11-21-2013

Bank of Idaho v. First American Title Insurance Company Appellant's Reply Brief Dckt. 41157

IN THE SUPREME COURT OF THE STATE OF IDAHO

BANK OF IDAHO, an Idaho banking corporation, Plaintiff/Appellant, vs. FIRST AMERICAN TITLE INSURANCE COMPANY, a corporation, Defendant/Respondent.	Supreme Court Docket No. 41157 District Court Case No. CV-12-603

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APPELLANT'S REPLY BRIEF

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Appeal from the District Court of the Seventh Judicial District
of the State of Idaho, in and for the County of Bonneville

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THE HONORABLE JOEL E. TINGEY, DISTRICT JUDGE, PRESIDING

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1. Introduction.

In its responsive brief, FATCO makes several arguments, some which it raised below and some which it did not. Others address the actual conclusions of the District Court in its decision below and some do not. BOI respectfully submits the following points in reply, roughly in the sequential order presented in FATCO's brief, which demonstrate that none of the arguments raised by FATCO are persuasive. Accordingly, the District Court's decision should be reversed as requested in BOI's opening brief.

2. Contrary to FATCO's assertion, the "natural starting point" for analysis in this case is not Section 7, it is instead the grant of coverage afforded to BOI by Endorsement 116 to the Policy.

As a preliminary matter, FATCO asserts that in determining whether it is liable to BOI, "the natural starting point" for analysis is Section 7 of the Loan Policy Conditions and Stipulations. (Respondent's Brief, p. 7.) BOI respectfully disagrees, and submits that the "natural starting point" for any analysis in this case is instead the relevant grant of coverage afforded to BOI by the Policy at issue, Endorsement 116, which provides in pertinent part:

> **The Company hereby insures the owner of the indebtedness secured by the insured mortgage against loss or damage which the insured shall sustain by reason of the failure of** (i) **a MULTI FAMILY RESIDENCE** (*description of improvement e.g. "a single family residence"*) known as **1354 E 16th Street, Idaho Falls, ID 83401** (*street address*), **to be located on the land** at Date of Policy, or (ii) the map attached to this policy to correctly show the location and dimensions of the land according to the public records. (Emphasis added in part.)

(R. Vol. 2, pp. 457.) This grant of coverage unambiguously and unequivocally "insures" BOI for all "loss or damage" which it "shall sustain" because a "multi family residence" was not "located on the land."

In the midst of heated arguments about the meaning and effect of one fine print provision of the Policy or another, it is easy to overlook the central importance of this simple, broad grant of coverage. It differs markedly from the more traditional coverage usually afforded by title insurance. While common, "garden variety" title insurance typically insures only against title defects or other issues related to the title to property, Endorsement 116 insures the actual physical condition of the land, i.e., whether a building is in fact physically located on the property. Thus in one sense, the coverage at issue in this case is more akin to property insurance, rather than traditional title insurance insuring title, and might be characterized as a hybrid form of insurance. However it is characterized, this difference is important in this case for several reasons, discussed at various points below.

For example, the coverage afforded by Endorsement 116 distinguishes this case from most other title insurance claims litigated across the country, which typically involve judicial analysis that is premised on some sort of title defect or other problem with title, and the assessment of the consequences thereof. Indeed, FATCO has failed to point to a single case that addresses any title insurance issue in the context of coverage afforded by Endorsement 116 or its equivalent, one way or the other. BOI's nationwide research has likewise failed to reveal such a case. Consequently, this case appears to be unique in the annals of appellate jurisprudence, and the various analyses conducted by other courts in the context of more common title defect issues

may be of limited assistance. In short, this case presents relatively unique questions of first impression to this Court for review.

Likewise, as discussed in BOI's opening brief, the broad terms "loss or damage" are undefined by the Policy, and accordingly, must be given their ordinary meaning as applied by laymen in daily usage. (Appellant's Brief, p. 22.) As illustrated by the common definitions outlined in BOI's opening brief, the "ordinary meaning" of these terms is not limited as to kind or type of "loss" or "damage," and therefore far broader than FATCO often implies or asserts in its various arguments. Given the fact that Endorsement 116 insures the actual physical condition of the land rather than mere title to the property, it stands to reason that the kinds and types of "loss" or "damage" sustained by BOI and therefore potentially recoverable under the coverage afforded by this Policy may logically differ from those typically allowed in a garden variety title defect case. Accordingly, these distinctions and others make the grant of coverage afforded by Endorsement 116 the necessary and "natural starting point" for any analysis in this case, contrary to FATCO's assertion.

