

NO. 78774-3  
(Formerly Court of Appeals No. 55055-1-I)

IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

TODD SHIPYARDS CORPORATION,

Petitioner,

vs.

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

Respondent.

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APPEAL FROM KING COUNTY SUPERIOR COURT  
Honorable Linda Lau, Judge

**RESPONDENT'S SUPPLEMENTAL BRIEF**

Address:  
810 Third Ave., Suite 500  
Seattle, WA 98104  
(206) 622-8000

SCHROETER, GOLDMARK & BENDER  
By William Rutzick  
WSBA #11533  
Counsel for Respondent

**TABLE OF CONTENTS**

	<b><u>Page</u></b>
I. INTRODUCTION .....	1
II. ARGUMENT.....	1
A. The 1988 Bar Date Order Does Not Have Preclusive Effect.....	1
1. Procedural Matters.....	1
2. The Bankruptcy Court Did Not Address The Issue Raised By Mr. Herring In This Appeal And Under Due Process Could Not Preclude Mr. Herring’s Claim In This Appeal. ....	2
B. Mr. Herring Was A Known Creditor Because His Identity Was Reasonably Ascertainable To Todd And He Was Entitled To Mail Notice. ....	6
1. Facts Matter In Deciding Who Is A Known Creditor And Determining The Adequacy Of Due Process Notice. ....	6
2. The Court Of Appeal’s Majority Opinion Based Its Decision On And Limited It To The Unique Facts And Circumstances Presented By This Record.....	8
3. Applicable Precedent.....	12
C. The Analysis Of The Dissent Is Incorrect. ....	16
III. CONCLUSION .....	20

## TABLE OF AUTHORITIES

	<u>Page</u>
<b>Cases</b>	
<u>Black v. Todd Shipyard</u> , 717 F.2d 1280 (9 <sup>th</sup> Cir. 1983).....	12
<u>Blumenfeld v. Blumenfeld</u> , 589 N.Y.S.2d 297 (N.Y. Sup. Ct. 1992).....	6
<u>Chemetron Corp. v. Jones, et al.</u> , 72 F.3d 341 (3d Cir. 1995).....	passim
<u>Chong v. Director of OWCP</u> , 961 F.2d 1409 (9 <sup>th</sup> Cir. 1992) .....	12
<u>Fire Fighters v. City of Everett</u> , 146 Wn.2d 29, 42 P.3d 1265 (2002) .....	1
<u>Fogel v. Zell</u> , 221 F.3d 955 (7 <sup>th</sup> Cir. 2000).....	13, 20
<u>Herring v. Todd Shipyards</u> , 132 Wn. App. 479, 132 P.3d 1102 (2006) .....	7, 9, 12, 13, 16, 19, 20
<u>In re Apex Oil Co., Inc.</u> , 406 F.3d 538 (8 <sup>th</sup> Cir. 2005) .....	3
<u>In re Careau Group</u> , 923 F.2d 710 (9 <sup>th</sup> Cir. 1991) .....	6
<u>In re Chicago, Rock Island &amp; Pacific Railroad Co.</u> , 90 B.R. 329 (N.D. Ill. 1987).....	12, 13
<u>In re Crystal Oil</u> , 158 F.3d 291 (5 <sup>th</sup> Cir. 1998) .....	16
<u>In re Harbor Tank Storage Co., Inc.</u> , 385 F.2d 111 (3d Cir. 1967) .....	5
<u>In re Maya Construction Co.</u> , 78 F.3d 1395 (9 <sup>th</sup> Cir. 1996) .....	4, 5
<u>In re Newstar Energy</u> , 280 B.R. 623 (2002).....	5
<u>In re Savage Industries, Inc.</u> , 43 F.3d 714 (1 <sup>st</sup> Cir. 1994).....	4
<u>Lewis v. Lewis</u> , 646 A.2d 273 (Conn. 1994) .....	3
<u>Lustig v. United States D.O.L., et al.</u> , 881 F.2d 593 (9 <sup>th</sup> Cir. 1989) .....	12
<u>Matter of Brady, Texas, Municipal Gas Corp.</u> , 936 F.2d 212 (5 <sup>th</sup> Cir. 1991) .....	3, 6
<u>Matter of Carter</u> , 38 Bankr. 636 (D. Conn. 1984) .....	2, 3
<u>McDonald v. Director of OWCP, U.S. D.O.L.</u> , 897 F.2d 1510 (9 <sup>th</sup> Cir. 1990) .....	12
<u>Mennonite Bd. of Missions v. Adams</u> , 462 U.S. 791 (1983) .....	6, 14
<u>Mullane v. Central Hanover Bank &amp; Trust Co.</u> , 339 U.S. 306 (1950) .....	passim

