

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

GLOBAL DISCOVERIES LTD., LLC, ON
BEHALF OF THE HEIRS OF LARRY
BUNDA; AND BY OCWEN LOAN
SERVICING, INC., FOR UNCLAIMED
PROPERTY REPORTED IN THE NAMES
LARRY BUNDA AND HOMEQ SERVICING,

Petitioners,

vs.

Case No. 17-4919

DEPARTMENT OF FINANCIAL
SERVICES, BUREAU OF UNCLAIMED
PROPERTY,

Respondent.

_____ /

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on November 21, 2017, in Tallahassee, Florida, before Lawrence P. Stevenson, a duly-designated Administrative Law Judge of the Division of Administrative Hearings ("DOAH").

APPEARANCES

For Petitioner Global Discoveries Ltd., LLC:

Michael J. Farrar, Esquire
Michael Farrar, P.A.
18851 Northeast 29th Avenue, Suite 700
Aventura, Florida 33180

For Petitioner Ocwen Loan Servicing, LLC:

Barbara Fernandez, Esquire
West A. Holden, Esquire
Hinshaw and Culbertson, LLP
2525 Ponce de Leon Boulevard., 4th Floor
Coral Gables, Florida 33134

For Respondent: Josephine A. Schultz, Esquire
Department of Financial Services
Office of the General Counsel
200 East Gaines Street, Room 645E-5
Tallahassee, Florida 32399

STATEMENT OF THE ISSUE

Whether either of the Petitioners is entitled to the funds in Unclaimed Property Account Number 117786622.

PRELIMINARY STATEMENT

By Notice of Intent dated August 4, 2017, Respondent, Department of Financial Services, Bureau of Unclaimed Property ("Department"), gave notice of its intent to approve the claim for Unclaimed Property Account Number 117786622 filed by Ocwen Loan Servicing, LLC ("Ocwen"),^{1/} and to deny the claim filed by Global Discoveries Ltd., LLC ("Global"), for the same account. On August 23, 2017, Global filed a Petition for Evidentiary Hearing contesting the Department's preliminary decision. On August 30, 2017, the Department forwarded the cases to DOAH for the assignment of an Administrative Law Judge to conduct a formal hearing. Counsel for Ocwen filed a Notice of Appearance on September 14, 2017.

The hearing was originally scheduled to convene on October 20, 2017. The parties filed a pre-hearing stipulation on October 10, 2017. The Department filed a Motion to Relinquish Jurisdiction on October 18, 2017, arguing that because the parties were relying solely on documentary evidence and had agreed to the admissibility of those documents, there was no need of convening a formal evidentiary hearing. In its response in opposition, filed on October 19, 2017, Global argued that facts remained in dispute and stated that it objected to the admission of the insurance policy that is at the core of this case. In light of Global's response, the Department and Ocwen filed a joint motion for continuance on October 19, 2017. The continuance was granted and the hearing was rescheduled for November 21, 2017, on which date it was convened and completed.

No witnesses testified at the hearing. Oral argument was heard. Global's Exhibits 1 through 5; Ocwen's Exhibits 1 and 2; and the Department's Exhibits 1 through 10 and 12 were admitted without objection. Department Exhibit 11, the contested insurance policy, was admitted over Global's objection. The undersigned took official recognition of all requested cases, statutes, and other materials as requested by the parties.

The one-volume Transcript of the hearing was filed at DOAH on November 30, 2017.

Rather than the usual process of simultaneous submission of proposed recommended orders, the parties agreed that it would be more efficacious to follow a process akin to an appellate briefing schedule, with Global first submitting an initial brief/proposed recommended order, then the Department and Ocwen filing answer briefs/proposed recommended orders, and finally Global submitting a reply brief/proposed recommended order. A briefing schedule was established by Order entered on November 22, 2017. Two extensions were granted during the briefing process. All filings were timely and have been considered in the preparation of this Recommended Order.

Unless otherwise stated, all statutory references are to the 2016 edition of the Florida Statutes.

FINDINGS OF FACT

Based on the oral and documentary evidence adduced at the final hearing, and the entire record in this proceeding, the following Findings of Fact are made:

1. The Department is the state agency authorized to administer the Florida Disposition of Unclaimed Property Act, chapter 717, Florida Statutes. In that capacity, the Department, as custodian, receives dormant accounts from various entities and safeguards the funds until the rightful owner files a claim establishing his or her entitlement to the funds.

2. In 2013, the Department received \$273,100 from Amco Insurance Company ("Amco"), a subsidiary of Nationwide Insurance Company ("Nationwide"). Amco reported the funds as the proceeds of a Matured Life-Limiting Age insurance policy payable to the "Estate of Larry Bunda" and "Home Q Servicing" (hereinafter cited as "HomEq," the company's preferred name styling). Amco also provided a last known address for HomEq of Post Office Box 57621, Jacksonville, Florida 32241, as an additional property identifier. The funds are now identified as Unclaimed Property Account Number 117786622.

3. Global is registered with the Department as a claimant's representative pursuant to section 717.1400, Florida Statutes, which permits it to file claims with the Department on behalf of apparent owners.

4. In 2015, Global began investigating account number 117786622. In an email dated July 13, 2015, Nationwide reported to Bonnie McKee-Flores of Global that the customer in question was named Larry R. Bunda, born on October 19, 1950, with a reported address of 546 Elm Street, Ramona, California.

5. Global investigated the status of Larry R. Bunda. It obtained a Washington State Certificate of Death indicating that Larry R. Bunda died on September 8, 2008, in Seattle, Washington, of injuries sustained in a motorcycle accident. Global discovered three heirs to the estate of Larry R. Bunda:

Amelia Bunda of Bremerton, Washington; Robert Bunda of Bremerton, Washington; and George Bunda of El Cajon, California.

