

The Advocate

**Official Publication
of the Idaho State Bar
Volume 56, No. 11/12
November/December 2013**

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Michelle Ann Volkema
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The Advocate

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The Advocate makes occasional posts and takes comments on a LinkedIn group called "Magazine for the Idaho State Bar."

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On the Cover:

This photo was taken by Steve Fuller in 2011 and was submitted by Julie Harrison, a legal secretary at Evans Keane in Boise. The photographer accompanied Julie's husband, Ray, on a dream vacation of fishing along the Alaskan coast. They flew to Kenai, drove to Valdez and spent five days fishing, sightseeing and taking photos. The trip was arranged as a gift for Ray, who had suffered severe nerve damage and couldn't travel alone. Julie noted this picture as among the most compelling and sent them to *The Advocate* along with some of her own photography. Her picture of an American Avocet was used in the May issue earlier this year.

Section Sponsor:

This issue of *The Advocate* is sponsored by the Real Property Section.

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Special thanks to the October editorial team: Kristine Marie Moriarty, Amber Champree Ellis and Anna E. Eberlin.

January issue co-sponsors:

The Family Law Section and the Litigation Section.

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ISB/ILF Upcoming CLEs

November

November 12

Animal Issues in Tax, Estate Planning & Probate Law
Sponsored by the Animal Law Section and the Taxation, Probate and Trust Law Section
1:15 p.m. (MST)
The Law Center, 525 W. Jefferson - Boise / Statewide Webcast
3.0 CLE credits of which .25 is Ethics

November 15

Hydrology for Lawyers
Sponsored by the Water Law Section
8:30 a.m. (MST)
The Law Center, 525 W. Jefferson - Boise
6.25 CLE credits

November 15

2013 Headline News - Moscow
Sponsored by the Idaho Law Foundation
University Inn - Best Western, 1516 W. Pullman Rd. - Moscow
8:30 a.m. (PST)
6.0 CLE credits of which 1.0 is Ethics

November 18

What We Wish Our Business Clients Knew About the Law
Sponsored by the Idaho Law Foundation
Telephonic Conferencing
12:30 p.m. (MST)
1.0 CLE credits

November 22

2013 Headline News - Pocatello
Sponsored by the Idaho Law Foundation
Red Lion Hotel, 1555 Pocatello Creek Rd. - Pocatello
6.0 CLE credits of which 1.0 is Ethics

November 25

Making the Case for an Award of Restitution - or Not
Sponsored by the Idaho Law Foundation
Telephonic Conferencing
12:30 p.m. (MST)
1.0 CLE credits

December

December 2

Federal Prison: Advising Your Clients on How to Survive
Sponsored by the Idaho Law Foundation
Telephonic Conferencing
12:30 p.m. (MST)
1.0 CLE credits

December 6

2013 Headline News - Boise
Sponsored by the Idaho Law Foundation
SpringHill Suites by Marriott, 424 E. Parkcenter Blvd. - Boise
8:30 a.m. (MST)
6.0 CLE credits of which 1.0 is Ethics

December 12

Deciphering DOMA: A Primer for Idaho Attorneys on Hollingsworth v. Perry and U.S. v. Windsor
Sponsored by the Diversity Section
1:30 p.m. (MST)
The Law Center, 525 W. Jefferson - Boise / Statewide Webcast
3.0 CLE credits

December 13

CLE Replay Final Countdown: Your Law Practice - Planning for Death, Disability or Retirement and Closing the Doors
Sponsored by the Idaho Law Foundation
4:30 p.m. (MST)
Webcast
1.5 CLE credits of 1.0 is Ethics

December 20

CLE Replay Final Countdown: First or Next Post Judgment Case
Sponsored by the Idaho Law Foundation
4:30 p.m. (MST)
Webcast
1.5 CLE credits

December 27

CLE Replay Final Countdown: Dealing with Difficult Counsel
Sponsored by the Idaho Law Foundation
4:30 p.m. (MST)
Webcast
1.5 CLE credits of which 1.5 is Ethics

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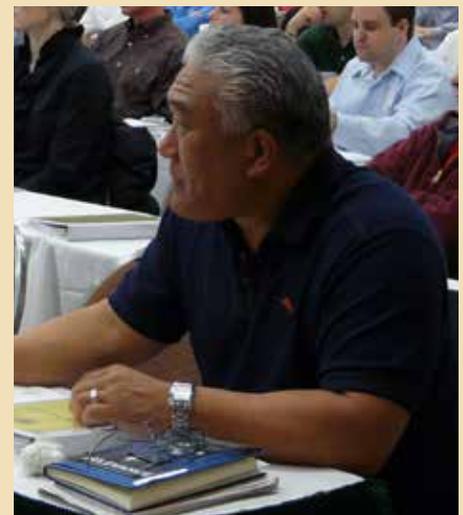
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Resolution District Bar Meetings to Tackle Issues

William H. Wellman
President, Idaho State Bar
Board of Commissioners

During November the Bar Commissioners will be coming to your district to meet and discuss bar business. I hope to meet and reacquaint with many of you at the meetings. The district meeting will center on the resolutions that have been prepared for your consideration. This year you will consider eight resolutions. The resolutions will be presented in a more up-to-date fashion. In order to deliver a consistent and reliable message in each district, bar staff has developed a power point presentation. It is anticipated that the presentations will proceed more quickly.

Unless the membership approves a resolution, the ISB Commission has no authority to take a position on legislative matters, court rules, policy and governance of the state bar and the district bars.



The specifics of the process are laid out in Idaho Bar Commission Rule 906. I want to mention what I think are the more important resolutions.

Resolution 13-7 Judicial Recruitment/Compensation. The data provided by the Idaho Supreme Court tells us that of the current sitting district judges, 60% will be eligible to retire in the next five years. 88%

The data provided by the Idaho Supreme Court tells us that of the current sitting district judges, 60% will be eligible to retire in the next five years.



of the appellate judges are eligible to retire within the next five years. The district court salary currently pays \$114,300. Unless the position pays substantially more it is unlikely that the selection process will attract the most competent applicants. Idaho ranks at the bottom of the contiguous states in district court judge compensation. Comparable district court salaries are:

Nevada	\$160,000
Washington	\$151,809
Wyoming	\$150,000
Utah	\$134,800
Montana	\$117,600
Oregon	\$114,468
Idaho	\$114,300

Not very often does the court ask for our support on compensation issues as an integrated bar. I encourage your unanimous approval of this resolution.

A revised MCLE resolution 13- 4 returns this year with some modifications to the 2012 resolution. It

asks that the 30 hour CLE requirement over three years remain with an increase from two to three hours of ethics credits. 10% of the total CLE requirement devoted to ethics is a minimum percentage. The resolution also proposes replacement of the Practical Skills Seminar with a New Attorney Program designed for recent law school graduates only and imposes a substantive Idaho law CLE credit requirement on all new Idaho attorneys. The New Attorney Program would be a live, in-person, approximately three-credit course the day of the admission ceremony and would consist of practical skills training and ethics and professionalism instructions. The substantive Idaho law CLE requirement would be made available via online on-demand streaming and involve instructions on ethics, civil and criminal procedure and community property law. Technology and adult learning techniques were considered along with the consideration of limiting expenses for the attorney.

Two-year law school

Recently, President Obama suggested that law schools consider a two-year degree program model. He is not the only proponent of the concept. Two-year JD programs are offered at Northwestern, Pepperdine and Vermont. There is a catch, however, to these two-year degree models. They are actually a three-year curriculum compressed into two. As we have seen the costs of legal education ratchet up yearly, it seems sensible to me that the quicker a law student moves through and into the workforce the less overall student loan debt is accumulated. What is wrong with the model curriculum engaging law students in class and or clinics continuously from their orientation to graduation?

The prospect of considering law as a career needs to be as transparent as possible. Prospective students need a realistic picture of the opportunities upon graduation. Law schools have not been so frank in their assessment of the placement opportunities. The ABA Section of Legal Education and Admission to the Bar gathers data from law schools and compiles an employment summary on classes on a year-by-year basis. The University of Idaho data for the 2012 graduates reveals that as of



Salary levels for Idaho judges fall short of those in surrounding states.

March 31, 2013, 58% of the class is employed on a full-time, long-term basis where their JD is a requirement for the job. (See <http://www.uidaho.edu/~media/Files/orgs/Law/Career/2012-Employment-Statistics-3-29-2013.ashx>)

The best and the brightest will continue to earn excellent starting salaries. But the rest of the graduates are finding the market tight and salary opportunity below \$50,000. The burden of student debt creates pressure to be as concerned about fees as a client's needs. The need for more attorneys who will work in family and public interest law is obvious. However, the work just does not pay well. The idea of two-year legal

education might make for more available lawyers to serve the critical needs of the low-income families.

About the Author

William H. Wellman is a solo practice attorney in Nampa, and is also the current President of the Idaho State Bar Board of Commissioners. Mr. Wellman has his BA from Miami University in Oxford, Ohio '74 and JD from West Virginia University College of Law '79. He has been the contract public defender in Owyhee County since 1986. His wife Debbie is a custody mediator and licensed counselor. They are parents to three adult children, all living in Boise.

2013 District Bar Association Resolution Meetings

District	Date/Time	City	Location
First Judicial District	Monday, November 4 at Noon	Coeur d'Alene	Hampton Inn & Suites, 1500 Riverside Drive
Second Judicial District	Monday, November 4 at 6 p.m.	Lewiston	Red Lion Inn, 621 21 st Street
Third Judicial District	Thursday, November 14 at 6 p.m.	Nampa	College of Idaho Simplot South Dining Hall, 2112 Cleveland Blvd.
Fourth Judicial District	Thursday, November 14 at Noon	Boise	Red Lion Hotel Downtowner, 1800 Fairview Avenue
Fifth Judicial District	Wednesday, November 13 at 6 p.m.	Twin Falls	Elevation 486, Arts Council Room, 195 River Vista Place
Sixth Judicial District	Wednesday, November 13 at Noon	Pocatello	Juniper Hills Country Club, 6600 S. Bannock Hwy.
Seventh Judicial District	Tuesday, November 12 at Noon	Idaho Falls	Hilton Garden Inn, 700 Lindsay Blvd.

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Mr. Lamer received his law degree and Master of Urban Planning at the University of Kansas. His practice will continue to focus on land use, real estate, and construction litigation. He is a member of the American Institute of Certified Planners, a LEED accredited professional, and a former Planning Commissioner for the Lawrence-Douglas County (Kansas) Metropolitan Planning Commission



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(Interim Suspension)

On October 4, 2013, the Idaho Supreme Court issued an Order Granting Petition for Interim Suspension of License to Practice Law immediately suspending the license of Meridian attorney Bryninn T. Erickson. The Idaho Supreme Court also ordered that Mr. Erickson shall comply specifically with I.B.C.R. 516 and 517 until further order of the Court.

A formal charge case is pending before the Professional Conduct Board.

Inquiries about this matter may be directed to: Bar Counsel, Idaho State Bar, P.O. Box 895, Boise, ID 83701, (208) 334-4500.

Clifford King B'Hymer

(Suspension)

On October 15, 2013, the Idaho Supreme Court entered a Disciplinary Order ordering that Clarkston, Washington attorney, Clifford King B'Hymer, be suspended from the practice of law for one year. Following a hearing in this reciprocal disciplinary proceeding at which Mr. B'Hymer elected not to participate, a Hearing Committee of the Professional Conduct Board recommended that the identical sanction imposed on Mr. B'Hymer in Washington, a one-year suspension, be imposed in Idaho.

Mr. B'Hymer was admitted to the practice of law in Idaho in April 1979. He was also previously admitted to the practice law in Washington

in October 1974. On May 3, 2013, the Washington Supreme Court entered its Order suspending Mr. B'Hymer for one year, effective seven days from the date of the Order. In the Washington disciplinary case, in which Mr. B'Hymer did not participate, the Hearing Officer concluded that Mr. B'Hymer violated Washington Rules of Professional Conduct 1.1 [Competence], 1.4 [Communication], 3.2 [Expediting Litigation], and 8.4(d) [Conduct Prejudicial to the Administration of Justice]. The Hearing Officer also concluded that Mr. B'Hymer violated ELC 1.5, ELC 5.3(e) and Rule of Professional Conduct 8.4(l) [Duties Imposed by the Rules for Enforcement of Lawyer's Conduct in Connection with the Disciplinary Matter] relating to his failure to promptly provide a full and complete response to a request for information regarding a grievance.

In the Washington disciplinary case, the Formal Complaint alleged four counts of professional misconduct with respect to Mr. B'Hymer's representation of three specific clients who were Social Security Administration ("SSA") disability insurance benefits claimants. The Formal Complaint also referenced sixteen other clients of Mr. B'Hymer with almost identical cases. All of the clients were only allowed to communicate with Mr. B'Hymer's nonlawyer assistant, NW. They all had hearings scheduled in front of the same Administrative Law Judge ("ALJ") in Clarkston, Washington in April 2011. Notices of the hearings

were mailed to both the clients and Mr. B'Hymer. Both were informed that the clients' applications could be dismissed if the clients failed to attend without good cause. NW thereafter called the clients and informed them that Mr. B'Hymer would not be attending their hearings and that they should not attend either. NW so informed the clients at Mr. B'Hymer's direction because he did not approve of the ALJ. NW told the clients that there would be no adverse consequences if they did not attend. The clients wanted to speak to Mr. B'Hymer, but he did not contact them. Mr. B'Hymer did not attend the hearings. Most of his clients followed Mr. B'Hymer's instructions and did not attend their hearings. Those clients' cases were dismissed.

Consistent with Idaho Bar Commission Rules 506(c) and 513, the Idaho Supreme Court suspended Mr. B'Hymer from the practice of law in Idaho for one year effective the date of the order as a reciprocal sanction. The Court also ordered that Mr. B'Hymer reimburse the Idaho State Bar for its costs in the amount of \$199.00. The Court's Order further ordered Mr. B'Hymer to comply with all of the requirements relating to suspension in the Idaho Bar Commission Rules, including Rules 506(c), 516 and 517, and any other applicable rules or authority.

Inquiries about this matter may be directed to: Bar Counsel, Idaho State Bar, P.O. Box 895, Boise, Idaho 83701, (208) 334-4500.

