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**IN THE SUPREME COURT OF THE
STATE OF IDAHO**

IDAHO FIRST BANK,

Appellant/Cross-Respondent,

v.

MAJ-LE TATE BRIDGES, and HAROLD
A. BRIDGES, individuals,

Respondents/Cross-Appellants.

SUPREME COURT CASE NO. 44532

(Dist. Court Case No. CV-2015-145-C)

JOINT RESPONDENTS' AND CROSS-APPELLANTS' BRIEF

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

HONORABLE JASON D. SCOTT, District Judge, presiding

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I. STATEMENT OF THE CASE

A. Nature of the Case.

This is an appeal arising out of a lender's untimely attempt to obtain a deficiency judgment on a promissory note after sale of the real property collateral. The debtors obtained a 2006 loan to build a cottage¹ on state-lease land near Payette Lake. The loan went into default and the lender sold the real property collateral. The lender claimed it was still owed additional amounts on the underlying promissory note and filed a complaint seeking a deficiency judgment. The new complaint, however, was untimely, per the three month deadline in I.C. § 45-1512, and the District Court granted summary judgment dismissing with prejudice the lender's deficiency action. The lender brings an appeal of that dismissal judgment, arguing that its untimely lawsuit seeking a deficiency judgment can be saved by the relation back doctrine found in IRCP 12.

This cross-appeal arises out of the lender's subsequent attempt to foreclose a different deed of trust on a different property to try and recover the same alleged deficiency that had already been barred by § 45-1512 and the District Court. The debtors had a second loan with the lender (from 2008) and that loan was secured by a deed of trust on the debtors' residence in Boise. That deed of trust on the Boise residence had a cross-collateralization provision stating that the Boise residence also secured any other amounts owed by the debtors to the lender. After losing (and appealing) its deficiency action for the 2006 loan, the lender commenced an arbitration proceeding to foreclose on the Boise residence in order to recover the same claimed deficiency on the 2006 loan that had already been barred. The debtors asked the District Court to

¹ The District Court referred to the Cottage as a "cottage," so the Bridges will use that terminology as well.

block this effort to recover a claimed deficiency that had already been barred by the District Court as untimely under § 45-1512. The district court declined, leaving the issue for resolution by the arbitrator. The arbitrator, in turn, deferred to this Court for resolving the issue before him. The debtors bring this cross-appeal asking this Court to find that the judgment dismissing a deficiency action under § 45-1512 bars any further attempts to recover the claimed deficiency through any other collateral.

B. Statement of Facts.

1. The Cottage Loan and Default on the Cottage Note.

Harold and Maj-le Bridges (the “Bridges”) obtained a \$1.5 million construction loan in 2006 (“Cottage Note”) from Idaho First Bank (“IFB”) to construct their cottage on Payette Lake on land owned by the State of Idaho and leased to the Bridges. (R, pp. 373-374, 382-83.) The cottage and state lease were collateral for the Cottage Note, pursuant to a Construction Deed of Trust (“Cottage DoT”):

For valuable consideration, Grantor does hereby irrevocably grant, bargain, sell and convey in trust, with power of sale, to Trustee for the benefit of Lender as Beneficiary, all of Grantor’s right, title, and interest in, to and under the Lease described below of the following described real property, together with all existing or subsequently erected or affixed buildings, improvements and fixtures

(R, pp. 382-83, 386-95.) The Bridges built a cottage that was approximately 5,000 square feet and intended it to be a permanent structure, with a cement foundation and a design and features specifically chosen to match the lake-front Property. (R, pp. 544-51.)

In 2015, the Bridges defaulted on the Cottage Note, no longer able to afford the loan payments. (*Id.*) Under Idaho law, before it could “institute a judicial action” against the Bridges

on the Cottage Note, IFB was required to sell the cottage and lease collateral to pay down the Bridges' Cottage Note. *See* I.C. § 45-1503.

2. IFB's Improper Lawsuit Seeking a Money Judgment Without First Foreclosing the Real Property Collateral.

Instead, on June 19, 2015, IFB sued the Bridges seeking a personal judgment for the entire amount outstanding on the Cottage Note without seeking to foreclose on the Cottage Note. (R, pp. 362-65.) The Bridges tried to convince IFB to voluntarily withdraw the Complaint and comply with I.C. § 45-1503, but IFB refused. (R, pp. 549-50, 770-71.) The Bridges filed a short motion to dismiss, pointing out that the lawsuit had been filed in violation of Idaho's security first/one-action rule in § 45-1503. (R, pp. 377-380.) IFB opposed the motion to dismiss, arguing that its lawsuit seeking a personal judgment, prior to foreclosure sale of the real property collateral, was proper. (R, p. 478.) IFB surprisingly claimed that the cottage and lease was personal property and not real property and therefore not subject to § 45-1503. (*Id.*)

3. Sale of the Real Property Collateral and the Untimely Deficiency Action Precluded By Idaho Statute.

Before the motion to dismiss was resolved, IFB sold the collateral for approximately \$1.2 million. (R, pp. 489.) Two bidders had offered \$1.2 million for the cottage and lease. (*Id.*) The sale closed on September 15, 2015. (*Id.*) With the sale of the collateral, the Bridges were preparing for a dispute about whether a deficiency existed and, if so, in what amount.

On December 18, 2015, IFB filed a pleading entitled "Second Amended Complaint" (the "Deficiency Complaint"). (R, pp. 485-92.) This Deficiency Complaint admitted that the underlying cottage and lease were sold on September 15, 2015. (R, p. 489.) The Deficiency

Complaint alleged a deficiency owed of \$344,377.24 after the sale of the collateral. (R, pp. 490-91.) The Deficiency Complaint alleged two causes of action: (1) a “Claim For Deficiency Under Idaho Code § 28-9-615,” which continued IFB’s unusual argument that a cottage and lease are personal property rather than real property, and (2) a “Claim For Deficiency Under Idaho Code § 45-1512.” (*Id.*)

4. Memorandum Decision and Judgment Dismissing the Deficiency Action With Prejudice.

On January 21, 2016, the Bridges filed a motion for summary judgment because the Deficiency Complaint was untimely by three days (three months from sale of the collateral was December 15, 2015, but the Deficiency Complaint was not filed until December 18, 2015). (R, pp. 519-33.) The Bridges argued that IFB was now statutorily barred from claiming any deficiency was owed: “The Bridges ask the Court to find, as a matter of law, that IFB’s deficiency action ... was untimely filed and thus IFB is forever barred from seeking any deficiency on the Note, pursuant to Idaho Code § 45-1512.” (R, p. 530, emphasis added.)

IFB opposed dismissal with prejudice by raising two arguments: (1) its untimely action was saved by the relation back doctrine under IRCP 15 and its initial Complaint and/or First Amended Complaint filed June 19 and July 10, 2015, respectively; and (2) the collateral was personal property so Section 45-1512’s three month deadline was inapplicable. (R, pp. 775, 779.)

Ultimately, the District Court agreed with the Bridges that the tardy Deficiency Complaint had to be dismissed with prejudice. The District Court gave three different reasons for rejecting the “relation back” argument:

A. Idaho First Bank's deficiency claim under I.C. § 45-1512 is time barred.

....

First, Idaho First Bank's deficiency claim simply did not arise out of the conduct, transaction, or occurrence set forth or attempted to be set forth in its original and first amended complaints. To be sure, the original and first amended complaints involved attempts to collect on the same loan involved in the section 45-1512 claim. But there ends the relationship between the second amended complaint and the prior complaints. The prior complaints did not mention the deed-of-trust collateral. They neither asserted nor attempted to assert a deficiency claim (under section 45-1512 or otherwise). Presumably that is because a prerequisite to asserting such a claim—the sale of the deed-of-trust collateral—had not yet occurred. The deed-of-trust collateral was not sold until September 15, 2015, which is long after the prior complaints were filed. The section 45-1512 claim arose out of the sale of the deed-of-trust collateral for less than the loan's balance, not out of the Bridges' loan default. Indeed, had everything else been the same but the sale proceeds equaled or exceeded the loan balance, no deficiency claim would have ever arisen, despite the Bridges' loan default. As such, it is incorrect to view the deficiency claim as having arisen out of the conduct, transaction, or occurrence set forth or attempted to be set forth in Idaho First Bank's original and first amended complaints.

Second, and relatedly, relation-back is inappropriate because the deficiency claim under section 45-1512 had not even accrued when the prior complaints were filed. Such a claim does not accrue until the deed-of-trust collateral is sold, as no deficiency either exists or is calculable before the sale. It seems counterintuitive to apply Rule 15(c)'s relation-back doctrine in a way that causes any claim, including a deficiency claim, to relate back to a date earlier than the date on which the claim accrued. Indeed, a claim does not truly exist before it accrues. Had Idaho First Bank asserted a deficiency claim when it filed the prior complaints that claim would have been subject to dismissal because it had not yet accrued and, depending on the sale price ultimately obtained for the collateral, might never accrue.

A claim usually should not be related back to a pleading filed before the claim accrued. An exception to this general rule applies "if the original pleading gave notice that the conduct, transaction, or occurrence is of a continuing nature." But that is not the case here. Idaho First Bank's original claims were not continuing in nature. They alleged the existence of one outstanding loan debt. A portion of that same debt remained outstanding after the sale of the deed-of-trust collateral enabled Idaho First Bank to bring a deficiency claim, but, again, that was not inevitable. The collateral could, at least in theory, have sold for a price high

enough to leave no deficiency. Consequently, Idaho First Bank's second amended complaint asserts a section 45-1512 deficiency claim that is a new claim, not a continuation of the original claims. Relation-back therefore is not appropriate.

Third, relation-back is inappropriate because the original and first amended complaints were filed in violation of I.C. §45-1503(1). Under that statute, the grantor of deed-of-trust collateral is ordinarily not subject to suit before the deed-of-trust collateral has been sold in accordance with Idaho's deeds-of-trust act, at which point a deficiency claim may be asserted under section 45-1512 if the sale proceeds do not exhaust the loan balance. Idaho First Bank filed its original and first amended complaints before selling the deed-of-trust collateral, in reliance on an unsound argument that doing so did not violate section 45-1503(1) because the deed-of-trust collateral supposedly was "substantially valueless" under I.C. §45-1503(2). As discussed in this decision's section III(B), the cottage was real property, not personal property. Idaho First Bank's "substantially valueless" argument wrongly presumed the opposite. Moreover, it wrongly presumed the leasehold interest had no value. That the deed-of-trust collateral was not "substantially valueless" is proved by the \$1,200,088 sale price it fetched.

In any event, because Idaho First Bank violated section 45-1503(1) by filing its prior complaints before selling the deed-of-trust collateral, it seems entirely inequitable for its belated claim under section 45-1512 to relate back to the prior complaints. Rule 15(c) "has its roots in the former federal equity practice." The Court sees no good reason to invoke a rule that is designed to do equity so as to allow Idaho First Bank's premature filing of suit in violation of one provision of Idaho's deeds-of-trust act to excuse its failure to satisfy the filing deadline set in another of the act's provisions.

For these reasons, the Bridges are entitled to summary judgment against Idaho First Bank's section 45-1502 claim.

(R, pp. 774-78 (emphasis in original) (internal citations omitted).) The District Court also addressed and rejected IFB's attempt to re-characterize a cottage as personal property:

B. Idaho First Bank has no deficiency claim under I.C. § 28-9-615 because that statute is inapplicable when the collateral is real property.

... The Bridges seek summary judgment against Idaho First Bank's section 28-9-615 claim on the theory that its collateral was real property, which would mean that section 28-9-615, along with the rest of Article 9, is entirely

inapplicable. Idaho First Bank does not disagree that section 28-9-615 is inapplicable if the collateral was real property; in other words, it does not argue for applying of any of the exceptions to Article 9's inapplicability to interests in or liens on real property. Instead, it argues (rather meekly) that the cottage is personal property.

Once again, Idaho First Bank's collateral was (i) the Bridges' leasehold interest in the cottage site, and (ii) the cottage ultimately constructed there. As the Court will proceed to explain, these items of collateral are both real property.

