

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF COMMERCE

In the Matter of the Unclaimed Property
Claims Filed by Granite Financial, Larry
Bergman and Steven T. Schoeder

**RECOMMENDED ORDER ON
CROSS MOTIONS FOR
SUMMARY DISPOSITION**

This matter is before Administrative Law Judge Beverly Jones Heydinger on cross motions for summary disposition. The OAH motion record closed on January 6, 2012, upon receipt of Granite Financial's reply memorandum.

Jack E. Pierce, Attorney at Law, Pierce Law Firm, P.A., appeared on behalf of Granite Financial.

Kevin Coan, Attorney at Law, Hinshaw & Culbertson, LLP, appeared on behalf of Steven T. Schoeder.

Based upon all of the files, records, and proceedings herein, and for the reasons set forth in the accompanying Memorandum, the Administrative Law Judge makes the following:

RECOMMENDED ORDER

IT IS HEREBY RECOMMENDED that:

1. Steven Schoeder's Motion for Summary Disposition be GRANTED.
2. Granite Financial's Motion for Summary Disposition be DENIED.

Dated: January 23, 2012

s/Beverly Jones Heydinger

BEVERLY JONES HEYDINGER
Administrative Law Judge

NOTICE

This Report is a recommendation, not a final decision. The Commissioner of Commerce will make the final decision after a review of the record. The Commissioner may adopt, reject or modify the Recommendation made in this Report. Under Minn. Stat. § 14.61, the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact the office of the Commissioner of Commerce, 85 East Seventh Place, Suite 500, St. Paul, Minnesota 55101, to learn the procedure for filing exceptions or presenting argument.

If the Commissioner fails to issue a final decision within 90 days of the close of the record, this report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a. The record closes upon the filing of exceptions to the report and the presentation of argument to the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and the Administrative Law Judge of the date on which the record closes.

Pursuant to Minn. Stat. § 14.62, subd. 1, the Agency is required to serve its final decision upon each party and the Administrative Law Judge by first-class mail or as otherwise provided by law.

Any person aggrieved by a decision of the Commissioner may commence an action in district court to establish a claim. The proceeding shall be brought within 90 days after the decision of the commissioner.¹

MEMORANDUM

Granite Financial and Steven Schoeder have each filed a claim under the Unclaimed Property Act alleging entitlement to certain unclaimed dividends and other property relating to a life insurance policy issued by Manulife Financial.

Both parties have brought motions for summary disposition.

Undisputed Facts

In 1977, Manulife Financial issued a life insurance policy (Policy) with a policy number of 4078381 to Advanced Flex, Inc. (AFI).² AFI was a Minnesota corporation.³ AFI was listed as the owner of Policy #4078381 and Steven Schoeder was listed as the insured.⁴ Mr. Shoeder was the CEO and part owner

¹ Minn. Stat. § 345.51.

² Notice of Hearing at ¶ 1.

³ Affidavit of Jack Pierce, Ex. A.

⁴ Notice of Hearing at ¶ 1.

of AFI from 1972 to 1982.⁵ He ceased all ownership or other relationship with the company in 1982, when AFI was purchased by Larry Bergman.⁶

In February 1998, AFI took out a \$36,000 loan against the Policy.⁷

In 1999, Manulife Financial demutualized⁸ and issued shares of common stock to its policyholders. Manulife Financial allocated 1,634 shares to AFI based on Policy #4078381.⁹

On September 23, 2002, Larry Bergman, as Owner and Chairman of AFI, transferred and assigned all rights and interest in a life insurance policy with the number 40783813 to Berco, LLC (Berco). Larry Bergman was President and Owner of Berco. Mr. Schoeder was the insured on the policy. Manulife Financial registered the assignment effective October 23, 2002.¹⁰

Life insurance policy 40783813 is the same policy as 4078381. The additional “3” on the policy Mr. Bergman assigned to Berco represents a “check digit” used by Manulife Financial for administrative purposes.¹¹