TABLE OF AUTHORITIES, continued

	<u>Page</u>
<u>Peoples Nat'l Bank of Wash. v. Peterson</u> , 82 Wn.2d 822, 514 P.2d 159 (1973) .....	2
<u>Reliable Electric Co. v. Olson Constr. Co.</u> , 726 F.2d 620 (10 <sup>th</sup> Cir. 1984) .....	5
<u>Small v. United States of America</u> , 136 F.3d 1334 (D.C. Cir. 1998).....	8, 15
<u>Solow Building Co. v. ATC Associates</u> , 175 F. Supp. 2d 465 (E.D.N.Y. 2001) .....	13
<u>State v. Catlett</u> , 133 Wn.2d 355 P.2d 700 (1997).....	1
<u>State v. Clark</u> , 124 Wn.2d 90, 875 P.2d 613 (1994).....	1, 2
<u>Stevenson v. Baker</u> , 310 N.E.2d 58 (Ill. Ct. App. 1974).....	6
<u>Texaco, Inc. v. Sanders</u> , 182 B.R. 937 (S.D.N.Y. 1955).....	6
<u>Trump Taj Mahal Associates v. Alibraham</u> , 156 B.R. 928 (Bankr. D.N.J. 1993), <i>aff'd sub nom</i> , <u>Trump Taj Mahal Assocs. v. O'Hara</u> , 1993 U.S. Dist. LEXIS 17827 (D.N.J. December 13, 1993).....	12
<u>Tulsa Professional Collection Serv., Inc. v. Pope</u> , 485 U.S. 478, 99 L.Ed. 2d 565, 108 S. Ct. 1340 (1988).....	6, 7, 14, 15
<u>United States v. One Star Class Sloop</u> , 458 F.3d 16 (1 <sup>st</sup> Cir. 2006).....	14, 15, 18, 19
<u>Walker v. City of Hutchinson, et al.</u> , 352 U.S. 112 (1956) .....	8
<u>Yee v. Escondido</u> , 503 U.S. 519, 112 S. Ct. 1522, 118 L. Ed. 2d 153 (1992).....	2
 <b>Other Authorities</b>	
<b>United States Code</b>	
28 U.S.C. 1334(b).....	3
 <b>Miscellaneous</b>	
WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY (UNABRIDGED).....	17

## I. INTRODUCTION

Under the particular and somewhat unique facts in this appeal, the Court of Appeals correctly concluded that respondent Edwin Herring (hereinafter “Mr. Herring”) was a known creditor in the bankruptcy of petitioner Todd Shipyards Corporation (hereinafter “Todd”). Consequently, the Court of Appeals correctly concluded that Todd’s failure to provide actual notice to Mr. Herring violated due process and that Mr. Herring was not barred by the Todd bankruptcy from pursuing a claim against Todd relating to his mesothelioma which caused his death.

## II. ARGUMENT

### A. The 1988 Bar Date Order Does Not Have Preclusive Effect.

#### 1. Procedural Matters.

Mr. Herring previously argued, *citing* State v. Clark, 124 Wn.2d 90, 104-05, 875 P.2d 613 (1994), that this Court “generally decline[s] review of questions not raised before the Court of Appeals.” Todd replied that State v. Clark was overruled by State v. Catlett, 133 Wn.2d 355, 945 P.2d 700 (1997). Reply On Petition For Review, p. 1. Clark, however, was overruled on a different point, and this Court, well after Catlett, cited Clark to support the proposition that this Court “will generally decline to decide issues that were not raised below.” Fire Fighters v. City of Everett, 146 Wn.2d 29, 37, 42 P.3d 1265 (2002).

Todd implicitly concedes that it never raised in the Court of Appeals the preclusive effect of the bar date order. While this Court has the “authority” to consider an issue not raised in the Court of Appeals, Mr. Herring suggests that there are good reasons for the “general” rule. One of those reasons is :

“encourage parties to raise issues before the Court of Appeals, thereby ensuring the ‘benefit of developed arguments on both sides and lower court opinions squarely addressing the question.’”