Beginning with the leasehold interest, the Court notes that, under Idaho law, "real property" includes not only land itself but also "possessory rights to land." I.C. § 55-101(1). The Bridges' leasehold interest in the cottage site is a possessory right to land. Thus, the leasehold interest is real property. Idaho First Bank wastes no effort arguing to the contrary.

Turning to the cottage, the Court notes that, under Idaho law, "[t]hat which is affixed to land" also is real property. I.C. § 55-101(2). An article is affixed to land if it is (i) actually and constructively annexed to the land, (ii) appropriated to the use of that part of the land to which it is annexed, and (iii) the party annexing it to the land intended to make the article a permanent accession to the land. Idaho First Bank suggests that whether the cottage is "affixed to land" under this three-pronged test should not be determined before trial. But it offers no evidence to contest the Bridges' showing that the cottage is "affixed to land" under that test.

The Bridges' evidence shows that the cottage cost well in excess of \$1 million to build, is 5,000 square feet in size, is built on a cement foundation that is embedded in the ground, and was designed to match the slope, topography, size, and orientation of the leased property, as well as the surrounding environment and nearby Cottages. The Bridges' evidence also shows that they intended the cottage to be a permanent part of the leased property and that they constructed it without any contingency planning for its future removal from the leased property. This is exactly as one would expect of a home so costly and so large; structures of that nature are not generally built with an eye to relocating them to different real property in the future. The Bridges' evidence, considered by itself, satisfies the three-pronged test.

Idaho First Bank offers nothing to counterbalance it. At most, it renews its argument, made in the context of the Bridges' motion to dismiss its first amended complaint, that the cottage is personal property because it is defined as "Personal Property" in the Bridges' most recent lease of the cottage site. The cottage's

characterization for purposes of the current lease is insignificant. There is no reason the cottage could not be characterized as “Personal Property” for purposes of the lease relationship between the Bridges and the Idaho Department of Lands yet constitute real property as a matter of Idaho law for purposes of the loan relationship between the Bridges and Idaho First Bank.

Indeed, the Construction Deed of Trust includes “buildings” in its definitions of the terms “Real Property” and “Improvements” but does not include “buildings” in the definition of the term “Personal Property.” The cottage surely is a “building” under that term’s ordinary meaning, making it “Real Property” for purposes of the Construction Deed of Trust. Thus, the terms of the Construction Deed of Trust are powerful evidence that, at the time it contracted with the Bridges, Idaho First Bank regarded the to-be-constructed cottage as real property rather than personal property.

The Bridges’ years-later agreement with the Idaho Department of Lands to a renewed lease that characterizes the cottage as “Personal Property” does not give rise to a reasonable inference that the Bridges intended, at that point or any other, for the cottage to be removed from the cottage site, as might disqualify it from having “real property” status as an article “affixed to land.” That is true even though both the Bridges’ original lease and the one to which they last agreed identify circumstances in which the Idaho Department of Lands could cause the cottage’s removal. The mere theoretical possibility of removal does not cause the cottage to fail the “affixed to land” test, particularly in the absence of any evidence the Bridges ever intended or expected removal to occur, as well as in the absence of any evidence that removal-and the obvious waste associated with it-was anything more than a theoretical or remote possibility.

(R, pp. 779-81 (internal citations omitted).) The District Court entered a short Judgment on April 27, 2016: “Plaintiff Idaho First Bank’s second amended complaint is dismissed with prejudice, with no award of relief to Idaho First Bank.” (R, p. 766.)

5. IFB’s Motion to Reconsider Denied and Its Appeal.

On May 11, 2016, IFB filed a motion for reconsideration, re-arguing that the relation back doctrine should save its untimely Deficiency Complaint. On August 1, 2016, the District

Court denied the motion to reconsider and gave further reasons why the relation back doctrine was inapplicable:

First, after the Court granted summary judgment to the Bridges, the Nevada Supreme Court decided a similar case, *Badger v. Eighth Judicial District Court*, 373 P.3d 89 (Nev. 2016). There, the borrower and the guarantor defaulted on a loan. Before foreclosing on its loan collateral, the creditor sued the guarantor for the loan balance. While that lawsuit was pending, the creditor foreclosed, generating proceeds less than the loan balance and leaving a deficiency. Nevada law gave the creditor six months after the foreclosure to sue for a deficiency judgment. Nev. Rev. Stat. § 40.455(1). Within the six-month period, the creditor filed a separate lawsuit [against] the borrower to seek a deficiency judgment. The creditor failed, however, to seek a deficiency judgment against the guarantor within the six-month period. After the six-month period ended, the creditor's separate lawsuits against the guarantor and the borrower were consolidated. The creditor amended its complaint against the borrower to also seek a deficiency judgment against the guarantor. The parties litigated whether the creditor's amended complaint related back to its initial complaint against the borrower, thus rendering timely the creditor's otherwise untimely claim for a deficiency judgment against the guarantor. The Nevada Supreme Court ruled against the creditor, holding that "a complaint filed prior to a foreclosure sale cannot sufficiently put an obligor on notice of a deficiency claim," *id.* at 94, and that allowing relation-back in this context would permit creditors to circumvent the statutory scheme by filing pre-foreclosure lawsuits with the intent to amend their complaints to seek deficiency judgments after foreclosure. *Id.* at 95. *Badger* thus furnishes additional support for the Court's summary-judgment decision that an amended complaint asserting an untimely claim for a deficiency judgment does not relate back to a collection complaint filed before foreclosure, in violation of Idaho's "one action" rule.

Second, the Court will distinguish *Security Insurance Co. v. United States ex rel. Haydis*, 338 F.2d 444 (9th Cir. 1964), on which Idaho First Bank relies in its reply memorandum in support of its motion to reconsider. That was a Miller Act case. The Miller Act requires prime contractors on some federal construction projects to post bonds guaranteeing payment of their subcontractors and suppliers. It requires subcontractors and suppliers to wait at least ninety days after last furnishing labor or materials to sue on a bond. 40 U.S.C. § 270b(a). The plaintiff in *Security Insurance* was a supplier suing on the prime contractor's bond. The supplier's lawsuit was filed prematurely, however, before the ninety-day waiting period lapsed. At the time of trial more than a year later, the defendant sought

dismissal on grounds of prematurity. The supplier responded by filing a supplemental complaint containing an allegation that the waiting period had since lapsed. Not only had the waiting period lapsed by then, but so had the Miller Act's statute of limitations. On that alternative basis, the defendant sought dismissal. The supplier argued that the supplemental complaint related back to the original complaint, avoiding the statute-of-limitations problem. The Ninth Circuit accepted the supplier's relation-back argument. 338 F.2d at 449.

The difference between that situation and this one, though, is that there was no unsatisfied condition precedent to the existence of the supplier's Miller Act claim when it filed suit, whereas there was an unsatisfied condition precedent to the existence of Idaho First Bank's claim for a deficiency judgment when it filed suit. In other words, the supplier had an accrued Miller Act claim when it filed suit but merely lacked the right to do so at that time because the waiting period had not yet lapsed. Idaho First Bank, by contrast, had no accrued claim for a deficiency judgment when it filed suit because it had not yet sold the loan collateral and doing so was a condition precedent to accrual. *See* I. C. § 45-1512. *Security Insurance* was distinguished in much the same way in *United States ex rel. Wulff v. CMA, Inc.*, 890 F.3d 1070 (9th Cir. 1989), on which the Court relied in its summary-judgment decision. It does not support applying the relation-back doctrine here.

(R, pp. 822-24.)

On September 7, 2016, IFB filed a notice of appeal from the District Court's decision. (R, pp. 827-30.) The Bridges assumed they were close to the end: the Idaho Supreme Court would rule on this legal issue of the effect of a late filed deficiency action, hopefully affirming the District Court's (twice) well-reasoned decision, and the Bridges' litigation with IFB, on-going since June 19, 2015, would finally be over.

6. New Arbitration Action Seeking to Use Other Collateral to Recover the Same Alleged Deficiency on the Cottage Note That Had Already Been Barred.

Instead, on October 6, 2016, IFB sent the Bridges a document seeking to commence arbitration "for foreclosure and satisfaction of all amounts owing under 2 loan transactions." (R,

pp. 888, 894-96.) IFB was seeking to start a new foreclosure action against the Bridges based on the same claimed deficiency that Judge Scott had just dismissed with prejudice, while the appeal before this Court was pending. (*Id.*)

IFB based its new foreclosure action on a second loan that it provided to the Bridges in 2008. At the end of the construction of their cottage, the Bridges requested a second loan of \$150,000. (R, pp. 867-69.) The Bridges signed a separate, second promissory note (“Residence Note”) and second deed of trust (the “Residence Deed of Trust”) for the second loan. (R, pp. 871-86.) The Residence Deed of Trust secured the second loan through a lien on the Bridges’ residence in Boise (not a lien on the cottage in McCall). (R, pp. 878-86.) The Residence Deed of Trust contained a cross-collateralization provision that purported to use this lien on the Bridges’ residence in Boise to secure all other amounts that the Bridges owed to IFB, i.e. all amounts owed under the Cottage Note. (R, p. 878.) The cross-collateralization clause states:

Cross-Collateralization. In addition to the Credit Agreement, this Deed of Trust secures all obligations, debts and liabilities, plus interest thereon, of [the Bridges] to [IFB], ... whether now existing or hereafter arising, whether related or unrelated to the purpose of the Credit Agreement, whether voluntary or otherwise, whether due or not due, direct or indirect, determined or undetermined, absolute or contingent, liquidated or unliquidated, whether Grantor may be liable individually or jointly with others, whether obligated as guarantor, surety, accommodation party or otherwise and whether recovery upon such amounts may be or hereafter may become barred by any statute of limitations, and whether the obligation to repay such amounts may be or hereafter may become otherwise unenforceable....

(*Id.* (emphasis added).)

IFB asserted that the Residence Note was in default based on the Cottage Note default and that it could foreclose on the Residence Deed of Trust to recover its claimed deficiency on

the Cottage Note the District Court had just dismissed with prejudice. (R, pp. 887-96.) IFB pursued this new argument in arbitration and not to the District Court. (*Id.*) Despite the District Court's ruling that there could be no deficiency judgment on the Cottage Note under I.C. § 45-1512, IFB was claiming in arbitration that it still had a right to recover the full amount of that claimed deficiency by enforcing a cross-collateralization provision in the separate 2008 Deed of Trust encumbering the Bridges' Boise home.

7. Bridges' Motion to Stop IFB's Collateral Attack on Final Judgment in Arbitration and Have the District Court Resolve the Cross-Collateralization Argument.

The Bridges the asked the District Court to stop this collateral attack on its final judgment pending on appeal before this Court. (R, pp. 853-866.) The Bridges asked the District Court to (1) preclude IFB from raising these same Cottage Note deficiency claims in a second, different forum after having litigated that deficiency claim for over a year to a final judgment; (2) rule that its final judgment had *res judicata* effect to preclude this new argument by IFB to recover its claimed Cottage Note deficiency, which should have been raised with the District Court and is now barred by claim preclusion; or (3) alternatively, if not barred by its prior final judgment, then substantively reject this cross-collateralization argument based on at least five separate reasons. (*Id.*)

8. District Court Orders that Final Judgment Does Not Bar Cross-Collateralization Argument and Arbitration Can Resolve Cross-Collateralization Argument.

After oral arguments, the District Court rejected those arguments in a written opinion issued on December 15, 2016:

During the course of the appeal, which is pending, Idaho First Bank initiated

an arbitration proceeding against the Bridges, through which it is attempting to establish, among other things, that it may collect the remaining balance of the 2006 loan by foreclosing on the collateral the Bridges granted in connection with a separate loan it made to them in 2008. The collateral instrument for that loan contains what is commonly called a “cross-collateralization clause.” The clause provides that the collateral—a home located in Boise—secures not only the 2008 loan, but also any other debts the Bridges owe Idaho First Bank. Because of that provision, Idaho First Bank contends it may collect the remaining balance of the 2006 loan out of the proceeds of a foreclosure sale of the collateral for the 2008 loan.