3. **Contrary to FATCO's assertion, the District Court did not find that BOI's full credit bid was correctly applied as a "payment" on the secured obligation.**

In FATCO's statement of additional issues presented on appeal, it asserts, as Issue No. 2, that:

> The District Court did not err in **finding that BOI's full credit bid was correctly applied as a payment on the secured obligation** and that it satisfied in full any and all obligations to BOI with respect to the secured indebtedness. (Emphasis added.)

(Respondent's Brief, p.4) As discussed in detail below, much, if not most of FATCO's argument on appeal is premised on this point, i.e., the notion that BOI's full credit bid should be characterized as a "payment" on the secured obligation for purposes of analyzing the various provisions in the Policy at issue.

However, the District Court made no such finding. Indeed, the Court does not employ the word "payment" in its analysis at all. (R., Vol. 2, pp. 458-61.)

Instead, as discussed at length in BOI's opening brief, the core finding by the District Court is its conclusion that BOI's full credit bid at the trustee's sale constituted a "voluntary satisfaction or release of the insured mortgage," which completely terminated FATCO's liability under Section 9(c) of the Policy. (R., Vol. 2, p. 460.) In arriving at this conclusion, the District Court essentially adopted the argument FATCO was advancing at the time, as the Court itself noted in its decision: "[FATCO] asserts that by reason of the full credit bid, there is no loss or damage i.e., the mortgage debt was satisfied with the full credit bid." (R., Vol. 2, pp. 458-9.) For the reasons discussed in BOI's opening brief, this core conclusion by the District Court, and FATCO's argument to that effect below, are incorrect, and the Court's decision must be reversed. (Appellant's Brief, pp. 11-14.)

FATCO's incorrect assertion that the District Court concluded that BOI's full credit bid was correctly applied as a "payment" on the secured obligation is nothing more than an attempt to recast the District Court's conclusion in terms FATCO views as more favorable to its position. As such, it merely indicates FATCO's recognition that the District Court's conclusion is flawed. It is nevertheless irrelevant to this Court's review of the District Court's decision.

Accordingly, it should be rejected by this Court, as should each of the arguments FATCO attempts to construct on the foundation of that faulty premise.

4. **FATCO's argument that BOI's full credit bid constituted a "payment," under Sections 2(c) and 9(b) was neither argued nor decided in the District Court, and accordingly, should not be considered by this Court on appeal.**

As discussed above, the District Court never concluded in the first instance that BOI's full credit bid was correctly applied as a "payment" on the on the secured obligation, contrary to FATCO's assertion.

Nonetheless, FATCO employs this "payment" rationale to argue for the first time on appeal that: 1) because the full credit bid constitutes a "payment," the amount of insurance available under Section 2(c) was reduced to zero by BOI's full credit bid, since Section 2(c) requires that the amount of insurance be "reduced by the amount of all payments made;" and, 2) in similar fashion, Section 9(b) also requires that the amount of insurance be reduced by "payments" made, and therefore pursuant to Section 7(a)(ii) the amount of insurance is also reduced to zero. (Respondent's Brief, pp. 10-13.)

However, FATCO did not raise the applicability of either Section 2(c) or Section 9(b) in the District Court, in the manner it now argues on appeal. There is no such argument in FATCO's briefing below. (R. Vol. 1, pp. 152-66, Vol. 2, pp.317-27, 411-26.) Likewise, the District Court did not address or decide anything with respect to Section 2(c) or Section 9(b) in its analysis. (R., Vol. 2, pp. 458-61.)

It is axiomatic that this Court will not consider arguments raised for the first time on appeal. *See, e.g., Duspiva v. Fillmore,* 154 Idaho 27, __, 293 P.3d 651, 657 (2013) (Argument that federal standard applied not considered on appeal when not asserted in briefing to the district court.). Instead, appellate court review is limited to the evidence, theories and arguments that were presented below, and appellate courts will not consider new arguments on appeal. *See, e.g., Obenchain v. McAlvain Construction, Inc.,* 143 Idaho 56, 57, 137 P.3d 443, 444 (2006) (Argument that untimely appeal was caused by postal error not considered when not raised below.).