6. On September 13, 2016, Ms. McKee-Flores of Global sent an email to Nationwide requesting the issue date and check number of the check issued to Larry Bunda and HomEq Servicing. Ms. McKee-Flores explained that she was attempting to obtain a release from HomEq's successor, Ocwen, for the funds to be released to the Bunda estate, and that the information as to the check would help persuade Ocwen to sign the release. Nationwide responded: "The original check # was 0371843635 and it was issued on 11/05/2009." Nationwide did not state to whom the check was made payable.

7. The three heirs initiated a probate proceeding in the Circuit Court for the Second Judicial Circuit, in and for Leon County, Florida, Case No. 2016 CP 000687. On September 22, 2016, the court entered an Order of Summary Administration adjudging that there be an "immediate distribution of the assets of the decedent" equally to each of the heirs. Each heir was to receive a "one-third (1/3) share of decedent's share" of the Department's Unclaimed Property Account Number 117786622.

8. On October 17, 2016, Global filed with the Department a claim on behalf of the Bunda heirs, claiming 50 percent of the funds in account number 117786622, with HomEq (or its successor)

entitled to the other 50 percent as the joint named payee on the life insurance policy.

9. The Global claim was filed on Department Form DFS-UP-108, which is the form prescribed by Florida Administrative Code Rule 69G-20.0021(6) for claims filed by a claimant's representative. There is no dispute that Global used the correct form to file its claim.

10. On December 19, 2016, Ocwen filed its claim to the "Matured Life--Limiting Age" policy issued by Amco to the "Estate of Larry Bunda" and "Home Q Servicing." Ocwen claimed the funds as the successor company to HomEq.

11. The Ocwen claim was filed on Department Form DFS-UP-106, which is the form prescribed by rule 69G-20.0021(4) for claims filed directly by apparent owners, including corporations.

12. At some point after the claims were filed, the Department made further inquiry to Nationwide as to the nature and status of the insurance policy. In an email dated January 30, 2017, Jenn Hupp, a Nationwide premium processor, reported to Department regulatory specialist Tiffani Ealy Claven as follows: "I show that check 378366435 was issued on claim 84M85897 date of loss 10/22/2007. In payment of: POLICY LIMITS FOR DWELLING LOST IN FIRE-- REISSUE OF CK 378364049."

13. Ms. Hupp did not provide a date for either of the referenced checks, nor did she expressly state to whom they were made payable.

14. Neither check number referenced by Ms. Hupp matched the check number that Nationwide provided to Global on September 13, 2016. None of the referenced checks were made part of the record.

15. The actual policy document was provided to the Department by Nationwide no sooner than October 31, 2017.^{2/} The Department did not make Global aware that it had the policy document until November 14, 2017, when Global filed a written motion seeking to exclude the policy on grounds of inadequate notice. After hearing argument at the final hearing, the undersigned overruled Global's objection and admitted the policy.

16. The policy was not a life insurance policy but a homeowner's policy, number HMC 0009452948-6, issued by Allied Property and Casualty Insurance Company ("Allied Property"), another subsidiary of Nationwide, for the period running from May 6, 2007, to May 6, 2008. The face value of the insurance policy was \$273,100 for a dwelling, and included additional coverages for other structures, personal property, and personal liability. The policy declarations page identified Larry R. Bunda of 546 Elm Street, Ramona, California, as the named

insured. The policy declarations page identified 546 Elm Street, Ramona, California, as the insured property. The policy identified HomEq as the mortgage loss payee on the first mortgage. HomEq's address was listed as Post Office Box 57621, Jacksonville, Florida 32241-7621.

17. Nothing in the record explains why Nationwide originally reported the policy to the Department as a life insurance policy, or why it was reported by Nationwide's Amco subsidiary rather than by Allied Property, the issuer of the policy.

18. In support of its claim, Ocwen submitted a copy of a Deed of Trust, dated October 5, 2005, relating to the property located at 546 Elm Street, Ramona, California. The Deed of Trust identifies Larry R. Bunda as the purchaser/borrower, BNC Mortgage, Inc., as the lender, and TD Service Company as the trustee. The Deed of Trust identifies Mortgage Electronic Registration Systems, Inc. ("MERS") as the beneficiary, "acting solely as a nominee for Lender and Lender's successors and assigns." The Deed of Trust reflects a purchase price of \$495,000.

19. The Deed of Trust, in the Uniform Covenants, at paragraph 5, requires Mr. Bunda to insure the property against fire, flood, and other hazards, and further states:

All insurance policies required by Lender . . . shall include a standard mortgage clause, and shall name Lender as mortgagee and/or as an additional loss payee and Borrower further agrees to generally assign rights to the insurance proceeds to the holder of the Note up to the amount of the outstanding loan balance.

20. If Mr. Bunda failed to purchase the insurance, then the lender, through its servicing agent, had the authority to purchase insurance at Mr. Bunda's expense. In the event of loss, insurance proceeds were to be applied to restoration or repair of the property. If restoration or repair were "not economically feasible or Lender's security would be lessened," the insurance proceeds would be applied to the amounts secured by the Deed of Trust, with any excess paid to the borrower, Mr. Bunda.

21. Ocwen also provided an Assignment of Deed of Trust, dated August 10, 2011, that specifically identifies 546 Elm Street, Ramona, California, as the subject property. In the Assignment of Deed of Trust, MERS, as nominee for BNC Mortgage, Inc., assigns its rights under the Deed of Trust to U.S. Bank National Association ("U.S. Bank"), as "Trustee under Securitization Servicing Agreement Dated as of December 1, 2005 Structured Asset Investment Loan Trust Mortgage Pass-Through Certificates, Series 2005-11" (the "Securitization Servicing Agreement"). U.S. Bank's address is listed as c/o Ocwen Loan

Servicing, LLC, at Ocwen's West Palm Beach, Florida, office. The Assignment of Deed of Trust was recorded at the San Diego County Recorder's Office on August 25, 2011.