Clark, *supra*, 124 Wn.2d at 105 (quoting Peoples Nat’l Bank of Wash. v. Peterson, 82 Wn.2d 822, 830, 514 P.2d 159 (1973) and Yee v. Escondido, 503 U.S. 519, 538, 112 S. Ct. 1522, 118 L. Ed. 2d 153 (1992)).

Todd never explains why it failed even to raise this issue in the Court of Appeals, and provides no sufficient reason as to why the “general rule” should not apply.

**2. The Bankruptcy Court Did Not Address The Issue Raised By Mr. Herring In This Appeal And Under Due Process Could Not Preclude Mr. Herring’s Claim In This Appeal.**

Washington state courts have concurrent jurisdiction with federal bankruptcy courts on most dischargability issues. As the Court of Appeals in this case explained, at footnote 9 of the majority opinion:

State courts have concurrent jurisdiction with federal bankruptcy courts over all dischargability issues other than those concerning Section 523(a)(2), (4) or (6) of the Bankruptcy Code, which are inapplicable here. *See In re Carter*, 38 B.R. 636, 638 n. 5 (Bankr. D. Conn. 1984).

Other state and federal courts are of the same opinion. For example, in Lewis v. Lewis, 646 A.2d 273, 275 (Conn. 1994), the Connecticut Court of Appeals stated that “[t]he issue of dischargeability of the debt [dealt with in bankruptcy] owed to the plaintiff was properly before the trial court.” The Lewis court relied, *inter alia*, on 28 U.S.C. 1334(b); Matter of Carter, 38 Bankr. 636, 638, n.5 (D. Conn. 1984); and Matter of Brady, Texas, Municipal Gas Corp., 936 F.2d 212, 218 (5th Cir. 1991). See also Indiana University v. Canganelli, 501 N.E.2d 299, 301 (Ill. 1<sup>st</sup> Dist. 1986).

In re Apex Oil Co., Inc., 406 F.3d 538, 542 (8<sup>th</sup> Cir. 2005) involved a post bankruptcy class action that was filed in state court, removed to federal court, and then remanded to state court. The bankrupt defendant attempted to re-open its bankruptcy to decide the issue raised in the class action. The bankruptcy court refused and the Eighth Circuit affirmed its decision not to reopen the bankruptcy, allowing the issue to be decided in state court. The Court of Appeals held that even though the issue would involve construing bankruptcy court orders:

Congress granted state courts concurrent jurisdiction to consider bankruptcy issues arising from Chapter 11 proceedings. 28 U.S.C. § 1334(b).

In re Apex Oil Co., Inc., *supra*, 406 F.3d at 542.

The Todd bankruptcy court’s order was not preclusive of this appeal for two reasons. The first reason is that the Todd bankruptcy court

never dealt with the issue of whether Mr. Herring was a known or unknown creditor for purposes of the Todd bankruptcy. It is the debtor's, not the court's responsibility, to determine who are its known creditors and to list and notify such creditors. In re Maya Construction Co., 78 F.3d 1395, 1399 (9<sup>th</sup> Cir. 1996); In re Savage Industries, Inc., 43 F.3d 714, 720 (1<sup>st</sup> Cir. 1994). The bankruptcy court would have had no way of knowing that Todd had not carried out the responsibility of listing and notifying all known creditors. Indeed, the bankruptcy court's order indicated that it was the debtor's responsibility to determine known creditors when it ordered:

that in the event the Debtors amend the Schedules, appropriate notice thereof shall be given to such creditors whose status and/or claim has been revised, and said creditors shall have an additional thirty (30) day period following the giving of such notice to file a proof of claim or interest, . . .

CP 211 (emphasis added). Thus, the bankruptcy court never was faced with, or ruled on, the question of whether Mr. Herring was a known creditor.

The second reason the bankruptcy order was not preclusive is that based on due process, a known creditor not given proper notice is not bound by the discharge order:

[g]enerally, if a known contingent creditor is not given formal notice, he is not bound by an order discharging the bankruptcy's obligations.