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Casting Stones Across the Water

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Mother Theresa once said: "I alone cannot change the world, but I can cast a stone across the water to create many ripples." As we look back over this past year, we witness the growing number of lives that have experienced a positive impact from Idaho Law Foundation programs: ripples that have been generated because of the ongoing support of Idaho attorneys.

We must say that, thanks to an outstanding staff and the dedication of our supporters, 2013 has been another successful year for the Foundation. Idaho Volunteer Lawyers Program continues to organize attorneys in all parts of Idaho to provide pro bono legal services for low-income residents who need but cannot afford civil legal services.

Among their many accomplishments this year, IVLP began offering legal clinics tailored for the needs of Idaho's returning soldiers and collaborating with the Idaho Commission on Aging to enhance services for Idaho's elderly citizens.

Our Law Related Education Programs furthered the goal of provid-

ing students of all ages with tools to reinforce civic education, while helping to build positive relationships between students and members of Idaho's legal community. LRE's mock trial program added a successful courtroom artist contest to the mock trial competition and the Foundation was chosen to host the 2016 National High School Mock Trial Championship. LRE is also piloting the New American Law Academy, an exciting new adult legal education program offered for Boise area refugees.

So, you can see, there's a lot of meaningful activity happening here at the Idaho Law Foundation. We want to thank all of you who helped us realize this important work through your gifts of time and resources. We are especially grateful to all of you who have continued to offer your support during a time when one of our main sources of programmatic funding, IOLTA grants, has dropped by nearly 80% over the last several years.

We know that we are still able to respond to the legal and educational needs of our communities because you continue to step up and make sure it happens. We couldn't do the work we do without you. As the Law Foundation strives to improve the lives of Idaho citizens, even in challenging economic times, we are asking you to continue your support.

As you decide where to make any year-end charitable gifts, would you consider a tax-deductible donation to help Idaho Law Foundation and our programs? If you have given in the past, could you increase your donation amount this year? If you

Among their many accomplishments this year, IVLP began offering legal clinics tailored for the needs of Idaho's returning soldiers and collaborating with the Idaho Commission on Aging to enhance services for Idaho's elderly citizens.



have never given to the Idaho Law Foundation, could you join your colleagues who already give to the Idaho Law Foundation and make a donation of \$100 or more? Of course, any donation amount is always gratefully accepted.

You can give to the Law Foundation through a designation on your 2014 Licensing Form or visit our website at www.idaholawfoundation.org and click on the "Donate Now" link on the main page of our website. If you need additional information about the Law Foundation or our programs, please contact Carey Shoufler, the Foundation's Development Director. She will be happy to answer any questions you may have. You can reach her at (208) 334-4500 or cshoufler@isb.idaho.gov.

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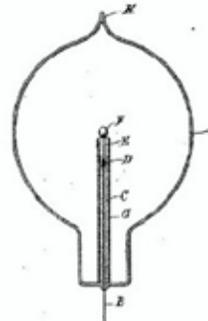
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Message From the Real Property Section

Arthur B. Macomber

We are looking forward to a winter of heavy snows and difficult driving conditions in Idaho. The Real Property Section has a set of thoughtful and challenging articles for you to snuggle up with as winter rages outside.

Even through ice and wind, swimming naked remains an option. At least according to Larry Prince and Kirk Cheney of Holland and Hart, who bring us an article discussing re-characterization of debt as equity for real estate investments in some insolvency or bankruptcy situations. As is true whether swimming or investing, the intent of the parties has a lot to do with the outcome.

Daniel Dansie of the firm Prince, Yeates & Geldzahler of Salt Lake provides a view of the impact of the *New Phase Investments, LLC v. Jarvis* 2012 case, which relates to Idaho's two signature rule for conveyances related to community real property assets. This article is especially important for real property, wills and trust, and family law practitioners, due to the expenses involved if real property conveyances are not properly done.

Hilary M. Soltman, Counsel for First American Title and Escrow brings us an analysis of the *ParkWest Homes, LLC v. Barnson* 2013 ("ParkWest II") case. Ms. Soltman's article

discusses difficult questions of priorities and the necessary parties to be named before courts adjudicating mechanic's lien and deed of trust foreclosures, and the extent of the property interest held by a trustee to a deed of trust. This is a difficult case, so strap in and get some hot chocolate first.

Yours truly takes up the difficult question of the legal characterization of the adversely claimed interest in real property prior to a quiet title action. The core question is whether a pre-lawsuit interest is characterized as contingent on the outcome of that suit, or is it a vested right. Practical issues as well as congruence with other law regarding contingent interests are plumbed.

Douglas R. Hookland, a partner at Scott Hookland, LLP, examines the difficulty contractors and subcontractors have using mechanics lien rights in public works projects. There are limited options and Mr. Hookland takes us through them giving us practical tips about all-important notice requirements.

Laurel Reynoldson, Of Counsel at Holland & Hart examines the *Old Cutters* decision, which tested a development agreement between the City of Hailey and a developer who needed annexation and a "pocket sewage treatment plant." After the housing market fell apart, several immediate questions arose. In the end the Idaho Supreme Court acknowledged limits to what a city can

expect. It reaffirmed that a city fee cannot exceed the cost of services, despite a development agreement that says otherwise.

Finally, Eric Steven of the firm Eric M. Steven Law, P.S. submits an article comparing residential tenancies and unlawful detainer issues in Idaho and Washington. This article is long enough that it does not appear in the magazine you're holding, but is only available on the State Bar's website at the following link: http://www.isb.idaho.gov/pdf/temp/tenancy_law.pdf. Anyone advising residential landlords will want to consider Mr. Stevens' perspective.

The Real Property Section and the individual writers appreciate your feedback on their contributions, and hope their articles bolster your understanding of Idaho law.

About the Author

Arthur B. Macomber's undergraduate degree in business was accomplished at George Fox University. Prior to attending the University of California Hastings College of the Law, he enjoyed 25 years in business, real estate, and construction. The practice of Macomber Law, PLLC focuses on real property, land use, water, and construction law.



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Lenders Versus Investors: How a Purported Loan May be Characterized as Equity Under Idaho Law

Larry E. Prince
Kirk S. Cheney

Imagine your client has invested in a risky venture. The venture is struggling. Perhaps it is an operating company that is having trouble paying its vendors. Or perhaps it is a real estate project that is over budget and unable to secure additional bank financing. Your client decides that, in addition to his equity investment, he would like to lend money to the venture to help prop it up until it recovers. Unfortunately, the hoped-for recovery never occurs, and your client's loan is not repaid. In a bankruptcy or state court insolvency proceeding, your client may be surprised to find that what he thought was a loan is "recharacterized" as equity — and your client stands at the back of the line behind true lenders and lienholders. What happened? Under a recent Ninth Circuit decision, and the state law it incorporates, a purported loan may be recharacterized as equity if the "loan" was so equity-like that your client's true intent was more like an investor than a lender.

To avoid such a result, lenders should:

- Avoid lending to entities in which the lender holds an equity stake. At the very least, separately document and account for any equity interest held by the lender.
- Document loans with a promissory note that includes an interest rate, payment schedule and maturity date.
- Where possible, obtain and perfect a security interest in collateral.
- Avoid lending to entities that have no equity capital.

This article first describes the Ninth Circuit's recent decision in *In re Fitness Holdings Int'l, Inc.*,¹ which opens the door for debt to be recharacterized as equity in bankruptcy proceedings in the Ninth Circuit. It then explains how the *Fitness Holdings* decision is consistent with existing Idaho law. Next, the article explores the factors that courts consider when distinguishing debt from equity. It concludes by briefly suggesting some strategic implications arising from the *Fitness Holdings* case and existing Idaho law.

Recent Ninth Circuit decision opens the door to recharacterization in bankruptcy

As Warren Buffett has famously said, "you only find out who is swimming naked when the tide goes out."² By the same token, deficiencies and ambiguities in investment transactions often go unnoticed as long as a venture is thriving and everyone is being paid. Things change when a venture becomes insolvent and parties are left to fight over a limited estate. Aiming to increase their own recoveries, competing parties may dispute each other's rights

under various theories. Debt recharacterization is one such theory. It is a tool that parties in bankruptcy cases have developed to step ahead of one another in priority and thereby increase their own recovery from a limited estate. No additional funds are brought into the estate through recharacterization, but a true creditor's relative priority is enhanced as equity-like claims are functionally subordinated.

Although recharacterization is not explicitly recognized in the Bankruptcy Code, several circuits recognize the doctrine.³ Recharacterization has long been prohibited in Ninth Circuit bankruptcy courts under Bankruptcy Appellate Panel precedent.⁴ In its recent *Fitness Holdings* decision, however, the Ninth Circuit reversed that precedent and held that courts have the power to recharacterize debt as equity. The Ninth Circuit's decision was made in the specific context of whether a pre-bankruptcy transfer by the debtor may be avoided as a fraudulent transfer, but the Court's reasoning could apply just as readily to any determination of whether a party's advance to a debtor is debt or equity.

In *Fitness Holdings*, the company executed several subordinated

Your client may be surprised to find that what he thought was a loan is "recharacterized" as equity — and your client stands at the back of the line behind true lenders and lienholders.

notes in favor of its sole shareholder, Hancock Park Capital. The company later refinanced its debt. It paid off Hancock Park's unsecured notes using secured debt. About 16 months later, the company filed for bankruptcy protection. Its unsecured creditors' committee brought suit to recover the payments made to Hancock Park as constructively fraudulent transfers pursuant to Bankruptcy Code § 548(a)(1)(B). That section allows the bankruptcy trustee to recover transfers made within two years of bankruptcy if the debtor was insolvent and did not receive "reasonably equivalent value" in exchange for the transfer. In other words, pre-bankruptcy payments may be "avoided," or unwound, so that the funds are brought back into the estate to be distributed pro rata among creditors according to their priority.

Hancock Park claimed that the debtor received reasonably equivalent value for the payments because they reduced dollar-for-dollar the debtor's obligations to Hancock Park. The creditors' committee argued that Hancock Park's interest in the debtor was not a debt, but an equity interest. Thus, the payments to Hancock Park did not reduce a debt, and the debtor received no value for the transfers. The bankruptcy court and the district court agreed with Hancock Park, each holding that under Bankruptcy Appellate Panel precedent, they had no power to recharacterize debt as equity.⁵

The Ninth Circuit reversed. It held that the Bankruptcy Code au-

thorizes recharacterization. This authority is not derived, as other courts have found, from the court's power to equitably subordinate claims (Bankruptcy Code § 510(c)) or its broad equitable powers (Bankruptcy Code § 105(a)). Instead, it is found in the Bankruptcy Code's "interlocking definitions" of *value*, *debt* and *claim*.⁶ Construing those definitions together, reasonably equivalent value is given when a debtor makes a transfer that satisfies a creditor's "right to payment."

The Ninth Circuit thus joins several other circuits which explicitly recognize the doctrine of recharacterization. Notably, in the Ninth

In Idaho Development, LLC v. Teton View Golf Estates, LLC,¹⁰ the Idaho Supreme Court recognized that trial courts have long been engaged in the business of sorting out loans from capital contributions — a court must, in certain situations, look behind the label the parties give to a transaction and determine whether an advance is debt or equity.¹¹

Circuit, the debt versus equity determination must be made by looking to underlying state law.⁷ In contrast, several circuits apply a multi-factor test derived from federal tax law to determine whether an interest is more like debt or equity,⁸ while others collapse the factors into a holistic determination of the parties' intent.⁹ As discussed below, Idaho law adopts this last approach.

Idaho law allows for recharacterization according to the parties' intent

Even before *Fitness Holdings*, Idaho law allowed for recharacteriza-

tion outside of bankruptcy. In *Idaho Development, LLC v. Teton View Golf Estates, LLC*,¹⁰ the Idaho Supreme Court recognized that trial courts have long been engaged in the business of sorting out loans from capital contributions — a court must, in certain situations, look behind the label the parties give to a transaction and determine whether an advance is debt or equity.¹¹ Viewed in this way, recharacterization is properly seen not as an exotic bankruptcy doctrine, but simply as the fundamental determination of a party's stake in a company. This determination is made by looking at the intent of the parties

at the time of the transaction, which "may be inferred from what the parties say in their contracts, from what they do through their actions, and from the economic reality of the surrounding circumstances."¹²

In *Idaho Development*, the purported lender advanced money to a joint venture. The advance was documented by a promissory note secured by a deed of trust. The note included a fixed interest rate, monthly payment and maturity date. In exchange for advancing the funds, the lender received a 33% profits interest in the venture. When the lender was not paid pursuant to the note, it filed a foreclosure action. The venture's other lienholders argued that they should be repaid ahead of the purported lender because the lender's advance was actually a capital contribution. The district court granted

summary judgment to the lienholders, and the lender appealed.

On appeal, the Supreme Court reversed and remanded. It held that the district court improperly granted summary judgment in light of several pieces of “strong evidence” that suggested the advance was intended to be a loan:

- The documents provided that the advance would be repaid when new financing was secured
- The lender received a promissory note secured by a deed of trust
- The note had a fixed interest rate, payment and maturity date
- The joint venture had paid interest to the lender
- Every relevant document referred to the advance as a loan

Taken together, these facts created a genuine issue of fact as to whether the parties intended the advance to be a loan. These are some of the same factors commonly considered by federal courts applying the recharacterization doctrine in bankruptcy. And that shouldn't be surprising: whether courts apply a single- or multi-pronged test, the goal is to reach a commonsense conclusion about whether the party advancing funds took economic risk like an equity investor, or expected simply to be repaid with interest like a lender.

Conclusion

Whether in bankruptcy court or in state court proceedings, recharacterization is a tool that can be used to dramatically alter parties' recoveries from an insolvent debtor. As described above, lenders should carefully document their loans to help insulate them from recharacterization. Lenders might also contemplate using recharacterization offensively. For example, if the debtor

Whether courts apply a single- or multi-pronged test, the goal is to reach a commonsense conclusion about whether the party advancing funds took economic risk like an equity investor, or expected simply to be repaid with interest like a lender.

has made pre-petition payments on purported “loans” to insiders, creditors should consider whether those payments could be avoided as payments to equity. Further, even without bringing additional funds into the estate, creditors may be able to enhance their distribution by arguing for recharacterization of competing claims that have equity-like characteristics. Ultimately, the court will separate lenders from investors by looking to the parties' intent.