BOI respectfully submits that in conformity with this longstanding rule, FATCO's new arguments regarding the alleged effect of Sections 2(c) and 9(b), which are raised for the first time on appeal here, should likewise be disregarded by this Court.

5. FATCO's attempt to re-characterize BOI's full credit bid as a "payment" rather than a "satisfaction or release" of the secured obligation, as the District Court concluded, is a distinction without a difference. Regardless of how it is characterized, Idaho law does not permit FATCO to employ BOI's full credit bid as a defense to liability under the Policy.

FATCO next argues that "]i]t is well established that a lender's credit bid at a foreclosure sale is treated as an actual payment on the underlying debt," and asserts that public policy concerns regarding "the integrity of non-judicial foreclosure sales" would be undermined if that was not the case. (Respondent' Brief, pp. 13-15.) Based on this premise, FATCO argues that it too is entitled to characterize BOI's full credit bid as a "payment" and thereby employ it to

avoid liability under the Policy, reiterating its position that as a "payment," BOI's full credit bid reduces the amount of insurance to zero. (Respondent' Brief, p. 18.)

However, FATCO simply misapprehends the limitation imposed by Idaho law on the use of a full credit bid to avoid liability. As discussed at length in BOI's opening brief, the full credit bid rule is a creature of the anti-deficiency provisions contained in statutes governing non-judicial foreclosures, which are designed to protect borrowers/grantors on a secured obligation, not a title insurer like FATCO. (Appellant's Brief, pp. 14-19) As such, Idaho law precludes FATCO from asserting BOI's full credit bid as a defense to liability because it is not a borrower/grantor on a secured obligation, as the Court of Appeal's decision in *Willis v. Realty Country, Inc.*, 121 Idaho 312, 316-7, 824 P.2d 887, 891-2 (App. 1991) (*pet. rev. denied*, February 28, 1992), and this Court's decision in *First Security Bank of Idaho, N.A. v. Gaige,* 115 Idaho 172, 174, 765 P.2d 683, 685 (1988), collectively hold.

This is so regardless of whether one characterizes the full credit bid as a "payment," as FATCO now attempts to do, or as a "satisfaction or release" of the secured obligation, as the District Court did below. Either way, the fact of BOI's full credit bid is simply not available to FATCO, and cannot be employed as a defense to liability under the Policy.

The full credit bid rule is a judicially created legal fiction designed to protect borrowers/grantors on a secured obligation, in the context of a non-judicial foreclosure. In *Kolodge v. Boyd, 105 Cal. Rptr. 2d 749, 755 (1st Dist. 2001)*, the court recognized this fact in its discussion of the rationale behind California's full credit bid rule, noting that it is a legal fiction

which serves the debtor protection policies behind California's anti-deficiency statute in the context of a lender/debtor relationship:

> **Acknowledging the interrelationship between foreclosure and antideficiency statutes [citation omitted] the Supreme Court designed the full credit bid rule to ensure the integrity of nonjudicial foreclosure sales insofar as such sales may relate to the debtor protection policies of the antideficiency statutes.** The rule makes a properly conducted nonjudicial foreclosure sale the dispositive device through which to " 'resolve the question of value and the question of potential forfeiture through competitive bidding....' " [citation omitted] A lender who enters a full credit bid is deemed to have irrevocably warranted that the value of the security foreclosed upon was equal to the outstanding indebtedness and not impaired. [citation omitted] Because the secured obligation has been totally satisfied, there is no deficiency that can be sued upon. The effect of the rule is to foreclose claims against the borrower that might be allowed by the antideficiency statutes, such as a claim for bad faith waste, if the measure of damages sought is the amount of the alleged impairment of the lender's security.
>
> **It is necessary to keep in mind that the idea that the full credit bid rule represents—that such a bid constitutes an admission as to the genuine value of the security property—is a legal fiction. As the United States Supreme Court has pointed out, bids at foreclosure sales often bear little relationship to the fair market value of security property** [citation omitted] [" 'fair market value' presumes market conditions that, by definition, simply do not obtain in the context of a forced sale."].) **While the fiction serves a useful purpose as between a lender and a borrower, because it is a useful way in which to enforce the policies reflected in the antideficiency statutes, it can be very troublesome when applied in other contexts**, as this case shows. (Emphasis Added.)

Kolodge, 105 Cal. Rptr. 2d at 755.

