9-27-2013

Bank of Idaho v. First American Title Insurance Company Appellant's 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

****

APPELLANT'S BRIEF

****

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

****

THE HONORABLE JOEL E. TINGEY, DISTRICT JUDGE, PRESIDING

****

Gregory L. Crockett, ISB No. 1640
Steven K. Brown, ISB No. 3396
Megan Fernandez, ISB No. 8678
HOPKINS RODEN CROCKETT
HANSEN & HOOPES, PLLC
428 Park Avenue
Idaho Falls, Idaho 83402
Telephone: 208-523-4445

Attorneys for Appellant

Charles A. Homer, ISB No. 1630
Peter D. Christofferson, ISB No. 8329
HOLDEN, KIDWELL, HAHN
& CRAPO, PLLC
1000 Riverwalk Drive, Suite 200
P.O. Box 50130
Idaho Falls, Idaho 83205
Telephone: 208-523-0620

Attorneys for Respondent

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

STATEMENT OF THE CASE

i. The Nature of the Case.

This is an action to recover damages due under a lender's policy of title insurance ("the Policy"), brought by the insured, Bank of Idaho ("BOI"), against First American Title Insurance Company ("FATCO"), successor in interest to United General Title Insurance Company ("United General"), which issued the subject policy through its authorized agent, Mountain West Title and Escrow ("Mountain West"). (R. Vol. 1, pp. 5-7.) The District Court granted FATCO's motion for summary judgment, concluding that the policy at issue did not provide coverage for BOI's losses. (R. Vol. 2, p. 461.) BOI respectfully appeals from that determination. (R. Vol. 2, pp. 470-73.)

ii. The Course of Proceedings Below.

BOI filed its complaint on January 27, 2012. (R. Vol. 1, p. 1.) FATCO answered on April 19, 2012, and the parties exchanged rounds of written discovery. (Id.) FATCO's answer admitted many of the basic facts alleged in the complaint, but asserted numerous affirmative defenses based on various policy provisions. (R. Vol. 2, pp. 310-14.)

In challenging these defenses, BOI filed a motion for partial summary judgment on April 5, 2013, asking for judgment in its favor on the issue of FATCO's liability under the Policy, but leaving the disputed issue of damages for later determination. (R. Vol. 1, pp. 146-7.) In addition to its memorandum in support, BOI offered the affidavit of Larry Bell, BOI's Vice President and Regional Real Estate Manager, with copies of the preliminary title commitment and the policy at issue attached as exhibits. (R. Vol. 1, pp. 68-110.) BOI also filed an affidavit of counsel attaching various other documents exchanged by the parties. (R. Vol. 1, pp. 25-67.)

FATCO filed its own motion for summary judgment on April 11, 2013, asserting that BOI had not suffered a loss covered by the Policy. (R. Vol. 1, pp. 149-52.) FATCO supported its motion with a memorandum and affidavits with attached exhibits from Jeffry Young, FATCO's Senior Claims Counsel, (R. Vol. 2, pp. 167-225), Jeffrey Kelley, a certified appraiser, (R. Vol. 2, pp. 226-283), and counsel, (R. Vol. 2, pp. 284-316.).

Both parties submitted memoranda in opposition to each other's motions, and BOI also filed second affidavits with attached exhibits from Larry Bell, (R. Vol. 2, pp. 328-62.), and counsel, (R. Vol. 2, pp. 363-79.), in opposition. The parties then filed reply memoranda in support of their respective motions, and FATCO also filed a motion to strike certain portions of Larry Bell's affdavits, (R. Vol. 2, pp. 427-8.), with a supporting memorandum, to which BOI filed a memorandum in opposition.

The District Court heard the parties' motions on May 9, 2013 and took the matter under advisement. (R. Vol. 2, pp. 450-1.) On May 28, 2013, the Court issued its memorandum decision and order granting FATCO's motion to strike in part, granting FATCO's motion for summary judgment and denying BOI's motion. (R. Vol. 2, pp. 452-62.) Judgment of dismissal was entered on May 28, 2013, (R. Vol. 2, p. 463-4.), and BOI timely filed its notice of appeal on June 24, 2013. (R. Vol. 2, pp. 470-4.)

iii. Statement of Facts.

The policy at issue in this case was issued to BOI in conjunction with financing a residential development project on adjoining lots in Idaho Falls, at the request of its customers, Brian and Amy Peterson (the "Petersons"). (R. Vol. 1, pp. 68-9, ¶ 2-4.) The Petersons' plans for the project called for one residential four-plex to be built on Lot 1 and a second to be built on Lot

2 with both lots having frontage and access to the city street. (Id.) BOI relied on the Petersons' plans in structuring the financing and securing the related commitments for title insurance. (Id.) BOI requested and obtained separate title insurance commitments on each lot through Mountain West, the authorized agent of United General, FATCO's predecessor in interest. (R. Vol. 1, p. 69, ¶ 4; Vol. 1, p. 5, ¶ 3-4; Vol. 2, p. 310, ¶ 2.)

After obtaining the commitments, BOI finalized the project's financing with two separate construction loans secured by two separate deeds of trust on Lot 1 and Lot 2 respectively, and in due course the two separate title insurance policies were issued. (R. Vol. 1, p. 69, ¶ 6-7.) The policy at issue in this action, Policy No. 64092871 (the "Policy"), insured Lot 1, and a second policy which is not at issue insured Lot 2. (Id.) For ease of reference, a complete copy of the Policy is attached to the first Affidavit of Larry Bell as Exhibit 2. (R. Vol. 1, p. 69, ¶ 7; Vol. 1, pp. 95-110.)

