theories of recovery and the facts underlying those theories. *City of Arlington, supra*, 164 Wn.2d at 793; *Marshall v. Thurston Cty.*, 165 Wn. App. 346, 353-54, 267 P.3d 491 (Div. 2 2011). The King County action concerned marshaling the estate of the delinquent insurer, and proper distribution to claimants under the priority scheme created by RCW 48.31.280. The present action concerns what to do with the funds left over that were not distributed in the King County receivership action, and that King County expressly declined to adjudicate. The first action was governed by all the provisions of RCW ch. 48.31 that deal with receivership of delinquent insurers. The second is governed by the ongoing effect of one specific escheat provision (RCW 48.31.155), its constitutionality under the Due Process Clause of the Fourteenth Amendment, and the WUUPA, ch. 63.29, RCW. Neither the theories of recovery nor the underlying facts are identical, and therefore there is no identity of subject-matter for purposes of res judicata.

For purposes of collateral estoppel we focus on identity of the “issue decided” rather than the subject-matter of the lawsuit, since collateral estoppel is issue preclusion, not claim preclusion. *Rains v. State, supra*, 100 Wn.2d at 665. The “issue decided” in the King County

receivership was priority of rights between all statutory claimants to distributions of funds that were distributable. *No issue was decided as to funds that were not distributable.* The issues in this case are whether Bell / PacMar or the State has superior rights to the funds that were not distributable in the receivership, whether Bell / PacMar's Due Process rights were violated by escheat after six years without notice, and whether the notice requirements of WUUPA were violated. These issues are not even close to being identical, and therefore even if there were a decided issue to preclude in the present case, the doctrine of collateral estoppel would not apply.

What has just been said demonstrates the absence of identity of claims or causes of action for purposes of the second element of res judicata.

To determine whether causes of action are identical, courts consider whether (1) prosecuting the second action would destroy rights or interests established in the first judgment, (2) the evidence presented in the two actions is substantially the same, (3) the two actions involve infringement of the same right, and (4) the two actions arise out of the same transactional nucleus of facts.

*Marshall v. Thurston Cty., supra*, 165 Wn. App. 354. Prosecuting this second action does not destroy rights established in the first judgment; indeed, it actually *further*s those rights. The King County receivership ordered that unclaimed funds of the PacMar Estate be sent to the State

under a statute that expressly provides that such property “shall be paid . . . to the person entitled to them or his or her legal representative upon proof satisfactory to the state department of revenue of his or her right to them.” RCW 48.31.155. In a very real sense, therefore, the present action is exactly what the King County Superior Court’s final orders contemplated, and not in any sense in derogation of those orders. Therefore, the first element weighs strongly in favor of finding that the causes of action are not identical.

The second element of the test of identity of claims for res judicata – whether the evidence is the same – weighs against finding identity here. The evidence in the prior case would be priority status of a shareholder in contention with trade creditors, and whether funds remain after payment of the trade creditors. The evidence in the present case focuses on the existence of the left-over undistributed funds from the receivership, the continued existence of PacMar, and its proper successors if it is dissolved.

The third element of the test of identity of claims for res judicata – two actions involve “infringement of the same right” – also weighs against finding identity here. The rights infringed in this claim are to ownership of property of the PacMar estate that has been discharged from the receivership, including some property that did not even exist until

after the conclusion of the receivership. The rights at issue in the receivership were to debts owed from property of the receivership. The persons with potential rights in the receivership were all creditors of PacMar entitled to priority under RCW 48.31.280. The persons with potential rights here are only the State, and Mr. Bell / PacMar. There is no infringement of the same rights.

The fourth element of identity for purposes of res judicata – “the same transaction nucleus of fact” – is also lacking. The new facts are that there are left-over funds that were not distributed by the receivership action. The State is threatening the escheat of those funds. These are new facts, giving rise to a new claim.

Unlike the prior cause of action in receivership, the WUUPA and 14<sup>th</sup> Amendment govern the outcome here. That too demonstrates that the claims are not identical for purposes of res judicata.