Approximately one month after AFI assigned its rights and interest in the Policy to Berco, two companies obtained judgments against AFI in Hennepin County District Court. Metro Sales Inc. obtained a judgment against AFI in the amount of \$7,760.75 on or about October 25, 2002,¹² and Spec Plating, Inc. obtained a judgment against AFI in the amount of \$26,513.28, on or about November 4, 2002.¹³

Manulife Financial began issuing dividend checks to AFI on or about December 19, 2002. AFI never cashed the dividend checks.¹⁴

On May 5, 2004, Berco assigned all of its rights, title, and interest in the Policy to Mr. Schoeder.¹⁵

On May 25, 2004, Mr. Schoeder paid back the loan that was taken out on the Policy in 1998. The amount owed on the loan had grown to a balance of \$60,684.62.¹⁶

⁵ Notice of Hearing at ¶ 2.

⁶ Affidavit of Steven Schoeder at ¶ 3.

⁷ Schoeder Aff., Ex. 1.

⁸ Demutualization is a process by which a mutual non-profit organization becomes a for-profit corporation that issues stock. *McGowen Investors, LP v. Keefe Bruyette & Woods, Inc.*, 540 F.Supp.2d 571, 572 (E.D. Pa. 2008).

⁹ Notice of Hearing at ¶ 4.

¹⁰ Schoeder Aff. at ¶ 6, Ex. 2.

¹¹ Letter from Manulife Financial dated March 11, 2011, attached to submission from Kevin Coan dated January 12, 2012.

¹² Pierce Aff. at ¶ 3, Ex. B.

¹³ Pierce Aff. at ¶ 4, Ex. C.

¹⁴ Notice of Hearing at ¶ 5.

¹⁵ Schoeder Aff. at ¶ 6, Ex. 3.

AFI was statutorily dissolved by the Minnesota Secretary of State in January 2006.¹⁷

In 2006, Manulife Financial deemed the shares of stock and unclaimed dividends it allocated to AFI under the Policy to be abandoned and it turned these properties over to the Department of Commerce (the agency that administers the Act). The Department liquidated the properties in November 2006 and maintains custody of three separate accounts with the following dollar amounts: \$4,062.12; \$52,662.35; and \$52,662.35. The Department assigned property ID 1752809 to the AFI property described as “dividends” (\$4,062.12); property ID 1752810 to the AFI property described as “other cert ownership (benef)” (\$52,662.35); and property ID 1752811 to the AFI property described as “underlying shares” (\$52,662.35).¹⁸

Larry Bergman filed a claim for all of the properties with the Department of Commerce on October 12, 2010.

In November 2010 and February 2011, Granite Financial purchased the judgments that Metro Sales and Spec Plating obtained against AFI in 2002.¹⁹

Granite Financial filed a claim for a portion of the properties with the Department on December 7, 2010.²⁰

Steven Schoeder filed a claim for all of the properties with the Department on May 19, 2011.

On September 22, 2011, Mr. Bergman withdrew his claim to the property. Mr. Bergman notified the Administrative Law Judge that he has no interest in the unclaimed property that is the subject of this contested case proceeding.

The Department of Commerce is not a party to this contested case, but is the custodian of the funds.

Motion Standard

Both Granite Financial and Mr. Schoeder have moved for summary disposition. Summary disposition is the administrative equivalent of summary judgment.²¹ Summary disposition is appropriate when there is no genuine dispute about the material facts, and one party is entitled to judgment as a matter of law.²² When considering a motion for summary disposition the decision

¹⁶ Schoeder Aff. at ¶ 5, Ex. 1.

¹⁷ Pierce Aff., Ex. A.

¹⁸ Notice of Hearing at ¶¶ 7-8; Second Affidavit of Jack Pierce (January 6, 2012), Ex. A.

¹⁹ Pierce Aff., Exs. B and C.

²⁰ Pierce Aff., Ex. D.

²¹ *Pietsch v. Mn. Bd. of Chiropractic Examiners*, 683 N.W.2d 303, 306 (Minn. 2004).