Endnotes

1. See *Official Comm. of Unsecured Creditors v. Hancock Park Capital II, L.P. (In re Fitness Holdings Int'l, Inc.)*, 714 F.3d 1141 (9th Cir. 2013).
2. 2001 Berkshire Hathaway Chairman's letter, available at <http://www.berkshire-hathaway.com/2001ar/2001letter.html>.
3. See *In re Lothian Oil*, 650 F.3d 539 (5th Cir. 2011); *In re SubMicron Sys. Corp.*, 432 F.3d 448 (3d Cir. 2006); *In re Dornier Aviation, Inc.*, 453 F.3d 225 (4th Cir. 2006); *In re Hedged-Investments Associates, Inc.*, 380 F.3d 1292 (10th Cir. 2004); *In re Autostyle Plastics, Inc.*, 269 F.3d 726 (6th Cir. 2001).
4. See *In re Pacific Express*, 69 B.R. 112, 115 (B.A.P. 9th Cir. 1986).
5. See *id.*
6. See *Fitness Holdings Int'l*, 714 F.3d at 1146.
7. See *id.*
8. See, e.g., *In re Hedged-Investments*, 380 F.3d at 1298; see also *In re Autostyle*, 269 F.3d at 748.

9. See, e.g. *In re SubMicron*, 432 F.3d at 456.

10. 152 Idaho 401, 272 P.3d 373 (2011).

11. 152 Idaho at 405-06, 272 P.3d at 377-78.

12. *Id.*

About the Authors

Larry E. Prince is a Partner in the Boise office of Holland & Hart. He represents secured creditors and debtors in bankruptcy proceedings, work-outs, real estate transactions and related commercial litigation. Larry earned his bachelor's degree at Boise State University and his law degree at the University of California, Hastings College of Law.



Kirk S. Cheney is an associate in the Boise office of Holland & Hart. He is a commercial litigator with significant experience in bankruptcy proceedings. Kirk earned his bachelor's degree at Brigham Young University – Idaho and his law degree at Yale Law School. Kirk is currently admitted to practice in New York and Texas.



Idaho's Two Signature Rule: A Shield for the Marital Community, Not a Sword for Creditors

Daniel Dansie

The requirement that community real property must be jointly conveyed by husband and wife is a fundamental component of Idaho's community property framework.¹ In the recent case of *New Phase Investments, LLC v. Jarvis*, the Idaho Supreme Court clarified the limits of the so-called "two signature rule" in a case between two competing creditors of a marital community. This article discusses the two signature rule and the impact of *New Phase* on the meaning of the rule, who can invoke the rule, and who the rule does not protect.² Parties interested in real estate transactions — such as buyers, lenders, and title insurance companies — should be familiar with § 32-912 and the holding of *New Phase* to properly protect their rights when dealing with community real property.³

History of the two signature rule in Idaho

The community property system has been the law in Idaho since 1866, well before statehood.⁴ Under the earliest community property statutes a husband could convey non-homestead community property without his wife's signature.⁵ However, by the early twentieth century the law had changed. A revision to Idaho's statutes adopted in 1919 stated: "The husband has the management and control of the community property . . . But he cannot sell, convey or incumber the community real estate unless the wife join with him in executing and acknowledging the deed or other instrument of conveyance by which the real estate is sold, conveyed, or incumbered."⁶

The Court has held that a non-signing spouse could be estopped from contesting a conveyance made without his or her signature based on conduct consistent with the existence of a conveyance.¹¹

The statute has been amended several times to give husband and wife equal management of community property and to alter — and ultimately remove — the requirement that a conveyance be acknowledged. Despite these amendments, the two signature rule has remained a consistent feature of Idaho's community property scheme. Today the rule is codified at Idaho Code § 32-912 and states: "[N]either the husband nor wife may sell, convey or encumber the community real estate unless the other joins in executing the sale agreement, deed or other instrument of conveyance by which the real estate is sold, conveyed, or encumbered."

The Idaho Supreme Court has repeatedly stated that "this statute was enacted for the purpose of protecting the community."⁷ Idaho cases indicate that the rule gives the non-signing spouse the opportunity to challenge a unilateral conveyance by the other spouse. For example, in one early case the court noted that mortgages on community property not executed by or with the consent of the wife would be "void and unenforceable."⁸ In another case, a wife challenged the conveyance, made without her signature, of the

right to harvest timber on community property, and the court held that such an attempt to convey an interest in community real estate was void without the wife's signature.⁹ A more recent case also held that a non-signing spouse was not bound by an attempted conveyance of community real property made without her written consent, even where the purchaser made "substantial improvements" to the property following the purported conveyance.¹⁰

Despite repeatedly using the term "void" to describe conveyances made without the signature of both spouses, in practice the Idaho Supreme Court has treated such situations as "voidable." The Court has held that a non-signing spouse could be estopped from contesting a conveyance made without his or her signature based on conduct consistent with the existence of a conveyance.¹¹ For example, the court affirmed a finding of estoppel against a non-signing spouse where the trial evidence demonstrated that she "was either aware of the contract to convey 'Poplar Farm' or actually participated and benefitted from the contract during its duration."¹²

Prior to *New Phase*, the Idaho Supreme Court had addressed the

two signature rule on a number of occasions. However, it had never examined whether one creditor of a community could use § 32-912 to invalidate an otherwise valid encumbrance held by a competing creditor: “The question of whether a third-party creditor can use I.C. § 32-912 as a sword to void a competing encumbrance was a novel one under Idaho law.”¹³

The New Phase litigation

In *New Phase*, two competing creditors sought to foreclose deeds of trust encumbering the same community real property in Bonneville County.¹⁴ Both creditors believed they had a superior interest in the property. The first creditor, DAFCO, LLC, sought to enforce a deed of trust that had been recorded in Bonneville County first and argued its encumbrance had priority.¹⁵ However, DAFCO’s deed had only been signed by the husband.¹⁶ The second creditor, New Phase, argued that DAFCO’s single-signature deed was void and sought to enforce deeds of trust that had been signed by both the husband and the wife but had been recorded in Bonneville County several months after DAFCO’s deed.¹⁷

Both parties moved for summary judgment, and the district court granted summary judgment in favor of New Phase. The district court focused on § 32-912’s language, which it found to be unambiguous.¹⁸ Based on its reading of § 32-912, the district court held that the statute “simply provides that a contract to encumber community real property which is not signed by both husband and wife is void.”¹⁹

On appeal, the Idaho Supreme Court also looked to the plain language of the statute, but focused on the purpose behind the law. The Court found that it “clearly expresses an intent to govern the property

rights of the marital community members, [but] it is silent regarding any rights of third parties.”²⁰ The court further noted, “[O]ur repeated announcement . . . that the statute was designed for the protection of the community follows directly from that plain reading, and we do not see how allowing a creditor to use the statute to attack another creditor’s encumbrance furthers that stated purpose.”²¹

The court acknowledged it had “formerly characterized one-spouse transfers as ‘void’ rather than ‘voidable.’”²² Nevertheless, the court stated that “although labeling conveyances in violation of Section 32-912 as ‘void,’ the court has, in effect, treated such agreements as ‘voidable’ by the non-signing spouse.”²³ The court noted it had previously held that “[w]hile it is true that a contract to convey community real estate is void if not signed and acknowledged by both the husband and wife under this statute, this is not an inexorable rule.”²⁴ The court also noted its previous ruling that where “an instrument lacks an acknowledgement of a spouse’s signature, the spouse will be deemed to have waived the defect if his or her conduct is consistent with the existence and validity of the instrument.”²⁵

The Court concluded that “the statute is only properly used as a

shield by the non-signing spouse to protect its interest in community real property — not as a sword by a third party to defeat an earlier recorded encumbrance.”²⁶ Examining the facts before it, the court noted that the non-signing spouse did not invoke her rights under § 32-912 to contest the conveyance to DAFCO.²⁷ As a result, the court found DAFCO’s deed to be a valid encumbrance on the community property, even without the wife’s signature. And because it was undisputed that DAFCO’s deed was recorded first, the court reversed summary judgment in favor of New Phase and found “DAFCO’s deed to be the first priority encumbrance on the Property.”²⁸

The upshot for real estate transactions

The plaintiff in *New Phase* probably was not alone in reading § 32-912 as meaning that conveyances signed by only one spouse are void regardless of circumstance. The best practice has always been, and remains, to ensure that any conveyance of community property in the chain of title bears the signature of both members of the community. However, in the event a conveyance of community property is signed by only one spouse, it is important to know there are circumstances in which the conveyance will be valid

The Court concluded that “the statute is only properly used as a shield by the non-signing spouse to protect its interest in community real property — not as a sword by a third party to defeat an earlier recorded encumbrance.”²⁶

and others where it will be voidable. *New Phase* clarifies that the grantee of a conveyance signed by only one member of the community, and unchallenged by the non-signing spouse, has a valid claim. Anyone involved in real estate transactions should understand the clarification provided in *New Phase*.

In the event a conveyance of community property is signed by only one spouse, it is important to know there are circumstances in which the conveyance will be valid and others where it will be voidable.

Endnotes

1. Idaho Code § 32-912.
2. *New Phase Investments, LLC v. Jarvis*, 153 Idaho 207, 280 P.3d 710 (2012).
3. *Id.* at 211, 280 P.3d at 714 (“[T]he statute is only properly used as a shield by the non-signing spouse to protect an interest in community real property—not as a sword by a third party to defeat an earlier recorded encumbrance.”).
4. David S. Perkins & Elizabeth Barker Brandt, *The Origins of Idaho’s Community Property System: An Attempt to Solve a Legislative Mystery*, 46 Idaho L. Rev. 37, 40-41 (2009).
5. See, e.g., *Wilson v. Wilson*, 6 Idaho 597, 57 P. 708 (1899).
6. *Childs v. Reed*, 34 Idaho 450, 202 P. 685 (1921)(quoting C.S. § 4666); *McKinney v. Merritt*, 35 Idaho 600, 208 P. 244 (1922) (quoting C.S. § 4666).
7. *Tew v. Manwaring*, 94 Idaho 50, 53, 480 P.2d 896, 899 (1971); accord *Finlayson v. Waller*, 64 Idaho 618, 134 P.2d 1069 (1943).
8. *Blaine County Nat. Bank v. Timmerman*, 42 Idaho 338, 245 P. 389 (1926).
9. *Fairchild v. Wiggins*, 85 Idaho 402, 380 P.2d 6 (1963).
10. *Lovell v. Sword*, 140 Idaho 105, 90 P.3d 330 (2004).
11. *Tew*, 94 Idaho at 53; *Calvin v. Salmon River Sheep Ranch*, 104 Idaho 301, 305, 658 P.2d 972, 976 (1983).
12. *Brown v. Burnside*, 94 Idaho 363, 366, 487 P.2d 957, 960 (1971).
13. *New Phase*, 153 Idaho at 212, 280 P.3d at 715.
14. *Id.* at 208-09, 280 P.3d at 711-12.
15. *Id.*
16. *Id.* at 208, 280 P.3d at 711.
17. *Id.* at 208-09, 280 P.3d at 711-12.
18. *Id.* at 209, 280 P.3d at 712.
19. *Id.*
20. *Id.* at 210, 280 P.3d at 713.
21. *Id.*
22. *Id.* at 211, 280 P.3d at 714 (citing *Thomas v. Stevens*, 69 Idaho 100, 102, 203 P.2d 597, 599 (1949)).
23. *New Phase*, 153 Idaho at 211, 280 P.3d at 714.
24. *Id.* at 211, 280 P. 3d at 714(quoting *Lovell v. Sword*, 140 Idaho 105, 109, 90 P.3d 330, 334 (2004)).
25. *New Phase*, 153 Idaho at 211, 280 P. 3d at 714 (quoting *Lovell*, 140 Idaho at 109, 90 P.3d at 334).
26. *New Phase*, 153 Idaho at 211, 280 P.3d at 714.
27. *Id.*
28. *Id.* at 212, 280 P.3d at 715.

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Inspecting a Faulty Foundation in *ParkWest Homes LLC v. Barnson*

Hilary M. Soltman

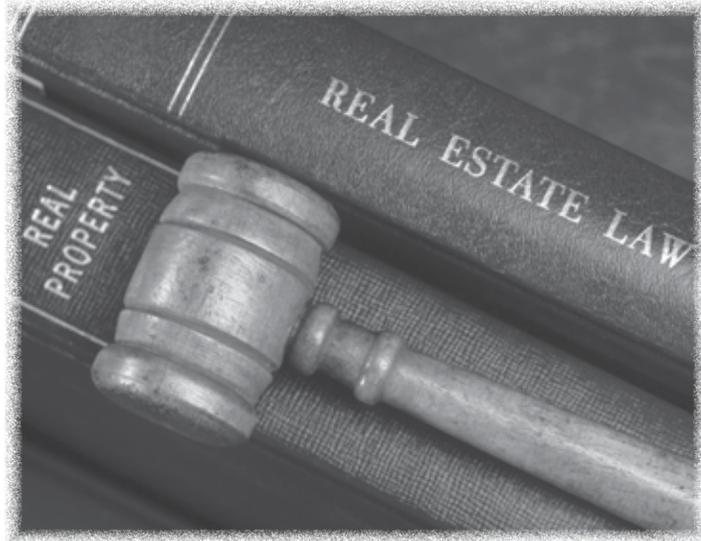
It began as one of the most ordinary disputes during the torrid real estate market in 2006: an optimistic buyer hires a contractor to build a beautiful new home, gets a loan to pay the contractor, and . . . files bankruptcy and fails to pay either the contractor or the lender. It resulted in one of the more confounding decisions from the Idaho Supreme Court's recent term, and one which could have very real impacts on real estate practice in Idaho. While the Court purported to follow established law with respect to deeds of trust and mechanics' lien foreclosures, the broad holdings of this case may change our understanding of the nature of title held by a trustee under a deed of trust and alter accepted norms when the trustee's interest intersects with other parties' interests in the same property.