Because *all* identities have to exist for application of res judicata or collateral estoppel, what has been said is sufficient to negate application of these doctrines. But having discussed res judicata and collateral estoppel on their own terms, we reiterate that the overriding consideration here is that even if Mr. Bell/PacMar were to be bound by a determination made by the King County Superior Court in the receivership, the question is: *What determination?* The only determination made was that the

undistributed funds, the left-over administrative funds, and the newly-recovered funds, were general, unrestricted funds of the PacMar Estate, and that they should be dealt with under RCW 48.31.155, which permits exactly the kinds of claim of ownership that Mr. Bell is asserting here. It follows that res judicata and collateral estoppel are false issues. This Court must decide this case based on the issues raised by the Appellants: (1) Due Process infringement by the automatic escheat provisions of RCW 48.31.155; (2) the State's breach of WUUPA; and (3) the general law of escheat, which favors PacMar / Bell.

**B. The Ownership Interests and Standing of PacMar and Mr. Bell are Established**

**1. Bell / PacMar are the Rightful Owners of the Disputed Funds, and the State is Merely Holding the Funds as a Custodian for the Rightful Owners**

Aside from claim or issue preclusion, the State's other major argument is that "Plaintiffs failed to establish an ownership interest in the undistributed funds," *id.* at 10, and that "[o]nly the State was legally entitled to the balance of the administrative retention amount or the amount received after the closure of the estate." *Brief of Respondent* at 13. This argument cannot withstand analysis. The State held PacMar / Bell's property on a custodial basis only, and it cannot escheat without due notice to interested persons, which was not given here.

While it is true, as the State argues, that upon appointment of the receiver all property rights of PacMar vested in the receiver, it follows *ipso facto* that upon discharge of the receiver, such property rights as still remained returned to PacMar. See, RCW 48.07.030 (application of general corporate laws to insurance corporations except as modified by Title 48); RCW 23B.03.020 (general corporate powers, including ownership of corporate property). The situation might have been different if, as claimed by the State, *Brief of Respondent* at 28, PacMar had been dissolved – *but it was not*. The Insurance Commissioner *may request* the dissolution of the corporate existence of the insurer in liquidation, but it is not automatic. RCW 41.31.060 (“The commissioner may apply under this chapter for an order dissolving the corporate existence of a domestic insurer”). The Commissioner did not do so in this instance, preferring “rehabilitation” under RCW 48.31.030 to corporate dissolution, CP 328, and the final orders do not contain any provision dissolving PacMar. CP 188-90, 204-05. PacMar – *Pacific Marine Insurance Company* – remains an active corporation in good standing.<sup>1</sup>

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<sup>1</sup> The State’s contrary assertion in its brief at page 28 is simply not supported by its record citation to CP 204, which is the order discharging receiver and closing the estate, but which does not order dissolution of PacMar. CP 204-05. We invite the Court to take notice of the online corporations search record for UBI 601067953, found at [http://www.sos.wa.gov/corps/search\\_results.aspx?search\\_type=simple&criteria=all&name\\_type=contains&name=pacific+marine+insurance&ubi=](http://www.sos.wa.gov/corps/search_results.aspx?search_type=simple&criteria=all&name_type=contains&name=pacific+marine+insurance&ubi=) (accessed 03/22/2013).

The corporation, not its shareholders, is the owner of all its property so long as it continues in existence. *State of California v. Tax Commissioner*, 55 Wn.2d 155, 157, 346 P.2d 1006 (1959). Therefore, PacMar is the presumed owner of the distributed funds unless it has been dissolved. If (as the State seems to contend) PacMar had been dissolved, then Mr. Bell's ownership interest in the disputed funds would be clearly established. 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 admits in its Brief that "PacMar's sole shareholder was the Pacific Marine Holding Company, an entity formed by Robert Bell." *Brief of Respondent* at 3. The State further admits that Pacific Marine Holding is "a defunct corporation". *Brief of Respondent* at 29. Accordingly, as sole shareholder of the holding company that was sole shareholder of PacMar, Mr. Bell is next in line for the PacMar assets.

The only basis for the State to assert a higher priority interest than PacMar or Mr. Bell is on the basis of escheat under RCW 48.31.155. But as we have already demonstrated, RCW 48.31.155 lacks the notice necessary to make escheat constitutional.