Maya, supra, 78 F.3d at 1399. This is a matter of due process:

As a matter of due process, the person whose entitlement to money from the debtor will be destroyed by the judgment is entitled to notice. *Collier on Bankruptcy* § 1141.01(b), at 1141-17 & n.40 (Lawrence P. King ed.) (1993).

Id.

Reliable Electric Co. v. Olson Constr. Co., 726 F.2d 620 (10<sup>th</sup> Cir. 1984), came to the same conclusion. Reliable Electric held that “the discharge of a claim without reasonable notice of the confirmation hearing is violative of the Fifth Amendment to the United States Constitution.” 726 F.2d at 623, citing, inter alia, In re Harbor Tank Storage Co., Inc., 385 F.2d 111, 115 (3d Cir. 1967), and Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950). See also In re Newstar Energy, 280 B.R. 623 (2002) (citing Reliable Electric and Mullane).

A crucial issue in this case is whether Mr. Herring was a known or unknown creditor in the Todd bankruptcy. Mr. Herring’s argument is that since Mr. Herring was a known creditor because his identity was reasonably ascertainable, Todd, as debtor, had the responsibility to list him as a creditor and send him mail notice, but that Todd did not carry out that responsibility. If Mr. Herring were not provided the mail notice required to be given to “known” creditors, then under due process he was “[n]ot bound by an order discharging the bankruptcy’s obligation.” Maya, supra, 78 F.3d at 1399; Reliable Electric, supra. If Mr. Herring could not be bound by the order

consistent with due process, the bankruptcy court's order could not have preclusive effect.

The cases on this issue relied upon by Todd in its petition are distinguishable.<sup>1</sup> They deal with situations for which the creditor had either been determined to be an unknown creditor or had knowledge of the bankruptcy proceeding while it was going on. That is not the situation here which, as the Court of Appeals found, involved a known creditor who did not receive actual notice.

**B. Mr. Herring Was A Known Creditor Because His Identity Was Reasonably Ascertainable To Todd And He Was Entitled To Mail Notice.**

**1. Facts Matter In Deciding Who Is A Known Creditor And Determining The Adequacy Of Due Process Notice.**

As characterized by the Supreme Court, a “known” creditor is one whose identity is either known or “reasonably ascertainable by the debtor.” Tulsa Professional Collection Serv., Inc. v. Pope, 485 U.S. 478, 490, 99 L.Ed. 2d 565, 108 S. Ct. 1340 (1988). A creditor's identify is “reasonably ascertainable” if that creditor can be identified through “reasonably diligent efforts.” Mennonite Bd. of Missions v. Adams, 462 U.S. 791, 798 n.4 (1983). Chemetron Corp. v. Jones, et al., 72 F.3d 341,

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<sup>1</sup> Matter of Brady, *supra*, 936 F.2d at 215 ; Stevenson v. Baker, 310 N.E.2d 58 (Ill. Ct. App. 1974); Blumenfeld v. Blumenfeld, 589 N.Y.S.2d 297 (N.Y. Sup. Ct. 1992); In re Careau Group, 923 F.2d 710, 712 (9<sup>th</sup> Cir. 1991); and Texaco, Inc. v. Sanders, 182 B.R. 937, 955, 957 (S.D.N.Y. 1995).

346 (3d Cir. 1995), reiterated that these definitions apply in the bankruptcy setting. Furthermore, the court in Chemetron stated:

Situations may arise when creditors are “reasonably ascertainable,” although not identifiable through the debtor’s books and records.

72 F.3d at 347. Those cases directly support the Court of Appeal’s conclusion that “[i]n sum whether a creditor is known or unknown depends on whether the debtor can reasonably determine the creditor’s identity and claim,” Herring v. Todd Shipyards, 132 Wn. App. 479, 483, 132 P.3d 1102 (2006).

Facts and circumstances also matter in determining the adequacy of notice. The “Mullane” test turns on whether notice is reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action . . .” Mullane, supra, 339 U.S. at 314. In the bankruptcy context, Tulsa, supra, held that whether a particular method of notice is reasonable depends on the particular circumstances. Tulsa, supra, 485 U.S. at 484. This completely supports the Court of Appeal’s conclusion that “[t]he reasonableness of the notice provided is determined by the totality of the circumstances.” Herring, supra, 132 Wn. App. at 482.