22. Ocwen submitted a copy of a Substitution of Trustee, dated March 3, 2011, in which MERS, as nominee for U.S. Bank, and "as trustee for the Securitization Servicing Agreement," substitutes Western Progressive, LLC ("Western Progressive"), as trustee under the Deed of Trust, in place of TD Service Company, the original trustee. The Substitution of Trustee was not recorded in the San Diego County Recorder's Office until July 12, 2011.

23. In its preliminary decision, the Department accepted that the Deed of Trust on 546 Elm Street, Ramona, California, was included in the Securitization Servicing Agreement, the first mention of which in the record is in the Substitution of Trustee dated March 3, 2011. Ocwen submitted a Limited Power of Attorney, dated June 1, 2012, listing the Securitization Servicing Agreement among those items over which U.S. Bank granted Ocwen a limited power of attorney. The Assignment of Deed of Trust also names the Securitization Servicing Agreement, implying a connection to the Deed of Trust on the Bunda mortgage.

24. However, the Securitization Servicing Agreement itself is not part of the record in this case. The Assignment of Deed

of Trust certainly assumes that the Bunda mortgage is part of the Securitization Servicing Agreement, but there is no document establishing that fact.

25. The failure to tie the Bunda mortgage to the Securitization Servicing Agreement would not affect the assignment of rights from BNC Mortgage to U.S. Bank, or the substitution of trustee from TD Service Company to Western Progressive, because both of those documents are executed in direct reference to the Deed of Trust on the Bunda property. However, the Limited Power of Attorney from U.S. Bank to Ocwen references only the Securitization Servicing Agreement. There is no record evidence directly establishing that Ocwen's limited power of attorney includes the Deed of Trust on the Bunda property. It appears that the Department was willing to infer that the Deed of Trust is included in the Securitization Servicing Agreement based on the indirect evidence of the Assignment of Deed of Trust and the Substitution of Trustee.

26. Ocwen submitted a U.S. Securities and Exchange Commission Form 8-K filed by Ocwen Financial Corporation, dated September 8, 2010, detailing Ocwen Financial Corporation's acquisition of "HomEq Servicing," through its subsidiary Ocwen Loan Servicing, LLC (the "Ocwen" referenced throughout this Order), effective September 1, 2010. The acquisition includes the "mortgage servicing rights and associated servicer advances"

of HomEq. In the Form 8-K, HomEq is identified as "the U.S. non-prime mortgage servicing business" owned by Barclays Bank PLC, a British company, and Barclays Capital Real Estate Inc., a Delaware corporation.

27. Florida Division of Corporations documents identify HomEq Servicing as a fictitious name registered by Barclays Capital Real Estate, Inc., on August 29, 2006. The registration was canceled on October 27, 2010.

28. Ocwen submitted a series of notices sent to Larry R. Bunda at 546 Elm Street, Ramona, California, giving notice of transfers of loan servicers. In a notice dated January 27, 2006, HomEq informed Mr. Bunda that the servicing of his account was being transferred from Option One to HomEq, effective February 1, 2006.

29. HomEq sent another notice, dated August 11, 2010, addressed to Larry R. Bunda at 1306 Poindexter Avenue West, Bremerton, Washington 98312-4333. By this time, Mr. Bunda had been dead for almost two years. The address is the same as that given by Mr. Bunda's heir, Robert Bunda, in the claim documents filed by Global. It is also the address given for "Rob Bunda" as the decedent's son on Larry R. Bunda's death certificate. Nothing in the record of this case indicates how HomEq came by this address for Larry R. Bunda in 2010.

30. The August 11, 2010, notice was intended to inform Mr. Bunda that HomEq was transferring the servicing of his account to Ocwen, as of September 1, 2010. This is consistent with Ocwen's Form 8-K, which stated that Ocwen was acquiring HomEq, effective September 1, 2010.

31. Ocwen submitted a Notice of Default and Election to Sell Under Deed of Trust ("Notice of Default"), dated February 17, 2011, over the signature of Marco Marquez. Mr. Marquez' position is unclear, as the signature line includes both "Western Progressive, LLC, as agent for beneficiary" and "By LSI Title Company, As Agent." The relationship of LSI Title Company to this case is unexplained in the record. The document indicates that it was recorded in the San Diego County Recorder's Office on February 18, 2011.

32. The date on the Notice of Default is prior to the appointment of Western Progressive as trustee by the Substitution of Trustee document dated March 3, 2011. The source of Western Progressive's authority to do anything regarding the property as of February 17, 2011, is unexplained in the record.

33. The Notice of Default does not state to whom it is addressed. By February 17, 2011, Larry R. Bunda was long dead, but the document includes no acknowledgement of his death or of any effort to locate his heirs. The text of the document

repeatedly refers to "your property," states that "you are behind in your payments" and advises "you" how to obtain a written itemization of the amount "you must pay." Nothing in the document gives any indication that the "you" being addressed is anyone other than Larry R. Bunda, the borrower, who was dead.

34. The Notice of Default offers the recipient an opportunity to bring the account into good standing by paying all past due payments, stated as \$121,831.17 as of February 17, 2011. The Notice of Default goes on to provide:

NOTICE IS HEREBY GIVEN: That Western Progressive, LLC is either the original trustee, the duly appointed substituted trustee, or acting as agent for the trustee or beneficiary under a Deed of Trust dated 10/5/2005, executed by LARRY R. BUNDA, A WIDOWER, as Trustor, to secure certain obligations in favor of BNC MORTGAGE, INC., A DELAWARE CORPORATION A CORPORATION [sic], AS LENDER, Mortgage Electronic Registration Systems, Inc., as beneficiary, recorded 10/12/2005, as Instrument No. 2005-0881960, in Book __, Page __, and rerecorded on __ as __ of Official Records in the Office of the Recorder of San Diego County, California describing land therein as: As more particularly described on said Deed of Trust.