The State seems to argue that neither PacMar nor Mr. Bell could have any further interest in the disputed funds simply because not all creditors were paid in the receivership proceeding. *Brief of Respondent* at 13-15. This does not follow. It might follow that Pacific Marine Holding could not get a shareholder priority distribution of funds adjudicated by the King County receivership because higher priority creditors were left unpaid, but this has no effect on funds that were not distributed by the King County Superior Court according to priority classes. The fact is, there were unrestricted funds of the PacMar estate left over that the King County receivership did not adjudicate, but instead entrusted to the State as custodian subject to the rights of putative owners to assert claims. Those funds belong either to the corporate entity that had been released from receivership, or to its shareholders in their capacity not as priority claimants in the receivership, but in their capacity as residual claimants after a corporate dissolution. The State cites absolutely no authority for its supposed superior right to ownership of funds belonging to the PacMar estate.

The State appears to have decided that it is entitled to the property of PacMar and Mr. Bell simply because it believes they are unworthy. The State has perhaps forgotten that our legal system protects private ownership of property, and affords all persons Due Process of Law. As is

made clear by the U.S. Supreme Court case of *Robinson v. Hanrahan*, 409 U.S. 38, 93 S.Ct. 30, 34 L.Ed.2d 47 (1972) (armed robber entitled to meaningful notice before his property can be seized by the government), Due Process does not exist just to protect people who behave in a manner approved by the State. *Brief of Appellants* at 11-12. As stated by the Washington Supreme Court, “it is not the policy of the state to absorb private property” if the rightful owners can be discovered. *In re Smith’s Estate*, 179 Wash. 287, 297, 37 P.2d 588 (1934).<sup>2</sup>

The State itself concedes that “Washington’s Uniform Unclaimed Property Act, ch. 63.29 RCW, establishes a procedure by which property that is presumed abandoned is transferred to the State *as custodian for the absent owner, who may claim it at any time.*” *Brief of Respondent* at 10 (emphasis added). But by its arguments in this appeal, the State is mistaking its custodial role for ownership rights.

As we previously argued, escheat is inapplicable when the rightful owner is known. *Brief of Appellants* at 20-23. By holding that under the plain language of RCW 48.31.155, Bell / PacMar are “persons entitled” to

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<sup>2</sup> The State makes reference to the receiver’s duty to assess PacMar’s shareholders “superadded liability” under Wash. Const. Art. XII §2, but makes no argument arising from this. *Brief of Respondent* at 3. To avoid confusion, any obligation arising from this duty was discharged as part of the settlement of the receiver’s action against Mr. Bell, which is admitted by the State. *Id.* at 3-4; CP 43 ¶5; CP 264, 268 ¶2.

the disputed funds, this Court will vindicate the presumption against escheat of private property.

## **2. Bell / PacMar have Standing**

The State argues that, under the facts presented here, Bell and PacMar lack standing to challenge the constitutionality of RCW 48.31.155. *Brief of Respondent* at 16-18. We accept the State's legal proposition: "A litigant does not have standing to challenge a statute on constitutional grounds unless the litigant is harmed by the particular feature of the statute which is claimed to be unconstitutional." *Kadoranian v. Bellingham Police Dept.*, 119 Wn.2d 178, 191, 829 P.2d 1061 (1992). But we cannot agree with the State's assertion that Bell and PacMar have not been harmed by the failure of RCW 48.31.155 to require notice to interested persons prior to escheat.

In *Kadoranian*, the daughter of a suspected drug dealer answered a call placed by a police informer. The police had authority to intercept this conversation based on the approval of one party to the call, under exceptions under the State Privacy Act, ch. 9.73, RCW. *Id.* at 181-82, 184. The sum and substance of the intercepted conversation was that her father was not home. *Id.* at 182. Later, after the father was arrested (not due to the intercepted communication), the daughter sued for damages and challenged the constitutionality of the Privacy Act exceptions. Under

these circumstances, the Supreme Court held that inadvertent interception under a valid authorization of “an inconsequential and non-incriminating statement by someone not named in the authorization” did not give rise to damage or injury under the Privacy Act. *Id.* at 188-89. Therefore, the “harm” threshold for constitutional standing was not satisfied. *Id.* at 191.

The present case is nothing like *Kadoranian*. PacMar is recognized as the putative owner of the undistributed funds in the very orders that release them to the custody of the State. The termination of the receivership returns residual ownership of corporate property back to the insurer. Under the corporate dissolution law cited above and in our opening brief, if there is a residuum beyond the life of the corporation, the shareholder is entitled to it. It is undisputed that Mr. Bell is the controlling person of PacMar’s sole shareholder (the holding company), and that the shareholder is defunct. Therefore, both PacMar and Bell have standing to challenge the constitutionality of RCW 48.31.155, under which their property was purportedly escheated to the State with no notice to them.