As a known creditor, Mr. Herring would be entitled to mailed notice rather than notice simply by publication. That is a crucial

distinction because notice by publication is well known to be almost useless in actually notifying anyone. More than 50 years ago the United States Supreme Court acknowledged that:

[c]hance alone brings to the attention of even a local resident an advertisement in small type inserted in the back pages of a newspaper,

Mullane, supra, 339 U.S. at 315. The Mullane court also explained:

[t]he chance of actual notice is further reduced when, as here, the notice required does not even name those whose attention it is supposed to attract, and does not inform acquaintances who might call it to attention.

Id. at 315. Six years after Mullane, the Supreme Court reiterated that:

[i]t is common knowledge that mere newspaper publication rarely informs a landowner of proceedings against his property. In *Mullane* we pointed out many of the infirmities of such notice and emphasized the advantage of some kind of personal notice to interested parties.

Walker v. City of Hutchinson, et al., 352 U.S. 112, 116 (1956) (emphasis added). As explained in Small v. United States of America, 136 F.3d 1334, 1336-37 (D.C. Cir. 1998), the efficacy of newspaper notice has only gotten worse:

[a]most fifty years after *Mullane*, in an increasingly populous and mobile nation, newspaper notices have virtually no chance of alerting an unwary person that he must act now or forever lose his rights;

(Emphasis added.)

2. **The Court Of Appeal's Majority Opinion Based Its Decision On And Limited It To The Unique Facts And Circumstances Presented By This Record.**

The Court of Appeals reached its decision because of the presence of a number of unique circumstances “not present in the cases on which the parties rely.” Herring, supra, 132 Wn. App. at 491. These unique circumstances included:

- the likelihood that anyone working under conditions similar to those Herring experienced would have grounds for an asbestos-related tort claim;
- the ease with which Todd could have notified Herring’s union; and
- the uniquely rich source of information possessed by the union.

Id. The Court of Appeals made clear that “[u]nder the *Mullane* due process standard, we hold that in these specific circumstances an attempt to identify and notify workers like Herring through their union was required.” Herring, supra, 132 Wn. App. at 491 (emphasis added). The court’s holding was both limited and justified by the specific facts which are all supported by the record. See CP 49, 587-92 and 598. Indeed, Todd presents no basis to dispute that those facts are in the record.

For example, Mr. Herring provided evidence from Todd’s counsel, Michael Marsh, that, in connection with the bankruptcy, Todd notified all unions whose members have worked at Todd Shipyard, which includes Local 7 whose members, (including Mr. Herring (CP 339, 348-49)), worked at Todd Shipyard in Seattle:

12. Todd made diligent efforts to identify and notify potential creditors of its bankruptcy. Such efforts included notifying individuals on its accounts receivable and accounts payable registers, notifying everyone who conducted business with Todd, and notifying all unions whose members had worked at Todd shipyards.

CP 456 (emphasis added).

Todd confirmed this evidence when it submitted an opinion from a Texas federal court which said the same thing. The federal district court in that case stated:

However, 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.

CP 199-200 (emphasis added).<sup>2</sup>

However, Mr. Herring also provided evidence, first presented in an earlier case, that no such notification was provided to Local 7. See CP 587-590. Only then did Mr. Marsh write a new and contradictory declaration in

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<sup>2</sup> Indeed, the District Court relied on that declaration in ruling in Todd’s favor:

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,<sup>9</sup> 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. *Mullane*, 70 S. Ct. at 658-59.

Williams v. Todd Shipyards Corp., C.A. No. H-95-4592 (S.D. Tex. 1997); CP 201-202 (emphasis added; footnote omitted).

which he then claimed that Todd only notified “all unions representing Todd’s employees.” CP 48. As the majority opinion pointed out, while Todd asserts that the change Marsh made in his last declaration “clarifies” the statement he made in prior declarations, it may also contradict his earlier declarations. Majority Opinion, n. 10.

Those declarations are significant for several reasons. If, as Mr. Marsh first swore, Todd attempted to notify all unions representing employees working at its shipyard, Todd must have believed it was practical to notify Local 7 and, indeed, “easy” to do so. Moreover, since Todd’s stated purpose in notifying “all unions whose members had worked at Todd” was to notify possible creditors, Todd must have believed that all such unions, including Local 7, or their members, were possible creditors. Why else would Todd have attempted to notify unions, such as Local 7, as Mr. Marsh’s initial declarations claimed?