The subject obligation includes ONE NOTE(S) FOR THE ORIGINAL sum of \$495,000.00. A breach of, and default in, the obligations for which such Deed of Trust is security has occurred in that payment has not been made of the following:

Installment of Principal and Interest plus impounds and/or advances which became due on 9/1/2008 plus late charges, and all

subsequent installments of principal, interest, balloon payments, plus impounds and/or advances and late charges that became payable.

You are responsible to pay all payments and charges due under the terms and conditions of the loan documents which come due subsequent to the date of this notice, including, but not limited to, foreclosure trustee fees and costs, advances and late charges.

Furthermore, as a condition to bring your account in good standing, you must provide the undersigned with written proof that you are not in default on any senior encumbrance and provide proof of insurance.

Nothing in this notice of default should be construed as a waiver of any fees owing to the beneficiary under the deed of trust, pursuant to the terms and provisions of the loan documents.

35. Again, the statements addressed to "you" do not appear to reference anyone other than the borrower, Larry R. Bunda, who was dead well before the Notice of Default was issued. In fact, Mr. Bunda was dead before the due date cited by the Notice of Default.

36. Also, the assertion that Western Progressive "is either the original trustee, the duly appointed substituted trustee, or acting as agent for the trustee or beneficiary under a Deed of Trust dated 10/5/2005, executed by LARRY R. BUNDA, A WIDOWER, as Trustor, to secure certain obligations in favor of BNC MORTGAGE" was not true as of February 17, 2011, at least

insofar as the record evidence of this case indicates. Western Progressive was not substituted as trustee until March 3, 2011.^{3/}

37. The Notice of Default concludes with the following statements:

The mortgagee, beneficiary, or authorized agent has fulfilled its obligation under California Civil Code Section 2923.5(a) by contacting the borrower either in person or by telephone to assess the borrower's financial situation and explore options to avoid foreclosure prior to 30 days of filing the Notice of Default. The borrower was advised of their right to a subsequent meeting within 14 days of the initial contact. In addition, the borrower was provided with the toll-free telephone number made available by the United States Department of Housing and Urban Development (HUD) to find a HUD-certified housing counseling agency.

38. The quoted statements cannot be true. Neither the mortgagee, nor the beneficiary, nor any authorized agent contacted the borrower, Larry R. Bunda, either in person or by telephone, because Larry R. Bunda was dead. The borrower was not advised of his right to a subsequent meeting, nor was he provided with a toll-free HUD number, because he was dead. The record is bereft of information as to the legal effect under California law of falsely attesting to having provided the notice apparently required by the cited provision of that state's civil code, or of failure to provide notice to the actual, living parties in interest.

39. Unsurprisingly, the borrower did not respond to the Notice of Default and the property proceeded to a trustee's sale. Ocwen submitted a Notice of Trustee's Sale, dated July 8, 2011, and recorded in the San Diego County Recorder's Office on July 12, 2011. This document is signed by Robin Pape, Trustee Sales Assistant, on behalf of Western Progressive, as trustee.

40. The Notice of Trustee's Sale begins as follows:

YOU ARE IN DEFAULT UNDER A DEED OF TRUST
DATED 10/5/2005. UNLESS YOU TAKE ACTION TO
PROTECT YOUR PROPERTY, IT MAY BE SOLD AT A
PUBLIC SALE. IF YOU NEED AN EXPLANATION OF
THE NATURE OF THE PROCEEDING AGAINST YOU,
YOU SHOULD CONTACT A LAWYER.

41. Nothing in the Notice of Trustee's Sale gives any indication that it is addressed to anyone other than Larry R. Bunda, who remained dead on July 8, 2011.

42. The Notice of Trustee's Sale informs the recipient that the trustee's public auction sale will occur on August 8, 2011, at the South entrance to the County Courthouse, 220 West Broadway, San Diego, California. It lists the street address of the property as 546 Elm Street, Ramona, California 92065, and states that the amount of the unpaid balance and other charges is \$610,258.23.

43. Finally, Ocwen submitted a Trustee's Deed Upon Sale, dated September 20, 2011, and recorded at the San Diego County Recorder's Office on September 29, 2011. The document states

that Western Progressive, as Trustee under the Deed of Trust,
"does hereby GRANT and CONVEY to Matthew D. Parker, a named man
as his sole and separate property . . . all right title and
interest conveyed to and now held by it as Trustee under the
Deed of Trust in and to the property situated in the county of
San Diego, State of California, described as follows"

There follows a legal description matching the Bunda property at
546 Elm Street, Ramona, California.

44. The Trustee's Deed Upon Sale also provides as follows:

This conveyance is made in compliance with the terms and provisions of the Deed of Trust executed by LARRY R. BUNDA, A WIDOWER as Trustor, dated 10/5/2005 in the Official Records in the office of the Recorder of San Diego, California under the authority and powers vested in the Trustee designated in the Deed of Trust or as the duly appointed Trustee, default having occurred under the Deed of Trust pursuant to the Notice of Default and Election to Sell under the Deed of Trust recorded on 10/12/2005, instrument number 2005-0881960, Book ---, Page --- and rerecorded on --- as --- of official records. Trustee having complied with all applicable statutory requirements of the State of California and performed all duties required by the Deed of Trust including sending a Notice of Default and Election to Sell within ten days after its recording and a Notice of Sale at least twenty days prior to the Sale Date by certified mail, postage pre-paid to each person entitled to notice in compliance with California Civil Code 2924b.