In March 2006, Julie Barnson signed a contract with ParkWest Homes, LLC (ParkWest) to build a new home.¹ A couple of months later, in May 2006, ParkWest registered under the Idaho Contractor Registration Act (ICRA)² and began building Ms. Barnson's home.³ Later, Ms. Barnson obtained a loan for the home and recorded two deeds of trust against her property on November 14, 2006.⁴ Then everything went awry — Ms. Barnson defaulted on both ParkWest and her lender and, predictably, ParkWest filed its mechanic's lien against her property on November 28, 2006.⁵

ParkWest filed its complaint to foreclose its mechanic's lien in August 2007⁶ naming Ms. Barnson and Mortgage Electronic Registration Systems, Inc. (MERS) as the nominee for the beneficiary under the deeds of trust recorded by Ms. Barn-

son.⁷ ParkWest also filed a *lis pendens* against the property. ParkWest and Ms. Barnson settled their dispute in September 2008; under the settlement agreement, Ms. Barnson agreed to grant ParkWest possession of the property and ParkWest released its claims against Ms. Barnson personally.⁸

MERS was not a party to the settlement agreement between ParkWest and Ms. Barnson and continued to challenge the validity of ParkWest's lien against the property. MERS filed a motion for summary judgment asserting that ParkWest's lien claim was defective under the ICRA and Idaho's mechanics' lien statutes.⁹ The district court agreed with MERS and granted summary judgment on January 26, 2009, but ParkWest timely appealed the judgment.¹⁰ While ParkWest's appeal was pending, MERS pursued non-judicial foreclosure against Ms. Barnson under its deeds of trust and sold the property through a trustee's sale on July 20, 2009 to Residential Funding Real Estate Holdings, LLC (Residential).¹¹



The broad holdings of this case may change our understanding of the nature of title held by a trustee under a deed of trust and alter accepted norms when the trustee's interest intersects with other parties' interests in the same property.

Of course, after the trustee's sale, the Idaho Supreme Court vacated and remanded the district court's decision, holding that ParkWest substantially complied with the ICRA and thus, its lien was valid.¹² Back on remand, MERS asked to be dismissed as a party-in-interest and Residential predictably intervened as the now-record owner of the real

property. Like MERS, Residential quickly looked for a way to invalidate ParkWest's lien.

Residential knew (or should have known) about ParkWest's lien at this point. There was a recorded claim of lien, a *lis pendens*, a judgment entered against Ms. Barnson, and it likely would have been disclosed during the foreclosure. So how could Residential shake free ParkWest's lien? Residential renewed the attack on ParkWest's lien from a different angle: it argued that because the trustee under the deed of trust held legal title to the property under Idaho law, and since ParkWest failed to name the trustee in its foreclosure action during the proscribed time under Idaho's mechanics' lien statutes, ParkWest lost its lien as to the trustee and all taking under it — namely, Residential.

The district court agreed with Residential. After fending off ParkWest's assertion that "the law of the case" from *ParkWest I* barred Residential's new challenge to its lien, the district court granted Residential's motion for summary judgment.¹³ ParkWest again appealed to the Idaho Supreme Court, likely expecting that the Supreme Court to uphold its lien (again). To ParkWest's surprise, the Supreme Court also agreed with Residential and affirmed the district court.¹⁴ In doing so, the Court also muddied the waters with respect to the nature of title held and conveyed by a trustee under a deed of trust.

The law of which case?

As a threshold matter, ParkWest urged both the district court and the Idaho Supreme Court to ignore Residential's substantive challenges to ParkWest's lien based on the "law of the case" doctrine. This doctrine pro-

The Court at that time swiftly dismantled this argument by noting the limited nature of title that passed to the trustee, explaining that "even though title passes for the purpose of the trust, a deed of trust is for practical purposes only a mortgage with a power of sale."²²

vides that when the Supreme Court states a principle or rule of law necessary to its decision on an appeal of a case, that pronouncement must be adhered to throughout the case, including subsequent appeals.¹⁵ The doctrine further "prevents consideration on a subsequent appeal of alleged errors that might have been, but were not, raised in the earlier appeal" of the same case.¹⁶

The question here was whether the Supreme Court's decision in *ParkWest I* — which held that ParkWest had a valid claim of lien — now barred Residential from raising another challenge to the validity of ParkWest's claim of lien.¹⁷ The "law of the case" doctrine does not neatly address this situation. Residential was not a party to the case or appeal in *ParkWest I* and was raising an issue that could not have been raised by MERS or ParkWest at the time of the district court's grant of summary judgment or the prior appeal, since the trustee's sale conveying the property to Residential had not yet occurred. Given these facts, the Supreme Court sidestepped this issue by limiting the "law of the case" doctrine to the two parties to the first appeal, ParkWest and MERS, and allowed Residential's novel challenge to ParkWest's lien.¹⁸

Title theories

The Idaho Code chapter addressing deeds of trust defines the "trustee" as "a person to whom *legal title* to real property is conveyed by trust deed."¹⁹ Thus, Idaho is a "title theory" state with respect to deeds of trust.²⁰ However, the Idaho Supreme Court has limited the scope of "title" held by the trustee, explaining that although Idaho's statutes adhere to the title theory, "the deed of trust conveys to the trustee nothing more than a power of sale, capable of exercise upon the occurrence of certain contingencies (such as default in payment) and leaves in the trustor a legal estate comprised of all incidents of ownership . . ."²¹

In *Long*, the grantor under a deed of trust filed bankruptcy and attempted to argue that the property encumbered by the deed of trust could not have been part of his bankruptcy estate because title to the property was actually held by the trustee under the deed of trust. The Court at that time swiftly dismantled this argument by noting the limited nature of title that passed to the trustee, explaining that "even though title passes for the purpose of the trust, a deed of trust is for practical purposes only a mortgage

with a power of sale.²² The Court went on to hold:

At the time [the grantor] filed his petition in bankruptcy, he had a legal interest in the property which was good against all persons except the Lewis County Abstract Company, which held nothing more than the power of sale upon certain contingencies. [The grantor's] interest (*comprised of all other attributes of ownership*) passed to the trustee in bankruptcy.²³

Fast forward to 2013: with little analysis, the *ParkWest II* Court seems to assert that the trustee holds unqualified title to the property conveyed under a deed of trust. *ParkWest II* cited *Long* for the assertions that Idaho is a title theory state and reiterated the statement that a deed of trust is effectively a mortgage with a power of sale, but did not accord *Long* any further discussion in arriving at its conclusion that the trustee under the MERS deeds of trust held legal title to the property.²⁴ At no point did the *ParkWest II* Court give any weight to its statements in *Long*, excerpted above, regarding the incidents of title retained by the grantor.

Once the *ParkWest II* Court determined that the trustee under the MERS deeds of trust held title to the property, the Court turned to ParkWest's exercise of its remedies under Idaho's mechanics' lien statutes. Idaho Code Section 45-510 requires that, in order to enforce its lien, a lienor must commence an action within six months after the claim of lien was filed. While this statute does not identify necessary parties to the action, the Court has previously held that where a lienor fails to timely name a party-in-interest to the property in an action to enforce its lien, the lienor loses its lien with respect to the unnamed party's interest in the property.²⁵



ParkWest acknowledged that it did not timely name the trustee under the MERS deeds of trust in its complaint to foreclose its lien and conceded that it lost its lien with respect to the trustee's interest, but argued that the interest lost was only the very limited power of sale held by the trustee as described in *Long*. After all, ParkWest had named Ms. Barnson, who held "all other attributes of ownership." On the other hand, Residential focused on the Court's statement in *Long* that the grantor's interest was "good against all persons except" the trustee, and argued that this reasoning should also extend to all persons taking *under* the trustee, including Residential.

The Court agreed with Residential and held that ParkWest's failure to name the trustee was fatal as to its claim of lien against the interest Residential obtained via the trustee's deed.²⁶ In order to reach this conclusion, the Court necessarily treated all incidents of ownership as being vested with the trustee and not the grantor; nothing less would have led to a *complete* failure of ParkWest's lien against Residential's interest in the property. Given the breadth of

In order to reach this conclusion, the Court necessarily treated all incidents of ownership as being vested with the trustee and not the grantor; nothing less would have led to a complete failure of ParkWest's lien against Residential's interest in the property.

the *ParkWest II* holding, the Idaho Supreme Court's current interpretation of "title theory" appears to extend beyond the commonly understood, limited nature of "title" held by the trustee.

The more you know, the less you need to – diminishing the impact of notice

Undeterred, ParkWest turned to the real estate practitioner's favorite argument: that Residential had *no-*

tice, both actual and constructive, of ParkWest’s mechanic’s lien and the judgment lien against Ms. Barnson. In response, the Court acknowledged that Residential had constructive notice of ParkWest’s lien and then completely ignored whether notice of the lien had any impact on the outcome of the case. This omission is somewhat jarring, but the analysis may ultimately have proven irrelevant to the Court’s holding since the Court’s interpretation of Idaho’s mechanics’ lien and deed of trust statutes essentially trumped any potential “notice” argument — in the end, whether Residential had notice (actual or constructive) of ParkWest’s lien had no bearing on ParkWest’s failure to enforce its lien against the trustee under the deeds of trust.

But what can the trustee convey?

ParkWest next argued that even if it lost its lien as to the trustee, its judgment lien against Ms. Barnson attached to her interest in the property prior to Residential’s purchase of the property at the trustee’s sale. The Court made quick work of this argument, explaining that the interest that Residential acquired from the trustee dated back to the interest conveyed to the trustee under the deed of trust, as opposed to the date of the sale.²⁷ In doing so, the Court relied on Idaho Code Section 45-1506(10), which states:

The trustee’s deed shall convey to the purchaser the interest in the property *which the grantor had, or had the power to convey, at the time of the execution by him of the trust deed* together with any interest the grantor or his successors in interest acquired after the execution of such trust deed.²⁸

Interestingly, this seemingly simple explanation exposed the problem with the Court’s previous “title theory” analysis under Idaho’s deed of trust statutes. Under Section 45-1506(10), the trustee under the deeds of trust conveyed to Residential the interest that Ms. Barnson had, or had the power to convey, at the time she executed the MERS deeds of trust on November 14, 2006. However, the interest that Ms. Barnson held on November 14, 2006 was subject to any mechanics’ lien rights of Park-

It is not the mechanics’ lien statute, but the Court’s expansive view of the nature of title held by the trustee — and the complete loss of ParkWest’s lien for failure to name that trustee — that creates the conflict Residential identifies.

West relating back to its commencement of construction. If ParkWest’s lien attached to Ms. Barnson’s interest in the property prior to November 14, 2006, was deemed valid by *ParkWest I*, and was properly enforced against Ms. Barnson’s interest in the property, how was Residential ultimately able to take *better* title than Ms. Barnson was ever able to convey to the trustee?

This quandary was not resolved by the Court in *ParkWest II*. In its briefing on appeal, Residential argued that the foregoing interpretation of Section 45-1506(10) reads

out of existence the requirement that a lienor must enforce its lien against a party-in-interest within six months of its claim of lien pursuant to Section 45-510. Residential’s argument relies, as it must, on the Court’s agreement that the trustee is the legal title holder to the property (otherwise the interest lost vis-à-vis the trustee would be negligible, as ParkWest believed). It is not the mechanics’ lien statute, but the Court’s expansive view of the nature of title held by the trustee — and the complete loss of ParkWest’s lien for failure to name that trustee — that creates the conflict Residential identifies. However, this reasoning still ignores the fact that, in the end, the trustee only held and could only convey to Residential the interest it received from Ms. Barnson — an interest that was subject to ParkWest’s validly filed and properly enforced mechanic’s lien.

Ramifications of the ParkWest II decision

The *ParkWest II* decision leaves a number of unanswered questions; chief among them is the extent of the property interest held by the trustee under a deed of trust (i.e. how many sticks of the “bundle of sticks”²⁹ the trustee holds). A second, but no less important, concern arises under the Court’s lack of any analysis as to the priority of the interest of Residential via the trustee’s deed versus ParkWest’s lien rights. Unfortunately, there are no easy answers yet. It is possible that the Court could limit this case to its unique facts or to mechanics’ lien claims specifically. However, Court’s broad language in *ParkWest II* — at least with respect to the nature of the trustee’s interest under a deed of trust — suggests otherwise.

This decision has set off alarm bells for the title industry, especially where title companies so often serve as trustees under deeds of trust, but *ParkWest II* also raises practical concerns for real estate lawyers. First, practitioners should alter their best practices to include trustees under any deeds of trust on the list of parties that must receive notice and be named in any foreclosure action. This, at least, was made very clear by *ParkWest II*.

Second, a large number of lien foreclosures have already occurred where trustees under prior or junior instruments were not named in the foreclosure action. *ParkWest II* opens the door for potential challenges to the ownership of the parties taking through foreclosure,³⁰ although it's unclear who could or would contest this. Title companies are waiting to see if *ParkWest II* spurs any new claims under existing policies or guarantees and are wrestling with how to underwrite new policies of insurance where an owner who obtained title through a foreclosure sale is now conveying the property to a new, unrelated party.

Perhaps the most troublesome implication of *ParkWest II* is its potential to complicate or impede real estate transactions. If a trustee is the legal title holder of the property, how should we approach any encumbrances junior to a deed of trust? Would the trustee need to consent to any junior encumbrances? Would the trustee need to be included in land use applications, as a signatory on plats, or involved in development agreements, easements, or any other documents requiring an owner's consent or execution? From the trustee's perspective, if a trustee must now consent to any of these documents, what duties would

the trustee have to each of the parties to these transactions?

Unfortunately, *ParkWest II* has created a sharp divide between esoteric legal theories about the nature of deeds of trust and our practical understanding of the nature of real estate transactions and financing. There is simply no way to know how far the Court will extend its interpretation of "title theory" until it is tested again. In the meantime, it's worth bearing in mind that this is unsettled territory when structuring transactions and navigating the inevitable conflicts of various parties' interests in property.

Endnotes

1. *ParkWest Homes, LLC v. Barnson*, 154 Idaho 678, 302 P.3d 18 (2013) ("*ParkWest II*").
2. Idaho Code §§ 54-5201 *et seq.* (2005).
3. *ParkWest II*, 154 Idaho at --, 302 P.3d at 20.
4. *Id.* at --, 302 P.3d at 21.
5. *Id.*
6. After *ParkWest* filed its claim of lien, Ms. Barnson filed bankruptcy. This tolled the time period for commencing an action under Idaho Code Section 45-510.

ParkWest commenced its action once the bankruptcy was resolved.