As a part of the transaction, BOI requested and paid an extra premium for the extended coverage provided by several endorsements, including Endorsement No. 116. (R. Vol. 1, p. 69, ¶ 5; Vol. 1, p. 89.) In addition to the more common types of coverage typically contained in title policies, Endorsement 116 expressly insured BOI against any "loss or damage" it sustained because of the failure to locate the planned four-plex on Lot 1, providing 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, . . . (Emphasis in original.)

(R. Vol. 1, p. 110.) BOI specifically requested the inclusion of Endorsement 116 because it wanted assurance that the planned building was actually built on Lot 1as legally described in the deed of trust in accordance with its standard practices when financing new construction. (R. Vol. 2, p. 330, ¶ 8.)

In fact, the required four-plex was never built on Lot 1. (R. Vol. 1, p. 70, ¶ 9.) Instead, without BOI's knowledge or consent, both four-plexes were built on Lot 2, and only a storm water retention pond, garbage bin and parking lot were located on Lot 1. (Id.)

The failure to locate one of the four-plexes on Lot 1 substantially decreased its value. (R. Vol. 1, p. 70, ¶ 10.) Although the parties dispute the amount of diminution, the appraisal BOI originally obtained in conjunction with financing the project provides that the market value of Lot 1 with the proposed four-plex on it was $279,000.00 as of December 13, 2006. (R. Vol. 2, p. 329, ¶ 4; Vol. 2, p. 339.) According FATCO's own appraiser, the appraised value of Lot 1 "as built" was $22,000.00 as of September 6, 2011, a difference of $257,000.00. (R. Vol. 2, p. 329, ¶ 5; Vol. 2, p. 234.)

The failure to locate one of the four-plexes on Lot 1 also eliminated BOI's ability to replace the short-term construction loans on the two parcels with long-term loans that could then be sold into the secondary market. (R. Vol. 1, p. 70, ¶ 10.) BOI does not retain loans like those at issue in its own loan portfolio. (R. Vol. 2, pp. 331-2, ¶ 13.) Instead, it routinely sells them into the secondary mortgage market. (Id.) Consequently, BOI's original plan was to finance each unit separately so its debt instruments would qualify for sale on the secondary market. (Id.)

However, in March, 2009, when BOI attempted to close out the construction loans on Lots 1 and 2 and replace them with the long-term loans that would constitute the Petersons' long term financing, which could then be individually sold into the secondary market, it was precluded from doing so because both four-plexes had been built on Lot 2, and the two parcels could no longer be sold separately. (R. Vol. 1, p. 70, ¶ 9-10; Vol. 2, pp. 331-2, ¶ 13, p. 333, ¶ 17.) At that point, BOI attempted to mitigate its damages by modifying the original deeds of trust to "cross-collateralize" the lots with a combined legal description. (R. Vol. 2, p. 333, ¶ 20; Vol. 2, pp. 197-8.)

The secondary market for loans for 1-4 family units is entirely different than multi-family units in excess of four units. (R. Vol. 2, p. 332, ¶ 15.) BOI made inquiries and could not locate a lender that would accept the single eight-unit property as collateral. (R. Vol. 2, p. 332, ¶ 13.) As a result, BOI was left without a secondary market for its debt instruments because the property was characterized "as built" as an eight-plex, tightly squeezed onto an undersized lot. (R. Vol. 2, p. 332-3, ¶ 13, 18.)

The Petersons subsequently defaulted on the construction loans and filed bankruptcy. The trustee initiated foreclosure proceedings, recording the Notice of Default and Election to Sell for Lot 1 on October 29, 2009. (R. Vol. 1, p. 70, ¶ 11; Vol. 2, p. 356.) According to the Notice, as of October 27, 2009, there was a total of $232,424.57 due and owing, plus $989.00 for the cost of the trustee's sale guarantee, attorney's fees and other expenses of foreclosure. (R. Vol. 2, p. 356.) From the time the Petersons defaulted on the loans through the foreclosure and sale process until the date BOI was eventually able to resell both lots as a single unit, it incurred additional out-of-pocket expenses in the amount of at least $37,816.05. (R. Vol. 2, p. 329, ¶ 9.)

The trustee's sale occurred on March 11, 2010, BOI made credit bids for all amounts due and owing on each lot at the sale, and the trustee conveyed both lots to BOI on March 15, 2010. (R. Vol. 2, pp. 211-6.) In an attempt to mitigate its losses, BOI finally resold both lots as a single unit on November 15, 2010, did not fully recoup its loan losses and expenses. (R. Vol.1, p. 70, ¶ 13; Vol. 2, p. 218.) Although it is a matter of dispute between the parties, BOI submits it has suffered losses and damages in the amount of at least $128,174.03. (R. Vol. 2, p. 333, ¶ 21.)

In accordance with the terms of the Policy, BOI submitted its Notice of Claim to Mountain West and United General on June 10, 2010. (R. Vol. 1, pp. 30-1.) United General responded on June 23, 2010, indicating it was investigating the claim and would advise BOI of its position after doing so. (R. Vol. 1, p. 33.) Nearly nine months later, FATCO finally denied BOI's claim on March 19, 2011. (R. Vol. 1, pp. 65-7.)