All requirements per California Statutes regarding the mailing, personal delivery and publication of copies of Notice of Default

and Election to Sell under Deed of Trust and Notice of Trustee's Sale, and the posting of copies of Notice of Trustee's Sale have been complied with. Trustee, in compliance with said Notice of Trustee's sale and in exercise of its powers under said Deed of Trust sold said real property at public auction on 9/14/2011. Grantee, being the highest bidder at said sale became the purchaser of said property for the amount bid, being \$65,000.00, in lawful money of the United States, in pro per, receipt thereof is hereby acknowledged in full/partial satisfaction of the debt secured by said Deed of Trust.

45. Again, there is no indication that any living person with an interest in the estate of Larry R. Bunda was given notice of this sale, despite the assurances of Western Progressive, in the Trustee's Deed Upon Sale.

46. The facts recited above raise many questions. First, why is this case being heard in Florida? Larry R. Bunda lived in California. His heirs live in the states of Washington and California. Ocwen's filings indicate that it is based in Boston, Massachusetts. The real property was in California and the Deed of Trust was drafted on a California-specific form. The mortgage was declared in default according to California law, and the foreclosure and subsequent resale were performed under California law. The insurance policy was issued by a California agency. It appears the only connection of this unclaimed property to Florida is the address provided to the

Department by Amco in its initial 2013 report: "last known address" of Post Office Box 57621, Jacksonville, Florida 32241.

47. This address turned out to be that of HomEq. According to Ocwen's Form 8-K, HomEq ceased to exist as a separate company as of September 1, 2010, approximately three years before Amco reported the unclaimed funds to the Department. The only real connections to Florida in this case are Global and Ocwen's acts of following the money to its landing place at the Department.

48. It is understandable that the Department took custody of the unclaimed property at the time Amco submitted it, given that the only address on the documentation was in Jacksonville. However, at some point it should have occurred to the Department that its unclaimed property counterpart in the State Controller's Office of California might be better placed to resolve this controversy involving issues of California real property law, inheritance law, and insurance law.^{4/}

49. One example will suffice to illustrate the problem of a Florida administrative agency attempting to apply California law to resolve these issues. In its proposed recommended order, the Department confidently argues that a 2014 amendment to section 580b of the California Code of Civil Procedure alters the analysis of this case as to the extinguishment of the debtor-creditor relationship during foreclosure proceedings.

The Department fails to note that three separate Federal courts in California have concluded that the operation of the 2014 amendment is prospective only. It would therefore be inapplicable to the instant case. See Shin v. Citizens Bank, N.A., 2018 U.S. Dist. LEXIS 14997 at n.2 (S.D. Cal. 2018); Prianto v. Experian Info. Solutions, Inc., 2014 U.S. Dist. LEXIS 94673 at n.2 (N.D. Cal. 2014); Johnson v. Wells Fargo Home Mortg., Inc., 2013 U.S. Dist. LEXIS 185345 at 19 (C.D. Cal. 2013).

50. An agency more familiar with California law might have been aware of the court decisions and the California rules of statutory construction that underlay their conclusions. Given its insistence that California law governs this case, the Department should have considered whether a California tribunal would be better placed to resolve these issues.^{5/}

51. A second question regards the status of Ocwen, which filed its claim on Department Form DFS-UP-106, the form prescribed for "apparent owners." Section 717.101(2) defines "apparent owner" as "the person whose name appears on the records of the holder as the person entitled to property held, issued, or owing by the holder." It is unclear whether Amco or the Department would be considered the "holder" of the insurance proceeds, but it makes no difference as Ocwen's name did not appear on the records of either entity. Ocwen could ultimately

be found to be an "owner" as defined in section 717.101(18), and could be a "claimant" as defined in rule 69G-20.030(14), but Ocwen was not an "apparent owner" at the time it filed its claim, under the express terms of section 717.101(2).

52. Therefore, it appears that Ocwen's claim was filed on the wrong form and should have been filed on Form DFS-UP-107, prescribed by rule 69G-20.0021(5) for "claims filed by other than apparent owners," which includes heirs, personal representatives, or beneficiaries, if Ocwen believed it was entitled to claim the funds as an owner. The Department should not have processed the Ocwen claim because it was not "complete" under the terms set forth in rule 69G-20.0021(1)(b), which provides that a complete claim "shall include the correct claim form identified in this rule."

53. Even if it were accepted that the rule's definition of "apparent owner" should not be read literally and that Ocwen was entitled to file its claim as "apparent owner" by virtue of its status as HomeEq's purchaser and successor in interest,^{6/} there remains the question of whether HomeEq, and therefore Ocwen, could be considered the "owner" of the unclaimed property in the sense required by section 215.965, Florida Statutes, which provides:

Disbursement of state moneys.— Except as provided in s. 17.076, s. 253.025(17), s.717.124(4)(b) and (c), s. 732.107(5), or

s. 733.816(5), all moneys in the State Treasury shall be disbursed by state warrant, drawn by the Chief Financial Officer upon the State Treasury and payable to the ultimate beneficiary. This authorization shall include electronic disbursement.^[7/] (Emphasis added).

54. The record evidence establishes that HomEq, and Ocwen as its successor, functioned as no more than loan servicers. While it is true that HomEq is named on the insurance policy as the "mortgage loss payee," there is nothing in the record that establishes HomEq as the "ultimate beneficiary" of the insurance policy. HomEq's part of the insurance transaction would be to collect the proceeds and pass them on to the ultimate beneficiary of the insurance contract, i.e., the lender whose money is at risk under the Deed of Trust. Ocwen could succeed to no more of an interest than that held by HomEq.

55. The Department argues that "Ocwen is claiming the funds in its own name under the authority of a limited power of attorney to act on U.S. Bank's behalf as a loan servicer." For the sake of argument, the undersigned will put aside Ocwen's failure to connect the Bunda mortgage to the Securitization Servicing Agreement for which it has a limited power of attorney. The Department offers no explanation as to what set of circumstances would allow an entity operating pursuant to a limited power of attorney--by definition,^{8/} in a representative capacity--to claim ownership, in its own name, of funds it seeks

as agent on behalf of its principal. The Department simply takes it as a given that Ocwen may claim as an owner.