There is no question that Todd knew that asbestos workers were a likely source of claims. Indeed, in its counsel’s declaration in this case, he states that Todd was aware of “a handful of asbestos-related employee claims which had been filed in New Orleans” at the time of the bankruptcy. CP 49. Mr. Herring also referred in its brief in the trial court to four reported decisions four from the Ninth Circuit involving asbestos injury claims against Todd that began prior to Todd’s bankruptcy:

Black v. Todd Shipyard, 717 F.2d 1280 (9<sup>th</sup> Cir. 1983); Lustig v. United States D.O.L., et al., 881 F.2d 593 (9<sup>th</sup> Cir. 1989); McDonald v. Director of OWCP, U.S. D.O.L., 897 F.2d 1510 (9<sup>th</sup> Cir. 1990); Chong v. Director of OWCP, 961 F.2d 1409 (9<sup>th</sup> Cir. 1992).

CP 598.

### **3. Applicable Precedent.**

The Court of Appeal's majority opinion distinguished specifically three cases relied upon by Todd.<sup>3</sup> For example, the Court of Appeals pointed out that "Rock Island differs from our case because there was no entity, like Local 7, to which the railroad could have given notice," and that "Todd knew of an entity whose members had been exposed to and injured by asbestos on its job sites." Herring, supra, 132 Wn. App. at 487. Similarly, in distinguishing Trump, the Court of Appeals explained "[a]s in Rock Island, the Trump court was again analyzing a situation in which there was no known entity to which the debtor could have given notice." Id. Todd does not explain why those distinctions are not valid.

The opinion in Chemetron was based on concerns by the court about the need to examine scientific duties and the expensive and time consuming efforts required to find out potentially damaged persons. The

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<sup>3</sup> Chemetron; supra, In re Chicago, Rock Island & Pacific Railroad Co., 90 B.R. 329 (N.D. Ill. 1987); Trump Taj Mahal Associates v. Alibraham, 156 B.R. 928 (Bankr. D.N.J. 1993), *aff'd sub nom, Trump Taj Mahal Assocs. v. O'Hara*, 1993 U.S. Dist. LEXIS 17827 (D.N.J. December 13, 1993).

Court of Appeals in this case correctly distinguished Chemetron and the other cases stating:

As we stated above, none of these concerns is present in our cases. Unlike the railroad in *Rock Island*, the casino in *Trump* or the chemical company in *Chemetron*, we are not requiring Todd to search through records to pull out names of individuals who might bring a claim against the company. No scientific or practical conundrums would arise from notifying an asbestos workers' union.

Herring, supra, 132 Wn. App. at 489.

The Court of Appeal's majority opinion relied, in part, on Fogel v. Zell, 221 F.3d 955 (7<sup>th</sup> Cir. 2000) and Solow Building Co. v. ATC Associates, 175 F. Supp. 2d 465, 473 (E.D.N.Y. 2001). Both of those cases held in similar fact patterns that actual notice was required and that the reasonableness of the debtor's action turned on "what information the debtors had in their possession in determining whether a potential claim was reasonably ascertainable." Herring, supra, 132 Wn. App. at 485. For example, in Fogel v. Zell, supra, the Seventh Circuit held that actual notice to a large purchaser of pipe was required in connection with a bankruptcy, even though not only had the purchaser not filed a claim or threatened to file a claim against the bankrupt, but there was no certainty that such a claim could or would be filed because the pipe had not failed at the time of the bankruptcy. Fogel, supra, 221 F.3d at 960-63. Fogel thus supports the proposition that a debtors has to utilize and draw inferences from the information it has in determining whether actual notice is required.

United States v. One Star Class Sloop, 458 F.3d 16 (1<sup>st</sup> Cir. 2006), is a legally and factually analogous case which was decided after the Court of Appeal's decision, and which provides guidance as to a debtor's obligation in the bankruptcy setting. The case involves a forfeiture proceeding by the United States government. Legally, this case is analogous because the court utilized the same cases and applied the same analysis as is utilized in the bankruptcy context, and which were relied upon by the majority opinion of the Court of Appeals in this case. The First Circuit relied on Tulsa Professional Collection Serv., Inc. v. Pope, supra, Menonite Bd. of Missions v. Adams, supra, and Mullane v. Central Hanover Bank & Trust Co., supra, in describing the government's duty. One Star Class Sloop, supra, 458 F.3d at 23.