After Idaho First Bank initiated the arbitration proceeding, the Bridges filed a motion asking the Court to block it. The Bridges also asked the Court to rule that the remaining balance of the 2006 loan has been extinguished and is uncollectable by any means, including resort to the collateral for the 2008 loan. The Bridges’ motion was argued on December 5, 2016. The Court denied the motion in an oral ruling. This order confirms that ruling in writing and supplements the Court’s reasoning.

Because Idaho First Bank’s appeal is pending, the Court lacks unfettered jurisdiction over this action. The jurisdiction it has is prescribed by I.A.R. 13(b). The Bridges contended their motion fits within the jurisdiction grants of I.A.R. 13(b)(6) and I.A.R. 13(b)(13).

The former of those rules, I.A.R. 13(b)(6), grants jurisdiction to decide motions made under I.R.C.P. 60(a) or 60(b) while an appeal is pending. The Bridges regarded their motion as one made under I.R.C.P. 60(b)(1) and 60(b)(6). Thus, to the extent the Bridges sought relief under I.R.C.P. 60(b)(1) or 60(b)(6), the Court had jurisdiction to decide their motion. The Court concluded, however, that no relief was appropriate under those rules. There is no “mistake, inadvertence, surprise, or excusable neglect” that justifies granting the Bridges relief from the judgment under I.R.C.P. 60(b)(1), nor is there “any other reason that justifies relief” from that judgment under I.R.C.P. 60(b)(6). Indeed, the judgment awarded them complete relief: dismissal of Idaho First Bank’s deficiency claims with prejudice. The Court sees no justification for reopening this action to litigate whether the Bridges are entitled to an additional measure of relief they didn’t seek: a declaratory judgment that the remaining balance of the 2006 loan is extinguished and not collectable by resort to collateral other than the McCall cottage.

The latter of those rules, I.A.R. 13(b)(13), grants jurisdiction to “[t]ake any action or enter any order required for the enforcement of any judgment or order.” The Court concluded that the Bridges’ motion doesn’t truly seek relief of that nature. The judgment the Court entered is self-enforcing--it’s a judgment of dismissal, awarding Idaho First Bank no relief on its deficiency claims. The arbitration proceeding Idaho First Bank subsequently commenced isn’t an attempt to relitigate its deficiency claims. Instead, it’s an attempt to collect the remaining balance of the 2006 loan by resort to collateral other than that which was at issue in this action.

Whether or not Idaho First Bank has the right to do so, Idaho First Bank’s attempt to do so isn’t a subversion of the judgment in this action. The relief the Bridges seek isn’t merely enforcement of the judgment; it’s an expansion of the judgment to resolve whether the remaining balance of the 2006 loan is extinguished (not just uncollectable by way of a deficiency claim) or instead may be collected by resort to other collateral. The Court lacks jurisdiction under I.A.R. 14(b)(13) to grant relief that amounts to expanding, rather than merely enforcing, the judgment.

Finally, the Court expressed the view that Idaho First Bank didn’t waive its right to arbitration under the 2008 loan documents, including the 2008 collateral instrument with the “cross-collateralization clause” at issue, by litigating this action. Thus, even if there were no jurisdictional impediment to granting the requested relief, the Court wouldn’t grant it. The arbitrator can decide whether Idaho First Bank has the right to collect the remaining balance of the 2006 loan through resort to the collateral for the 2008 loan.

(R, pp. 958-62.) The Bridges then filed their timely cross-appeal. (R, pp. 963-70.)

9. Utah Arbitrator Stays Proceedings to Allow This Court to Rule on Idaho Law.

The arbitration proceeding is now stayed by order of the arbitrator, James R. Holbrook (University of Utah law professor), who recognized the better position of this Court to apply Idaho law and address the same issues that he was being asked to address:

9. The Arbitrator has determined one of the questions to the Supreme Court, which the Bridges have included in their Appeal, is whether the Bank has the right to collect the Cottage Deficiency under the Residence Loan Clause, or

whether the Cottage Deficiency was extinguished and is therefor uncollectable as Residence Loan Debt. This issue is the crux of the Arbitration.

10. Because of the significance to the Parties of this issues – which is on appeal to the Supreme Court to be decided there under Idaho law – and because this issue will be decided within 18 months or less, the Arbitrator has determined to grant the Stay Motion pending the outcome on appeal.

(See Affidavit of Counsel in Support of Request for Judicial Notice, filed contemporaneously, Ex. A, pp. 2-3.) The arbitrator’s two orders granting the stay of arbitration pending resolution of this appeal are not in the Clerk’s Record of this matter but the Bridges have requested that this Court take judicial notice of those orders. (See Request for Judicial Notice of Filings in Related Arbitration, filed contemporaneously.)

II. ISSUES PRESENTED ON APPEAL

1. Whether the District Court’s judgment dismissing, with prejudice, the deficiency action on the Cottage Note was properly entered because the relation back doctrine in IRCP 15 has no applicability to save the untimely filing and the cottage and lease are properly characterized as real property for purposes of I.C. § 45-1512.

III. ADDITIONAL ISSUES PRESENTED ON CROSS-APPEAL

1. Whether the District Court erred in failing to rule that its judgment dismissing the deficiency action on the Cottage Note barred any subsequent attempt to foreclose on other collateral to recover the same alleged deficiency on the Cottage Note, based on principles of claim preclusion.

2. Whether the cross-collateralization provision can be used to collect a deficiency that is otherwise barred by I.C. § 45-1512, an issue raised but not reached by the District Court.

IV. ATTORNEY FEES ON APPEAL

Respondents/Cross-Appellants Bridges are claiming attorney fees on appeal pursuant to Idaho Code § 12-120(3).

V. ARGUMENT IN RESPONSE TO APPELLANT'S APPEAL

A. Standard of Review of District Court's Summary Judgment Ruling.

The Bridges agree with the Standard of Review in Appellant's Brief regarding the issues that Appellant raised.

B. The District Court Properly Applied I.C. § 45-1512 in Dismissing IFB's Claim for Any Deficiency Under the Cottage Note.

IFB has admitted that it missed the three month deadline for a deficiency action found in I.C. § 45-1512. IFB has no one to blame but itself for that error. The statute is clear and is easily met. The Bridges certainly have no blame for IFB's mistake. Thus, this litigation and appeal is solely IFB's attempt to ask the courts to bail it out and avoid the known and obvious consequences of its mistake.

IFB has consistently raised only two arguments to try and save its Deficiency Complaint that it has always admitted was filed three days after the three month deadline in Idaho Code § 45-1512. IFB claims that (1) Idaho Code § 45-1512 is inapplicable because the cottage and lease are personal property, not real property; and (2) the Deficiency Complaint is not untimely because an earlier complaint was filed and that earlier filing date should be used to meet the requirements in Section 45-1512. Both arguments were properly rejected by the District Court and should be rejected by this Court, as discussed below.

1. The Cottage and Lease Are Real Property.

IFB does not dispute that a leasehold interest in the cottage site is a real property interest. See I.C. § 55-101 (“Real property or real estate consists of: 1. Lands, possessory rights to land ...”); *Wing v. Martin*, 107 Idaho 267, 272, 688 P.2d 1172, 1177 (1984) (“Under a lease of real property, the lessee has the possessory interest”). However, IFB argues that the lease alone is valueless and what it was actually selling was the cottage. IFB claims that the cottage was personal property, not real property, so the foreclosure statutes for real property (including the anti-deficiency statute Section 45-1512) are inapplicable. That argument defies all common sense and logic, long established real estate legal principles, Idaho case law, the Deed of Trust contract that the parties signed, and IFB’s own long-standing characterization of the collateral.

a. Cottage is Affixed to Real Property Based Upon All Objective Evidence.

Idaho statute defines real property to include not only the land itself but also “that which is affixed to land.” I.C. § 55-101(2). The test for “affixed to land,” which was cited by the District Court and IFB, is found in *Spencer v. Jameson*, 147 Idaho 497, 501-02, 211 P.3d 106, 110-11 (2009):

When faced with the issue of fixture, we apply three general tests: “(1) Actual or constructive annexation to the realty; (2) Appropriation to the use of that part of the realty to which it is connected; [and] (3) Intention of the party so annexing to make the article a permanent accession to the realty.”

(*Id.*) In *Spencer*, this Court examined a “mobile” home and the affidavit of its owner that explained how it had been affixed to the land by use of a well, septic system, driveway, power lines, foundation, and decks. (*Id.*) This Court found that the mobile home was affixed and, therefore, real estate for purposes of a non-judicial foreclosure. (*Id.*) Since the mobile home in

Spencer was affixed, then certainly the cottage in this case is even more so affixed.

This Court recently further elaborated on intent determined in the third prong of the test, and adopted nine factors for consideration:

In *Rayl [v. Shull Enterprises, Inc.]*, 108 Idaho 524, 700 P.2d 567 (1984), the Court explained the intent factor as follows:

The intention sought is not the undisclosed purpose of the annexor, but rather the intention implied and manifested by his act. Thus, the intent should be determined from the surrounding circumstances at the time of installation, and not necessarily from testimony as to the subjective intent of the installer and his frame of mind at the time of installation. [T]he inquiry is not strictly as to the intention of the person himself who annexed the chattel to the freehold.... The inquiry is as to what intention must be imputed to him in the light of all the circumstances, when tested by the common understanding of those familiar with the subject.

The Court of Appeals has listed nine factors useful in objectively determining intent:

(1) the nature of the article; (2) the manner of annexation to the land; (3) the injury to the land, if any, by its removal; (4) the completeness with which the chattel is integrated with the use to which the land is being put; (5) the relation which the annexer has with the land such as licensee, tenant at will or for years or for life or fee owner [sic]; (6) the relation which the annexer has with the chattel such as owner, bailee or converter; (7) the local custom respecting treating such chattel as personal property or a fixture; (8) the time, place and degree of social, economic and cultural development, (e.g., a luxury in one generation is a necessity in another...); and (9) all other relevant facts surrounding the annexation.

Liberty Bankers Life Ins. Co. v. Witherspoon, Kelley, Davenport & Toole, P.S., 159 Idaho 679, 692, 365 P.3d 1033, 1046 (2016)(citations and internal quotations omitted).

Of the *Spencer* three part test, IFB appears to concede the first two prongs but challenges the intent prong. Interestingly, IFB does not address the nine factors related to objective intent from the *Liberty Bankers* case, as the nine factors all weigh in favor of showing objective intent

to affix the Cottage. The undisputed facts are that the cottage is on a cement foundation that is embedded in the ground; the materials used to build it were specifically chosen to match with the environment as a cottage on the shores of Payette Lake; it was built into the slope of the property and shaped and designed to match the topography; it was used as a residence on the Property; it is over 5,000 square feet; it sold for \$1.2 million; and, the construction of the cottage did not include any contingency planning for future removal or transport of the cottage to a site property. (R, pp. 421-444, 547-548.)

In other words, each of these *Liberty Bankers* objective factors is addressed by the undisputed evidence:

- | | |
|---|--|
| (1) “nature of the article” – | a cottage residence; |
| (2) “manner of annexation to the land” – | constructed on a foundation built into the land and built to match the topography; |
| (3) “injury to the land ... by its removal” – | no contingency for removal and therefore likely significant damage, if not complete destruction; |
| (4) “completeness with which the chattel is integrated with the use to which the land is being put” – | wholly integrated like any home; |
| 5) “relation which the annexer has with the land” – | long-term lease with rights to recover all value from the cottage upon non-renewal of the lease; |
| (6) “relation which the annexer has with the chattel” – | owner of the cottage with rights to recover value; |
| (7) “local custom respecting | local custom treats a cottage as real |

- | | |
|---|--|
| treating such chattel as personal property or a fixture” – | estate; |
| (8) “time, place and degree of social, economic and cultural development” – | unclear what this factor tests; |
| (9) “all other relevant facts surrounding the annexation” – | liened by a Deed of Trust, no other security agreement or financing statement, and IFB’s own documents refer to the cottage as real property collateral. |

(R, 386-395, 421-444, 466, 544-551, 659-662, 675-717.).