In its Memorandum Decision, the District Court indicated it considered the following provisions of the Policy, which BOI sets forth in full for ease of reference:

> 2. **CONTINUATION OF INSURANCE.**
>
> (a) **After Acquisition of Title.** The coverage of this policy shall continue in force as of Date of Policy in favor of (i) an insured who acquires all or any part of the estate or interest in the land by foreclosure, trustee's sale, conveyance in lieu of foreclosure, or other legal manner which discharges the lien of the insured mortgage; (ii) a transferee of the estate or interest so acquired from an insured corporation, provided the transferee is the parent or wholly-owned subsidiary of the insured corporation, and their corporate successors by operation of law and not by purchase, subject to any rights or defenses the Company may have against any predecessor insureds; and (iii) . . .

(b) **After Conveyance of Title.** The coverage of this policy shall continue in force as of Date of Policy in favor of an insured only so long as the insured retains an estate or interest in the Land, or holds an indebtedness secured by a purchase money mortgage given by a purchaser from the insured, or only so long as the insured shall have liability by reason of covenants of warranty made by the insured in any transfer or conveyance of the estate or interest. This policy shall not continue in force in favor of any purchaser from the insured of either (i) an estate or interest in the land, or (ii) an indebtedness secured by a purchase money mortgage given to the insured.

(c) **Amount of Insurance.** The amount of insurance after the acquisition or after the conveyance shall in neither event exceed the least of:
(i) the Amount of Insurance stated in Schedule A;
(ii) the amount of the principal of the indebtedness secured by the insured mortgage as of Date of Policy, interest thereon, expenses of foreclosure, amounts advanced pursuant to the insured mortgage to assure compliance with laws or to protect the lien of the insured mortgage prior to the time of acquisition of the estate or interest in the land and secured thereby and reasonable amounts spent to prevent deterioration of improvements, but reduced by the amount of all payments made; or
(iii) . . .

7. **DETERMINATION AND EXTENT OF LIABILITY.**

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.

(a) The liability of the Company under this policy shall not exceed the least of:
(i) the Amount of Insurance stated in Schedule A, or, if applicable, the amount of insurance as defined in Section 2(c) of these Conditions and Stipulations;
(ii) the amount of the unpaid principal indebtedness secured by the insured mortgage as limited or provided under Section 8 of these Conditions and Stipulations or as reduced under Section 9 of these Conditions and Stipulations, at the time the loss or damage insured against by this policy occurs, together with interest thereon; or
(iii) the difference between the value of the insured estate or interest as insured and the value of the insured estate or interest subject to the defect, lien or encumbrance insured against by this policy.

(b) In the event the insured has acquired the estate or interest in the manner described in Section 2(a) of these Conditions and Stipulations or has conveyed the title, then the liability of the Company shall continue as set forth in Section 7(a) of these Conditions and Stipulations.
. . .

9. REDUCTION OF INSURANCE; REDUCTION OR TERMINATION OF LIABILITY.

(a) All payments under this policy, . . . shall reduce the amount of insurance pro tanto. However, any payments made prior to the acquisition of title to the estate or interest as provided in Section 2(a) of these Conditions and Stipulations shall not reduce pro tanto the amount of insurance afforded under this policy except to the extent the payments reduce the amount of the indebtedness secured by the insured mortgage.

(b) Payment in part by any person of the principal of the indebtedness, or any other obligation secured by the insured mortgage, or any voluntary partial satisfaction or release of the insured mortgage, to the extent of the payment, satisfaction or release, shall reduce the amount of insurance pro tanto. The amount of insurance may thereafter be increased by accruing interest and advances made to protect the lien of the insured mortgage and secured thereby, with interest thereon, provided in no event shall the amount of insurance be greater than the Amount of Insurance stated in Schedule A.

(c) Payment in full by any person or the voluntary satisfaction or release of the insured mortgage shall terminate all liability of the Company except as provided in Section 2(a) of these Conditions and Stipulations.

Schedule A

Amount of Insurance: $227,041.30
Date of Policy: January 8, 2007 at 3:40 PM.

ENDORSEMENT (CLTA Form 116)

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.

This endorsement is issued as part of the policy. Except as it expressly states, it does not (i) modify any of the terms and provisions of the policy, (ii) modify any prior endorsements, (iii) extend the Date of Policy, or (iv) increase the Amount of Insurance. To the extent a provision of the policy or a previous endorsement is inconsistent with an express provision of this endorsement, this endorsement controls. Otherwise, this endorsement is subject to all of the terms and provisions of the policy and any prior endorsements. (Emphasis in original)

(R. Vol. 2, pp. 454-7.)

ISSUES PRESENTED ON APPEAL

1. Did the District Court err in concluding that BOI's full credit bid at the trustee's sale constituted a "voluntary satisfaction or release of the insured mortgage" which terminated FATCO's liability pursuant to Section 9(c) of the Policy Conditions and Stipulations?

2. Did the District Court err in relying on the full credit bid, given the Idaho appellate decisions which expressly limit those who can assert a full credit bid as a defense to a debtor on a secured obligation?

3. Did the District Court err in construing the meaning and effect of Section 7(a)(ii) of the Policy by concluding that the earliest point that "loss or damage" occurred is the time of the foreclosure sale, given the abundant evidence in the record that clearly demonstrates BOI sustained "loss or damage" before the trustee's sale took place.