56. The Department specifically relies on language from the Limited Power of Attorney giving Ocwen authority to:

Demand, sue for, recover, collect and receive each and every sum of money, debt, assessment, and interest (which now is, or hereafter shall become due and payable) belonging to or claimed by U.S. Bank National Association, as Trustee

57. The Department seems to believe that this language self-evidently establishes Ocwen's ownership interest in the proceeds of this insurance policy, when it merely authorizes Ocwen to go out and recover funds "belonging to . . . U.S. Bank." It does not transfer ownership of those funds to Ocwen. It does not make Ocwen the ultimate beneficiary of the insurance policy.

58. The undersigned is aware of cases such as Lenart v. Ocwen Financial Corporation, 869 So. 2d 588 (Fla 3d DCA 2004), in which the court assumed without discussion that a loan servicer such as Ocwen may stand in the shoes of the mortgagee as "owner" for the purpose of litigation over insurance proceeds. However, Lenart involved litigation between private parties. It did not involve an unpaid property claim before the Department, which has very specific requirements under statute and rule, including the "apparent owner" limitation on the use

of Form DFS-UP-106 and the "ultimate beneficiary" limitation on the disbursement of moneys from the State Treasury in section 215.965. Even if Ocwen were to establish its right to claim insurance proceeds as the mortgage loss payee, it would not necessarily have proven its right to claim those funds once they have become unclaimed property and passed to the Department's custody.

59. In its attack on the proposed award to Ocwen, Global contends that Ocwen's documentation fails to establish that the rights of HomEq as the loss payee on the insurance policy were transferred to Ocwen by its acquisition of HomEq in 2010. As indicated above, the undersigned is persuaded that Ocwen did succeed to HomEq's rights but finds that those rights are insufficient to establish Ocwen's status as an owner of the proceeds. The record evidence at most establishes that Ocwen is the agent of the ultimate beneficiary of the insurance policy.

60. Global cites Martin Young v. Department of Banking and Finance, 659 So. 2d 410 (Fla. 1st DCA 1995), for the proposition that the Department may not disburse funds to Ocwen because Ocwen is no more than a creditor in this case. In Martin Young, the Department had awarded unclaimed insurance proceeds to creditors of the apparent owner. On appeal, the Court first held that the Department has no statutory authority to

prioritize competing claims, a holding since superseded to a degree by statute. See § 717.1241, Fla. Stat.

61. More to the point, the court held that creditors were not "owners" because they did not have a "legal or equitable interest" in the subject property. "Insurance proceeds are personal property which judgment creditors cannot reach or claim an interest in until after resorting to judicial process." Martin Young, 659 So. 2d at 411.

62. The Department distinguishes Martin Young by arguing that it involved unsecured creditors, whereas U.S. Bank was a secured creditor by reason of the recorded Deed of Trust containing a power of sale provision and the homeowner's insurance policy with the standard mortgagee clause.

63. Global accurately points out that the Martin Young court stated no distinction between secured and unsecured creditors. However, the court's holding appears expressly limited to the reach of judgment creditors who have not obtained a lien by way of writ of execution. The Department is correct that a secured creditor such as U.S. Bank already has a lien on the property and executes on that lien when it forecloses on the secured loan.

64. Of course, the Department's analysis assumes that U.S. Bank's agents foreclosed on the property in accordance with California law. As indicated in Findings of Fact 31-45, there

is insufficient evidence in the record to establish that the default and foreclosure were properly performed. Though Martin Young appears not to preclude an award to Ocwen, the statutes and rules under which the Department operates do not allow Ocwen, as U.S. Bank's agent, to claim "ownership" of the unclaimed funds.

65. The question at the heart of this case, regarding the claim of Global and especially that of Ocwen, is: what happened in California? The Department's preliminary decision to award the claim to Ocwen assumes that a check was issued to the Bunda estate, that the Bunda estate failed to keep up the payments on the property, and that the Bunda estate allowed the foreclosure to occur in 2011. The evidence supports none of the Department's assumptions.

66. It is known for certain that Larry R. Bunda entered into a Deed of Trust to purchase the property at 546 Elm Street, Ramona, California, on October 5, 2005. It is known for certain that Larry R. Bunda purchased homeowner's insurance on the property with a face value of \$273,100 for the dwelling and that the term of the insurance was from May 6, 2007, to May 6, 2008. It is known for certain that Larry R. Bunda died on September 8, 2008.

67. Beyond these facts, matters become hazier if one relies on the documents in evidence without assuming facts

outside the record. One may reasonably presume the correctness of Nationwide's report that the total loss of Mr. Bunda's dwelling occurred on October 22, 2007. That date coincides with the time of the Witch Creek fire, which began near the town of Ramona and destroyed over 1,000 residences and other buildings. Therefore, it is reasonable to find that Larry R. Bunda was alive when the loss occurred.

68. Nationwide reported to Global that the original check to pay the insurance claim was check number 0371843635 and was issued on November 5, 2009, more than one year after Larry R. Bunda's death. Nationwide offered no explanation as to why the check was issued more than two years after the loss was incurred. Nationwide did not provide a copy of the check or state to whom the check was made payable. No explanation was given for the failure of any party to negotiate the check.

69. Nationwide later reported to the Department that two other checks had been issued: check number 378364049 and the reissued check number 378366435. Nationwide gave no dates for these two checks. Nationwide did not provide copies of these checks or state to whom the checks were made payable. No explanation was given for the failure of any party to negotiate either of the checks.

70. No evidence was presented as to why Nationwide issued more than one check. No evidence was presented as to why none

of these checks was ever negotiated. If one presumes that the checks were made payable to the policy payees, Larry R. Bunda and HomEq, and that Mr. Bunda was dead at the time they were issued, then one questions why HomEq apparently failed to take any steps to secure the funds for its principal.