The only evidence that IFB raises to challenge the intent prong is language from the land-lease agreement that the Bridges had with the State of Idaho. (R. 458-475.) The 2006-08 land lease existing at the time the cottage was constructed merely stated that if the lease was breached, the State of Idaho could take back the real property and tear down any “improvements” not otherwise removed by the Bridges, including the cottage. (R, 459, 466.) This lease provision certainly compelled the Bridges to perform their lease but the possible draconian consequences of not performing is not evidence that the Bridges objectively intended to remove the Cottage from the Property. In fact, by constructing the million dollar Cottage, the Bridges (and any other rational person) intended it to be permanently affixed as real property and not as a detachable fixture removable from the underlying land if a breach were to occur.

The objective evidence is not in dispute, that the Bridges intended to affix the Cottage to the land so that it was a permanent part of the land. The three factors of the *Spencer* test are all met and summary judgment was properly granted.

b. The Parties Contracted For the Cottage to Be Real Property Subject to the Deed of Trust.

IFB also appears to argue that somehow the parties contracted around the Cottage being affixed to the land and instead agreed that it would only be considered personal property collateral. However, in making that argument, IFB relies upon a contract that was not even between the parties. The controlling contract between the parties defining the type of collateral is the 2006 Construction Deed of Trust. Importantly, the District Court pointed out that this Deed of Trust specifically includes the Cottage as real property collateral:

Indeed, the Construction Deed of Trust includes “buildings” in its definitions of the terms “Real Property” and “Improvements” but does not include “buildings” in the definition of the term “Personal Property.” (H. Bridges Decl. Ex. B at 1, 8.) The cottage surely is a “building” under that term’s ordinary meaning, making it “Real Property” for purposes of the Construction Deed of Trust. Thus, the terms of the Construction Deed of Trust are powerful evidence that, at the time it contracted with the Bridges, Idaho First Bank regarded the to-be-constructed cottage as real property rather than personal property.

(R, p. 781.) IFB does not dispute that interpretation of the plain language of the 2006 Deed of Trust. In addition, IFB does not dispute that all of its internal documents refer to the collateral as real property collateral. The Bridges submitted twelve different uncontested examples of internal IFB documents admitting that it was treating the cottage as a “residence” and “real property.” (R, p. 675-717.) IFB has failed to submit evidence to challenge those admissions.

Instead, IFB argues that a 2014 lease between the Bridges and the State of Idaho, which referred to the cottage as “personal property,” should trump the actual Deed of Trust between the Bridges and IFB. Again, the District Court cogently rejected that nonsensical argument:

The cottage’s characterization for purposes of the current lease is insignificant. There is no reason the cottage could not be characterized as

“Personal Property” for purposes of the lease relationship between the Bridges and the Idaho Department of Lands yet constitute real property as a matter of Idaho law for purposes of the loan relationship between the Bridges and Idaho First Bank.

...

The Bridges’ years-later agreement with the Idaho Department of Lands to a renewed lease that characterizes the cottage as “Personal Property” does not give rise to a reasonable inference that the Bridges intended, at that point or any other, for the cottage to be removed from the cottage site, as might disqualify it from having “real property” status as an article “affixed to land.” That is true even though both the Bridges’ original lease and the one to which they last agreed identify circumstances in which the Idaho Department of Lands could cause the cottage’s removal. ... The mere theoretical possibility of removal does not cause the cottage to fail the “affixed to land” test, particularly in the absence of any evidence the Bridges ever intended or expected removal to occur, as well as in the absence of any evidence that removal-and the obvious waste associated with it-was anything more than a theoretical or remote possibility.

(R, pp. 780-81.)

For the reasons discussed above, the Bridges ask this Court to affirm the District Court’s conclusion that the Cottage and lease were real property not personal property collateral; therefore subject to the requirements of Idaho Code § 45-1503 and -1512.

2. The Relation Back Doctrine Under IRCP 15 Has No Application.

A decision to deny application of IRCP 15(c) is a discretionary decision. *See, e.g., Trimble v. Engelking*, 130 Idaho 300, 303, 939 P.2d 1379, 1382 (1997) (“It must therefore be determined whether Trimble met the requirements of I.R.C.P. 15(c) for amendment of the complaint and relation back to the date of the original filing. The decision to grant or deny a party’s motion to amend a pleading is left to the trial court’s discretion, and we will not reverse such a ruling absent an abuse of this discretion.”). Between the District Court’s two memorandum decisions, four independent reasons exist explaining its refusal to apply IRCP

15(c) and the relation back doctrine to save IFB from its late deficiency claim. The District Court's thoroughly reasoned analysis shows that it "acted within the boundaries of this discretion and consistent with the legal standards applicable to the specific choices available to it." *See, e.g., Hoskinson v. Hoskinson*, 139 Idaho 448, 457, 80 P.3d 1049, 1058 (2003) (discussing test for abuse of discretion and finding no abuse in denial of Rule 15 motion).

a. The District Court Properly Applied Its Discretion Regarding the Equities of the Relation Back Doctrine As Applied to the Multiple Complaints Filed by IFB.

The District Court correctly concluded that the relation back doctrine in IRCP 15(c) is based in equity, *i.e.*, applied to do equity. *See, e.g., Scarborough v. Principi*, 541 U.S. 401, 418 (2004) (noting that Rule 15(c) "has its roots in the former federal equity practice.") (quoting 6A Charles A. Wright et al., *Federal Practice and Procedure* §1496 (2d ed. 1990)). IFB appears to concede this point and repeatedly requests that IRCP 15(c) be applied to provide mercy to IFB regarding its error in missing the three month deadline in Section 45-1512.

The District Court then noted how inequitable it would be if IFB were able to avoid the statutory deadline for filing a deficiency complaint by relying upon another complaint that was also improperly filed in violation of Idaho's deed of trust statutes:

...[R]elation-back is inappropriate because the original and first amended complaints were filed in violation of I.C. §45-1503(1). Under that statute, the grantor of deed-of-trust collateral is ordinarily not subject to suit before the deed-of-trust collateral has been sold in accordance with Idaho's deeds-of-trust act, at which point a deficiency claim may be asserted under section 45-1512 if the sale proceeds do not exhaust the loan balance. Idaho First Bank filed its original and first amended complaints before selling the deed-of-trust collateral, in reliance on an unsound argument that doing so did not violate section 45-1503(1) because the deed-of-trust collateral supposedly was "substantially valueless" under I.C. §45-1503(2).... That the deed-of-trust collateral was not "substantially valueless" is

proved by the \$1,200,088 sale price it fetched.

In any event, because Idaho First Bank violated section 45-1503(1) by filing its prior complaints before selling the deed-of-trust collateral, it seems entirely inequitable for its belated claim under section 45-1512 to relate back to the prior complaints. ... The Court sees no good reason to invoke a rule that is designed to do equity so as to allow Idaho First Bank's premature filing of suit in violation of one provision of Idaho's deeds-of-trust act to excuse its failure to satisfy the filing deadline set in another of the act's provisions.

(R, p. 778.)

The District Court correctly reasoned that the original two complaints filed by IFB were both filed in violation of Idaho statute. As discussed *supra*, the cottage and lease are real property and therefore subject to I.C. §45-1503, per its plain language:

If any obligation secured by a trust deed is breached, the beneficiary *may not institute a judicial action against the grantor or his successor in interest to enforce an obligation owed by the grantor or his successor in interest unless:*

- (a) The trust deed has been foreclosed by advertisement and sale in the manner provided in this chapter and the judicial action is brought pursuant to section 45-1512, Idaho Code; or
- (b) The action is one for foreclosure as provided by law for the foreclosure of mortgages on real property; or
- (c) The beneficiary's interest in the property covered by the trust deed is substantially valueless as defined in subsection (2) of this section, in which case the beneficiary may bring an action against the grantor or his successor in interest to enforce the obligation owed by grantor or his successor in interest without first resorting to the security; or
- (d) The action is one excluded from the meaning of "action" under the provisions of section 6-101(3), Idaho Code.

I.C. §45-1503 (emphasis added).

Unarguably, IFB brought a lawsuit seeking a personal judgment against the Bridges despite not having foreclosed the substantial real property collateral, as required by subsection

(a). Further, none of the additional exclusions outlined in subsections (b)-(d) apply, which shows that the lawsuit pursued by IFB violated I.C. §45-1503.

Thus, it is indisputable that IFB can, at the very most, relate back to a lawsuit it filed in violation of § 45-1503. The District Court properly exercised its discretion in ruling that IFB's request under IRCP 15(c) would be an inequitable use of the relation back rule. The use of a lawsuit filed in violation of one statute (§ 45-1503) in an attempt to save a second lawsuit filed untimely in violation of a second statute (§ 45-1512), is improper. Having properly applied its discretion, the District Court's refusal to apply IRCP 15(c) should be upheld on appeal, without even needing to consider the three additional reasons given by the District Court.

b. The District Court Did Not Abuse Its Discretion in Following the Approach of the Nevada Supreme Court in Similar Circumstances.

At the hearing on the original motion for summary judgment, the parties and the District Court conceded that they had not uncovered any case law similar to the facts of this case: namely, the attempted use of the relation back doctrine to save an untimely deficiency complaint by relation back to a foreclosure complaint (even a properly filed one). However, at the hearing on the motion to reconsider, the District Court noted that it had found a newly issued case from the Nevada Supreme Court that was factually similar. It expressly adopted the reasoning of that opinion, which reasoning echoed the arguments raised by the Bridges. (R, pp. 822-23.)

The case, *Badger v. Eighth Judicial District Court*, 373 P.3d 89 (Nev. 2016), involved a creditor pursuing claims against both a borrower and a guarantor. Under Nevada law, the creditor properly filed a lawsuit against the guarantor prior to the foreclosure being completed against the

borrower. (*Id.* at 92.) After the foreclosure, the creditor filed a deficiency lawsuit against the borrower within Nevada's statutory anti-deficiency deadline of six-months. (*Id.*) But Nevada law at the time also required a deficiency lawsuit against the guarantor within the same six-month deadline. (*Id.*) The creditor failed to include the guarantor in the deficiency lawsuit filed against the borrower and the creditor failed to amend its lawsuit against the guarantor to include the new deficiency claim. (*Id.* at 92-3.)

The parties then stipulated to consolidate and the creditor filed an amended complaint seeking a deficiency judgment against the guarantor. (*Id.* at 92.) The creditor argued that under Nevada's similar rule 15(c), the untimely amended complaint for a deficiency judgment against the guarantor should not be barred by the six month deficiency deadline. It contended that it could be saved by either the prior guarantor complaint (filed before the foreclosure) or the timely deficiency complaint against the borrower. (*Id.* at 93.) However, the Nevada Supreme Court rejected application of the relation back doctrine to either of those prior complaints, stating:

Consistent with these policy rationales, NRS 40.455 (1) requires that an application for a deficiency judgment be made within six months after the date of a foreclosure sale.... It follows that a complaint filed prior to a foreclosure sale cannot sufficiently put an obligor on notice of a deficiency claim.... As a general principle, this court will not interpret statutes so as to render the statutory language meaningless.

...

We conclude that relation back pursuant to NRCP 15(c) may not be utilized to save an untimely application for a deficiency judgment under NRS 40.455(1). We emphasized in [previous cases] that the six-month statutory deadline is a rigid one, and we reiterate here that a creditor's failure to timely file an application for a deficiency judgment per NRS 40.455 is fatal. To permit relation back pursuant to NRCP 15(c) in this case would allow creditors to bypass the deadline entirely with intentions to amend a pending complaint later. Such an outcome would be

inconsistent with Nevada's aim to protect borrowers and guarantors ... and would fail to provide guarantors with adequate notice of a deficiency claim....

Id., 373 P.3d at 94-5. The *Badger* court rejected any "actual notice" exception to the anti-deficiency statute (since the guarantor had actual notice of an intended deficiency action based on the timely deficiency claim brought against the borrower).