ATTORNEY'S FEES ON APPEAL

BOI respectfully submits that it is entitled to an award of attorney's fees on appeal pursuant to Idaho Code § 41-1839(1), because this is an action against an insurer that failed to pay the amount justly due under the Policy.

ARGUMENT

I. Introduction.

The District Court concluded that BOI did not suffer a loss covered by the Policy. (R. Vol. 2, p. 461.) It based that conclusion entirely on the fact of BOI's full credit bid at the trustee's sale, coupled with its interpretation of the meaning and effect of Sections 2, 7 and 9 of the Conditions and Stipulations to the Policy. (R. Vol. 2, p. 459-61.) Indeed, the Court even acknowledged that the affidavit testimony of Larry Bell "may be sufficient for creating an issue of fact about" BOI's damages, but nonetheless concluded that was immaterial because "the full credit bid resolved the debt, and the mortgage must be considered satisfied, with no further amounts owing." (R. Vol. 2, p. 461.)

BOI respectfully submits that the District Court erred in construing the meaning and effect Sections 2, 7 and 9, and in its application of the full credit bid to bar BOI's recovery. In particular, the Court's conclusion that the full credit bid constituted a "voluntary satisfaction or release of the insured mortgage" which terminated FATCO's liability pursuant to Section 9(c) is plainly incorrect, and lies at the heart of the Court's decision. Accordingly, the Court's grant of summary judgment to FATCO cannot stand, and should be reversed for each of the reasons discussed in detail below.

II. **Standard of Review.**

This Court reviews a district court's grant of summary judgment *de novo*, and employs the same standard a district court uses to rule on the motion. *See, e.g., Stonebrook Const., LLC v. Chase Home Finance, LLC,* 152 Idaho 927, 929-30, 277 P.3d 374, 376-7 (2012); *Arreguin v. Farmers Ins. Co. of Idaho,* 145 Idaho 459, 461, 180 P.3d 498, 500 (2008). Summary judgment is only appropriate when the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *Id.* The Court liberally construes the record in favor of the party opposing the motion, and draws all reasonable inferences and conclusions in favor of that party. *Id.*

The interpretation of the legal effect of an insurance policy, the meaning of unambiguous provisions contained therein and the question of whether a given provision is ambiguous are all questions of law over which this Court exercises free review. *Rizzo v. State Farm Ins. Co.*, ___ Idaho ___, 305 P.3d 519, 523 (2013); *Arreguin,* 145 Idaho at 461, 180 P.3d at 500. When policy language is clear and unambiguous, it must be given its ordinary meaning, and coverage is determined according to the plain meaning of the words employed. *Rizzo*, ___ Idaho at ___, 305 P.3d at 523; *Farm Bureau Ins. Co. v. Kinsey,* 149 Idaho 415, 419, 234 P.3d 739, 743 (2010).

III. **The District Court's conclusion that BOI's full credit bid at the trustee's sale constituted a "voluntary satisfaction or release of the insured mortgage" which terminated FATCO's liability pursuant to Section 9(c) of the Policy was incorrect and must be reversed.**

The District Court's conclusion that "[u]nder Section 9, the full credit bid constituted a 'voluntary satisfaction or release of the insured mortgage' which terminated Defendant's liability" is the core of its decision. (R. Vol. 2, p. 460.) BOI respectfully submits that conclusion is incorrect for the following reasons.

By its own terms, Section 9(c) does not terminate FATCO's liability in this case because BOI made its full credit bid in the context of a trustee's sale where it acquired legal title to the property, thereby discharging the mortgage lien. Such circumstances fall squarely within the express exception to Section 9(c)'s applicability. It provides:

> [9](c) Payment in full by any person or the voluntary satisfaction or release of the insured mortgage shall terminate all liability of the Company **except as provided in Section 2(a) of these Conditions and Stipulations.** (Emphasis added.)

(R. Vol. 2, p. 456.)

Thus, the applicability of Section 9(c) is expressly dependent on whether the circumstances described in Section 2(a) are involved, as they are in this case. Section 2(a) provides in pertinent part:

> 2. **CONTINUATION OF INSURANCE.**
> (a) **After Acquisition of Title. The coverage of this policy shall continue** in force as of Date of Policy **in favor of (i) an insured who acquires all or any part of the estate or interest in the land by** foreclosure, **trustee's sale**, conveyance in lieu of foreclosure, or other legal manner **which discharges the lien of the insured mortgage**; (ii) . . . (Emphasis added.)

(R. Vol. 2, p. 454.)

Taken together, the unambiguous meaning and effect of these provisions is that a "voluntary satisfaction or release of the insured mortgage," which might otherwise terminate FATCO's liability pursuant to Section 9(c), expressly does not do so when is occurs in the context of a trustee's sale where the insured takes title to the property and the mortgage lien is thereby discharged. That is precisely what occurred in this case, and therefore, the District Court's conclusion that Section 9(c) bars BOI's recovery because of its full credit bid is plainly incorrect.

In its analysis of the effect of Section 2(a) on Section 9(c), the District Court apparently conflated the language of Section 2(b) with that of Section 2(a), and misunderstood the plain difference between them. In its discussion of Section 2(a), the Court noted:

> Section 2(a) refers to ongoing coverage under the policy in certain circumstances, **such as a warranty claim made by a third-party purchaser** following the insured's foreclosure on the property. **Therefore, while Section 2(a) acknowledges ongoing coverage based upon circumstances different than that currently before the Court, it does not**

> **resurrect liability under the present facts when there has been a satisfaction or release of the insured mortgage.** (Emphasis added.)