Idaho appellate courts have gone even further and simply adopted a bright line rule that the protections afforded by Idaho's anti-deficiency statute, and the full credit bid rule embodied therein, do not extend to anyone except the borrower/grantor on a secured obligation, as reflected in the decisions in *Gaige* and *Willis.* Idaho is not alone in this approach. *See, Glenham v. Palzer,* 792 P.2d 551 (Wa. App. 1990)(action by secured creditors against third

parties who were not obligors under loan agreement relating to foreclosed debt not precluded by full credit bid)

Moreover, FATCO's expressed concern regarding the undermining of "the integrity of non-judicial foreclosure sales" is ironic in the extreme, as is its repeated insistence that it has not invoked the protection of Idaho's anti-deficiency statute in this case. (See, e.g., Respondent's Brief, p. 16.) By asserting BOI's full credit bid to avoid liability, that is precisely what it has done, because the full credit bid rule only exists in the context of Idaho's anti-deficiency statute in the first instance.

In addition, none of the cases FATCO relies on require a different analysis. The only Idaho case cited, *Fed. Home Loan Mortg. Corp. v. Appel,* 143 Idaho 42, 137 P.3d 429 (2006), arose in the context of a lender's action to eject the borrowers/grantors from the secured property after a trustee's sale, and the discussion regarding credit bids arose in the context of deciding whether or not a credit bid, as opposed to a cash bid, was permissible pursuant to Idaho's deed of trust foreclosure statutes. *Appel,* 143 Idaho at 43-4, 137 P.3d at 431-2. Accordingly, *Appel* does nothing to disturb the decisions in *Gaige* and *Willis*, and consequently, it provides no support to FATCO's position here. Likewise, the other two out of state cases cited by FATCO, *Alliance Mortg. Co. v. Rothwell*, 900 P.2d 601 (Cal. 1995) and *M&I Bank, F.S.B. v. Coughlin*, 805 F. Supp. 2d 858 (D. Ariz. 2011) obviously can do nothing to disturb the decisions in *Gaige* and *Willis.*

Finally, FATCO's attempt to distinguish *Gaige* and *Willis* is unpersuasive. FATCO simply asserts that neither *Gaige* nor *Willis* supports the notion that a lender's credit bid

should not be applied as a "payment" on the secured indebtedness. (Respondent's Brief, p.16) However as discussed above, the fact of BOI's full credit bid is simply not available to FATCO as a defense to liability under Idaho law because it is not a borrower/grantor on a secured obligation. That is true regardless of whether one characterizes a credit bid as a "payment" or as a "satisfaction or release" of the secured obligation.

6. **FATCO's attempt to rebut BOI's position that the District Court erred in its analysis of Section 7(a)(ii) and its conclusion regarding the time at which BOI's "loss or damage" first "occurred" is unpersuasive,**

In the final section of FATCO's substantive argument, it attempts to rebut BOI's position, discussed at length in pages 19-24 of its opening brief, that the District Court erred in its analysis of Section 7(a)(ii), erred in concluding that the foreclosure sale was the first point in time that "loss or damage" could "occur," and erred in equating the time that such "loss or damage" "occurs" with the time that the amount of such losses might ultimately be "determined." (Appellant's Brief, pp. 19-24, Respondent's Brief, p. 19-24.)

FATCO first responds by asserting that even if one assumes BOI incurred "loss or damage" as a result of the failure to locate a four-plex on Lot 1, that "supposed loss or damage was mitigated to zero at the foreclosure sale when the debt secured by the insured deed of trust was paid in full." (Respondent's Brief, p. 19-24.)

However, FATCO's response only demonstrates its misconception of the District Court's decision, and BOI's resulting position that the Court erred in concluding that the time of the foreclosure sale is the first point at which loss or damage "occurred" for purposes of

determining when to measure the amount of the debt pursuant to Section 7(a)(ii). In other words, the pertinent question under Section 7(a)(ii) is not whether the loss or damage was subsequently "mitigated to zero" by BOI's full credit bid at the foreclosure sale, or for that matter, even whether such "loss or damage" may ultimately be recovered by BOI. It is instead the following question: at what point in time did "loss or damage" "insured against" by Endorsement 116 first "occur?"