71. Was HomEq aware that Larry R. Bunda was dead at the time the checks were issued? Such might be inferred from the August 11, 2010, notice that HomEq sent to Mr. Bunda at his son's address in Bremerton, Washington. However, it is just as likely that Mr. Bunda moved in with his son after the loss of his home and sent HomEq a forwarding address. Any finding on that score would be speculative. In any event, HomEq was absorbed by Ocwen on September 1, 2010. The record indicates no further correspondence addressed to Bremerton, Washington. As HomEq's successor, Ocwen should have known of the Washington address, but the record contains no direct mailings from Ocwen to Larry R. Bunda.

72. There is nothing in the record indicating that Western Progressive's Notice of Default and Notice of Trustee's Sale were addressed to anyone other than the borrower, Larry R. Bunda, who was long dead by the time the default and foreclosure proceedings on 546 Elm Street began. Nonetheless, the Notice of Default falsely stated that Western Progressive had contacted "the borrower either in person or by telephone" to explore

options to avoid foreclosure. Further, at the time it issued the Notice of Default, Western Progressive had yet to be substituted as trustee under the Deed of Trust. Based on this record and the briefs of the parties, there is no way to ascertain the rights (if any) of Larry R. Bunda's heirs to unwind the sale of the property or seek damages for Western Progressive's selling of the property without notice to the Bunda estate.

73. This point is important because a large part of the Department's argument for awarding the claim to Ocwen rests on the assumption that the Bunda heirs "waived" their right to contest the Ocwen claim because of "the foreclosure they allowed to occur in 2011." There is no record evidence that the Bunda heirs even knew of the foreclosure, let alone "allowed" it to happen. The Department simply assumes a fact not in evidence.^{9/}

74. Global claims that the Bunda heirs are entitled to one-half of the proceeds of the insurance policy as the successors to Larry R. Bunda as the joint named payee on the policy. Global relies on the Order of Summary Administration entered by the Leon County circuit court on September 22, 2016, adjudging that there be an immediate distribution of the assets to the Bunda heirs.

75. On November 15, 2017, the circuit court on its own motion entered an Order to Set Aside Order of Summary

Administration, citing unspecified "abnormalities" that had been found in the estate file. Thus, Global's reliance on the Order of Summary Administration is misplaced.

76. As to the heirs' entitlement to one-half of the proceeds, this argument would be more persuasive had the policy been one for life insurance, as the Department and Global originally believed. Because the actual policy was a homeowner's insurance company, the heirs' rights would appear to be subsidiary to the rights of the secured creditor to obtain the difference between the value of the note and the price obtained from the trustee's sale of the property in its damaged condition.

77. Again, however, this hierarchy of rights depends on a finding that the Notice of Default, the Notice of Trustee's Sale, and the trustee's sale of the property at 546 Elm Street were conducted in accordance with California law. The Department appears sanguine that this is the case, but the record presented at the hearing does not permit a finding that Ocwen's principal, U.S. Bank, through its agent, Western Progressive, gave notice to any living person with an interest in Larry R. Bunda's estate of the default, foreclosure, or trustee's sale on the property at 546 Elm Street in Ramona, California. The record is not even clear that Western Progressive was an authorized agent at the time it issued the

Notice of Default. The record permits no conclusion as to the legal effect of a failure to notify the estate or of falsely attesting that notice has been given to the borrower.

78. Nonetheless, a finding that Ocwen has failed to establish ownership of the funds does not necessitate a finding that the Bunda heirs are entitled to the funds. Enough is known of the situation to permit the conclusion that the Bunda heirs' claim is likely a subsidiary claim. It would be premature to award them half of the unclaimed property until the Department or some other entity conducts a proper investigation and determines whether the foreclosure on the Bunda mortgage was conducted in accordance with California law.

79. Global's final ground for claiming entitlement to the funds is that it filed the first complete claim. Section 717.1241(1)(a) provides:

(1) When conflicting claims have been received by the department for the same unclaimed property account or accounts, the property shall be remitted in accordance with the claim filed by the person as follows, notwithstanding the withdrawal of a claim:

(a) To the person submitting the first claim received by the Division of Unclaimed Property of the department that is complete or made complete.

80. The Department concedes that Global filed all of the necessary paperwork. Its application was not "incomplete" in

the clerical sense that Global left out any of the information required by Form DFS-UP-108. The Department contends that Global's application was not substantively complete in that it did not establish proof of entitlement to the funds on the part of the Bunda heirs. "Proof of entitlement" is expressly required in order for an application to be deemed "complete." Section 717.1241(3) provides: "A claim is complete when entitlement to the unclaimed property has been established." See also Fla. Admin. Code R. 69G-20.0021(1)(b)&(c).

81. The Department observes that section 717.1241 is a procedural statute enacted to provide guidance to the Department when it receives claims from two or more claimants, all of whom are entitled to the property. The "first to file" language does not create an independent basis for establishing entitlement but is a way for the Department to choose among entitled claims.

82. For purposes of commencing a review, the Department deems a claim "complete" when all the required documentation has been submitted. If a claim is missing information, the Department may return it to the claimant or request additional information from the claimant. If more information is sought, the claim is abated until the Department receives the requested information or deems the claim withdrawn for failure to provide the information. § 717.124(1)(b), Fla. Stat. If the claimant provides the requested information, then the Department will

review the claim on the merits to determine whether entitlement has been demonstrated.

83. The Department argues that the merits review is subsequent to and separate from the claimant's submission of the required documents. Global has conflated the claimant's responsibility to provide all required documentation with the Department's responsibility to review the claim on the merits and determine whether entitlement has been established by a preponderance of the evidence. The mere fact that the claimant provides the documentary information required by statute and rule does not mean the claim is "complete" in the sense that entitlement is established.