(R. Vol. 2, p. 459.)

However, Section 2(a) addresses coverage "After Acquisition of Title" by an insured lender, and expressly addresses the circumstance of an insured lender acquiring title at a trustee's sale which discharges the mortgage lien. It says nothing about "a warranty claim made by a third-party purchaser."

The sole mention of warranty claims anywhere in Section 2 is contained in Section 2(b), which addresses continuing coverage "After Conveyance of Title," by the insured and provides that one of the circumstances where coverage may continue <u>after the insured conveys title</u> is when the insured has potential warranty liability:

> [2](b) **After Conveyance of Title.** The coverage of this policy shall continue in force as of Date of Policy in favor of an insured only so long as the insured retains an estate or interest in the Land, or holds an indebtedness secured by a purchase money mortgage given by a purchaser from the insured, **or only so long as the insured shall have liability by reason of covenants of warranty made by the insured in any transfer or conveyance of the estate or interest.** . . . (Emphasis added.)

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

Unlike Section 2(a), Section 2(b) is not referenced in Section 9(c) at all. Therefore, its language plays no role in interpreting the interplay between Sections 9(c) and 2(a) that may result in a termination of liability pursuant to Section 9(c), absent circumstances that are addressed by the specific language of Section 2(a).

Accordingly, the District Court also erred in conflating the language of Section 2(b) with that of Section 2(a) and misinterpreting the distinction between them, thereby concluding that Section 2(a) addresses "circumstances different than that currently before the

Court," which do not "resurrect liability under the present facts when there has been a satisfaction or release of the insured mortgage."

Indeed, precisely the opposite is true. The circumstances here clearly fall within the express scope of Section 2(a), which in turn means that FATCO's liability is not terminated by Section 9(c), contrary to the District Court's conclusion. BOI respectfully submits that these plain errors alone are sufficient to require reversal of the District Court's decision.

IV. **Under Idaho law, FATCO cannot assert BOI's full credit bid as a defense to liability and the District Court erred in relying on the full credit bid to defeat BOI's claim.**

In conjunction with its discussion of Sections 7 and 9 of the Policy Conditions and Stipulations, the District Court noted that "[t]here can be no question that regardless of motive or fair market value, the full credit bid extinguished the debt and mortgage," quoting a passage from this Court's decision in *Federal Home Loan Mortg. Corp. v. Appel,* 143 Idaho 42, 44, 137 P.3d 429, 431 (2006) (credit bid extinguishes the debtor's debt to the extent of the bid).

The District Court's statement essentially articulates the so-called "full credit bid rule," which arises from anti-deficiency statutes and was apparently first stated by the California Supreme Court in *Cornelison v. Kornbluth*, 542 P.2d 981 (1975). In *Cornelison,* the court interpreted California's anti-deficiency statute and held that an action for waste by a deed of trust beneficiary against the borrowers/grantors and their successors in interest was precluded because the beneficiary had purchased the property at a foreclosure sale with a full credit bid, which satisfied the debt and established there was no impairment of the security for the debt. *Cornelison*, 542 P.2d at 991-2.

However, FATCO is not entitled to benefit from the full credit bid rule under Idaho law, and BOI respectfully submits it was error for the District Court to entirely rely on it in granting summary judgment. 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), hold 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.

In *Gaige*, First Security Bank extended various loans secured by a deed of trust on a building and other collateral to a company. *Gaige,* 115 Idaho at 173, 765 P.2d at 684. The president of the company, Gaige, also executed personal guarantees of the company's debt. *Id.* After the company defaulted, the Bank foreclosed on the deed of trust on the building, and was high bidder at the sale. *Id.* Rather than foreclosing on the company's remaining collateral, the Bank sued Gaige personally as guarantor of the company's debt to recover the remaining balance due on the notes. *Id.* No deficiency judgment was sought against the company itself. *Id.*

In defense of the action on the guarantees, Gaige asserted that the deed of trust anti-deficiency statute, Idaho Code § 45-1512, precluded the Bank from bringing the action on the guarantees. *Id.* The Statute provides:

> 45-1512. Money judgment -- Action seeking balance due on obligation. At any time within 3 months after any sale under a deed of trust, as hereinbefore provided, a money judgment may be sought for the balance due upon the obligation for which such deed of trust was given as security, and in such action the plaintiff shall set forth in his complaint the entire amount of indebtedness which was secured by such deed of trust and the amount for which the same was sold and the fair market value at the date of sale, together with interest from such date of sale, costs of sale and attorney's fees. Before rendering

> judgment the court shall find the fair market value of the real property sold at the time of sale. The court may not render judgment for more than the amount by which the entire amount of indebtedness due at the time of sale exceeds the fair market value at that time, with interest from date of sale, **but in no event may the judgment exceed the difference between the amount for which such property was sold and the entire amount of the indebtedness secured by the deed of trust.** (Emphasis added.)