United States v. One Star Class Sloop, supra, is factually similar to the present case in that the party responsible for finding interested parties had information that there was a potential interested party, but did not know who it was, i.e., "in this case, it is undisputed that the government knew there was an additional investor ("possibly a doctor or dentist") but did not know the investor's name." Id. at 24. That is analogous to the situation in this case in which Todd was on notice that there likely were some asbestos injury claimants because Todd had had such claims in the recent past (CP 49 and 598), but did not know specifically who they were.

Both the facts in United States v. One Star Class Sloop and in this case, thus, present what the First Circuit referred to as one of the “hard cases,” which are those cases:

[i]n which an interested party's name or whereabouts were not actually known to the government but may or may not have been reasonably ascertainable. In those instances, an inquiring court must look to "the practicalities and peculiarities of the case." *Mullane*, 339 U.S. at 314.

Id. at 23. In such an instance as in Tulsa, supra, the court must consider the circumstances and balance the interests of the competing parties. Significantly, the First Circuit utilized a bankruptcy case in analyzing the situation and concluding that there is a duty to inquire of others when the party has “easy access” to a “potentially fruitful” lead:

The government is not required to engage in a sprawling, open-ended investigation to identify and track down unidentified, but potentially interested, parties. *See, e.g., Chemetron Corp. v. Jones*, 72 F.3d 341, 346 (3d Cir. 1995). If, however, the government has easy access to a lead that it knows (or reasonably should know) is potentially fruitful, it has some duty to elicit the available information and take reasonable action in response to it. *See Small v. United States*, 329 U.S. App. D.C. 98, 136 F.3d 1334, 1338 (D.C. Cir. 1998).

Id. at 24. The First Circuit properly held that the government could have been in touch with several potential sources of information:

Here, for example, the government could at least have asked Crosby, with whom it was in contact, if he knew the names of his fellow investors, or it could have made similar inquiries at Marblehead Trading (the locus from which the sloop was seized).

Id. at 25. That is no different than the situation in this case in which Todd easily could have contacted Mr. Herring's union and asked it for the names of its members, who were a likely source of claims against Todd. Indeed, according to some of Mr. Marsh's sworn statements in the record, claim that Todd attempted to do so. CP 49.<sup>4</sup>

**C. The Analysis Of The Dissent Is Incorrect.**

The dissent in this case draws an unduly narrow inference from the applicable law. Both the majority opinion and the dissent refer to In re Crystal Oil, 158 F.3d 291, 297 (5<sup>th</sup> Cir. 1998) and, in particular, the statement that:

[i]n 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.

Herring, supra, 132 Wn. App. at 486. The dissent appears to interpret the phrase "reasonably suggest" to require that Todd possess "specific information of Herring's identity or his exposure to asbestos."<sup>5</sup> That

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<sup>4</sup> The fact that Mr. Marsh changed his story subsequently, is of no moment for purposes of this summary judgment, since Mr. Herring is entitled to the benefit of the evidence.

<sup>5</sup> The paragraph in the dissent in which that phrase appears, reads as follows:

While Todd may have been generally aware that there were asbestos related claims for which it may be liable, the undisputed facts of this case reveal that it possessed no specific information of Herring's identity or his exposure to asbestos. Todd thus did not have in its possession specific information that reasonably suggested it would be liable to Herring for his asbestos related tort claims. Therefore, Herring was an unknown creditor and notice by publication was sufficient.

Herring, supra, 132 Wn. App. at 495 (emphasis added).

interpretation is inconsistent with the ordinary meaning of “suggest” in WEBSTER’S NEW TWENTIETH CENTURY DICTIONARY (UNABRIDGED), page 1822, the first definition of which reads:

1. to bring (a thought, problem, desire, etc.) to the mind for consideration.

The third definition of “suggest” states:

3. to propose (someone or something) as a possibility; as, can you *suggest* a course of study?

Under those definitions, and contrary to the dissent’s position, information which reasonably brings a thought to mind for consideration or reasonably proposes something as a possibility is a “reasonable suggestion.”

