

May, 2016

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Your leadership is pleased to bring this valuable member service to you and we welcome your comments and suggestions for future issues.

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Idaho Land Title Association

Dear ILTA Members,

This month I want to report back to the membership about the ILTA's participation and success at the ALTA Federal Conference and Lobby Day in Washington, D.C. on May 16, 17 and 18th. Idaho was represented by me, Daryl Olsen, J.T. Jacobsen and Quinn Stufflebeam ("ILTA"). The conference brings ALTA members to Washington to amplify our voice and advance our common interests.

Over 250 title insurance and settlement industry professionals met in Washington, D.C. to discuss the changes and challenges our industry is facing and to find solutions for ALTA and ILTA members. The energy at the Conference was outstanding and it comes from the clear understanding of how important it is for us to make sure that elected officials and all policy makers understand the benefits that consumers receive from the title insurance and the settlement industry.

We spent the first two days of the conference learning about how industries adapt to change and what strategies are effective for bringing about helpful change to our industry. These discussions helped prepare us for Lobby Day. This year was especially important because on April 29, 2016, Director Cordray announced that the CFPB would be reopening the TRID rule late this summer for comments and possible changes (nka Know Before you Owe rule). This came at a perfect time for us to remind Congress about the unnecessary challenges and confusion brought by TRID.

Below are a few main talking points that ILTA focused on when we met with Idaho Senators, Representatives and staffers.

- The need for the CFPB to provide clarification and formal guidance about how to comply with the 1,888 page complicated regulation. The new regulation is causing confusion for consumers at the closing table and clarification and guidance about the practical application of the regulation is necessary.
- CFPB should fix the rule's requirement that is causing consumers to receive incorrect title insurance premium disclosures. The regulations require that we improperly disclose title insurance premiums in a simultaneous issue scenario. This means that consumers are provided with inaccurate information about their title insurance costs. Consumers should receive clear information about their title insurance costs on the Closing Disclosure required under TRID.

We also educated our Congressmen on the value of our industry by explaining:

- On average, the title industry collects \$4.8 billion in back income taxes and recovers \$325 million in unpaid child support per year. The title industry employees 108,000 professionals with offices in every county in the United States.
- Title insurance is a **one-time** fee that financially protects homebuyers for as long as they own the home. ALTA members educate homebuyers about what to expect when buying a home and how an owner's title insurance policy helps provide peace of mind by reducing their risk and protecting their property rights.

We encouraged our Representatives to join a "Dear Colleague" letter that was sent to House members by Reps. Ross (R-FL) and Perlmutter (D-CO). A "Dear Colleague" letter is correspondence that is sent by a member of Congress to other congressional offices to encourage others to cosponsor, support, or oppose an upcoming matter, such as a bill. The letter sent by Reps. Ross and Perlmutter encouraged their fellow Representatives to use the TRID rulemaking process to fix inaccurate title insurance disclosures.

We met with Senator Risch personally and we met with staff members of Senator Crapo, Congressman Labrador and Congressman Simpson. I am pleased to report that both Senator Risch and Senator Crapo agreed to sign a "Dear Colleague" letter to Director Cordray. ALTA is in the process of following-up with the other Representatives but we are confident they will follow suit and join the House letter.

The re-opening of the TRID rule was not the only topic of conversation at the Conference and the impact that the ALTA has for our industry was very evident. The ALTA Committees are diligently working on goals and priorities to resolve industry issues such as, but in no way limited to, pushing model legislation for predictable or flat recording fees, industry compliance, updated ALTA policy and endorsement forms, cyber security and of course continued pressure on CFPB. This conference reiterates the importance of having a strong industry presence through ALTA and TIPAC (Title Industry Political Action Committee). This strength is what allows our industry to get CFPB's ear as well as our Representatives and Senators. Advocacy is vitally important and without TIPAC and ALTA our industry has no cards to play. It is only through our support of TIPAC that ALTA can continue to have influence with Congress and make our industry stronger. If you haven't done so already, I encourage you to contribute to TIPAC and IPAC today! If you have any questions you can contact the ILTA PAC Committee at idaholandtitle.com/committees/.

With all of the challenges we face in our industry, sometimes we have to remind ourselves that the title industry is very strong. We are good people and the products and services we provide are valuable to the people we serve. *We protect property rights! We provide peace of mind!*

Best regards,

Cindy Guanell

President, ILTA

Matt Ryden, Judiciary Chair

Greetings, Members. The following are summaries of recent Idaho Supreme Court decisions bearing some significance to our daily lives. Enjoy.

McKay v. Walker, Idaho Supreme Court Docket No. 42434 (March 23, 2016)

This case examines the interplay between mortgage law and judgment lien concepts to resolve a legal malpractice suit arising from a divorce settlement.