This Court rejected Gaige's assertion and held that the protections afforded by the Statute do not extend to guarantors but instead protect only borrowers/grantors on the secured obligation:

> **The first issue we address is whether our anti-deficiency statute, I.C. § 45-1512, [fn omitted] applies to Gaige as a guarantor.** Resolution of this issue had been reserved previously in *Valley Bank v. Larson,* 104 Idaho 772, 663 P.2d 653 (1983). We decide it today, and **we hold that it does not.**
>
> I.C. § 45-1512 applies to claims by a creditor secured by a deed of trust for the balance due after a deed of trust sale. **The protection in I.C. § 45-1512 is given to the borrower-grantor who gives the security interest described in the deed of trust. However, Gaige was not the borrower-grantor who gave the security interest covered by the deed of trust.** The corporation, A.J. Gaige & Associates, Inc., was the borrower and grantor of the security. John Gaige merely guaranteed that debt.
>
> Gaige argues that I.C. § 45-1512 protection should extend by implication to guarantors on public policy grounds because guarantors and deed of trust debtors alike share a need for protection from creditors who desire to recover their indebtedness secured by the deed of trust. **While there may be arguments for extending anti-deficiency protection to guarantors, that action is for the legislature to do, not the court.** In some states, such as Alaska, the legislature saw fit to extend protection to guarantors, [citation omitted]; at present ours has not. Although the Nevada court is apparently "convinced that it is unsound to deny guarantors the benefits of [anti-deficiency] legislation," [citation omitted], a majority of state courts considering the issue have declined to expand the coverage of the statute to those not covered by the statute. [citations omitted] **We deem it better policy to follow the wording of the statute and leave any expansion of coverage to the legislature.** (Emphasis added.)

Gaige, 115 Idaho at 174-5, 765 P.2d at 685-6.

Three years later in *Willis*, the Court of Appeals expressly rejected an attempt by one who also was not a borrower/grantor to avoid liability for property damages by asserting

California's full credit bid rule, relying on this Court's decision in *Gaige*. *Willis,* 121 Idaho at 316-7, 824 P.2d at 891-2.

The facts in *Willis* are more convoluted than those in *Gaige*. Elnora Wise sold her motel to the Pickens who executed a promissory note and deed of trust in favor of Wise as part of the sale. *Willis,* 121 Idaho at 313-5, 824 P.2d at 888-90. The Pickens subsequently defaulted on the note and Mrs. Wise instituted foreclosure proceedings, which were automatically stayed for a considerable period by the Pickens' bankruptcy. *Id.* After the stay was lifted, Mrs. Wise assigned her deed of trust rights to Realty Country, who proceeded with the foreclosure and purchased the property pursuant to a full credit bid at the sale. *Id.* While the foreclosure was pending, Mrs. Wise permitted others to remove most of the fixtures from the property. *Id.* Realty Country advised Mrs. Wise it would offset the resulting damage to the property against the payments it owed her pursuant to the assignment agreement. *Id.* Mrs. Wise subsequently died and the personal representative of Mrs. Wise's estate filed for a declaratory judgment that Realty Country was not entitled to the offset, arguing in part that Realty Country's full credit bid at the foreclosure sale precluded it from claiming the offset. *Id.*

On appeal, the Court expressly held that the Estate could not avoid liability for the offset by asserting the full credit bid rule formulated by the California Supreme Court in *Cornelison,* because the Estate was not the borrower/grantor on the deed of trust and therefore was not entitled to such protection under Idaho law:

> III. FULL CREDIT BID
>
> **We turn first to the issue whether Realty Country's full credit bid at the foreclosure sale precludes it from recovering the costs of repairing the damage to the property. As authority for this proposition, the Estate cites *Cornelison.*** In *Cornelison,* the court,

> interpreting the California anti-deficiency statute, held that a beneficiary under a deed of trust who purchased property at a private foreclosure sale by bidding the outstanding balance was not entitled to recover damages in an action for waste against the successor-in-interest of the original grantor of the deed of trust.
>
> To determine this issue, we look to our own anti-deficiency statute, I.C. § 45-1512. [fn omitted] **Our Supreme Court has determined that the protection in I.C. § 45-1512 extends only to the borrower-grantor who gives the security interest in the deed of trust.** [citation omitted] The Court stated that the protection in I.C. § 45-1512 did not extend to the guarantor and declined to extend the coverage of the anti-deficiency statute to those not specifically covered by the statute[.]
>
> . . .
>
> Applying *Gaige* to the present case, the Pickens were the borrower-grantors entitled to protection under the Idaho anti-deficiency statute; **in the event that Realty Country had sued the Pickens for the cost of repairing the property, the full credit bid would have precluded the action.** However, Mrs. Wise is the assignor of beneficial rights under the deed of trust. Relying on our Supreme Court's interpretation of I.C. § 45-1512, we conclude that Mrs. Wise is not entitled to protection under the anti-deficiency statute. **Thus, *Cornelison* is not applicable to the facts of this case. Consequently, Realty Country's full credit bid at the foreclosure sale does not preclude it from recovering from the Estate the costs of repairing the property.** (Emphasis added.)

Willis, 121 Idaho at 316-7, 824 P.2d at 891-2.

Thus it is clear that no one other than the borrower/grantor on a secured obligation can rely on the full credit bid rule that is embodied in Idaho's anti-deficiency statute to avoid liability.

Moreover, this Court's statement regarding credit bids in *Appel*, relied on by the District Court in its decision here, does not hold to the contrary. *Appel* was an action to eject the borrowers/grantors on a deed of trust from the secured property after the 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 431-2. Accordingly, *Appel* does nothing to disturb the decisions in *Gaige* and *Willis*.