The State argues that only the seven claimants who failed to negotiate their checks, and who were certified by the receiver to the State Treasurer as persons entitled to payment, could have claimed the disputed funds. *Brief of Respondent* at 17. As already discussed, this flawed analysis completely overlooks the fact that each transmittal to the State

Treasurer identified the funds as funds *of the Pacific Marine Insurance Company estate*. This should have put the State Treasurer / DOR on notice that PacMar had a potential interest in these funds.

While it may be that the seven claimants who did not cash their checks would have been entitled at some point to assert a claim against these funds, it should be remembered that, unlike Bell / PacMar, they were directly notified of the proceedings, and the King County Superior Court ruled that their claims would be forfeited if they did not respond within 30 days. CP 189 ¶E. Furthermore, this argument could only apply to the first \$22,958.56, representing funds that were unclaimed. It has no application to the left-over administrative funds, or the newly-recovered funds, which total \$73,614.75.

**C. The State Violated Constitutional and Statutory Notice Duties**

**1. RCW 48.31.155 is Unconstitutional for Lack of Notice to the Owners of the Insurer**

At last we return to our basic argument: that RCW 48.31.155, by permitting automatic escheat after six years *without formal escheat proceedings* and *without any notice* to the owners of the insurer in receivership, is unconstitutional under Due Process. The statute provides, in relevant part:

Unclaimed funds subject to distribution remaining in the liquidator's hands when he or she is ready to apply to the

court for discharge, including the amount distributable to a person who is unknown or cannot be found, shall be deposited with the state treasurer, and shall be paid without interest to the person entitled to them or his or her legal representative upon proof satisfactory to the state treasurer of his or her right to them. *An amount on deposit not claimed within six years from the discharge of the liquidator is deemed to have been abandoned and shall be escheated without formal escheat proceedings and be deposited with the state treasurer.*

Former RCW 48.31.155 (Laws of 1993, ch. 462 §68) (emphasis added).

This statute only applies at the time of discharge of the receiver, when the residual rights of the insurer and its owners are about to be restored. Yet it is clear that there is no provision in this statute for notice to these owners, or for any formal escheat proceeding under which notice would be given. Even if read together with the WUUPA, the notice provisions vis-à-vis shareholders of the insurer and the discharged insurer itself are woefully inadequate, since the scope of notice is limited to those persons listed by the receiver as entitled to notice. RCW 63.29.170, .180. The State points to this limitation as a way to absolve itself from responsibility, but all it does is reinforce the conclusion that escheat under RCW 48.31.155 violates Due Process.

**2. A Party's Ability to "Monitor" a Case Does not Discharge other Parties from the Affirmative Obligation to Provide Notice of Filings**

The State does not contest our statement in our opening brief that "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.” *Brief of Appellant* at 4. In particular, and of central relevance here, the State makes no effort to establish any copies of pleadings were given to Mr. Bell or to PacMar relating to the closing orders that transferred undistributed and newly-recovered funds to the State Treasurer pursuant to RCW 48.31.155.

The State does argue that by virtue of being the company under receivership, PacMar had notice of the closing orders transferring undistributed funds. *Brief of Respondent* at 21. This glib argument sounds good, but analysis demonstrates that it has no substance to it. Notice by the State to itself does not satisfy the “fundamental requirement of due process” that there be “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 . . .*” *Robinson v. Hanrahan, supra*, 409 U.S. at 40 (emphasis added). “[A] corporation can only act through its agents . . .” *Wilson v. United States*, 221 U.S. 361, 377, 31 S.Ct. 538, 55 L.Ed. 771 (1911); *accord, e.g., Broyles v. Thurston Cty.*, 147 Wn. App. 409, 430, 195 P.3d 985 (Div. 2 2008). There was no particularized service of these pleadings upon the officers or shareholders of PacMar, who were the “interested parties” who could actually take action on behalf of PacMar. *The State’s phantom notice to*

*PacMar via the receiver was merely the State talking to itself.* At most, this gave notice to *one* of the “interested parties” in this case – the State itself. As a matter of actual substance, it did not give meaningful notice to PacMar, the free company owned and managed by Mr. Bell.