7. *ParkWest II*, 154 Idaho at --, 302 P.3d at 21.
8. *Id.*
9. *ParkWest Homes, LLC v. Barnson*, 149 Idaho 603, 605, 238 P.3d 203, 205 (2010) ("*ParkWest I*").
10. *Id.*
11. *ParkWest II*, 154 Idaho at --, 302 P.3d at 21.
12. *ParkWest I*, 149 Idaho at 609, 238 P.3d at 209.
13. *ParkWest II*, 154 Idaho at --, 302 P.3d at 22.
14. *Id.*, 154 Idaho 678, 302 P.3d 18.
15. *Swanson v. Swanson*, 134 Idaho 512, 515, 5 P.3d 973, 976 (2000).
16. *Taylor v. Maile*, 146 Idaho 705, 709, 201 P.3d 1282, 1286 (2009).
17. *ParkWest II*, 154 Idaho at --, 302 P.3d at 21-22.
18. *Id.* at --, 302 P.3d at 23.
19. Idaho Code § 45-1502(4) (2008) (emphasis added).
20. *Long v. Williams*, 105 Idaho 585, 671 P.2d 1048 (1983); *contra* Restatement (Third) of Property § 4.1 (2013). In general, the characteristics that separate "title theory" states from the alternative "lien theory" states are, first, that vesting title in the trustee allows for a more expedi-

Practitioners should alter their best practices to include trustees under any deeds of trust on the list of parties that must receive notice and be named in any foreclosure action.

This, at least, was made very clear by *ParkWest II*.

tious remedy in the event of a default on the obligation secured by the grantor (namely, non-judicial foreclosure) and second, that statute of limitations does not run against the exercise of the power of sale held by a trustee as it would against the lien of a mortgage. See Grant S. Nelson & Dale A. Whitman, *Real Estate Finance Law* § 1.6 (5th Ed. 2010); Restatement (Third) of Property § 4.1 (2013).

21. *Long*, 105 Idaho at 586, 671 P.2d at 1049.

22. *Id.* at 587-88, 671 P.2d at 1050-51.

23. *Id.* at 588, 671 P.2d at 1051 (emphasis added).

24. 154 Idaho at --, 302 P.3d at 25.

25. *Willes v. Palmer*, 78 Idaho 104, 109, 298 P.2d 972, 975 (1956).

26. *ParkWest II*, 154 Idaho at --, 302 P.3d at 25.

27. *ParkWest II*, 154 Idaho at --, 302 P.3d at 25-26.

28. Emphasis added.

29. Yes, that's right, the "bundle of sticks."

Perhaps the most troublesome implication of *ParkWest II* is its potential to complicate or impede real estate transactions.

If a trustee is the legal title holder of the property, how should we approach any encumbrances junior to a deed of trust?

Did you really think we could leave that reference out of the Real Property Section's issue of *The Advocate*?

30. Excepting, obviously, any non-judicial foreclosures through a trustee under a first-position deed of trust.

About the Author

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Prescriptive Rights: Vested Before Judgment, or Contingent?

Arthur B. Macomber

This article discusses Idaho law defining prescriptive or adverse possession claims as vested rights that a title owner of record has to “recover,” instead of rights contingent on quiet title adjudication.¹ With the 2006 change in the statutory period from five to 20 years, the issue of vested versus contingent interests has been brought to the forefront. Law, logic, and private markets recommend the characterization of pre-suit adverse claims as merely contingent interests. This discussion helps illuminate some interesting and sometime subtle principles at play.

Prescriptive easement interests and evidence required

“An easement is the right to use the land of another for a specific purpose that is not inconsistent with the general use of the property by the owner.”² The Idaho Supreme Court has clearly stated that “[t]o establish an easement by prescription, the claimant must prove by clear and convincing evidence use of the subject property, which is characterized as: (1) open and notorious; (2) continuous and uninterrupted; (3) adverse and under a claim of right; (4) with the actual or imputed knowledge of the owner of the servient tenement (5) for the statutory period.”³ Further, “[r]ecognizing that ‘[p]rescription acts a penalty against a landowner[,]’ . . . prescriptive rights ‘should be closely scrutinized and limited by the courts.’”⁴

Plain language of adverse possession statute

For over 120 years, the fifth element — the statutory period to estab-

Did the 2006 enactment trigger a legislative taking whereby unadjudicated vested rights based on a five-year statutory claim were legally erased?

lish a prescriptive easement — was five years.⁵ Language of today’s statute is identical to the 1887 language, except for the 2006 change of the statutory period from five to 20 years:

Action to recover realty. No action for the recovery of real property, or for the recovery of the possession thereof, can be maintained, unless it appears that the plaintiff, his ancestor, predecessor or grantor, was seized or possessed of the property in question within twenty (20) years before the commencement of the action; and this section includes possessory rights to lands and mining claims.⁶

“The language of a statute should be given its plain, usual and ordinary meaning.”⁷

The first two clauses of Idaho Code section 5-203 include both recovery of physical possession and recovery of non-possessory interests, such as easements. This accords with Idaho Code section 55-101, which defines real property interests as “[l]ands, possessory rights to land, ditch and water rights, and mining claims, both lode and placer[,] that which is affixed [or] appurtenant to land.”⁸ In Idaho, easements are real

property appurtenant to land unless they are personal easements in gross.⁹

“The creation of a private easement by prescription is not favored under Idaho law.”¹⁰ Not favoring prescriptive rights, the legislature quadrupled the statutory period for prescriptive claims.¹¹ That change was due to “take effect” on July 1, 2006.¹²

A few questions arose. What does it mean to be “seized or possessed of the property . . . within twenty (20) years before the commencement of the action?”¹³ What is the connection between the statutory period and a lawsuit’s filing date? What does “take effect” mean regarding allegedly accrued “vested” rights?¹⁴ Did the 2006 enactment trigger a legislative taking whereby unadjudicated vested rights based on a five-year statutory claim were legally erased? Or, can a prescriptive easement claimant bring a five-year based claim decades down the road and enforce his “title?” If so, would this not erase the statutory link between the statutory period and the filing date of the action?

The filing date determines which statutory period applies

The *Smith* case recognized that the Legislature tied the statutory pe-

riod to the filing date: “[a]ccepting [a certain date] as the correct date [of the filing of the action], it follows that this action was commenced thirty days before the expiration of the [twenty] year period of adverse possession, which otherwise would have matured and perfected defendants’ title.”^{15 16}

Neither Idaho Code section 5-203, nor its predecessor statutes, nor the Territorial Law of Idaho included punctuation separating the statutory period and the words “before the commencement of the action.”¹⁷ Since at least 1881, this statutory structure provided the plain language means for proper interpretation of Idaho Code section 5-203.¹⁸ In *Smith*, the adverse possession claim was dismissed, because suit was filed prior to the running of the statutory period.¹⁹ By tying the filing date to the statutory period, the statutes alter the common law prescriptive easement action, thus the elements of a prescriptive easement must be proven within Idaho Code section 5-203, not as an action under common law.²⁰

Interpreting the statute to recognize the filing date as determinative of which statutory period applies gives the benefit of certainty to property titles. The rule would be that for quiet title filings prior to July 1, 2006 an adverse possessor merely held a “contingent interest” and could bring an action to vest his right, instead of gaining vested title without court decree. Conversely, for a July 2, 2006 or later filing he would have to show a 20-year accrual of possession or use to have such a contingent interest adjudicated as a vested right.

In Idaho, pre-lawsuit rights are vested

Since 2006, the Idaho Supreme Court has continued to state that if

an adverse possessor meets the five elements, title “vests” in the adverse possessor “by operation of law.”²¹ However, the Court in both *Capstar III* and *Machado* failed to explain why that conclusion of law was asserted, and thus it is arguable that the Court is not committed to that view. Further, the Court has not explained why such a claim automatically vests instead of being contingent on the outcome of a quiet title action.

Black’s Law Dictionary defines “vested right” as a “right that so completely and definitely belongs to a person that it cannot be impaired

The characterization of a five-year-based claim as a vested right implies the judicial findings of a quiet title action are a mere declaratory judgment.²⁹

or taken away without the person’s consent.”²² More to the point, a “vested interest” is “an interest the right to the enjoyment of which, either present or future, is not subject to the happening of a condition precedent.”²³

In Idaho, the definition of a “vested right” was addressed in relation to water rights in *United States v. Pioneer Irrigation District*, wherein the Court stated that a “vested right” to the use of water may come into being by a judicial decree, permit, or license.²⁴ Additionally, fee simple title vests in a sheriff’s deed grantee if the fore-

closed-upon mortgagor does not redeem within the statutory period.²⁵ In that case, the establishment of the vested right was contingent upon the prior grantee not redeeming, therefore only a contingent interest was held prior to redemption.²⁶

Prior to 2006, a prescriptive easement claimant could present evidence of any continuous five-year time period back to the 1800s. Without explanation, the Idaho Supreme Court implied this will be true even 100 years from today, regardless of the 2006 legislative quadrupling of the statutory period.²⁷ The *Backman* case, decided in 2009, was filed in Bonner County as Case Number CV-2006-0000365 on February 24, 2006, prior to the effective date of the change, thus the Court’s ruling that the five-year period applied does not block a future Idaho court from finding adverse claims are contingent upon adjudication.²⁸

Problems with the vested rights characterization

The characterization of a five-year-based claim as a vested right implies the judicial findings of a quiet title action are a mere declaratory judgment.²⁹ However, if a filing date is determinative of the applicable statutory period, would not a post-July 1, 2006 filed case confirming a vested right and a conveyance of title based on passage of a pre-2006 five-year statutory period be an invalid *ipse dixit* ruling? Such a holding of a conveyance of title using the old statutory period would ignore the Idaho statute defining contingent interests, and further, would be unworkable in modern real estate and title insurance markets.³⁰

If a claimant’s right accrues and vests without him prevailing in

court, a person could pull an ace from his vest and trump the property right of a title owner regardless of the date of “commencement of the action.” Taken a step further, a claimant would “own” the property in question without ever filing an action to transfer title. That interpretation eviscerates the statute of frauds regarding conveyances of non-possessory easements, allowing transfers to occur with simply the passage of time (plus the other elements).³¹ This cannot have been the Legislature’s intent in 2006.

A prescriptive claim is a contingent interest

In Idaho, “[a] future interest is contingent whilst the person in whom, or the event upon which, it is limited to take effect remains uncertain.”³² “A future interest is vested when there is a person in being who would have a right, defeasible or indefeasible, to the immediate possession of the property upon the ceasing of the immediate or precedent interest.”³³ Specifically, “an estate vests in interest when there is a present, accrued, fixed and indefeasible right of enjoyment at a future time.”³⁴

Idaho Code section 55-106 does not differentiate between wills, trusts, or real property interests. The solution proposed in this discussion would recognize that prior to commencing an action and prevailing, claimants do not have a vested right, but only “an inchoate expectancy, a contingent interest . . . in the event” of prevailing on their claim.³⁵ An unadjudicated prescriptive claim is not a present, accrued, fixed and indefeasible right of enjoyment at a future time, prior to “commencement of the action” and claimant’s prevailing in that action, but instead an interest contingent on that future event’s outcome.³⁶



The vested rights fiction unsettles real property land titles, because there is nothing compelling an adverse claimant to bring suit to quiet title. “[I]f the plaintiffs have any interest in [a] property, either contingent or expectant, they *may* maintain an action to determine any adverse claim or interest thereto.”³⁷ Some case law recognizes that adverse claimants must “establish [the elements] . . . by clear and convincing evidence,” and thus any property interest remains *contingent on adjudication*.³⁸

Pre-adjudication title transfer by operation of law is impractical

Scenario #1: Title owner dies, and land ownership goes to the heir “by

operation of law.”³⁹ This is proven by deed, will, or other estate-related document. If an adverse claimant appeared, the statute would allow the transfer to the heir, subject to that adverse claim.⁴⁰ However, to quiet title the adverse claimant would need to “commence [] an action” and receive a favorable judgment under Idaho Code section 5-203.

Conversely, if the adverse claimant died prior to filing suit, who would challenge the title transfer to the heir, except perhaps claimant’s estate? No title insurer or buyer would accept the risky title encumbered by a dead adverse claimant’s “vested” title without “commencement of a [quiet title] action.”⁴¹ The

Taken a step further, a claimant would “own” the property in question without ever filing an action to transfer title.

fiction of automatic vesting of title to adverse claimants makes no economic sense, and unduly increases land investment risk and market instability.

Scenario #2: Adverse claimant requests title insurance for their “operation of law” pre-suit vested title ownership.⁴² Refusing, the title company requires “commencement of the [quiet title] action.” A title company will not insure an *inchoate expectancy*, because its insurance could be triggered to defend a future quiet title action. Private markets logically consider adverse claims to be contingent on a civil judgment.

Scenario #3: Adverse claimant contracts for real estate agent to sell “his” land. The recorder’s office has no record of claimant’s deed or favorable judgment. The real estate agent will not risk trying to sell this property.⁴³ It is logical for the law to acknowledge the market risks found in real property conveyances.⁴⁴

As in other areas of law, “[t]he more legally cogent time to sever a contingent interest and its accompanying [] relationship [to a true owner’s title] is the moment that the contingency fails to occur” upon judgment.⁴⁵

Finally, if the claimant does not sustain his burden of proof, would we say the court destroyed a vested right by a judicial taking?⁴⁶ The judicial takings question is avoided if the pre-adjudicatory right is characterized as contingent.

Conclusion

Maintaining the pre-judgment adverse claimant’s vested rights fiction disrupts real property conveyance and title insurance markets. Statutory *contingent interests* should

not be construed as *vested rights* by the courts. A statute in effect when a case is commenced should not be ignored to favor a prescriptive claimant.⁴⁷ Idaho can and should dispense with the fiction so that statutes are given harmonious, practical, and logical effect.

Endnotes

1. IDAHO CODE § 5-203 (2013).
2. *Abbott v. Nampa School Dist. No. 131*, 119 Idaho 544, 548, 808 P.2d 1289, 1293 (1991).
3. *Baxter v. Craney*, 135 Idaho 166, 173, 16 P.3d 263, 270 (2000).
4. *Benninger v. Derifield*, 145 Idaho 373, 375, 179 P.3d 336, 338 (2008); citing *Gibbens v. Weisshaupt*, 98 Idaho 633, 638, 570 P.2d 870, 875 (1977).
5. IDAHO CODE § 5-203; see Hist. C.C.P. 1881 § 143; R.S. § 4036 (1887).
6. IDAHO CODE § 5-203.
7. IDAHO CODE § 73-113(1); *Johnson v. Sanchez*, 140 Idaho 667, 668, 99 P.3d 620 (Ct. App. 2004); *George W. Watkins Family v. Messenger*, 118 Idaho 537, 539-40, 797 P.2d 1385, 1387-88 (1990); *Zener v. Velde*, 135 Idaho 352, 355, 17 P.3d 296, 299 (Ct. App. 2000).