Here, the District Court agreed with that reasoning, "*Badger* thus furnishes additional support for the Court's summary-judgment decision that an amended complaint asserting an untimely claim for a deficiency judgment does not relate back to a collection complaint filed before foreclosure, in violation of Idaho's 'one action' rule." (R., p. 823.)

IFB tries to distinguish the *Badger* case, but incorrectly asserts that the opinion is only applicable to situations where a party (guarantor) is trying to use the relation back doctrine based upon a complaint filed by a different party (borrower). IFB overlooks the important fact that the guarantor also had its own complaint filed prior to the foreclosure and was trying to relate back to that complaint as well. The *Badger* court specifically addressed that issue: "It follows that a complaint filed prior to a foreclosure sale cannot sufficiently put an obligor on notice of a deficiency claim.... To permit relation back pursuant to NRCP 15(c) in this case would allow creditors to bypass the deadline entirely with intentions to amend a pending complaint later." 373 P.3d at 95.

The *Badger* case is directly on point and illustrates all of the practical reasons why the relation back doctrine should not be applied to circumvent an anti-deficiency statute. The District

Court properly applied its discretion in adopting that reasoning for denying application of IRCP 15(c).

c. The District Court Did Not Abuse its Discretion in Concluding that the Deficiency Action Does Not Arise Out of the Conduct, Transaction, or Occurrence Set Out in the Initial Complaints Filed Prior to the Foreclosure Sale.

The District Court also concluded that, for purposes of IRCP 15(c)(1)(B), a deficiency claim does not arise “out of the conduct, transaction, or occurrence” of a complaint filed prior to a foreclosure sale. (R, p. 776.) The District Court rightly concluded that a deficiency claim arises only after a foreclosure sale and, thus, cannot be said to arise out of any “conduct, transaction, or occurrence” that predates the foreclosure. (*Id.* (“The section 45-1512 claim arose out of the sale of the deed-of-trust collateral for less than the loan’s balance, not out of the Bridges’ loan default. Indeed, had everything else been the same but the sale proceeds equaled or exceeded the loan balance, no deficiency claim would have ever arisen, despite the Bridges’ loan default.”); “Where, by way of amendment, a party is setting forth a new cause of action, it does not relate back” and allegations “arising at a different time and with regard to a different set of facts” must be considered a new cause of action; *see also Wing v. Martin*, 107 Idaho 267, 269-71, 688 P.2d 1172, 1174-76 (1984) (*citing* 6 Wright & Miller, Federal Practice and Procedure § 1497, pp. 489-492 (1971)); *Black Canyon Racquetball Club v. Idaho First Nat’l Bank, N.A.*, 119 Idaho 171, 178, 804 P.2d 900, 907 (1991) (stating that “the new claims relied in part upon new facts not alleged in the original complaint”).)

The District Court further relied upon long-standing U.S. Supreme Court and Ninth Circuit precedent that if a claim has not yet “accrued” at the time of the original pleading, then

that original pleading cannot be used to save the claim from a deadline that only arose and fully ran after the claim accrued. See *United States ex rel. Texas Portland Cement Co. v. McCord*, 233 U.S. 157, 164 (1914) (“[I]t is elementary that an amendment dates back to the filing of the petition, and is to supply defects in the cause of action then existing, or at most to bring into the suit grounds of action which existed at the beginning of the case. In this case there was no cause of action to amend. Nor was the amendment of January 9, 1911, the introduction of a new cause of action existing at the beginning of the suit.”); *United States ex rel. Wulff v. CMA, Inc.*, 890 F.2d 1070, 1074 (9th Cir. 1989) (citing *McCord* in refusing to permit relation-back of an amended complaint asserting “a Miller Act claim which the Wulffs did not have when they filed their original complaint”). The District Court further explained:

It seems counterintuitive to apply Rule 15(c)’s relation-back doctrine in a way that causes any claim, including a deficiency claim, to relate back to a date earlier than the date on which the claim accrued. Indeed, a claim does not truly exist before it accrues. Had Idaho First Bank asserted a deficiency claim when it filed the prior complaints, that claim would have been subject to dismissal because it had not yet accrued and, depending on the sale price ultimately obtained for the collateral, might never accrue.

(R, pp. 776-77.)

Now, to counter those arguments, IFB cites to numerous cases that are not instructive because they fail to include any claims that accrued after the original pleading and after the “conduct, transaction, or occurrence” that is supposedly the basis for relation back. IFB cites cases under 15(d) that involve after-arising claims that are timely filed, only questioning whether they would be included in the same lawsuit as prior claims. IFB cites *Security Insurance Co. v. United States ex rel. Haydis*, 338 F.2d 444 (9th Cir. 1964), even though the 9th Circuit in *Wulff*

already pointed out the distinction: the claim had already accrued at the time of the original pleading and the original pleading contained the full claim; the only deficiency was that the original pleading was filed prior to a waiting period expiring. IFB also cites numerous cases involving claims that were not pled in the original pleading but could have been pled in that original pleading and, therefore, were allowed to be added through Rule 15(c).

In fact, none of the cases cited by IFB address the particulars of this case: an amended pleading that adds a claim that (1) had not accrued and did not exist at the time of the original pleadings; (2) could not have properly been pled in the original pleadings; (3) accrued several months after the original pleadings; (4) is trying to be saved by original pleadings that were filed in violation of statute and should be dismissed; and (5) if saved by the original pleadings would completely eviscerate the protections of Idaho's anti-deficiency statute (since a foreclosure complaint could then always be filed prematurely as a means to avoid the three month deadline). The District Court properly determined that none of the cases cited by IFB were on point like the *Texas Portland Cement* case from the U.S. Supreme Court, the *Wulff* case from the 9th Circuit, and the recent *Badger* case out of Nevada. The District Court did not abuse its discretion in finding that a deficiency claim does not accrue until after a foreclosure sale and the relation back doctrine is not applied to save claims that have not accrued at the time of the original pleading.

d. The District Court Had Additional Compelling Reasons It Could Have Used to Reject Application of the Relation Back Doctrine to These Facts.

The District Court discussed four reasons for rejecting the relation back doctrine as applied to the facts of this case. Surely, the District Court could have relied upon at least four

additional reasons. (R, 755.) Thus, even if this Court determines the District Court’s reasoning was in error, this Court may utilize those additional reasons to sustain the District Court. *See, e.g., Edged in Stone, Inc. v. Nw. Power Sys., LLC*, 156 Idaho 176, 181, 321 P.3d 726, 731 (2014) (“Where the lower court reaches the correct result by an erroneous theory, this Court will affirm the order on the correct theory.’ ... We affirm the district court’s order granting summary judgment ... because it reached the correct result, although by a different theory.”).

First, the relation back doctrine has no application here because it would be used to eviscerate the plain meaning of I.C. § 45-1512 and its three month deadline. (R, pp. 729-731.) The statute is plain: “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” I.C. § 45-1512 (emphasis added). The statute specifically states that the deficiency action must be brought “after” the sale under the deed of trust and within “3 months.” IFB is arguing it can get around that timing by filing two complaints that are both outside that specific three month window. IFB is seeking to avoid the plain meaning of the statute, which it cannot do. *Idaho Youth Ranch, Inc. v. Ada Cnty. Bd. of Equalization*, 157 Idaho 180, 184, 335 P.3d 25, 29 (2014) (“The objective of statutory interpretation is to give effect to legislative intent.”); *J & M Cattle Co. v. Farmers [653] Nat. Bank*, 156 Idaho 690, 694, 330 P.3d 1048, 1052 (2014) (“Statutory interpretation begins with an examination of the literal words of a statute.”); *Am. Bank v. Wadsworth Golf Constr. Co. of the Sw.*, 155 Idaho 186, 191, 307 P.3d 1212, 1217 (2013) (“When the statutory language is unambiguous, the clearly expressed intent of the legislative body must be given effect, and the

Court need not consider rules of statutory construction.”). The *Badger* court similarly addressed this point, “As a general principle, this court will not interpret statutes so as to render the statutory language meaningless.” 373 P.3d at 94.

Second, if IFB’s application of the relation back doctrine is correct, it would completely remove the protections I.C. § 45-1512 is intended to provide borrowers: an expedited resolution of any potential deficiency claim. (R, p. 731.) Apparently, in IFB’s world, any creditor contemplating the sale of property secured by a deed of trust can file a complaint at any time prior to the sale of the collateral, forever protecting creditors from satisfying the required “3 months” post-sale deadline in I.C. § 45-1512. Based on IFB’s logic, creditors would be able to file a deficiency claim any time after the sale of the collateral and it will always “relate back” to that original complaint. If this is the law, then every creditor will take this approach to protect themselves and eliminate any three month deadline. The *Badger* Court recognized this problem: “To permit relation back pursuant to NRC 15(c) in this case would allow creditors to bypass the deadline entirely with intentions to amend a pending complaint later. Such an outcome would be inconsistent with Nevada’s aim to protect borrowers ... and would fail to provide ... adequate notice of a deficiency claim” 373 P.3d at 95.

Third, I.C. § 45-1512 is a statute of repose and cannot be circumvented by the relation back doctrine. (R, 726-29, 757-63.) The U.S. Supreme Court has stated that equitable doctrines like estoppel or tolling can be used to extend a statute of limitation and save an otherwise untimely claim but cannot be used to extend a statute of repose:

Statutes of limitations, but not statutes of repose, are subject to equitable tolling, a doctrine that “pauses the running of, or ‘tolls,’ a statute of limitations when a litigant has pursued his rights diligently but some extraordinary circumstance prevents him from bringing a timely action.” Statutes of repose, on the other hand, generally may not be tolled, even in cases of extraordinary circumstances beyond a plaintiff’s control. . . . [A] ‘critical distinction’ between statutes of limitations and statutes of repose ‘is that a repose period is fixed and its expiration will not be delayed by estoppel or tolling.’”

CTS Corp. v. Waldburger, 134 S. Ct. 2175, 2183 & 2187 (2014) (emphasis added).

Persuasive case law has extended that holding to also include Rule 15 amendments, *i.e.* estoppel, tolling, *and Rule 15 amendments* cannot be used to extend a statute of repose or otherwise save a claim filed after the statute of repose has run. The logic is that equitable and procedural rules cannot be used to extend a statute of repose that contains a substantive right that on a fixed day the defendant will be free from any further claim. *See, e.g., Police & Fire Ret. Sys. of City of Detroit v. IndyMac MBS, Inc.*, 721 F.3d 95, 110 (2d Cir. 2013) (when a claim is commenced after the statute of repose has run, “the Rule 15(c) ‘relation back’ doctrine does not permit members of a putative class, who are not named parties, to intervene in the class action as named parties in order to revive claims that were dismissed from the class complaint for want of jurisdiction”); *In re Lehman Bros. Sec. & ERISA Litig.*, 800 F. Supp. 2d 477, 483 (S.D.N.Y. 2011) (“[A]s a number of courts have stated, the Rule 15(c) relation back doctrine does not apply to statutes of repose.”); *Miguel v. Country Funding Corp.*, 309 F.3d 1161, 1165 (9th Cir. 2002); *USM Corp. v. GKN Fasteners Ltd.*, 578 F.2d 21, 22 (1st Cir. 1978) (holding that “Rule 15 is not to be viewed as enlarging or restricting federal jurisdiction. The doctrine of relating back in time to the original pleadings does not affect the jurisdiction of the district court here in any

manner.”); *Resolution Tr. Corp. v. Olson*, 768 F. Supp. 283, 284-86 (D. Ariz. 1991) (finding that deficiency action was barred by the 90-day statute because “where the statutory time limitation is part of the substantive right, Rule 15(c) does not apply to relate back an untimely complaint.”).