As discussed at length in BOI's opening brief, the factual record before the Court amply demonstrates that significant "loss or damage," as those terms are commonly defined and employed in Endorsement 116, which included actual, out-of-pocket expenses, first "occurred" long before the foreclosure sale, at a time when, for purposes of Section 7(a)(ii), the "unpaid principal on the indebtedness secured by the insured mortgage …, together with interest thereon" was far in excess of $200,000.00. (Appellant's Brief, pp. 22-24.) At a minimum, the factual record before the Court creates material issues of fact in that regard, which make summary judgment inappropriate.

Next, FATCO insists that BOI's position "reflects a fundamental misunderstanding" of the nature of the coverage afforded by a lender's policy, and quotes at length from a number of cases in other jurisdictions and one treatise, in an apparent attempt to support its position that only a "loan loss" is insured under a lender's policy of title insurance. (Respondent's Brief, pp. 19-22.)

However, FATCO fails to support that argument with any reference to the language contained in this Policy. As discussed both above and below, the "loss or damage"

insured against by Endorsement 116 is clearly not so limited, to a "loan loss" or otherwise. Instead, those terms are undefined by the Policy, and accordingly must be given their ordinary meaning as applied by laymen in daily usage, for purposes of analyzing Endorsement 116 and Section 7(a)(ii).

Moreover, several of the authorities FATCO relies on do not actually support FATCO's position, and all are readily distinguishable from this case. In the first instance, none involve a lender's policy which includes a grant of coverage like that afforded to BOI by Endorsement 116, or its equivalent. As discussed above, the coverage afforded by Endorsement 116 differs markedly from "garden variety" title insurance, which typically only insures against defects in title and the like, while Endorsement 116 insures the actual physical condition of the land. Likewise, no case addresses the nature of "loss or damage" as those terms are commonly defined for purposes of Endorsement 116 and Section 7(a)(ii), and none interprets the meaning and effect of either provision.

The authorities cited by FATCO are summarized in its quote from Palomar's Treatise, which FATCO emphasizes as follows:

> [I]n the context of an owner's policy, the insured sustains a "loss" when the existence of a title problem reduces the fair market value of the insured interest; **conversely, in the context of a loan policy, the insured generally has no compensable "loss," despite the existence of a title problem, unless the loan is not repaid and, as a result of the title problem, the lender receives less for the land than the amount of the debt.** In other words, existing case law almost unanimously holds that an insured owner has a loss as soon as its legal rights in the property are diminished, without an out-of-pocket cost; but **a lender has no loss until it sustains an out-of-pocket loss.** This distinction is expressly made in the cases of *Green v. Evesham Corp.*, *Blackhawk Production Credit Ass'n v. Chicago Title Ins. Co.*, *CMEI, Inc. v. American Title Ins. Co.*

Joyce Palomar, *Title Ins. Law* § 6:20 (2011) (emphasis added) (citations omitted). (Respondent's Brief, pp. 21-2.)

The quoted language that FATCO emphasizes makes clear that Palomar is addressing traditional title insurance that only insures title, not the coverage afforded to BOI in this case by Endorsement 116. More importantly, the emphasized language actually supports BOI's position, not FATCO's. It is clearly addressing the question of whether an insured lender has suffered a loss that is "compensable" under a lender's policy, not the pertinent question here, which is the time at which "loss or damage" has "occurred" for purposes of Section 7(a)(ii) and Endorsement 116. Finally, it confirms that a lender suffers a "loss" when it sustains out-of-pocket loss. As discussed above, the record in this case clearly demonstrates the BOI sustained out-of-pocket losses long before the foreclosure sale. In short, nothing in the quote from Palomar or the other cases cited by FATCO refutes BOI's position.

Next, based on the authorities it cites, FATCO argues that there are two indispensable prerequisites to "recovery" under a lender's title policy: 1) the existence of an "insured defect;" and, 2) a "loan loss" resulting from the "insured defect." It asserts that if either prerequisite is missing, there is no "loss" or "damage" within the "indemnity" of the policy. (Respondent's Brief, pp. 22-23.) It concludes by asserting that none of the issues discussed in BOI's opening brief, such as a diminution in value of the collateral, the inability to market the insured deed of trust on the secondary market, a default by the borrowers, or the necessity of foreclosure "are defects insured under the Loan Policy." (Respondent's Brief, p. 23.)

However, none of the language quoted by FATCO from the authorities it cites states that a "loan loss" is required, or even addresses the meaning of that term. Moreover, as discussed both above and below, the question of whether or not a "recovery" may be had is simply irrelevant to the question at hand.