Maintaining the pre-judgment adverse claimant’s vested rights fiction disrupts real property conveyance and title insurance markets.

8. See 73-114(2)(e).
9. IDAHO CODE §§ 55-101(3), 55-603, 73-114(2); 73 C.J.S. Property § 7, p. 159; *Hughes v. State*, 80 Idaho 286, 293, 328 P.2d 397, 404 (1958).
10. *Backman v. Lawrence*, 147 Idaho 390, 397, 210 P.3d 75, 82 (2009); citing *Elder v. Northwest Timber Co.*, 101 Idaho 356, 358, 613 P.2d 367, 369 (1980).
11. IDAHO CODE § 5-203; S.L. 2006, Ch. 158, § 1, eff. Jul. 1, 2006.
12. IDAHO CONST. Art. III § 22; IDAHO CODE § 67-510; *Fox v. Board of County Com’rs, Boundary County*, 121 Idaho 686, 690, 827 P.2d 699, 703 (Ct.App. 1991).
13. IDAHO CODE § 5-203.
14. IDAHO CONST. Art. III § 22; IDAHO CODE § 67-510.
15. The phrase after the last comma must be in error, because prior to adjudication the adverse claimant merely enjoys a contingent interest, not a vested right, unless there was a judicial taking. IDAHO CODE § 55-105; *Johnson v. Johnson*, 113 Idaho 602, 746 P.2d 1061 (1987).
16. *Smith*, 76 Idaho at 268-269, 281 P.2d at 486-487; but see *Johnson v. Johnson*, 113 Idaho 602, 746 P.2d 1061 (1987).
17. IDAHO CODE § 5-203; see C.C.P. 1881, § 143; R.S. § 4036 (1887).
18. *Gen. Laws of Idaho*, 11th Sess., Terr. Legisl., Boyakin (Terr. Printer), p. 27 § 143; IDAHO CODE § 5-203; *Smith*, 76 Idaho at 268-269, 281 P.2d at 486-487.
19. *Smith*, 76 Idaho at 269.
20. IDAHO CODE § 73-116.
21. IDAHO CODE § 9-503; *Capstar Radio Operating Co. v. Lawrence*, 283 P.3d 728, 742, 153 Idaho 411, 425, fn. 2 (2012) (“*Capstar III*”) (“In 2006, Idaho Code section 5-203 was amended to extend the statutory time period from five years to twenty years. However, the twenty-year time period does not apply to an easement by prescription acquired prior to the amendment.”); *accord Machado v. Ryan*, 280 P.3d 715, 725, 153 Idaho 212, 222 (2012); *Smith v. Long*, 76 Idaho 265, 268-269, 281 P.2d 483, 486-487 (1995); see *Persyn v. Favreau*, 119 Idaho 154

(1990), citing *Kimball v. Lohmas*, 31 Cal. 154 (1866); and *Cramer v. Walker*, 23 Idaho 495, 499, 130 P. 1002, 1006 (1913) (“[I]f appellant had been, as the evidence shows, in the continuous adverse possession of the property from April 5, 1884, and had paid the taxes assessed against the property continuously during that period of time, his claim by adverse possession had matured and ripened into title on the 5th of April, 1889,” prior to adjudication).

22. Black’s Law Dictionary, 8th Ed., p. 1349 (2004).

23. Black’s Law Dictionary, 8th Ed., p. 829 (2004).

24. *United States v. Pioneer Irr. Dist.*, 144 Idaho 106, 108, 157 P.3d 600, 602 (2007); *Hardy v. Higginson*, 123 Idaho 485, 490, 849 P.2d 946, 951 (1993).

25. *Eastern Idaho Production Credit Ass’n v. Placerton, Inc.*, 100 Idaho 863, 867, 606 P.2d 967, 971 (1980).

26. *Id.*; IDAHO CODE § 55-106.

27. *Capstar Radio Operating Co.*, 283 P.3d at 742, fn. 2, 153 Idaho at 425, fn. 2.

28. *Backman v. Lawrence*, 147 Idaho 390, 210 P.3d 75 (2009).

29. IDAHO CODE § 10-1201.

30. IDAHO CODE § 55-106.

31. IDAHO CODE § 9-503.

32. IDAHO CODE § 55-106.

33. IDAHO CODE § 55-105.

34. *Zimmer v. Zimmer*, 47 Idaho 364, 367, 276 P. 302, 305 (1929); citing Thompson on Construction of Wills, 598.

35. IDAHO CODE § 55-106; *Johnson v. Johnson*, 113 Idaho 602, 603, 746 P.2d 1061, 1062 (Ct.App. 1987) (prior to decedent’s death former spouse only had a contingent interest); *Gem Valley Ranches, Inc. v. Small*, 92 Idaho 232, 235, 440 P.2d 352, 355 (1968) (prior to being paid appellants only had a contingent interest); *Bliss v. Bliss*, 20 Idaho 467, 500-501, 119 P. 451, 474-475 (1911); citing *Hirsh v. Auer*, 146 N.Y. 13, 19, 40 N.E. 397, 403 (1895) (contingent interest became vested at the death of the insured); *Wilson v. Linder*, 18 Idaho 438, 448, 110 P. 274, 284 (1910) (plaintiffs have a contingent remainder in the estate which may be defeated).

36. IDAHO CODE § 5-203.

37. *Wilson v. Linder*, 110 P. 274, 280, 18 Idaho 438, 444 (1910) (emphasis added) (Court applies contingent interest analysis to acquisition of title to real property).

38. IDAHO CODE § 55-106; *Baxter v. Craney*, 135 Idaho 166, 173, 16 P.3d 263, 270 (2000).

39. *Nebeker v. Piper Aircraft Corp.*, 113 Idaho 609, 619, 747 P.2d 18, 28 (1987).

40. IDAHO CODE § 55-503.

41. IDAHO CODE § 9-503.

42. IDAHO CODE § 9-503.

43. IDAHO CODE § 55-501.

44. IDAHO CODE § 9-503.

45. *See Beaudoin v. Davidson Trust Co.*, 263 P.3d 755, 759, 151 Idaho 701, 705 (2011) (trustee’s fiduciary duty ended when contingency failed to occur to vest

interest of beneficiaries); *In re Rothchild’s Estate*, 283 P. 598, 607-08, 48 Idaho 485, 494-95 (1929) (contingent remainderman interest may vest to known beneficiary upon decedent’s death, but possessory interest is contingent upon ending of life estate); and *In re Estate of Zimmer*, 276 P. 302, 305, 47 Idaho 364, 367 (1929) (“[T]he uncertainty of the right . . . [is] the difference between the vested and contingent interest.”).

46. *Stop the Beach Renourishment, Inc. v. Florida Dept. of Environmental Protection*, 560 U.S. ___, 130 S.Ct. 2592, 177 L.Ed.2d 184 (2010) (discussion of whether judicial takings can constitutionally exist and what criteria would show such had occurred).

47. IDAHO CODE §§ 5-203 and 55-106; *Smith v. Long*, 76 Idaho 265, 268-269, 281 P.2d 483, 486-487 (1995).

About the Author

Arthur B. Macomber’s undergraduate degree in business was accomplished at George Fox University. Prior to attending the University of California Hastings College of the Law, he enjoyed 25 years in business, real estate, and construction. The practice of Macomber Law, PLLC focuses on real property, land use, water, and construction law.



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Claims on Idaho Public Works Projects

Douglas R. Hookland

Subcontractors and suppliers working on privately owned construction projects use mechanics' liens to secure payment for their work. Those subcontracting and supplying on public works projects lack lien rights, but have a different tool available. Idaho's Public Contracts Bond Act ("Act")¹ was adopted to provide security for certain subcontractors and suppliers providing labor, materials, and/or rental equipment on Idaho state and local public works construction projects.² This article provides a summary of the key issues to address and how to timely perfect a secured claim under the Act.

The key issues include:

1. Has the public body required a bond or alternate security?
2. Does the subcontractor or supplier have standing to assert a bond claim?
3. Does the subcontractor or supplier have any preclaim notice requirements to satisfy?
4. What are the claim requirements?
5. Are there any post-claim notice requirements?
6. How and when to sue.

Overview

Mechanics' lien rights are not available to contractors, subcontractors, or suppliers on public works projects. As a substitute for lien rights, certain subcontractors and suppliers may assert a claim against the payment bond or government obligations furnished by the prime contractor on Idaho public works projects.³ Generally, subcontractors and suppliers claiming to have sup-

There is also no bond requirement on public works projects where the estimated cost is less than \$10,000 and where the estimated cost is less than \$50,000 for which no responsive statement of interest was received from a licensed public works contractor.

plied labor, materials, or equipment to the prime contractor or a first tier subcontractor have a right of action on the prime contractor's bond or other government obligations if:

1. They have not been paid in full; and
2. If they have contracted with a first-tier subcontractor, they must give written notice of the claim to the prime contractor who furnished the bond or government obligations; and
3. If required, the notice of bond claim is sent by registered or certified mail no later than 90 calendar days after the day they last provided labor, materials, or equipment. The notice may be sent to the prime contractor at any place the contractor maintains an office, conducts business, or at the residence of the contractor.

Possible public body liability

Generally, a state or local public body letting a contract has no exposure or liability to any unpaid subcontractor or supplier, unless the public body has failed or neglected to obtain delivery of the payment bond or government obligations as required by the Act. In such situa-

tion, the unpaid subcontractor or supplier may make demand on the public body, and if payment is not forthcoming, commence suit directly against the public body to recover sums owing plus attorney fees.⁴ It is important to note that construction of a public solid waste disposal site is exempt from the bonding requirements.⁵ Therefore, subcontractors and suppliers may have no bond or government obligations to claim against on these projects. There is also no bond requirement on public works projects where the estimated cost is less than \$10,000 and where the estimated cost is less than \$50,000 for which no responsive statement of interest was received from a licensed public works contractor when statements of interest were solicited as provided in Idaho Code § 67-2805.⁶

Practice Tip: To avoid liability to unpaid subcontractors and suppliers, prior to permitting the prime contractor to commence work, the public body should confirm the prime contractor has furnished the required payment and performance bonds or alternate security. Similarly, prior to agreeing to provide labor, materials, or equipment on a project, a subcontractor or supplier should

confirm, by contacting the public body, that a proper payment bond or alternate security has been posted by the prime contractor. It can be easier and less costly to claim against a payment bond or alternate security than asserting claims directly against a public body.

Setting the stage for asserting a claim

Subcontractors or suppliers must contract with either the prime contractor or a first-tier subcontractor to have standing to assert bond claims.⁷ If the subcontractor or supplier contracts with a second or lower tier subcontractor, they will not have standing to assert a bond claim. A “subcontractor” is defined as one who performs for the prime contractor a specific part of the labor or material requirements of the original contract.⁸ A fabricator can qualify as a first subcontractor under the Act, provided its relationship on the project with the prime contractor is substantial and important.⁹

Factors to consider when determining a “substantial and important” relationship include:

1. The percentage of the prime contract subbed out to the subcontractor/fabricator. For example, if 10% or more of the total prime contract is subbed out to a subcontractor/fabricator, this subcontractor/fabricator may have a substantial and important relationship with the prime contractor.
2. Is the contract between the prime contractor and the subcontractor/fabricator complex, and does it refer to or incorporate provisions in the prime contract?
3. Will the subcontractor/fabricator provide any on site work?
4. Has the prime contractor required the owners of the subcontractor/fabricator to personally guarantee

the subcontractor/fabricator’s performance obligations?¹⁰

Practice Tip: Prior to agreeing to participate on a public works project, the subcontractor or supplier can take certain steps to determine whether they are contracting directly with either the prime contractor or a first-tier subcontractor. These steps include contacting the public body letting the contract to determine the prime contractor and to

These steps include contacting the public body letting the contract to determine the prime contractor and to request a copy of the payment and performance bonds, which will show who the prime contractor is on the project.

request a copy of the payment and performance bonds, which will show who the prime contractor is on the project. If the subcontractor or supplier is not contracting with the prime contractor, then contact the prime contractor to determine if the prime contractor is contracting directly with the person or entity to whom the potential bond claimant is furnishing labor, materials, or rental equipment.

Pre-claim notice requirements

Some states, such as Washington, require certain subcontractors and suppliers to timely and properly serve pre-claim notices as a prerequi-

site to having valid secured rights on state or local public works projects.¹¹ In contrast, in Idaho, there are no pre-claim notice requirements. This means subcontractors and suppliers with standing to make bond claims are not required to provide a pre-claim notice or information to the prime contractor or public body to have bond claim rights.

Notice requirements

A subcontractor or supplier contracting with a first-tier subcontractor must serve a bond claim within **90 calendar days** after last performing labor or last furnishing material or rental equipment.¹² While the statute (Idaho Code § 54-1927) states this 90 day period runs from the last of the labor, materials, or rental equipment furnished, it is recommended the bond claimant run its ninety 90-day period from when it last performed a substantial amount of labor or last furnished a substantial amount of material or rental equipment that is not for repair or warranty work. Doing so should help avoid an argument the claim is untimely.

Practice Tip: Courts have held mechanics’ lien claims untimely when the only work furnished within the 90-day period to record a lien is either trifling (small) amounts of work, or repair work, or warranty work. To avoid possible application of these holdings to a bond claim, a claimant is encouraged to run its 90-day period to serve a bond claim from when it last performed a substantial amount of on-site labor or furnished a substantial amount of materials or rental equipment that is not for repair or warranty work.

A subcontractor or supplier contracting directly with the prime contractor does not need to serve a bond claim, unless government obligations (i.e. cashier’s or certified check)

are posted in lieu of a surety bond. If government obligations have been posted, the notice of claim should be provided to the public body that let the contract and the prime contractor within **90 calendar days** after the claimant last performed labor or last furnished materials or rental equipment.