Idaho’s deficiency statute is a statute of repose for two main reasons: (1) it acts to shorten and trump the normal statute of limitation for a claim on the underlying promissory note; and (2) it is focused on finality rather than stale claims. Here, the statute of limitation on a promissory note claim in Idaho is five years, but this three-month deficiency statute acts independent of that limitation period (as is typical of a statute of repose) and can therefore significantly shorten a time period the purpose of which is to prevent the filing of claims before the facts become stale, e.g. witnesses’ memories fade, witnesses die, or physical evidence is lost or misplaced. No one could reasonably argue that a three-month deficiency deadline was intended to preclude stale claims; rather its purpose (and the main purpose of all statutes of repose) is to create almost immediate closure for the debtor after sale of the real property collateral. The statute gives the creditor only three months to either assert further liability or the debtor gets a fresh start and freedom from liability. *See CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2183 (2014) (“Statutes of repose also encourage plaintiffs to bring actions in a timely manner, and for many of the same reasons [as a statute of limitation]. But the rationale has a different emphasis. Statutes of repose effect a legislative judgment that a defendant should ‘be free from liability after the legislatively determined period of time.’” (quoting C. J. S. §7, at 24 and also citing case law that compared the statute of repose to a bankruptcy discharge and fresh start)).

Thus, Idaho’s deficiency statute should be found to be a statute of repose wherein the

legislature granted a substantive right to debtors. Debtors are protected from further litigation if nothing is filed during the three months after the foreclosure sale, “even in cases of extraordinary circumstances beyond a plaintiff’s control,” and certainly in this situation where IFB has only itself to blame for failing to bring a timely deficiency action. *See W. Loan & Bldg. Co. v. Gem State Lumber Co.*, 32 Idaho 497, 501, 185 P. 554, 555 (1919).

Finally, as part of the equitable considerations under IRCP 15(c), it is important to note that there is no reason to expand Rule 15(c) to apply to this case. A creditor has three months to file a deficiency claim, per a clearly written and long-existing statute, and the creditor’s failure to meet that deadline does not merit a new expansion of IRCP 15(c) to protect the creditor from its own negligence. *See, e.g., In re Riverview Prods.*, 34 F. Supp. 482, 484-85 (W.D.N.Y. 1940) (“Section 1083 further makes available to the creditor an opportunity to establish this difference, if the creditor feels that the debt has not been satisfied upon the sale of the security, by applying to the foreclosure court, within a ninety day period, for a deficiency judgment, upon proof as to value of the security. If, for some reason, the creditor chooses not to so apply, that is no concern of the Legislature or of this Court.”); *Haines Pipeline Constr., Inc. v. Exline Gas Sys.*, 921 P.2d 955, 960-61 (Okl. Ct. App. 1996) (“FDIC’s failure to timely seek a deficiency judgment after the sale of the mortgaged premises operated to satisfy Exline’s debt.”); *Citrus State Bank v. McKendrick*, 215 Cal. App. 3d 941, 948-49, 263 Cal. Rptr. 781, 786 (1989) (“However, the language of section 580a could not be clearer. It states that any action for a deficiency judgment ‘must be brought within three months’ of the foreclosure sale. Given the mandate of section 580a, an action brought more than three months after the sale, as is the case here, is subject to

dismissal as untimely.”).

For all of the reasons stated above, IFB’s attempted use of the relation back doctrine is incorrect and its untimely deficiency claim is barred. The District Court’s ruling should be affirmed.

VI. ARGUMENT IN SUPPORT OF CROSS-APPELLANT’S APPEAL

A. Standard of Review of Order Dated December 15, 2016.

The issue of a District Court’s jurisdiction to address issues like claim preclusion during the pendency of an appeal is a question of law that this Court reviews de novo. *See e.g., Slavens v. Slavens*, 384 P.3d 962, 965 (Idaho 2016) (“[T]he issue of whether a district court has subject matter jurisdiction is a question of law, over which we exercise free review.”). Similarly, whether claim preclusion bars litigation or arbitration is a question of law that this Court reviews de novo. *See Ticor Title Co. v. Stanion*, 144 Idaho 119, 122, 157 P.3d 613, 616 (2007) (“Whether claim preclusion or issue preclusion bars relitigation between the same parties of a prior litigation is a question of law upon which this Court exercises free review.”); *see also Shackelford v. State*, 160 Idaho 317, 322, 372 P.3d 372, 377 (2016). The waiver of a party’s right to rely on an arbitration clause and therefore the subject matter jurisdiction of the District Court is a legal issue that this Court reviews de novo. *See Borah v. McCandless*, 147 Idaho 73, 77-79, 205 P.3d 1209, 1213-15 (2009).

B. The Idaho Supreme Court, And Not An Arbitrator, Should Resolve the Cross-Collateralization Issue.

The District Court presided over litigation between the Bridges and IFB that lasted for more than a year. From December 18, 2015, to August 1, 2016, that litigation centered on IFB’s

alleged claim to a deficiency owing on the 2006 Cottage Note. In that litigation, the Bridges specifically asked the District Court to rule that such a deficiency claim was “forever dismiss[ed]” and “IFB is forever barred from seeking any deficiency on the [2006 Cottage] Note.” (R. pp. 530, 532.) Ultimately, the District Court entered a judgment dismissing with prejudice IFB’s lawsuit to recover a deficiency judgment on the 2006 Cottage Note. IFB brought this appeal to challenge that final judgment of dismissal.

However, shortly after filing this appeal, IFB commenced a new and concurrent effort in a new forum to recover its same claimed deficiency owing on the 2006 Cottage Note. IFB’s arbitration action focuses on foreclosing a different piece of collateral (the Bridges’ Boise home) in order to recover the same alleged deficiency on the 2006 Cottage Note to which it was previously “forever barred.” IFB claimed that a cross-collateralization agreement allowed recovery of the claimed deficiency on the 2006 Cottage Note notwithstanding the final Judgment dismissing that deficiency claim with prejudice. The claim is was an obvious collateral attack on the District Court’s final Judgment.

The Bridges were forced to ask the District Court (the seemingly logical choice) to stop the arbitration and apply *res judicata* to bar a new action to recover the same claimed 2006 Cottage Note deficiency. The Bridges pointed out that this cross-collateralization argument could have, and should have, been raised before the District Court and was now barred by claim preclusion.

Surprisingly, the District Court declined to stop the arbitration and declined to address the *res judicata* or other substantive issues related to this cross-collateralization argument. Therefore,

the Bridges filed their cross-appeal because they contend a collateral attack on a final Judgment should be resolved by the Courts, not an arbitrator.

1. The District Court Erred By Claiming No Jurisdictional Authority to Address the Recovery of a Deficiency Claim Through a Cross-Collateralization Provision.

The District Court decided that it did not have jurisdiction to address the substantive issue raised by the Bridges. The Bridges ask whether IFB can forcibly switch forums to an arbitrator and get a second chance to recover a deficiency on the 2006 Cottage Note despite IFB already litigating with the Bridges to a final Judgment related to a claimed deficiency on the 2006 Cottage Note and despite the final Judgment dismissing with prejudice IFB's deficiency complaint. The District Court ruled that IFB's appeal of the final Judgment limited the District Court's jurisdiction so that it could not substantively address the Bridges' motion to stop that arbitration and substantively address IFB's collateral attack on the final Judgment. The District Court committed legal error here in improperly interpreting its jurisdictional limits. The District Court had jurisdiction to address those crucial questions notwithstanding the pendency of IFB's appeal.

The Bridges asked the District Court to stop the arbitration and address the substantive issue of IFB's new argument for recovering a deficiency on the 2006 Cottage Note, believing the District Court to be the obvious and most logical court to address the issue. The District Court had just spent fifteen months presiding over litigation between IFB and the Bridges regarding the 2006 Cottage Note, and twelve of those months was spent presiding over whether the Bridges could recover a deficiency on that 2006 Cottage Note. The District Court had just issued a final

Judgment and two Memorandum Decisions resolving that deficiency dispute.

Certainly, if no appeal had been filed, then the District Court (and arguably, the District Court in Valley County) would have had jurisdiction to address the issues of: stopping the forum shopping and a second bite at the apple through arbitration; enforcing the “litigation” exception to arbitration; and applying claim preclusion and the bar rule from the final Judgment. It, therefore, made no logical sense that the District Court would no longer be able to address these issues merely because IFB had filed an appeal. It made no logical sense that IFB would be able to protect its forum shopping to arbitration and its collateral attack on the final Judgment merely by filing an appeal prior to or during that arbitration action.

Jurisdiction seemed clear. The District Court and the Bridges both identified Idaho Appellate Rule 13 addressing the jurisdiction of the District Court during appeals to this Court, but applied them differently. The District Court said: “Because Idaho First Bank’s appeal is pending, the Court lacks unfettered jurisdiction over this action. The jurisdiction it has is prescribed by I.A.R. 13(b).” The Bridges pointed to two provisions that each provided broad language where jurisdiction would seem to be obvious: I.A.R. 13(b)(6), which incorporates the provisions of I.R.C.P. 60(b)(1) or 60(b)(6) regarding “relief from a final judgment” for “mistake, inadvertence, surprise, or excusable neglect” and for “any other reason that justifies relief”; and I.A.R. 13(b)(13), which allows the District Court to “Take any action or enter any order required for the enforcement of any judgment or order.” All of these provisions provided substantial room for the District Court to exercise jurisdiction over these important issues. Idaho does not appear to have any case law interpreting the meaning of these jurisdictional provisions or limiting their

scope, and the District Court did not cite any cases as controlling or persuasive.

In addition, the Bridges argued that the District Court had inherent authority to address these issues directly, as implicating its work during the last fifteen months and especially its final Judgment. Certainly the intent of these jurisdictional provisions appears to be to grant the District Court the ability to address questions and issues with practicality and efficiency, rather than binding the District Court's hands: "unless prohibited by order of the Supreme Court, the district court shall have the power and authority to rule upon the following motions and to take the following actions during the pendency on an appeal." Here, no Supreme Court order prohibited the District Court from addressing these issues under the broad language of I.R.C.P. 60(b)(1), I.R.C.P. 60(b)(6), and/or I.A.R. 13(b)(13).

In addition, it is difficult to understand how the District Court would lack "inherent" jurisdiction during the appeal to address the related issues of (1) IFB's waiver of its right to arbitration based on its litigation of the same or substantially similar issue, and (2) the claim preclusive effect of its judgment. If an appeal strips the District Court of this jurisdiction, then that would result in improper use of an appeal in order to facilitate forum shopping, i.e. solely because of the appeal, the Bridges are forced to proceed in an arbitration that would otherwise be barred by the District Court. That result lacks logic.

The District Court had jurisdiction, under I.A.R. 13(b), or inherently, to address the substantive issues regarding IFB's attempt to use arbitration to get around the District Court's final Judgment. The District Court committed legal error in ruling that it lacked jurisdiction to address the Bridges' motion.

2. Claim Preclusion Arising Out of District Court's Final Judgment on Cottage Note Deficiency Claim Should Prevent the New Argument of Cross-Collateralization Provision.

With jurisdiction a non-issue, the real question is whether the District Court committed error by failing to apply claim preclusion. The District Court failed to even expressly address the issue in its written order. The District Court only ruled:

Idaho First Bank didn't waive its right to arbitration under the 2008 loan documents, including the 2008 collateral instrument with the "cross-collateralization clause" at issue, by litigating this action. Thus, even if there were no jurisdictional impediment to granting the requested relief, the Court wouldn't grant it. The arbitrator can decide whether Idaho First Bank has the right to collect the remaining balance of the 2006 loan through resort to the collateral for the 2008 loan.

(R, p. 960.) That analysis failed to address the principles of claim preclusion that should have prevented IFB from collaterally attacking the final Judgment through a new arbitration proceeding.

Idaho law is clear that claim preclusion has broad scope to preclude subsequent litigation or arbitration about issues that could and should have been raised:

Claim preclusion bars adjudication not only on the matters offered and received to defeat the claim, but also as to "every matter which might and should have been litigated in the first suit." In other words, when a valid, final judgment is rendered in a proceeding, it "extinguishes all claims arising out of the same transaction or series of transactions out of which the cause of action arose." This Court has noted that the "transactional concept of a claim is broad" and that claim preclusion "may apply even where there, is not a substantial overlap between the theories advanced in support of a claim, or in the evidence relating to those theories."