84. The Department's argument is correct. The facts of this case do not permit a finding that the Bunda heirs are entitled to the unclaimed funds. A secured lienholder who followed all proper steps in notifying the borrower or his heirs of the default, of the foreclosure, and of the pending trustee's sale would be entitled to cover any deficiency with some or all of the proceeds of the insurance policy. Ocwen's failure to demonstrate that all proper steps were taken means that it is not entitled to the unclaimed funds under the facts of this case, but Ocwen's failure does not establish that Global's claim is "complete" on the merits.

85. In summary, Ocwen has failed to establish by a preponderance of the evidence that it is entitled to the funds in Unclaimed Property Account Number 117786622 because:

- a. It failed to file its claim on the correct form;
- b. It failed to establish its right to claim as an "owner" of the property; and
- c. It failed to establish that the foreclosure and sale of the Bunda property were conducted in accordance with California law.

86. Global failed to establish by a preponderance of the evidence that it is entitled to a portion of the funds in Unclaimed Property Account Number 117786622 because its claim is subsidiary to that of the secured creditor, and the evidence did not foreclose the possibility that U.S. Bank may have a valid claim to the property as the secured creditor, if the regularity of the events surrounding the foreclosure and sale of the Bunda property can be established.

87. Under the facts established by the record of this case, neither claimant established its entitlement to Unclaimed Property Account Number 117786622. This finding and recommendation should not preclude the Department from allowing Ocwen to file a proper claim as a representative of U.S. Bank and then undertaking further investigation to establish whether the foreclosure sale on the Bunda property was conducted in accordance with California law. If Ocwen is unable to establish

U.S. Bank's right to the unclaimed property as a secured creditor, then the subsidiary claim put forward by Global on behalf of the Bunda heirs should be held entitled to the property.

CONCLUSIONS OF LAW

88. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and the parties thereto pursuant to sections 120.569 and 120.57(1), Florida Statutes.

89. In any administrative proceeding for the determination of a claim for unclaimed property, the claimant has the burden of proving entitlement to the property by a preponderance of the evidence. See § 717.126, Fla. Stat.

90. The hearing is a de novo proceeding intended to formulate agency action, not to review action taken earlier. Beverly Enters.-Fla., Inc. v. Dep't of HRS, 573 So. 2d 19, 23 (Fla. 1st DCA 1990).

91. The evidence presented did not support either of Petitioners' arguments as to entitlement to the unclaimed property. Neither Petitioner established, by a preponderance of the evidence, its entitlement to Unclaimed Property Account Number 117786622.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the claim of Ocwen Loan Servicing, LLC, for entitlement to Unclaimed Property Account Number 117786622 be DENIED, without prejudice. It is also RECOMMENDED that the claim of Global Discoveries Ltd., LLC, for entitlement to Unclaimed Property Account Number 117786622, be DENIED.

DONE AND ENTERED this 23rd day of April, 2018, in Tallahassee, Leon County, Florida.



LAWRENCE P. STEVENSON
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 23rd day of April, 2018.

ENDNOTES

^{1/} The original style of the case referred to "Ocwen Loan Servicing, Inc." Much of the discovery materials submitted on Ocwen's behalf used "Inc." rather than "LLC" for the company. Because the company's actual claim for unclaimed property used the "LLC" appellation, this Order will accept that as the company's actual name.

^{2/} This is the date that Nationwide's records custodian certified the business records. There is no indication in the

record as to when the Department physically received the document.

^{3/} The undersigned is here giving Ocwen the benefit of the doubt by accepting that the Substitution of Trustee was actually executed on March 3, 2011. As noted above, it was not recorded until July 12, 2011, four days after Western Progressive sent the Notice of Trustee's Sale to "Larry R. Bunda, a Widower." See Findings of Fact 39-42 infra.

^{4/} Global argues that Florida law should apply because Florida is where the property at issue, i.e., the unclaimed funds in the Department's account, is located. Given the pervasiveness of California contacts, it is difficult under any of the choice of law tests put forward by the parties to conclude that Florida law should govern this case, aside from the statutory and rule provisions regarding unclaimed property. The only real question is whether a Florida tribunal should be hearing the case at all.

^{5/} This is not intended to castigate the Department's failure to know that the law's effect is prospective only. The undersigned is no better versed in the nuances of California real estate, insurance, and estates and trusts law and is in no better position to draw definitive conclusions on the interplay of those broad subjects in this case than is the Department.

^{6/} Global correctly points out that there is no direct evidence in the record establishing that HomEq ever acquired servicing rights from the original servicer, Option One. The record does include HomEq's January 27, 2006, Notice of Service Transfer letter to Larry R. Bunda informing him of the change in servicers, which Global characterizes as "self-servicing." The undersigned is persuaded that this letter and the fact that HomEq is named as the loss payee on the insurance policy are sufficient to establish that HomEq was the loan servicer on the Bunda mortgage. There is no other conceivable reason why HomEq, a loan servicing business, would be the loss payee on the homeowner's insurance policy.

^{7/} The Department has acknowledged that it is required to comply with section 215.965. See Exhibit B to Global's Request for Official Recognition filed on October 6, 2017 (letter from Josephine A. Schultz, Esquire, to Judge Maria M. Korvick, dated March 17, 2017).

^{8/} See § 709.2102(9), Fla. Stat.

^{9/} This is not the only instance of the Department's position resting on facts not in evidence. The Department also states as fact that "the insurance check in payment of the claim was payable to both Bunda, who at the time was deceased and hence to his estate, and HomEq." As noted above, the evidence indicates that as many as three checks were issued and none of them has been made part of the record. Therefore, it cannot be known to whom the checks were made payable. It is also unknown whether Larry R. Bunda's estate was made aware of the existence of any one of the insurance checks at the time it was issued.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.