Therefore, since FATCO is clearly not the borrower/debtor on the deed of trust at issue here, it is not entitled to the benefit of the full credit bid rule, and the District Court erred in relying on the full credit bid to dismiss BOI's claim.

V. **The District Court misconstrued the meaning and effect of Section 7(a)(ii) of the Policy, and incorrectly concluded that the earliest point that damages occur is the time of the foreclosure sale. There is instead abundant evidence in the record that clearly demonstrates BOI sustained "loss or damage" before the trustee's sale took place.**

The District Court concluded that "[t]he foreclosure sale is the earliest point at which time damages occur," and held that due to the full credit bid, "there was no unpaid principal indebtedness after the foreclosure sale" under Section 7(a)(ii). (R. Vol. 2, p. 460.)

In doing so, the Court simply rejected as "immaterial" the abundant evidence in the record that clearly demonstrates BOI sustained "loss or damage" long before the foreclosure sale. Accordingly, BOI respectfully submits that both conclusions are incorrect, for the reasons discussed in turn below.

The Court's very brief discussion of damages demonstrates that it failed to recognize the crucial distinction between the time when "loss or damage" begins to "occur," and the time when the amount of damage can actually be "determined:"

> [T]here could be no **determination** of damages "insured against" until the foreclosure sale i.e., if the amount recovered through sale or bid and transfer of title was less than the amount of the debt, the difference would be the damages recoverable by way of a deficiency judgment and/or claim against the Policy. The foreclosure sale is the earliest point at which time damages **occur**. It is axiomatic that creditors frequently are made

> whole by reason of a credit bid at a foreclosure sale. As such, until the foreclosure sale takes place, damages are inchoate and speculative. (Emphasis added.)

(R. Vol. 2. p. 460.)

However, Section 7(a)(ii) does not say that the amount of the secured indebtedness should be "determined" after a foreclosure sale. Instead it plainly states that the relevant point in time to calculate the amount of the debt is the time when "loss or damage" insured against by the Policy "occurs." (R. Vol. 2. p. 453.) There is a clear distinction between the two. For example, there is no doubt that an injured car wreck victim's loss or damage "occurs" at the time of the collision. But it is equally clear that it may take years of medical treatment before his or her damages can finally be "determined." In similar fashion in this case, the time when BOI's "loss or damage" could have been ultimately "determined" may well have been after the sale. In fact, the "determination" of BOI's ultimate "loss or damage" may not have been possible until after it attempted to mitigate its loss by finally selling the property to a third party in November of 2010. However, that does not mean that BOI's "loss or damage" did not "occur" long before the trustee's sale was held.

The District Court's statements that "[i]t is axiomatic that creditors frequently are made whole by reason of a credit bid at a foreclosure sale," and therefore, "until the foreclosure sale takes place, damages are inchoate and speculative" further illustrates the point that the Court was incorrectly focused on when damages could be "determined" rather than when they "occur."

Moreover, the first statement is basically a comment on potential mitigation from which the second does not logically flow. Although BOI concedes it will eventually have to prove its damages with reasonable certainty, the mere fact that contract damages are perhaps not capable of exact proof does not preclude their availability as a matter of law. *See, Hummer v. Evans,* 129 Idaho 274, 280, 923 P.2d 981, 987 (1996).

Finally, the District Court's statement that "if the amount recovered through sale or bid and transfer of title was less than the amount of the debt, the difference would be the damages recoverable by way of a deficiency judgment and/or claim against the Policy" suggests that the Court concluded that the only kind of "loss or damage" BOI is entitled to recover is that which a lender can recover against a debtor in an action for a deficiency judgment.

While that was certainly one of FATCO's consistent themes below, nothing in the Policy supports it. Section 7(a) certainly does not. It provides:

> (a) The **liability** of the Company under this policy **shall not exceed the least of**:
> (i) **the Amount** of Insurance stated in Schedule A, or, if applicable, **the amount** of insurance as defined in Section 2(c) of these Conditions and Stipulations;
> (ii) **the amount** of the unpaid principal indebtedness secured by the insured mortgage as limited or provided under Section 8 of these Conditions and Stipulations or as reduced under Section 9 of these Conditions and Stipulations, at the time the loss or damage insured against by this policy occurs, together with interest thereon; **or**
> (iii) **the difference** between the value of the insured estate or interest as insured and the value of the insured estate or interest subject to the defect, lien or encumbrance insured against by this policy.
> . . . (Emphasis added.)

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

The language highlighted above demonstrates that in general, Section 7(a) functions as nothing more than a maximum "policy limit" on FATCO's liability, the dollar amount of which may fluctuate over the lifetime of the Policy, depending on various circumstances and events. Thus at any given point, the maximum dollar amount may be the amount stated in Schedule A, (in this case $227,041.30); or it may be the amount defined by the parameters of Section 2(c) when applicable; or it may be the total amount of the debt, principal and interest combined, <u>at the time loss or damage insured against occurs</u>, minus any limitations or reductions imposed by Sections 8 or 9 respectively; or it may be the amount represented by the difference in value between the estate or interest as insured and as subject to the specific peril insured against; whichever happens to be less at the relevant point in time.

In fact, the terms "loss or damage" are undefined anywhere in the Policy itself. Accordingly, such common, non-technical words are 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).