More importantly, FATCO's discussion reflects its apparent confusion as to the distinction between the risk insured against, the "defect" in FATCO's parlance, and a "loss" caused by that "defect." There is no dispute that the "defect" insured against in this case is the risk that a building was not physically located on Lot 1. As discussed above, the grant of coverage afforded to BOI by Endorsement 116 unambiguously and unequivocally "insures" BOI for all "loss or damage" which it "shall sustain" because a "multi family residence" was not "located on the land," and there is no dispute that there was no building on the insured parcel.

As also discussed above and in BOI's opening brief, the broad terms "loss or damage" are undefined by the Policy, and accordingly, they must be given their ordinary meaning as applied by laymen in daily usage. *See, e.g. Armstrong v. Farmers Ins. Co. of Idaho*, 147 Idaho 67, 71, 205 P.3d 1203, 1207 (2009). As illustrated by the common definitions outlined in BOI's opening brief, the "ordinary meaning" of these terms is not limited in terms of the kind or type. Consequently, the "loss" or "damage" is not limited to a "loan loss" under the coverage afforded by Endorsement 116, contrary to FATCO's repeated assertion.

Moreover, no other provision of the Policy at issue here limits the terms "loss or damage" to a "loan loss" as FATCO suggests. The sole constraint on the "loss or damage" that is recoverable under the Policy is contained in the first sentence of Section 7, which provides:

> This policy is a contract of indemnity against **actual monetary loss or damage sustained or incurred by the insured claimant who has suffered loss or damage by reason of the matters insured against by this policy** and only to the extent herein described. (Emphasis added.)

(R. Vol. 2, p. 455.)

This provision says nothing about the term "loss or damage" being limited to a "loan loss." Moreover, it draws the clear distinction between the generic manner in which the term "loss or damage" is employed in Endorsement 116 and Section 7(a)(ii), and the type of "loss or damage" that is ultimately recoverable under the Policy, i.e., "actual monetary loss or damage." In other words, the provision explicitly recognizes that an "insured claimant" may suffer generic "loss or damage" as a result of "matters insured against" by the Policy for purposes of Endorsement 116 and Section 7(a)(ii), but that such generic "loss or damage" may only be recoverable to the extent it constitutes "actual monetary loss or damage."

Consequently, this provision only provides further support for BOI's position that the record before the Court amply demonstrates that it sustained "loss or damage" for purposes of Endorsement 116 and Section 7(a)(ii) long before the foreclosure sale took place, contrary to FATCO's arguments and the District Court's decision.

Finally, FATCO argues that whatever losses "BOI supposedly incurred" prior to the foreclosure sale, they were "mitigated in full" at the foreclosure sale by its full credit bid. (Respondent's Brief, pp. 22-23.)

However, this argument again illustrates FATCO's misconception of the District Court's decision, and BOI's position that the Court erred in its analysis with respect to when "loss or damage" first "occurred" for purposes of Section 7(a)(ii). As discussed above, the

pertinent question under Section 7(a)(ii) is not whether the loss or damage was subsequently "mitigated in full" by BOI's full credit bid, but instead when did "loss or damage" "insured against" by Endorsement 116 first "occur?"

In short, none of FATCO's arguments in support of the District Court's decision regarding Section 7(a)(ii) and the time at which BOI's "loss or damage" first "occurred" are persuasive, the District Court's decision in that regard is incorrect, and it should accordingly be reversed for the reasons discussed above and in BOI's opening brief.

7. **BOI's appeal is not frivolous, unreasonable or without foundation, and accordingly, FATCO is not entitled to an award of attorney's fees on appeal.**

FATCO asserts that it is entitled to an award of attorney's fees and costs on appeal pursuant to Idaho Code § 12-123, Idaho Code § 41-1839(4) and *Mortensen v. Stewart Title Guar. Co.*, 149 Idaho 437, 447, 235 P.3d 387, 397 (2010). It contends it is entitled to such an award because BOI's appeal is frivolous, unreasonable and without foundation. It bases that contention on the argument that BOI has not introduced any arguments or cited any authority not already considered and disposed of by the District Court, and therefore, BOI is only asking this Court to reach a different conclusion. (Respondent's Brief, pp. 24-25.)