Ticor Title v. Stanion, 144 Idaho 119, 126, 157 P.3d 613, 620 (2007); *State v. Wolfe*, 158 Idaho 55, 63, 343 P.3d 497, 505 (2015) ("[r]es judicata's preclusive effect bars 'not only subsequent re-

litigation of a claim previously asserted, but also subsequent re-litigation of any claims relating to the same cause of action which were actually made or which might have been made' in the first suit."); *Magic Valley Radiology, P.A. v. Kolouch*, 123 Idaho 434, 437, 849 P.2d 107, 108 (1993) ("[T]he transactional concept of a claim is broad, and ... the bar of claim preclusion is similarly broad.... [T]he bar of claim preclusion may apply even where there is not a substantial overlap between the theories advanced in support of a claim, or in the evidence relating to those theories."); *see also* Restat. 2d of Judgments, § 24 (2nd 1982) ("Dimensions of 'Claim' for Purposes of Merger or Bar -- General Rule Concerning 'Splitting': When a valid and final judgment rendered in an action extinguishes the plaintiff's claim pursuant to the rules of merger or bar ... the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose."); Restat 2d of Judgments, § 25 (2nd 1982) ("Exemplifications of General rule Concerning Splitting: The rule of § 24 applies to extinguish a claim by the plaintiff against the defendant even though the plaintiff is prepared in the second action (1) To present evidence or grounds or theories of the case not presented in the first action, or (2) To seek remedies or forms of relief not demanded in the first action.").

Res judicata, both claim and issue preclusion, is applicable during an appeal of the final Judgment at issue. *See, e.g.*, Restat 2d of Judgments, § 13, cmt. f (2nd 1982) ("The better view is that a judgment otherwise final remains so despite the taking of an appeal unless what is called an appeal actually consists of a trial de novo....") *Gilbert v. State*, 119 Idaho 684, 686, 809 P.2d 1163, 1165 (Ct. App. 1991) (noting Supreme Court looks to Restatement Second of Judgments

on issues of res judicata but ultimately not reaching issue regarding its application during the pendency of an appeal); *Roberts v. Hollandsworth*, 101 Idaho 522, 524 n.5, 616 P.2d 1058, 1060 (1980) (noting “that the pendency of an appeal does not suspend operation of an otherwise final federal court judgment as *res judicata* within the federal system....”); *Sacks v. Reader (In re Reader)*, 183 B.R. 630, 633-34 (Bankr. D. Idaho 1995) (concluding that Idaho courts would enforce res judicata principles during pendency of an appeal).

IFB already had its full opportunity to raise the cross-collateralization argument. In this litigation, IFB raised a claim that it could recover a deficiency balance under the Cottage Note. On January 20, 2016, the Bridges filed their motion for summary judgment to dismiss the deficiency action and permanently eliminate any claim for any further debt owing on the Cottage Note. Thus, IFB was obligated to then raise any and all its arguments to support its claim for that deficiency. *See Ticor Title*, 144 Idaho at 126, 157 P.3d at 620 (“every matter which might and should have been litigated in the first suit”); Restat 2d of Judgments, § 24 (2nd 1982) (“That a number of different legal theories casting liability on an actor may apply to a given episode does not create multiple transactions and hence multiple claims. This remains true although the several legal theories depend on different shadings of the facts, or would emphasize different elements of the facts, or would call for different measures of liability or different kinds of relief.”).

However, ITB raised only two arguments below – IRCP 15’s relation back doctrine and Article Nine – and chose to not then raise its third argument, first presented to the arbitrator – the cross-collateralization provision. IFB never mentioned its argument that this claimed deficiency

could be recovered against the Bridges' Boise home even if the deficiency action was barred under I.C. § 45-1512. IFB chose to keep silent on this issue, although IFB was perfectly able to raise the argument, and nothing prevented IFB from making the argument as all necessary facts supporting this theory had already occurred. *See, e.g., AgStar Fin. Servs., ACA v. Nw. Sand & Gravel, Inc.*, 161 Idaho 801, 391 P.3d 1271, 1282 (2017) (“[W] here a creditor forecloses against a portion of its security and obtains a deficiency judgment, it cannot then seek to recover against the additional security that was not sought in the first instance.”)

IFB forced the Bridges to first litigate for eight months to prevail on dismissing the deficiency action. Then, only after losing, did IFB raise this additional argument about the cross-collateralization provision for the first time. During the entirety of the litigation in this case, IFB never mentioned this alternative position. IFB should have raised this argument long ago, rather than splitting its claims in violation of *res judicata* principles. IFB chose not to raise its cross-collateralization argument with the District Court and now IFB should have to live with that decision. Parties do not get to split their claims in order to preserve two different bites at the apple.

Instead, IFB collaterally attacks the District Court's rulings by asking the arbitrator to contradict and undermine the District Court's rulings regarding IFB's attempt to recover a deficiency on the Cottage Note. The District Court already concluded that any deficiency claim on the Cottage Note is dismissed with prejudice because it was untimely filed. Having lost that issue and apparently conceding it expected to also lose the issue on appeal, IFB went to a different forum with an arbitrator hoping that the arbitrator would undermine the District Court's

Judgment. IFB was asking the arbitrator to find that a non-existent deficiency on the Cottage Note can still be recovered by foreclosing on the Bridges' Boise home. Rather than ask the District Court to address this argument, IFB went around the District Court and asked an arbitrator to decide the issue.

The District Court should have applied claim preclusion to bar this new arbitration proceeding. The District Court is the correct forum to interpret Idaho's claim preclusion law and apply its impact on its own final Judgment. *See, e.g., John Hancock Mut. Life Ins. Co. v. Olick*, 151 F.3d 132, 139 (3d Cir. 1998) (preclusive effect of prior judgments is a matter to be resolved by courts, not arbitrators); *In re Y & A Group Sec. Litigation*, 38 F.3d 380, 383 (8th Cir. 1994) ("The district court, and not the arbitration panel, is the best interpreter of its own judgment."); *Bryan Cty. v. Yates Paving & Grading Co.*, 638 S.E.2d 302, 304-05 (Ga. 2006) ("The principle stated ... is that 'even when arbitration is involved ... 'courts should not have to stand by while parties re-assert claims that have already been resolved.' 'No *matter what*, courts have the power to defend their judgments as *res judicata*, including the power to enjoin or stay subsequent arbitrations.'") (internal citations omitted); *C & O Dev. Co. v. American Arbitration Ass'n*, 48 N.C. App. 548, 552, 269 S.E.2d 685, 687 (1980) ('the extent of a judgment's binding effect is a matter for judicial determination').²

² IFB argues that Judge Scott properly refused to address the claim preclusion effect of his judgment because *res judicata* issues, including claim preclusion, should be resolved by the arbitrator and not by the courts. IFB cites to the *Storey Construction* case. In *Storey Construction*, the district court held that the arbitrability of *res judicata* issues should be resolved by the district court and not by the arbitrator. *Storey Construction, Inc. v. Hanks*, 148 Idaho 401, 405-407, 224 P.3d 468, 472-474 (2009) . That issue was not properly appealed, so the Idaho Supreme Court never reached the issue. *Id.*

In *dicta*, the Idaho Supreme Court did mention the issue and appeared to indicate that the arbitrator (not the court) should resolve issues of *res judicata* where "[t]here is nothing in the parties' contract excluding the defense of

The District Court's Judgment means that any further arguments that amounts are still owed on the Cottage Note and recoverable against any of the Bridges' assets are now precluded (claim preclusion). This Court should correct the District Court's legal error regarding the ramifications of claim preclusion, confirming that the District Court's final Judgment fully addressed all arguments for recovering on the Cottage Note and IFB's untimely third argument about a cross-collateralization provision is now barred.

C. Cross-Collateralization Provision Cannot Be Used to Revive Deficiency Claim Already Properly Dismissed With Prejudice Pursuant to Idaho Code § 45-1512.

Claim preclusion should prevent IFB's collateral attack on the District Court's final judgment. However, even if claim preclusion is inapplicable to bar IFB's cross-collateralization argument, the District Court erred by leaving this issue for the arbitrator to resolve. IFB chose to drag the Bridges into litigation for a total of fifteen months in District Court regarding the 2006 Cottage Note. After losing repeatedly in that litigation before the District Court, IFB should not

res judicata from their agreement to arbitrate." 148 Idaho at 406, 224 P.3d at 473, n.1. That footnote, however, as stated, is *dicta*. Idaho has no binding precedent regarding whether Judge Scott or this arbitrator should address the res judicata impact of Judge Scott's final judgment.

There is extensive case law to support the proposition that when a court presides over litigation that results in a judgment that then is potentially relevant to a subsequent arbitration demand, the Court (not the arbitrator) should be the person to decide the res judicata impact of that judgment and whether it bars arbitration. In another footnote, the Idaho Supreme Court quoted a Ninth Circuit case for the proposition that "[A] res judicata objection based on a prior arbitration proceeding is a legal defense that, in turn, is a component of the dispute on the merits and must be considered by the arbitrator, not the court." *Storey Construction*, 148 Idaho at 406, 224 P.3d at 473, n.1 (emphasis added.) That case involves a decision about the res judicata impact between two arbitration proceedings. That scenario is materially different from the res judicata impact between a judicial proceeding and a subsequent arbitration. The Ninth Circuit therein cites *John Hancock Mutual Life Insurance Co. v. Olick*, 151 F.3d, 132, 137, 138 (1998), where the Third Circuit found that "federal courts must protect the thought and integrity of prior judgments," a view supported by the Fifth, Seventh, Eighth, and Eleventh Circuits, which have specifically found that there is a material difference when the res judicata effect of a state or federal judgment is at issue (rather than a prior arbitration award).

Thus, this Court should follow the logic outlined above, finding that Judge Scott and the appellate courts are the proper forums to address the question of whether res judicata bars arbitration, and find that Judge Scott's final judgment and the doctrine of claim preclusion does bar further arbitration of a deficiency claim.

have been allowed to change the forum to arbitration to test alternative or additional theories. As a matter of law, IFB waived its right to rely upon any arbitration provision in seeking to recover first under the 2006 Cottage Note. As a matter of law, the District Court, not the arbitrator, had subject matter jurisdiction over the 2006 Cottage Note and recovery of any deficiency on that Note. The District Court should have forced IFB to finish any remaining litigation regarding the 2006 Cottage Note in District Court.

1. IFB is Prevented From Changing the Forum to Arbitration to Relitigate the Key Issue of Recovery of a Deficiency on the 2006 Cottage Note.

Ninth Circuit case law (and apparently uniform across all state and federal jurisdictions) is that arbitration demands cannot be used as a second bite of the apple or after a party has significantly litigated an issue in district court. *See Martin v. Yasuda*, 829 F.3d 1118 (9th Cir. 2016) (“[P]laintiffs have shown prejudice here because, should this case go to arbitration, they would have to relitigate a key legal issue on which the district court has ruled in their favor. We and other circuits routinely have found this factor dispositive because the plaintiffs would be prejudiced if the defendants got a mulligan on a legal issue it chose to litigate in court and lost.”); *Borah v. McCandless*, 147 Idaho 73, 78-79, 205 P.3d 1209, 1214-15 (2009); *Hansen v. State Farm Mut. Auto Ins. Co.*, 112 Idaho 663, 670-71, 735 P.2d 974, 981-82 (1987) (“The policy underlying the enforcement of arbitration agreements or provisions in a written contract is rendered meaningless when the parties to such agreements proceed with the litigation process.... In short, when it appeared that things were not going its way, State Farm wanted out of the litigation process.” (Internal citations omitted)).

The District Court (not an arbitrator) is responsible for deciding the issue of waiver. *See Martin v. Yasuda*, 829 F.3d 1118 (9th Cir. 2016) (“We have made clear that waiver by litigation conduct is part of the first category of gateway issues.... Accordingly ... the question before us is presumptively for a court and not an arbitrator to decide. Every circuit that has addressed this issue—whether a district court or an arbitrator should decide if a party waived its right to arbitrate through litigation conducted before the district court—has reached the same conclusion.”); *Borah*, 147 Idaho at 78-79, 205 P.3d at 1214-15 (affirming district court retaining jurisdiction despite arbitration demand because arbitration waived by litigation); *Hansen*, 112 Idaho at 670-71, 735 P.2d at 981-82 (affirming district court finding waiver of arbitration).