Blacks Law Dictionary defines "loss" as "an undesirable outcome of a risk; the disappearance or diminution of value, usu. in an unexpected or relatively unpredictable way." *Black's Law Dictionary* 963 (8th ed. 2004). *Merriam-Webster Online Dictionary* in turn defines "loss" as a "failure to keep or to continue to have something, the experience of having something taken from you or destroyed." *Black's* defines the noun "damage" as "Loss or injury to person or property." *Black's* at 416. *Merriam-Webster Online* in turn defines "damage" as "loss or harm resulting from injury to person, property, or reputation." None of the definitions even suggest that "loss or damage" must be actionable, much less capable of "determination" with mathematical precision. Given that the terms are employed conjunctively in the Policy, any one of these definitions is sufficient to establish that BOI suffered "loss or damage" which "occurred" long before the foreclosure sale.

The record here certainly demonstrates that BOI suffered significant "loss or damage" as defined above prior to the sale. The failure to locate one of the four-plexes on Lot 1 substantially decreased Lot 1's value, thereby impairing BOI's collateral. (R. Vol. 1, p. 70, ¶ 10.)

The competing appraisals of the parties suggest a difference in value for Lot 1 as high as $257,000.00. (R. Vol. 2, p. 329, ¶ 4-5; Vol. 2, pp. 234, 339.)

The failure to locate one of the four-plexes on Lot 1 also eliminated BOI's ability to replace the construction loans with the term loans that would have constituted the Petersons' long term financing, which BOI could then sell individually into the secondary mortgage market, in accordance with BOI's original plan and routine practice. (R. Vol. 1, p. 70, ¶ 9-10; Vol. 2, pp. 331-3, ¶ 13, 17.) In addition, the two Lots could no longer be sold separately because both four-plexes were built on Lot 2 and neither had street frontage. (Id.)

The secondary market for loans on 1-4 family units is entirely different than multi-family units in excess of four units. (R. Vol. 2, p. 332, ¶ 15.) BOI made inquiries and could not locate a lender that would accept the single eight-unit property. (R. Vol. 2, p. 332, ¶ 13.) As a result, BOI was left without a secondary market for its debt instruments because the property was characterized "as built" as an eight-plex, tightly squeezed onto an undersized lot. (R. Vol. 2, p. 332-3, ¶ 13, 18.) Thereafter, from the time the Petersons defaulted on the construction loans through the foreclosure and sale process to the date BOI was eventually able to resell both lots as a single unit, it incurred additional out-of-pocket expenses in the amount of at least $37,816.05. (R. Vol. 2, p. 329, ¶ 9.)

In short, rather than being free and clear of the project in March, 2009, after replacing the construction loans with term loans and selling them individually into the secondary market as planned, BOI was instead forced to deal with the Peterson's default, foreclose on its impaired collateral and incur tens of thousands of dollars of out-of-pocket expenses, all because the four-plex was not built on Lot 1, and all before the foreclosure sale ever took place. It seems difficult to imagine a more clear cut case of "loss or damage" which this Policy expressly insured against.

Given this state of the record, the first "loss or damage" as commonly defined "occurred," when the four-plex was not in fact built on Lot 1, as "insured against" by Endorsement 116 to the Policy. At the very latest, BOI sustained "loss or damage" when the Petersons defaulted on their loan, and BOI was forced to institute foreclosure proceedings to take title to Lot 1 without the contemplated four-plex. Indeed, some courts have suggested the proper time to measure a lender's loss is the point at which the lender makes the loan in reliance on the title policy issued by the insurer in the first place. *See, e.g., Equity Income Partners LP v. Chicago Title Ins. Co.*, 2012 WL 3871505, (unpublished opinion) (D. Az. 2012) slip op. *3-4 (nothing to suggest loss suffered should only be measured at the time of ultimate foreclosure, loss was suffered at the time lender issued the loan in reliance on title policy); *see, also, Citicorp Sav. of Illinois v. Stewart Title Guar. Co.*, 840 F.2d 526 (7th Cir.1988).

But regardless of which point in time one chooses, a significant portion of the "loss or damage insured against" which BOI "sustained" as a result of the failure to build the four-plex on Lot 1 "occurred" well before the eventual foreclosure sale was completed and at a time when the "unpaid principal on the indebtedness secured by the insured mortgage ..., together with interest thereon" was in excess of $200,000.00.

At a minimum, material issues of fact make summary judgment inappropriate on this record, and accordingly, the District Court's decision should be reversed.

CONCLUSION

For each of the foregoing reasons, BOI respectfully asks this Court to reverse the District Court's decision, and remand this action to the District Court for further proceedings consistent with the Court's opinion.

DATED this 26th day of September, 2013.

HOPKINS RODEN CROCKETT
HANSEN & HOOPES, PLLC

By: ______________________
Gregory L. Crockett
Attorneys for Bank of Idaho

CERTIFICATE OF SERVICE BY MAIL, HAND DELIVERY
OR FACSIMILE TRANSMISSION

I hereby certify that two (2) true and correct copies of the foregoing document were on this date served upon the person named below, at the address set out below his name, either by mailing, hand delivery or by telecopying to him true and correct copies 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 26th day of September, 2013.

Gregory L. Crockett

Charles A. Homer, Esq.	■	U.S. Mail
HOLDEN, KIDWELL, HAHN	□	Overnight Delivery
& CRAPO, PLLC	□	Hand Delivery
1000 Riverwalk Drive, Suite 200	□	Facsimile
P.O. Box 50130		
Idaho Falls, ID 83205		