Nothing could be further from the truth. In *Mortensen,* this Court upheld the trial court's award of attorney's fees on the following basis:

> Idaho Code §§ 41–1839 and 12–123 are the exclusive remedies for obtaining attorney fees in disputes arising out of insurance policies. I.C. § 41–1839(4). The district court awarded $25,000 in attorney fees to Stewart Title pursuant to § 41–1839(4), which permits such an award in suits over insurance policies when the court finds "that a case was brought, pursued or defended frivolously, unreasonably or without foundation." Although § 41–1839 does not clarify what cases would be unreasonable or frivolous, this

> Court has many times addressed I.C. § 12–121, a similar provision that permits fee awards in frivolous or meritless cases. Under I.C. § 12–121, **"[i]f there is a legitimate, triable issue of fact or a legitimate issue of law, attorney fees may not be awarded."** *Kiebert v. Goss,* 144 Idaho 225, 228, 159 P.3d 862, 865 (2007). "[W]hether a statute awarding attorney's fees applies to a given set of facts is a question of law" subject to free review. *Ransom v. Topaz Mktg.,* 143 Idaho 641, 644, 152 P.3d 2, 5 (2006).
>
> **The district court's award was proper because Mortensen never raised any triable issues of fact. Mortensen raised an emotional-distress claim and a claim for breach of contract for Stewart Title's refusal to defend his appeal in the face of unambiguous contract language permitting Stewart Title to pay the limit on his policy instead of pursuing his appeal. Mortensen also did not attempt to offer any factual evidence to support his claims that Stewart Title acted without diligence or in bad faith when it sought to obtain for him an ownership interest in the access road, even though he demanded that Stewart Title do something to ensure he had an easement there.** The award for attorney fees below pursuant to I.C. § 41–1839(4) is therefore affirmed. (Emphasis added.)

Mortensen, 149 Idaho at 447, 235 P.3d at 397. Upon further review, this Court also decided to award fees on appeal for the same reasons, despite the fact that the respondent's request for fees on appeal was not ideal:

> As stated above, I.C. § 41–1839(4) authorizes an award of attorney fees if an appeal is brought frivolously. Again, Mortensen is merely asking this Court to second-guess the district court's ruling despite unambiguous controlling language in the insurance policy. After reviewing the briefing on the petition for rehearing, the Court awards attorney fees on appeal in this substitute opinion. *See Elec. Wholesale Supply Co. v. Nielson,* 136 Idaho 814, 828, 41 P.3d 242, 256 (2001) (**awarding fees where the appellant "failed to present a meaningful issue on a question of law**"). Therefore, no rehearing is necessary. Stewart Title's petition for rehearing is denied. (Emphasis added.)

Mortensen, 149 Idaho at 448, 235 P.3d at 398.

Unlike the appellant in *Mortensen,* BOI presents perfectly legitimate and important questions of law to this Court regarding the proper interpretation and effect of the Policy language at issue which are questions of first impression for this Court. It also presents a perfectly legitimate question of whether FATCO can employ the full credit bid rule to avoid

liability, given existing Idaho law which holds that it cannot. Likewise, BOI has presented genuine issues of fact regarding the nature, extent and timing of "loss" or "damage" it has sustained, as the District Court itself acknowledged, though it found those genuine issues to be immaterial in light of its legal conclusions. (R. Vol. 2, p. 461)

The mere fact that the District Court incorrectly rejected BOI's arguments does not render them frivolous, unreasonable or without foundation. Indeed, if that was the case, one could never appeal an adverse summary judgment determination without fearing an award of fees on appeal. Accordingly, an award of fees to FATCO is clearly improper, regardless of the outcome of this appeal.

CONCLUSION

For each of the foregoing reasons, and for the reasons discussed in its opening brief, BOI respectfully requests that this Court reverse the District Court's decision, and remand this action to the District Court for further proceedings consistent with the Court's decision.

DATED this 21st day of November, 2013.

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By: _____
Gregory L. Crockett
Attorneys for Plaintiff

CERTIFICATE OF SERVICE BY MAIL, HAND DELIVERY
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I hereby certify that a true and correct copy of the foregoing document was on this date served upon the person named below, at the addresses set out below his name, either by mailing, hand delivery or by telecopying to him a true and correct copy of said document in a properly addressed envelope in the United States mail, postage prepaid; by hand delivery to him; or by facsimile transmission.

DATED this 21st day of November, 2013.

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