²² *Sauter v. Sauter*, 70 N.W. 2d 351, 353 (Minn. 1955); *Louwagie v. Witco Chemical Corp.*, 378 N.W.2d 63, 66 (Minn. App. 1985); Minn. R. Civ. P. 56.03.

maker must view the facts in the light most favorable to the non-moving party.²³ The moving party carries the burden of proof and persuasion to establish that no genuine issues of material fact exist.²⁴ The non-moving party cannot rely upon general statement or allegations, but must show the existence of specific material facts which create a genuine issue.²⁵

In this instance, where there are cross-motions for summary disposition, the same standards apply, and summary disposition should be granted only where there are no material facts in dispute.²⁶

Unclaimed Property Act

Under the Unclaimed Property Act, the term “unclaimed funds” is defined in part to mean all moneys held and owing by any life insurance corporation unclaimed and unpaid for more than three years after the moneys became due and payable under any life or endowment insurance policy or annuity contract which has matured.²⁷

Shares of stock are deemed abandoned if a dividend distribution or other sum payable as a result of the interest has remained unclaimed by the owner for three years and the owner within three years has not:

(1) communicated in writing with the association regarding the interest or a dividend, distribution, or other sum payable as a result of the interest; or

(2) otherwise communicated with the association regarding the interest or a dividend, distribution, or other sum payable as a result of the interest, as evidenced by a memorandum or other record on file with the association prepared by an employee of the association.²⁸

Property presumed abandoned and subject to custody under the Act must be reported and delivered to the Department.²⁹ The Department holds the unclaimed property as a custodian. The Act provides for the custodial taking, not escheat, of the unclaimed property presumed to be abandoned. Unlike escheat, where the right of the owner is foreclosed and title to the property passes to the state, custodial acts do not cut off the property rights of the owner.³⁰

²³ *Ostendorf v. Kenyon*, 347 N.W.2d 834 (Minn. App. 1984); *Carlisle v. City of Minneapolis*, 437 N.W.2d 712, 715 (Minn. App. 1988).

²⁴ *Theile v. Stich*, 425 N.W.2d 580, 583 (Minn. 1988).

²⁵ *Murphy v. Country House, Inc.*, 307 Minn. 344, 351-52, 240 N.W.2d 507, 512 (Minn. 1976).

²⁶ *See Wightman v. Springfield Terminal Ry. Co.*, 100 F. 3d 228, 230 (1st Cir. 1996).

²⁷ Minn. Stat. § 345.33(b).

²⁸ Minn. Stat. § 345.35(a).

²⁹ Minn. Stat. § 345.43, subd. 2a.

³⁰ *See, Traveler's Exp. Co., Inc. v. State of Minn.*, 506 F.Supp. 1379, 1380 n. 1 (D. Minn. 1981).

An “owner” is defined to mean “a depositor in case of a deposit, a beneficiary in case of a trust, a creditor, claimant or payee in case of other choses in action, or any person having a legal or equitable interest in property subject to [the Act].”³¹ A person entitled to payment under the Act must be one who has an interest in the property and who has filed a claim on a form prescribed by the commissioner.³² The commissioner shall consider any claim filed and may authorize that a hearing be held and evidence received to determine whether a claim should be allowed.³³

Arguments of the Parties

Granite Financial argues first that it and Mr. Schoeder are claiming entitlement to funds associated with two separate and different policies. The AFI abandoned shares of stock that were tendered to the Department in 2006 came from Policy #4078381. As a judgment creditor of AFI, Granite Financial claims it is entitled to these funds. The policy that Mr. Schoeder maintains he was assigned all rights and interests in is Policy #40783813. Granite Financial asserts that not only is this a different policy number, documentation submitted by Mr. Schoeder establishes that Policy #40783813 has not been abandoned within the meaning of the Act and therefore cannot be the source of the unclaimed funds. According to an exhibit submitted by Mr. Schoeder, premium payments in the form of dividends and other communications have been made with respect to Policy #40783813 as recently as May 2010.³⁴

In addition, Granite Financial points out that when Manulife Financial tendered the abandoned property to the Department it was required to provide the name and last known address of the record holder of the property. Manulife reported AFI as the owner and listed its last known address. If the policies at issue were the same, Granite Financial maintains that Manulife Financial would have reported Mr. Schoeder as the owner and supplied his address.