Facts: The assets in the divorce proceeding included a note in favor of Husband secured by a mortgage on real property. Taking into consideration the payment terms and value of this Note, the parties reached a property settlement agreement (“PSA”). The PSA required Husband to pay \$800,000 to Wife. The PSA was recorded in the real property records by attachment to a recorded Divorce Decree. The PSA did not recite the instrument number of the mortgage or the legal description of the secured property.

Husband obtained a \$1.2 million judgment against the borrower after it failed to make payments under the Note. Multiple creditors with insured priority were involved in this litigation. As a result, Husband assigned the judgment to a title company in exchange for immediate payment of the judgment amount. When Husband failed to remit any of these collected funds to Wife in satisfaction of the PSA, she initiated contempt proceedings against him, and ultimately accepted a settlement agreement modifying Husband’s payment obligations.

Claim: The Wife brought a legal malpractice action, contending that if her divorce attorney had included the instrument number and legal description of the mortgage in the recorded PSA, she would have had a judgment lien against the proceeds of the Note under Idaho Code 11-1110.

Holding: The Supreme Court upheld the lower court’s determination that the failure to recite the instrument number or legal description of the mortgage in the Divorce Decree made no difference because a mortgage is personal property, not real property, and therefore not subject to a judgment lien.

Idaho’s judgment lien statute, Idaho Code 11-1110, provides that a recorded judgment or decree “becomes a lien upon all real property of the judgment debtor in the county, not exempt from execution, owned by him at the time or acquired afterwards at any time prior to expiration of the lien.” (Emphasis added.)

The Court specifically addressed the Wife’s reliance on oft-cited case law indicating that a deed of trust (and, by analogy, a mortgage) is an interest in real property. The Court resolved this apparent inconsistency by declaring that all interests in real property are not necessarily real property in and of themselves. Additionally, the legal principle that “title passes” with a deed of trust did not mandate a determination that a deed of trust or mortgage is real property. Instead, even if title passes, and even if trust deeds and mortgages are required to be treated like real property for recording purposes, the interest is nothing more than a contingent right to sell.

Based upon this holding, the current state of the law in Idaho is that deeds of trust and mortgages are *not* real property subject to a judgment lien under Idaho Code 11-1110.

Houpt v. Wells Fargo, Idaho Supreme Court Docket No. 41990 (December 29, 2015)

In this case, a Borrower brought a “wrongful foreclosure” action on ground that the lender was not the beneficiary of record when the trustee initiated foreclosure.

Facts: In 1993, the Houpts executed a Deed of Trust in favor of American Bank of Commerce, as beneficiary. In 2004, through a series of mergers, Wells Fargo acquired the obligation secured by the Deed of Trust. In 2010, at the request of Wells Fargo, the Trustee recorded a Notice of Sale. At the time, no Assignment had been recorded and American Bank of Commerce was the beneficiary “of record.”

One day before the Trustee’s Sale, the Houpts filed for bankruptcy. Wells Fargo obtained stay relief and resumed foreclosure, issuing a new Notice of Sale, which clarified that the “Beneficial Interest is now held by Wells Fargo Bank, National Association, by merger agreement dated February 5, 2004.”

Lawsuit: Shortly before the new sale date, the Houpts filed their complaint, seeking to enjoin the sale and recover damages from Wells Fargo and the Trustee. Wells Fargo then recorded an Assignment of Deed of Trust. The Houpts later stipulated to a sale with proceeds tendered to the court, while reserving their claims for damages for wrongful foreclosure.

Results:

Preliminary Injunction Denied. The Houpts initially sought to enjoin the sale on the ground that Wells Fargo was not the beneficiary of record at the time the first Notice of Sale was recorded, as purportedly required by Idaho Code 45-1505. This claim failed at the District Court level and was not examined by the Supreme Court. Wells Fargo had contended that: 1) it was exempt from the requirement to record an assignment because it was the beneficiary by merger under 12 U.S.C. 215(a); and 2) it cured the defect by recording an Assignment during the litigation. The District Court found that Wells Fargo’s recordation of the Assignment, even after the first Notice of Sale, cured the defect. (Note: this determination was neither disturbed nor examined by the Supreme Court.)

Claim for Damages for “Wrongful Foreclosure” Against Wells Fargo Dismissed. The Supreme Court noted that, unlike other jurisdictions, Idaho does not recognize a distinct claim for “wrongful foreclosure.” Instead, such actions must be brought under the theory of conversion, whereby an action accrues only after property is wrongfully taken from a plaintiff’s possession. In the context of foreclosure, this could only occur upon the actual foreclosure sale. In this case, the parties stipulated to a sale with proceeds tendered to the court. Therefore, no foreclosure sale actually occurred and the Houpts claim failed.