A subcontractor or supplier contracting with a first-tier subcontractor must serve its bond claim on the prime contractor by registered mail or certified mail, postage prepaid, in an envelope addressed to the prime contractor at any place the prime contractor maintains an office, conducts business, or at his or her residence.¹³ It is also recommended to serve a copy of the bond at same time by registered or certified mail on the surety providing the bond.

While the statute (Idaho Code § 54-1927) mandates serving the claim by registered or certified mail, written notice served by regular mail has been found effective and valid, because the notice was given and received within the required 90-day period, and the registered or certified mail requirement is intended to assure receipt of the notice.¹⁴

Practice Tip: Send the bond claim by certified mail, return receipt requested, and by first class mail. Certified mail is cheaper than registered mail, and can be received sooner than registered mail. In case the addressee refuses to sign for or pick up the certified mail, sending the bond claim also by first class mail will better ensure the claim is actually received (particularly if the first class mail version is not returned to you).

Although the statute (Idaho Code § 54-1927) requires only that written notice of the bond claim be “given” within the 90-day period, the best practice is to serve the bond claim by registered or certified mail



sufficiently in advance of the 90-day deadline such that the claim is actually received within the 90-day period.

Practice Tip: Contact the public body letting the contract and request a copy of the payment and performance bonds or government obligations furnished by the prime contractor. Under Idaho Code § 54-1927 and Idaho’s Public Records Act¹⁵, the public body is required to furnish these documents upon request. Typically, most public entities will email these documents to you on the day you request them. Obtaining copies of the bond or government obligations will confirm the identity of the prime contractor,

and permit you to serve a copy of the bond claim on the surety providing the bond, which should hasten payment to the claimant. If government obligations have been posted in lieu of a bond, a claim should be served on the public body and prime contractor within the 90-day period, whether the claimant contracted with the prime contractor or a first-tier subcontractor.

If the claimant must serve a bond claim or claim against government obligations, the claim must state with substantial accuracy the amount claimed and the name of the person or entity to whom the labor, materials, and/or rental equipment were furnished or performed.¹⁶

If government obligations have been posted in lieu of a bond, a claim should be served on the public body and prime contractor within the 90-day period, whether the claimant contracted with the prime contractor or a first-tier subcontractor.

Post-claim notice requirements

There are no post-claim notice requirements. In other words, after a claimant who is required to serve a claim on a state or local project does so, it does not have to provide a further notice to any person or entity to maintain its claim.

Suit on bond claim

A first-tier subcontractor must commence suit on its bond claim **no later than one year** from the date on which final payment under the subcontract becomes due.¹⁷ A material supplier or rental equipment supplier must commence suit on its bond claim **no later than one year** from the date on which it furnishes the last of its material or equipment.¹⁸ Suit must be filed in the appropriate court of any county in which the contract was to be performed.¹⁹

A second-tier subcontractor (one contracting with a first-tier subcontractor) must commence suit on its bond claim **no later than one year** after it last furnished work.²⁰ It is recommended that second-tier subcontractors not run their one year from when they last performed a small (trifling) amount of work or from any repair or warranty work they performed.

Attorney fees

In any lawsuit brought on a bond claim, the prevailing party is entitled to recover its reasonable attorney's fees.²¹ In 2009 the Idaho Supreme Court ruled that the prevailing party is entitled to recover its reasonable attorney fees incurred on appeal.²²

Endnotes

1. Idaho Code §§ 54-1925 through 54-1930.
2. "State Public Works" are construction projects let by the State of Idaho or a subdivision of the State. "Local Public Works" projects are construction projects let by local governmental entities, such as a city, town, county or public school district.
3. Idaho Code §§ 54-1926 & 54-1926A.
4. Idaho Code §§ 54-1928 & 54-1929.
5. Idaho Code § 54-1903(j).
6. Idaho Code § 54-1903(i).
7. Idaho Code § 54-1927; *LaGuard Steel Products v. A.S.C. Constructors, Inc.*, 108 Idaho 817, 818, 702 P.2d 855, 856 (Ct. App. 1985).
8. *LaGuard Steel Products v. A.S.C. Constructors, Inc.*, 108 Idaho 817, 818, 702 P.2d 855, 856 (Ct. App. 1985).
9. *Id.* at 818-819.
10. *Id.*
11. Revised Code of Washington §§ 39.08.065 & 60.28.015.
12. Idaho Code § 54-1927.

13. Idaho Code § 54-1927.

14. *Consolidated Concrete Co. v. Empire W. Constr. Co.*, 100 Idaho 234, 236-37, 596 P.3d 106, 108-09 (1979).

15. Idaho Code § 9-338 *et. seq.*

16. Idaho Code § 54-1927.

17. Idaho Code § 54-1927.

18. Idaho Code § 54-1927.

19. Idaho Code § 54-1927.

20. Idaho Code § 54-1927.

21. Idaho Code § 54-1929.

22. *Evco Sound & Electronics, Inc. v. Seaboard Surety Co.*, 148 Idaho 357, 367, 22. 3 P.3d 740, 750 (2009).

About the Author

Douglas R. Hookland is a partner in the Tigard, Oregon law firm of Scott Hookland LLP. He has been a member of the Idaho State Bar since 2003, and his practice emphasizes enforcement of creditor's rights and construction law. He received his law degree from Willamette University College of Law. He is a frequent author and presenter of written materials to attorneys and trade groups in the area of creditor's rights and construction law. He can be reached at (503) 620-4540 or drh@scott-hookland.com.



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In re Old Cutters, Inc.: If a Little is Good, a lot Must be Better — Except When it Comes to Annexation Fees

Laurie Reynoldson

Numerous real estate related lawsuits were filed during the economic downturn and the Great Recession that followed. Most were foreclosure actions. Some were filed by developers as last ditch efforts to save their properties, their businesses and their assets. In *re Old Cutters*¹ is one of those cases. At the heart of the decision is a discussion about just how far a city can go — and how much a city can charge a developer — when annexing real property as part of a voluntary annexation. The answer, at least from the United States Bankruptcy Court’s perspective,² appears to be not near as far in post-Recession 2013 as some developers previously tolerated.

The facts: It’s gonna cost you

In 2003 and 2005, Old Cutters purchased several tracts of real property in Blaine County contiguous to the City of Hailey for the purpose of constructing a residential planned unit development. As part of the development process, Old Cutters investigated several options to provide sewer and water to the proposed subdivision. One such option was to develop the property in Blaine County, requiring significant out-of-pocket expenditures to construct a pocket sewage treatment plant to serve the subdivision. Another option was to seek annexation into the City of Hailey, and tie in to the City’s water and sewer services.

Old Cutters understood that annexation would require a payment of annexation fees to offset costs to the City for incorporating the new

At the heart of the decision is a discussion about just how far a city can go — and how much a city can charge a developer — when annexing real property as part of a voluntary annexation.

development.³ After a number of pre-application meetings with the City, Old Cutters was also under the impression that annexation into Hailey would be quicker than developing the project in Blaine County.⁴ Old Cutters filed its annexation application with the City in August 2003.

Although the first public hearing on Old Cutters’ application occurred in November 2003, the City did not make a decision at that time, and continued subsequent hearings until March 2004. At that hearing, the City Council decided to commission a new fiscal study and, thereafter, the City contracted with Management Partners (MP) to prepare the study. MP released the initial draft of the new fiscal study in October 2005. The draft study recommended that Old Cutters pay an annexation fee of \$788,000, covering not only the actual impact costs of Old Cutters’ annexation, but also “a share of [the City’s] projected future budget deficiencies, future capital expenditures, and other costs not directly associated with the annexation of the Property.”⁵

Following discussions with City officials, MP finalized its fiscal report in November 2005 (MP Report). The MP Report recommended that the Old Cutters’ annexation fee be increased to \$1,875,920, which further included a “variety of additional future municipal capital projects” that the City “hoped to be able to undertake” in the future.⁶

For reasons that are unclear, the City decided that the MP Report should be further revised and, in December 2005, the MP Report was again modified and the Old Cutters’ annexation fee increased to \$2,056,427. Although Old Cutters objected to the City’s requirement that the developer should pay for costs to the City wholly unrelated to the Old Cutters’ project, on January 6, 2006, Old Cutters offered to pay an annexation fee of \$2,000,000. The offer was rejected by the City.

Three days later at yet another public hearing on the Old Cutters’ application, the City Clerk, apparently of her own volition, suggested to the City Council that annexation fee negotiations with Old Cutters should “start at not less than

\$3,000,000.⁷⁷ Still more meetings and negotiations between the City and the developer ensued, and the parties finally reached agreement in 2006 on an annexation fee of \$3,787,500.

Terms of the development agreement: While you're at it...

The City and Old Cutters executed an Annexation, Services and Development Agreement on April 6, 2006 (the "Development Agreement").⁸ The Development Agreement included the following paragraph: "[t]he Parties acknowledge and agree that the annexation fee... are [sic] fair and equitable and that the annexation fees have been agreed upon as consideration for the City providing essential governmental and utility services to the Property and to mitigate the impact on the City of annexation and development of the Property."⁹ The Development Agreement required Old Cutters to pay the annexation fee in installments after the final plat for the subdivision was recorded. Then, additional payments were due annually until a certain percentage of the lots were sold, at which time Old Cutters was to pay a balloon payment. Old Cutters' payment obligations under the Development Agreement were secured by a lien on the "Market Rate Lots" proposed to be developed in the Property.¹⁰

Finally, the Development Agreement obligated the developer to comply with the City's Inclusionary Community Housing Ordinance ("ICH Ordinance") by constructing market rate housing on 20 percent of all lots to be developed in the project. The Development Agreement documented how Old Cutters would satisfy the requirements of the ICH Ordinance, and included



the following waiver relating to the market rate lots:

COMMUNITY HOUSING ORDINANCE. [Old Cutters] hereby waives any right it may have to assert that the City's Community Housing Ordinance is invalid in whole or in part as it applies to the Subdivision [contemplated by the Development Agreement].¹¹

After entering into the Development Agreement, the City repealed the ICH Ordinance in 2010. Although Old Cutters requested relief from the affordable housing require-

ments following repeal of the ICH Ordinance, the City refused to so amend the Development Agreement based upon the waiver contained therein.¹²

Procedure: The bottom falls out

Old Cutters, faced with an inability to sell lots, pay property taxes, meet financing requirements¹³, or make payments due to the City under the Development Agreement¹⁴, filed for Chapter 11 relief on August 1, 2011. In its petition, Old Cutters cited "delays and costs it incurred in the annexation process, and its corre-

In its petition, *Old Cutters* cited "delays and costs it incurred in the annexation process, and its corresponding inability to take advantage of a favorable real estate market preceding the recession" as the primary reasons for the bankruptcy filing.¹⁵

sponding inability to take advantage of a favorable real estate market preceding the recession” as the primary reasons for the bankruptcy filing.¹⁵ Following Old Cutters’ bankruptcy filing, Mountain West Bank, the primary creditor, commenced adversary proceedings to determine the City’s rights against Old Cutters.¹⁶ In particular, the parties filed cross-motions for summary judgment to determine the enforceability of the annexation fee payment and the community housing requirements in the Development Agreement.

The decision: When too much is too much

Neither party challenged Hailey’s authority to annex the property.¹⁷ Rather, central to the dispute were the conditions of the annexation. Accordingly, the issue before the Court was whether a city may contract to annex land on whatever terms (including fee amount) agreed upon by the municipality and the applicant landowner.¹⁸

Old Cutters challenged the enforceability of the Development Agreement by arguing that the City’s imposition of an annexation fee exceeding the actual costs of development impact and the community housing requirements were *ultra vires* acts.¹⁹ In other words, the Legislature granted certain powers to municipalities, and the City’s decision to charge a fee that exceeds the estimated costs of development, covers budget shortfalls, and is earmarked for future capital projects unrelated to the annexation request, exceeds these powers. Specifically, Old Cutters argued that, under Idaho law, “the annexation fee cannot be sustained under Hailey’s annexation authority, police powers, taxing authority, nor can it be justified as

a traditional contract.”²⁰ Similarly, Old Cutters argued that requiring construction of a certain number of “community housing” units was also an *ultra vires* act exceeding the City’s powers.

The City defended the conditions in the Development Agreement, insisting that the Court lacked authority to review what was basically a legislative action of the City Council.²¹ Additionally, the City argued that Old Cutters should be estopped from challenging the validity of pro-

Similarly, in *Old Cutters*, the Court determined that requiring the developer to pay a fee that greatly exceeded the actual costs of impact of the annexation exceeded the City’s power.²⁸

visions of the Development Agreement because it was freely negotiated by the parties²² and, in setting the annexation fee, the City was acting “within the general grant of constitutional authority [that] is not prohibited by state law.”²³

Generally under Idaho law, acts by a city that exceed powers granted to the city are deemed *ultra vires* acts. Idaho law has long recognized three sources of power and no others: (1) powers granted in express words; (2) powers fairly implied in

or incident to those powers expressly granted; and (3) powers essential to the accomplishment of the declared objects and purposes of the corporation.²⁴

The Idaho Supreme Court examined those powers in *Black v. Young*, where the City of Ketchum attempted to impose certain contractual conditions on property owners beyond the scope of the statutory powers on a petition to vacate an alley.²⁵ In *Black*, a landowner sought vacation of an alley, and in consideration therefor, offered to pay \$5,000 and move a log cabin and salvageable material from the alley. The City of Ketchum rejected the offer, requiring instead that the applicant obtain a building permit, a commitment for a sizable construction loan, and sign a development agreement granting the city a right of reversion if certain development condition timelines were not met.²⁶ The landowner subsequently sued to invalidate the development agreement, and the *Black* Court found that “the two conditions that the City of Ketchum imposed upon vacation of the alley, as well as the right of reversion... are not expressly granted powers..., nor are they powers essential to the vacation of the alley.”²⁷ Therefore, the additional conditions in the development agreement constituted *ultra vires* acts, and were not enforceable.