In response to Granite Financial’s argument, Mr. Schoeder submitted a letter from Manulife Financial stating that the two policy numbers reflect the same policy. According to the letter, the additional “3” on the policy reflects a “check digit” used by Manulife for administrative purposes and it has “no significance to the demutualization record for allocated common shares.”³⁵

If the policies are the same, Granite Financial argues that even if Mr. Schoeder has an ownership interest in the funds, it has priority as a judgment creditor and is entitled to payment before shareholders receive any assets.³⁶

³¹ Minn. Stat. § 343.31, subd. 7.

³² Minn. Stat. § 345.49, subd. 1.

³³ Minn. Stat. § 345.50.

³⁴ See, Schoeder Aff. Ex. 1.

³⁵ Letter from Manulife Financial dated March 11, 2011.

³⁶ Minn. Stat. § 302A.725, subd. 3 (A shareholder is not entitled to receive any assets of the corporation until the corporation has satisfied “the debts, obligations, and liabilities of the corporation”)

Granite Financial notes that under general corporate law governing dissolutions, a shareholder is not entitled to receive any assets of the corporation until the corporation has satisfied its debts, obligations and liabilities.³⁷ According to Granite Financial, the amount owed by AFI on the two judgments through November 10, 2011, is \$46,926.29.

Steven Schoeder argues that as the owner of the Policy since May 5, 2004, when he obtained assignment of all rights and interest in the Policy, he is entitled to all of the funds. Mr. Schoeder points out that the judgments Granite Financial purchased were entered against AFI a month or so *after* the Policy was assigned to Berco. Two years later, Berco assigned all of its rights and interest in the Policy to Mr. Schoeder. According to Mr. Schoeder, there is no authority permitting a creditor to collect on a judgment against property owned by a third-party. Mr. Schoeder asserts that Granite Financial's claims are against a previous owner, and that he does not owe Granite Financial anything.

Mr. Schoeder also argues that he is entitled to the funds by virtue of his ownership of the Policy and his status as the insured. He notes that courts in other jurisdictions have recognized that ownership of a policy carries with it the right to receive policy dividends.³⁸

Analysis

The Administrative Law Judge is persuaded that there is only one insurance policy at issue in this matter and that AFI assigned all rights and interest in this policy to Berco prior to the judgments being entered against AFI. Thereafter, Berco assigned all rights and interest in the policy to Mr. Schoeder making him the owner of the policy as well as the insured.

As the policy owner and beneficiary, Mr. Schoeder is entitled to the dividends and other proceeds payable under the policy, including the unclaimed funds held by the Department.³⁹ While Granite Financial is correct that corporations are required to satisfy their debts and obligations before shareholders receive any assets, the assets that Granite Financial claims did not belong to AFI at the time the judgments were entered.

It is not clear why Manulife Financial paid dividends to AFI after the policy was assigned to Berco and why it identified the unclaimed property as belonging to AFI when it delivered the property to the Department. Whatever the reason, AFI ceased having rights or interest in the policy after September 23, 2002, before the judgments were entered. As a result, Granite Financial is not entitled to the funds.

³⁷ Minn. Stat. § 302A.725, subd. 3.

³⁸ See, *Evans v. Moore*, 853 So.2d 850, 854-855 (Miss. Ct. App. 2003), citing *Succession of Jackson*, 402 So.2d 753, 756 (La. Ct. App. 1981).

³⁹ Minn. Stat. § 61A.12.

Mr. Schoeder has a legal interest in the property and has filed a claim with the Department as required by the Act. The Administrative Law Judge concludes that there is no genuine issue of material fact and that Steven Schoeder is entitled to the unclaimed funds as a matter of law. The Administrative Law Judge recommends that Mr. Schoeder's motion for summary disposition be granted and that the Department distribute all of the property at issue to Mr. Schoeder.

B.J.H.