The District Court erred in not applying this waiver doctrine. The District Court did exactly what Idaho and Ninth Circuit law has said is prohibited: allowing IFB to switch the forum to arbitration seeking to litigate about the 2006 Cottage Note after litigating it for fifteen months in District Court, where it received an unfavorable ruling. This constitutes legal error. If claim preclusion was not applicable – and the Bridges certainly believe it is – then the District Court (not an arbitrator) should have concluded the litigation between IFB and the Bridges by addressing the substance of IFB’s cross-collateralization argument.

2. This Court Should Dismiss IFB’s Cross-Collateralization Argument.

Though the District Court erred and did not reach the substance of IFB’s cross-collateralization argument, this Court can still reach the legal issue, which was raised and fully briefed below, thereby most efficiently resolving this issue by avoiding a remand on this substantive issue. *See, e.g., United States v. Locke*, 471 U.S. 84, 92 n.99, 105 S. Ct. 1785, 1791

(1985) (“When the nonconstitutional questions have not been passed on by the lower court, we may vacate the decision below and remand with instructions that those questions be decided, or we may choose to decide those questions ourselves without benefit of lower court analysis. The choice between these options depends on the extent to which lower court factfinding and analysis of the nonconstitutional questions will be necessary or useful to our disposition of those questions.” (Internal citations omitted)); *Mort v. United States*, 86 F.3d 890, 893 (9th Cir. 1996) (“In this case, the facts are undisputed and further fact finding is unnecessary Thus, we can determine as easily as the district court . . . and we exercise our discretion to do so.”); *Marsoner v. United States (In re Grand Jury Proceedings)*, 40 F.3d 959, 964 (9th Cir. 1994) (stating that “the record is sufficiently developed and . . . remand is unnecessary”); *Meinhold v. United States DOD*, 34 F.3d 1469, 1474-75 (9th Cir. 1994) (finding that “further factfinding is unnecessary and we can determine as easily as the district court”); *Killinger v. Twin Falls Highway District*, 135 Idaho 322, 17 P.3d 266 (2000) (reversing summary judgment for condemnor and entering summary judgment for property owner on facts before it).

IFB claims that it can foreclose on the Bridges’ Boise home to recover the deficiency that was previously dismissed with prejudice, relying on the following language in a Deed of Trust on the Bridges’ home:

CROSS-COLLATERALIZATION. In addition to the Credit Agreement, this Deed of Trust secures all obligations, debts and liabilities, plus interest thereon, of [the Bridges] to [IFB], ... whether now existing or hereafter arising, whether related or unrelated to the purpose of the Credit Agreement, whether voluntary or otherwise, whether due or not due, direct or indirect, determined or undetermined, absolute or contingent, liquidated or unliquidated, whether Grantor may be liable individually or jointly with others, whether obligated as guarantor, surety, accommodation party or

otherwise and whether recovery upon such amounts may be or hereafter may become barred by any statute of limitations, and whether the obligation to repay such amounts may be or hereafter may become otherwise unenforceable....

(R, p. 878.)

IFB is claiming that the protection of the anti-deficiency statute was waived by the Bridges when they signed this 2008 Deed of Trust with this cross-collateralization provision. For numerous reasons, IFB violated public policy by having the Bridges sign this boilerplate and over-reaching provision. Therefore, the provision should not be enforced to recover any further amounts under the 2006 Cottage Note.

First, public policy voids any contractual provision that attempts to violate state statute, and waiver is no defense to that violation of statute. *See Wernecke v. St. Maries Joint Sch. Dist.* # 401, 147 Idaho 277, 286-88, 207 P.3d 1008, 1017-19 (2009) (“If a contract is illegal and void, the court will leave the parties as it finds them and refuse to enforce the contract. The contract cannot be treated as valid by invoking waiver or estoppel. Therefore, because the Agreement was illegal and violative of the Act, ISIF cannot rely on the doctrines of waiver and estoppel to enforce the Agreement against Wernecke. ... [T]his Court will not enforce an illegal contract, regardless of the fact that the parties knowingly entered into that contract.” (Internal citations omitted)); *see also AED, Inc. v. KDC Invs., LLC*, 155 Idaho 159, 167, 307 P.3d 176, 184 (2013) (illegal contract violating statute); *McDougall v. Kasiska*, 48 Idaho 424, 436-37, 282 P. 943 (1929) (public policy prohibited agreements containing usurious rates). Idaho has not yet addressed the specific issue of a contractual waiver of anti-deficiency protections, but our case law gives clear direction of how that issue should be resolved.

Second, case law from other jurisdictions has consistently rejected any contractual waivers of the anti-deficiency statute protections. *See, e.g., Brunsoman v. Scarlett*, 465 N.W.2d 162, 163-69 (N.D. 1991) (“The rights and defenses granted debtors by the anti-deficiency judgment law would be largely illusory if a prospective creditor could compel a prospective debtor to waive them at the time the mortgage is executed. We therefore conclude, as have other courts, that, because of the public policy against deficiency judgments, the procedural rights granted mortgagors and vendees under the anti-deficiency judgment law cannot be contractually waived in advance of default.”); *Palm v. Schilling*, 244 Cal. Rptr. 600, 609 (1988) (“The explicit language of [the anti-deficiency statute] brooks no interpretation other than that deficiency judgments are prohibited To allow a purchase money creditor to circumvent the absolute rule by enforcing a purported waiver of section 580b in exchange for other concessions would flaunt the very purpose of the rule.... Contractual waiver as the quid pro quo for any other concession is contrary to public policy.”); *Chem. Bank v. Belk*, 41 N.C. App. 356, 363, 255 S.E.2d 421, 426 (1979) (“The protection of the anti-deficiency judgment statute ... cannot be waived since that statute was designed for the benefit of the general public and was not intended to be merely a right which could be waived or which purchasers could be compelled to waive as a prerequisite for obtaining financing.”); *Stretch v. Murphy*, 166 Or. 439, 447-48, 112 P.2d 1018, 1021 (1941) (“The [anti-deficiency] statute here involved is not one creating a merely personal privilege which may be waived. It is an inhibition against the court’s rendering a certain kind of judgment in foreclosing a certain kind of mortgage. Its effect is to deprive the circuit court of power theretofore granted it by the legislature. Parties to contracts cannot by agreement invest courts

with jurisdiction not conferred upon the courts by law. That part of the contract before us which attempts to reinvest the circuit court with power of which it has been specifically divested by the legislature is void as contravening the declared public policy of this state. No right of action for damages can be based upon the breach of such illegal agreement.”). Other states may have different variations of their anti-deficiency protections but the overall concept is the same – statutes in Idaho and other states strictly limit how lenders can recover deficiencies, require exact compliance by lenders, and thereby create statutory protections for borrowers.

Third, public policy voids any contractual provision that attempts a pre-default waiver of the protections of a statute of limitation. *See, e.g.*, 51 Am Jur 2d Limitation of Actions § 349 (2nd 2015) (“A purported waiver of the [statute of limitation] defense in the future, is void and unenforceable as contrary to public policy.”); *see also Haggerty v. Williams*, 84 Conn. App. 675, 680-82, 855 A.2d 264, 268-69 (2004) (listing thirteen jurisdictions holding such waivers to be unenforceable for two reasons: “we fear that if we were to uphold the validity of such waivers in the original contract, ‘such a stipulation would be inserted in every promissory note and similar instrument as a matter of routine. The door would be open to the very abuses the statute was designed to prevent, and the result would be an annihilation of the statute.’” (Internal citations omitted)); *Ross v. Ross*, 393 P.2d 933, 934 (1964) (“We have before held that the statutes of limitation of this state [Arizona] are declarations of public policy as well as a private right to the individual. Public policy cannot be wiped out by a private attempt to repeal the statutes in advance. The waiver of ‘diligence in bringing suit’ was ineffective.” (Internal citations omitted)).

Idaho does not appear to have addressed this specific issue yet. However, the reasons for

the rule are obvious: every contract would require a pre-default waiver of statute of limitation protections if that were allowed, thereby effectively eliminating all statutes of limitation. IFB could provide no case to challenge this proposition. Instead, IFB tried to confuse the Court by providing cases about waivers of statutes of limitation post-breach. Clearly those post-breach waivers are allowed and happen all the time and do nothing to undermine the purpose of statutes of limitation.

Fourth, even ignoring the unenforceability of all waivers that violate statute and public policy, a waiver must be knowing and voluntary. *See Brand S Corp. v. King*, 102 Idaho 731, 734, 639 P.2d 429, 432 (1981) (“Waiver is a voluntary, intentional relinquishment of a known right or advantage.”). Here, the cross-collateralization provision says nothing about the anti-deficiency statute, so IFB cannot claim the Bridges made a knowing and intentional waiver of those protections. While the anti-deficiency protections of I.C. § 45-1512 are well known and existing for decades, IFB chose not to give any meaningful disclosure of what statutory protections were purportedly being waived. IFB certainly should have specifically referenced those protections if it intended its boilerplate and non-negotiable Deed of Trust to contain a knowing and intentional waiver of those protections. Accordingly, IFB cannot enforce a waiver it never obtained.

Fifth, the anti-deficiency statute is a statute of repose that extinguishes the debt, rather than just making the debt “barred by any statute of limitations [or] ... otherwise unenforceable,” so the language in the cross-collateralization provision is not applicable. (*See supra* pp. 29-31.) For all of the above reasons, IFB’s argument to undermine the District Court’s prior ruling

dismissing the deficiency action should be rejected.

VII. ATTORNEY FEES ON APPEAL

The Bridges are entitled to attorney fees on appeal pursuant to I.C. § 12-120(3). Attorney fees are allowed on appeal under I.C. § 12-120(3) to the prevailing party for actions based on a note and/or a commercial transaction. *Prehn v. Hodge*, 161 Idaho 321, 385 P.3d 876, 887 (2016).

Section 12-120(3) provides:

In any civil action to recover on an open account, account stated, note, bill, negotiable instrument, guaranty, or contract relating to the purchase or sale of goods, wares, merchandise, or services and in any commercial transaction unless otherwise provided by law, the prevailing party shall be allowed a reasonable attorney's fee to be set by the court, to be taxed and collected as costs.

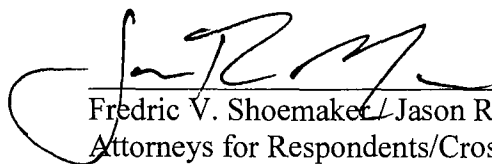
Here, the Bridges prevailed before the District Court regarding litigation about a promissory note, finding that IFB could not recover any further on the 2006 Cottage Note. On appeal, the Bridges similarly should prevail. Therefore, pursuant to the plain language of the statute regarding a “note” and/or a commercial transaction, the Bridges are entitled to their attorney fees for prevailing on appeal regarding the dismissal of IFB’s claim for a deficiency on the 2006 Cottage Note.

VIII. CONCLUSION

For all the reasons stated above, the Bridges respectfully request that this Court: (1) affirm the District Court’s final Judgment permanently dismissing IFB’s attempt to recover a deficiency on the 2006 Cottage Note; and (2) reverse the District Court’s order failing to apply res judicata principles to bar IFB’s untimely attempt to raise a cross-collateralization argument to collaterally attack that final Judgment.

RESPECTFULLY SUBMITTED this 18th day of July, 2017.

GREENER BURKE SHOEMAKER OBERRECHT P.A.

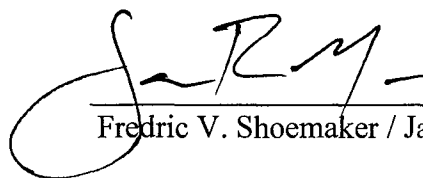

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18th day of July, 2017, I served a true and correct copy of the foregoing JOINT RESPONDENTS' AND CROSS-APPELLANTS' BRIEF to the following person by the following method:

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