There are other instances besides this case in which less information than is required by the dissent would reasonably suggest both the claim for which the debtor may be liable and the entity to whom the debtor would be liable. For example, assume a debtor knew that an injurious substance such as contaminated food, had been distributed to a chapter house of a fraternity or sorority, had been ingested by members of the chapter house, and that when the same substance had been ingested elsewhere, it had caused injury to the users. Assume further that the debtor could easily contact the head of the chapter house and ask for the names of its members who may have ingested the food. Instead, the debtor asserted that since it did not know for a fact that a particular named

member had been hurt, it had no duty to make the simple inquiry to the head of the chapter house. The dissent indicates there could be no duty by the debtor in that situation. Mr. Herring believes that is not in line with the ordinary meaning of “reasonably suggests.” The same would be true if the debtor knew that the same substance had been distributed and used by students in a specific elementary school, and had caused injury in other instances when used in a similar fashion. It would be extraordinary to say that the debtor had no obligation to inquire of the principal of that school as to the names of the students in that school who may have ingested the food or notified their families of the bankruptcy. CP 590.<sup>6</sup>

The majority opinion rather than the dissent also follows the position adopted in United States v. One Star Class Sloop, supra. That case found a duty to inquire when the information available to the government considerably narrows the potentially affected people, and it would be easy to inquire. The same analysis applies here.

The dissent also criticizes the majority opinion’s analysis “in two major respects.” It first argues that the central issue is whether Mr. Herring was a known or unknown creditor, not whether the Local was a

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<sup>6</sup> Obviously, different facts would produce a different result. For example, if the substance had been used by someone in Seattle, the obligation to inquire of everyone in Seattle would be considerably more onerous which might negate the duty. Local 7 is far closer to the examples in the text than to this example.

known or unknown creditor, and points out that it was Mr. Herring that filed the claim. Herring, supra, 132 Wn. App. at 492. Assuming that Mr. Herring were the relevant creditor, the debtor still has a duty to communicate to the union the existence of the bankruptcy in order to give notice to Mr. Herring via the union. One Star Class Sloop, supra. No one would effectively argue that if a debtor knew that a member of a family had a claim against it, but did not know which family member it was, the debtor would have no obligation to notify the parents, even though they may not be the creditor. Moreover, contrary to the argument in the first footnote in the dissent, there is substantial support in the record for the contention that the Local was a known creditor. Specifically, Mr. Marsh's first sworn statement was that Todd notified the Local. Given the dissent's position that the only entities to whom notice need be given are creditors, the fact that Mr. Marsh swore that Todd provided notice to the Local (CP 456), raises an inference that Todd believed the Local to be a creditor.<sup>7</sup>

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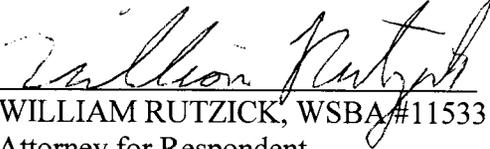
<sup>7</sup> This relates to another flaw in the dissent which quotes from and relies on Mr. Marsh's last declaration which the dissent claims to be "uncontested." Herring, supra, 132 Wn. App. at 493, n. 39. As discussed above, that statement is contested by Mr. Marsh's own previous declarations. This was a summary judgment and the Court must consider evidence which benefits Mr. Herring, as the non-moving party.

The dissent's second criticism of the majority opinion's analysis is that it applies the "reasonably foreseeable test" rejected in Chemetron Herring, supra, 132 Wn. App. at 492-93. In fact, however, the majority opinion applied a "reasonably ascertainable test" much as was done in Fogel, supra. There, the Seventh Circuit held that the debtor should have provided notice to Denver even though no such claim by Denver had been made, because pipe sold to other purchasers had previously failed. That is similar to the analysis used by the majority opinion here, and supports Todd's duty to give notice to Mr. Herring via his union.

### III. CONCLUSION

For the foregoing reasons, and the reasons previously argued, the Court of Appeal's decision should be affirmed, the dismissal reversed, and the case remanded for trial.

RESPECTFULLY SUBMITTED this 23<sup>rd</sup> day of **March, 2007**.

  
WILLIAM RUTZICK, WSBA #11533  
Attorney for Respondent

SCHROETER, GOLDMARK &  
BENDER  
500 Central Bldg., 810 Third Avenue  
Seattle, WA 98104  
(206) 622-8000