Claim for Damages Against the Trustee for Violation of Fiduciary Duty Dismissed. The Houpts contended that the Trustee was liable to them for failing to verify the beneficiary of record before issuing the first Notice of Sale. The Supreme Court noted that, in Idaho, “a trustee may initiate foreclosure without first proving ownership of the underlying note or demonstrating that the deed of trust beneficiary has requested or authorized the trustee to initiate those proceedings.” *Trotter v. Bank of New York Mellon*, 152 Idaho 842, 847 (2012). The Court found that, even if the Houpts claim had not been rendered moot by their subsequent stipulation to a sale, no claim would have existed against the Trustee because the Trustee had no obligation to verify the owner of the note or prove that the beneficiary authorized the foreclosure.

2016 Idaho Primary Election Report

Martin Bilbao, Gallatin PA

ILTA Lobbyist

Tuesday, May 17 was the 2016 Idaho Primary Election. Every election cycle has its own surprises and this year's primary election was no different. Seven incumbent Republican legislators will not return next session after losing to primary opponents.

Many key incumbent legislators faced difficult primary elections. Several of the most important incumbent victories came from Sen. Shawn Keough (R, District 1), Rep. Eric Redman (R, District 2), Rep. Luke Malek (R, District 4), Sen. Abby Lee (R, District 9) and Sen. Patti Anne Lodge (R, District 11). In the end, Keough, Redman and Malek won handily. Lodge's race was much closer than expected though she won in a 52.9% to 47.1% split. As expected, Lee's race was very tight and ended only 28 votes ahead of her opponent.

Below is a summary of some of the key races and how the outcomes will likely affect the Idaho Legislature in 2017.

Rep. Kathy Sims (R) District 4, lost to **Paul Amador** in a 48.4% to 51.6% split. Sims, in her third term, served as Vice Chair of the Local Government Committee, and sat on the Judiciary, Rules and Administration Committee as well as State Affairs. Amador has a general election opponent but it is expected that he will win.

Sen. Sheryl Nuxoll (R) District 7, lost to Carl Crabtree in a 48.8% to 51.2% split. Nuxoll in her third term served as Vice Chair of the Health and Welfare Committee as well as serving on JFAC and the Resources and Environment Committee. Crabtree has a general election opponent but is expected to win the election.

Rep. Shannon McMillan (R) District 7, lost to Priscilla Giddings in a 38.7% to 61.3% split. McMillan in her third term served on the Agriculture Affairs Committee, Judiciary, Rules & Administration Committee as well as State Affairs. Giddings has a general election opponent but is expected to win the election.

Rep. Merrill Beyeler (R) District 8, lost to Dorothy Moon in a 41.4% to 58.6% split. Moon who has been active in the Republican Party is expected to easily beat her general election opponent who is running as a constitutional party candidate.

Rep. Rich Wills (R) District 23, lost to Christy Zito in a 44.9% to 55.1% split. Wills in his seventh term has served as Chair of the Judiciary, Rules & Administration Committee as well as serving on the Education Committee and the Transportation and Defense Committee. This race was one of the biggest incumbent surprises and will greatly affect the committee chairman discussion during reorganization this December.

Rep. Pete Nielsen (R) District 23, lost to Megan Blanksma in a 22.1% to 77.9% split in a three person primary race. Blanksma will be the new representative as she does not have a general election opponent.

Rep. Paul Romrell (R) District 35, lost to Karey Hanks in a 48.1% to 51.9% split. Romrell's loss was another surprise as most thought he would be safe in his reelection. Hanks will be the new representative as the primary election was the only contested race.

***Open Seats:** In addition to upsets in the race, there are a few contested races remaining in seats where the incumbent retired this year. These races will be determined in November.*

Scott Syme (R) won a five-way GOP primary for Gayle Batt's District 11 House of Representatives seat. Scott has a Democrat opponent, Edward Savala, but is expected to win in November.

Gayann DeMordaunt (R) of District 14 beat her primary opponent and is expected to beat Glida Bothwell in the November election. DeMordaunt is running for the seat her husband, Rep. Reed DeMordaunt, vacated to focus on his business.

Randy Armstrong (R) of District 28 will be facing Steve Landon in the November election. Armstrong easily won the primary election against three other opponents in an open seat vacated by Rep. Ken Andrus.

Bryan Zollinger (R) of District 33 is the Republican nominee to fill the seat vacated by Rep. Linden Bateman. Zollinger is expected to beat his Democrat opponent this November.



ILTA contingent with Senator Risch during the ALTA Federal Conference in Washington, D.C.

2016 DUES

We are in the midst of our 2016 dues drive. If you haven't submitted your dues please do so as soon as possible. For those that have already submitted—THANK YOU!