The principle that Due Process requires prior notice and a meaningful opportunity to participate is fundamental to the rule of law. *E.g., Estate of Toland v. Toland*, 170 Wn. App. 828, 839, 842, 286 P.3d 60 (Div. 2 2012); *Topliff v. Chicago Ins. Co.*, 130 Wn. App. 301, 306-07, 122 P.3d 922 (Div. 3 2005). The State attempts to substitute for constitutionally sufficient notice the argument that, because Mr. Bell initially appeared in the receivership action in 1987 and 1988, he was “aware” of it, and could have “monitored” its progress over the ensuing twelve years from his home in New Zealand. *Brief of Respondent* at 25. Thus, the State implies, Mr. Bell could have learned about the orders entered in 2000-2001 regarding the unclaimed, left-over, and newly-recovered funds.

The State must know that this is not how our system of civil litigation operates. Once a party has appeared, it is incumbent upon all other parties in the lawsuit to serve him or her with copies of all filings in the action. CR 5(a). The fact that a party’s attorney withdraws certainly does not relieve the other parties of the obligation to copy the party with

pleadings; provided they know that party's address. CR 5(b); *cf.* CR 71(c)(1) (if client address withheld in Notice of Withdrawal, service shall be made on the party by serving Clerk). Here, there is no question that the lawyer for the receiver was in contact with Mr. Bell in New Zealand at least by 1991, CP 44 ¶6, and therefore the State has no excuse for not *directly copying* Mr. Bell with the pleadings pertaining to residual amounts left undistributed by the receivership account.

Due Process requires that when the State has actual knowledge that a permissible method of notification will be ineffective, this triggers an obligation to do more. *Robinson v. Hanrahan, supra*, 409 U.S. at 40; *accord, e.g., Speelman v. Bellingham/Whatcom Cty. Housing Auth.*, 167 Wn. App. 624, 632, 273 P.3d 1035 (Div. 1 2012). Leaving an unrepresented person in New Zealand without any notice of these undistributed funds, on the theory he could “monitor” court proceedings occurring half-way around the globe, fails to satisfy this standard.

### **3. The State Failed to Give Proper Notice under the WUUPA**

In our opening brief we argued that the State failed to comply with the notice requirements of WUUPA. The State responds that it was not required to “search out” Bell and PacMar, because they were not reported to it by the receiver as having an interest in the funds. *Brief of Respondent*

at 15-16. As argued already, this narrow interpretation of the duty of notice under WUUPA only exacerbates the constitutional infirmity of RCW 48.31.155. But if it is true as a matter of statutory interpretation (but not Due Process) with respect to Mr. Bell, it is hardly true with respect to PacMar itself.

As already noted, the letters from the receiver's counsel remitting funds to the State Treasurer plainly label the funds "undistributable assets of the receivership estate" of "Pacific Marine Insurance Company," "Unclaimed Assets from Receivership Estate of Pacific Marine Insurance Company . . .," or "recoveries on behalf of the receivership of PacMar." CP 210, 211, 215, 217. While the letter pertaining to unclaimed assets lists other potential claimants, CP 212-13, there is no question that Pacific Marine Insurance Company is clearly identified to the Department as the primary apparent owner of all funds in each of these communications. Based on this information, both Due Process and RCW 69.29.180 required that the Department notify PacMar that it was holding funds in which PacMar had an apparent ownership interest.

It must also be noted that the State's own receiver was providing this information to the State DOR. The State should not be permitted to escape its notice duties based on the malfeasance of its own officers, and thus facilitate the taking of private property without notice. Mr. Bell was

well known to the receiver, and the fact that he was left off of the apparent ownership list is attributable to the receiver's adversarial position with respect to Mr. Bell. If the statute can be avoided so easily, then that is all the more reason that Due Process requires meaningful and effective notice to the private citizen of the pending taking of his property which the State holds as a mere custodian.

## II. CONCLUSION

For all the foregoing reasons, and the reasons stated in our opening brief, 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 funds, left-over administrative funds, and newly-acquired funds, plus interest under RCW 63.29.240(3)(b).

DATED this 25<sup>th</sup> day of March, 2013.

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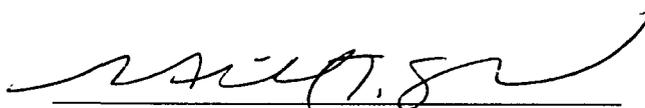
Attorneys for APPELLANTS

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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 REPLY 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 25<sup>th</sup> day of March, 2013.



Mina Shahin

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