Similarly, in *Old Cutters*, the Court determined that requiring the developer to pay a fee that greatly exceeded the actual costs of impact of the annexation exceeded the City’s power.²⁸ Indeed, the Development Agreement required Old Cutters to pay an annexation fee of nearly \$3.8 million when the estimated costs of annexation were less than \$788,000.²⁹ Accordingly, requiring payment of the annexation fee was an *ultra vires* act. The Court reasoned:

While private parties enjoy near unfettered flexibility in negotiating contract terms, the Idaho Legislature and court decisions demand that cities have a statutory basis for their conduct in this context. Put another way, Hailey cannot credibly justify its insistence upon payment of over \$2 million in additional annexation fees from Old Cutters as an appropriate exercise of its ‘powers essential to the accomplishment of the declared objects’ of the [annexation] statute.³⁰

For the same reasons, the Court determined that requiring Old Cutters to construct a certain number of community housing units was also an *ultra vires* act and, therefore, unenforceable.³¹

Practical considerations after Old Cutters: The new (and reduced) costs of development?

Is this the correct result? On the one hand, it seems a slippery slope for a court to undo material contractual provisions reached following extensive negotiations. On the other hand, it is hard to say whether the Development Agreement was truly the result of arm’s length bargaining. In the development world, time is money. If a developer is not selling lots, there is no influx of new capital to repay development debts – whether to lenders or municipalities. Given that three years had lapsed between Old Cutters’ submission of the annexation application and the signing of the Development Agreement, the developer here had to do something – anything – to move the project forward, even if that meant agreeing to provisions in the Development Agreement that were less than favorable.

While the Bankruptcy Court reached its decision by trying to determine how the highest court in Idaho would rule on the issues,³² the *Old Cutters* decision is merely instructive.

Although agreeing to an annexation fee that is significantly more than estimated costs to cover the development may seem preposterous, it happened routinely in the mid-2000s. Developers bought fire trucks for fire stations on the other side of town. They contracted to build schools serving children who did not live anywhere near the subdivisions they were developing. They agreed to cover budget shortfalls. They agreed to install stoplight signals miles away from the development project. Why? Because it was the cost of doing business with the city or county issuing the necessary permits in the pre-Recession market. And without the necessary permits, developers could not develop lots, market them, construct buildings and homes on them, sell them, and repay the debts due and owing.

Following *Old Cutters*, is it safe to say that cities and counties will no longer look to developers to fund projects, contribute to coffers, and backstop budget shortfalls that are wholly unrelated to the development? Not so fast. Remember that *Old Cutters* was decided by the Bankruptcy Court, not the Idaho Su-

preme Court. While the Bankruptcy Court reached its decision by trying to determine how the highest court in Idaho would rule on the issues,³² the *Old Cutters* decision is merely instructive. Practically, the market will continue to dictate what makes sense to developers, including how much money is too much to spend on a proposed development. Certainly, those developers that survived the Great Recession are now negotiating using a markedly more conservative approach. For now, at least. Until the next big run up of real estate, we may not wholly understand the instructive impact of the *Old Cutters* case.

Endnotes

1. 488 B.R. 130 (Bankr.D.Idaho 2012).
2. The Court recognized that a number of the issues raised by the parties were issues of first impression. Although the Bankruptcy Court considered certifying the issues to the Idaho Supreme Court, the parties did not petition for such certification and, for purposes of judicial efficiency, requested the Court to decide the substantive issues through cross-motions for summary judgment. *Id.* at 142.
3. Right about the time Old Cutters filed its application, the City relied on a 2001 fiscal study prepared by Tischler & Associates (“Tischler Study”) to set the an-

nexation fee for an area known as Airport West. Using the methodology in the Tischler Study, Old Cutters estimated that the annexation fee would equal \$350,000 for the planned unit development.

4. *Id.* at 135.

5. *Id.*

6. *Id.*

7. *Id.* at 136. At her deposition, the City Clerk characterized annexation fees as “basically the price of admission to a city, that a developer is willing to pay to glean the services of a city.” *Id.* at 153. What’s more, the City Clerk and others testified under oath that many of the capital improvement projects Old Cutters was asked to fund as part of the annexation fee have never been undertaken by the City.

8. *Id.*

9. *Id.*

10. *Id.* In its motion for summary judgment, Mountain West Bank alleged that the City’s lien on the “Market Rate Lots” was not valid under Idaho law because of a failure to satisfy the statute of frauds, as more particularly described in *Ray v. Frasure*, 146 Idaho 625, 200 P.3d 1174 (2009). The Court disagreed with Mountain West Bank, and relying on *Gugino v. Kastera, LLC (In re Ricks)*, 433 B.R. 806 (Bankr.D.Idaho 2010), the Court determined that the City had a valid lien, which attached to “the one hundred eight (108) market rate single family and duplex lots. The four (4) townhouse lots, three (3) community housing duplex lots and Lot 73 are included in this calculation.” *Old Cutters*, 488 B.R. at 142. The Development Agreement included, as Exhibit 1, a metes and bounds legal description of entire development, and as Exhibit 2, a map showing all lots in the property. The Development Agreement also included a provision that the parties understood that “any subdivision application and approval would ultimately result in the creation of blocks and lots with numbering that would differ from the numbering of the lots shown on Exhibit 2.” The Court determined that the Development Agreement adequately described the property, and satisfied the statute of frauds.

11. *Id.* at 137.

12. Interestingly, following the repeal of the ICH Ordinance, the City agreed to remove similar community housing requirements in another development agreement for a project known as Sweetwater.

13. The development was heavily lever-

aged. Mountain West Bank loaned the developer approximately \$13,133,000, and the project was infused with cash contributions of \$4,400,000 by the principal member of the developer’s company.

14. Pursuant to the repayment terms of the Development Agreement, Old Cutters paid the City annexation fees totaling \$1,317,000 before the bankruptcy petition was filed.

15. *Id.* Indeed, by the time the Development Agreement was executed, the real estate bubble had long since burst, the country was in the midst of one of the toughest recessions in history, developers everywhere were facing foreclosure actions, and Old Cutters was sitting on property that was producing no income. Since this article is focused on the enforceability of the annexation fee and community housing requirements in the Development Agreement – and not the bankruptcy petition itself – a discussion of bankruptcy procedure, secured and unsecured claims, and analysis of other bankruptcy principles of which the author is woefully uninformed, will not be undertaken in this article. Suffice it to say that Old Cutters and Mountain West Bank filed a number of claims against the City, most of which related to the City’s alleged unfair treatment of Old Cutters in this case.

16. Old Cutters and Mountain West Bank each filed separate complaints against the City of Hailey. The actions were consolidated at a joint pre-trial conference in 2012.

17. Idaho Code § 50-222.



18. *Old Cutters*, 488 B.R. at 151.

19. *Id.* at 143.

20. *Id.* at 150.

21. Before reaching its decision on the amount of the annexation fee and the ICH Ordinance, the Court dispensed with a number of ancillary arguments

Since this article is focused on the enforceability of the annexation fee and community housing requirements in the Development Agreement – and not the bankruptcy petition itself – a discussion of bankruptcy procedure, secured and unsecured claims, and analysis of other bankruptcy principles of which the author is woefully uninformed, will not be undertaken in this article.

advanced by the City. First, the City alleged that the Court was precluded from reviewing the terms of the Development Agreement because Idaho Code § 50-222 grants authority to annex lands and "...to equitably allocate the costs of public services in management of development of the urban fringe." *Id.* at 144. Hailey argued that a review of the annexation decision and interpretation of the Development Agreement was barred by the political question doctrine (i.e., "that a court should not substitute its judgment for that of another branch of government, when the matter was one properly entrusted to that other branch"). *Id.* Old Cutters argued that it had no issue with the annexation itself – which Old Cutters supported – but the terms of such annexation embodied in the Development Agreement. In other words, the Court was not asked to pass judgment on the City's statutory power to annex, but rather, to evaluate the enforceability of the terms of the Development Agreement. The Court agreed with Old Cutters, and concluded that it had authority to review the enforceability of the annexation fee and the community housing requirements.

Hailey also argued that Old Cutters' claims were barred by applicable statutes of limitation. *Id.* at 143. Old Cutters did not challenge the amount of the annexation agreement or the community housing requirement until five years and seven months after the Development Agreement was executed by the parties. Accordingly, the filing date lagged both the 3-year statute of limitation for statutory liability under Idaho Code § 5-218, and the 5-year catch-all statute of limitation for an action on written contracts under Idaho Code § 5-216. Relying on *Thompson v. Ebbert*, 144 Idaho 315, 160 P.3d 754 (2007), and *Infanger v. City of Salmon*, 137 Idaho 45, 44 P.3d 1100 (2002), Old Cutters argued that Idaho statutes of limitation do not apply to an action to void enforcement of illegal conditions in a contract. *Old Cutters*, 488 B.R. at 146-47. The Court agreed with Old Cutters, and concluded that a challenge to the potentially void provisions in the Development Agreement was not time-barred by any statutes of limitation. *Id.* at 147.

Finally, the City alleged that Old Cutters should be estopped from contesting the terms of the Development Agreement. Although the City argued both equitable estoppel and quasi-estoppel, the Court did not agree on either count. The

Court rather quickly disposed of Hailey's equitable estoppel argument, noting that the City was unable to state the elements of an equitable estoppel claim. *Id.* at 149. Regarding the claim of quasi-estoppel, the Court noted that Old Cutters "consistently questioned the authority of Hailey to calculate the annexation fee...". *Id.* Therefore, it could not be argued that Old Cutters had changed its course to the detriment of the City. What's more, the Court aptly noted that an equitable remedy was only available to a non-offending party and, if the Development

The Court acknowledged that "[b]ecause there is no precedent from the Idaho Supreme Court specifically delineating a city's power to negotiate and contract for annexation fees, this Court must do its best to predict how the Idaho Supreme Court would resolve this issue." *Id.* at 151.

Agreement included unenforceable provisions, the City should not be entitled to an equitable remedy if it exceeded its statutory authority relating to the annexation fee and the ICH Ordinance requirements in the Development Agreement. *Id.* at 149-50.

22. The Court correctly noted that "Old Cutters' consent to pay the annexation, fixed after years of study, posturing and calculating by the city, may have been compelled by financial necessities that arouse during the nearly three-year process of annexation of the Property, and in light of the changing economy, Old Cutters['] need to get some lots sold." *Id.* at 154.

23. *Id.* at 150. The City acknowledged that the annexation fee "is not a tax, a statutory charge, or a regulatory fee," clarifying that it is its general powers that allow the City to charge and collect the annexation fee. *Id.*

24. *Id.* (citing *Black v. Young*, 122 Idaho 302, 834 P.2d 304, 310 (1992)).

25. *Id.* at 152.

26. *Id.*

27. *Id.*

28. While Idaho Code § 50-222 allows a city to annex lands and "equitably allocate the costs of public services in the management of development on the urban fringe," nothing in the statute allows a city to collect more than a developer's equitable share of the costs to be incurred by the municipality in annexing the land.

29. As part of the adversary proceedings, Old Cutters did not seek reimbursement for the portion of the annexation fee paid to the City over and above the \$788,000.

30. *Id.* at 153-54. The Court also noted that cities may not demand a "*quid pro quo* from a party petitioning the city for its legislative decision beyond that which is allowed in the authorizing statute." *Id.*

31. In what must be recognized as incredible judicial restraint, the Court expressly "declines the opportunity to comment further on Hailey's insistence that Old Cutters abide an agreement to comply with an ordinance that the city has apparently decided was ill-advised or defective, and has repealed, while allowing other developers relief from similar community housing requirements." *Id.* at 156.

32. The Court acknowledged that "[b]ecause there is no precedent from the Idaho Supreme Court specifically delineating a city's power to negotiate and contract for annexation fees, this Court must do its best to predict how the Idaho Supreme Court would resolve this issue." *Id.* at 151.

About the Author

Laurie Reynoldson is Of Counsel at *Holland & Hart, LLP*. Her practice focuses on the acquisition, disposition, and development of real property, as well as land use, entitlements, and permitting matters. She earned her J.D., magna cum laude, from Gonzaga University, and holds a B.A. in Design and Planning Studies from the University of Washington.





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Regular Spring Term for 2014

Boise January 13, 15, 17, 22 and 24
Boise February 12, 14, 18, 19 and 21
Boise April 4 and 14
Northern Idaho April 8, 9 and 10
Boise May 2 and 5
Eastern Idaho May 13, 14 and 15
Boise June 2, 4 and 6
Twin Falls June 10 and 11

By Order of the Court
Stephen W. Kenyon, Clerk

NOTE: The above is the official notice of the 2014 Spring Term for the Supreme Court of the State of Idaho, and should be preserved. A formal notice of the setting of oral argument in each case will be sent to counsel prior to each term.

OFFICIAL NOTICE COURT OF APPEALS OF IDAHO

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Judges
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David W. Gratton
John M. Melanson

Regular Spring Term for 2014

Boise January 9, 14, 16 and 21
Boise February 6, 11, 13 and 20
Moscow March 10, 11, 12, 13 and 14
Boise March 18 and 20
Boise April 8, 10, 15 and 17
Boise May 6, 8, 13 and 15
Boise June 10, 12, 17 and 19

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Stephen W. Kenyon, Clerk

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Idaho Supreme Court Oral Argument for December 2013

Monday, December 2, 2013 – BOISE

8:50 a.m. *Sarah M. Johnson v. State* #38769-2011
10:00 a.m. *Rule Steel Tanks, Inc. v. Dept. of Labor* (Industrial Commission) ..
..... #40344-2012
11:10 a.m. *Craig L. Mulford v. Union Pacific Railroad* #39991-2012

Wednesday, December 4, 2013 – BOISE

8:50 a.m. *Michael Vawter v. United Parcel Service* (Industrial Commission)
..... #40660-2013
10:00 a.m. *Bradley K. Morgan v. New Sweden Irrigation District*
..... #39624-2012
11:10 a.m. *Murphy Land Company v. Jay P. Clark* (Industrial Commission)
..... #39898-2012

Thursday, December 5, 2013 – BOISE

8:50 a.m. *Clearwater REI, LLC v. Mark Boling* #40809-2013
10:00 a.m. *State v. Krystal Lynn Easley* #39710/39711-2012
11:10 a.m. *Dale Piercy v. Canyon County* #39708-2012

Monday, December 9, 2013 – BOISE

8:50 a.m. *Jamee Lee Wade v. Bryan F. Taylor* #40142-2012
10:00 a.m. *Karl Peter Undesser v. Kathy Jones Undesser* #40385-2012
11:10 a.m. *Gregory Renshaw v. Mortgage Electronic Registration Systems* ...
..... #40512-2012

Wednesday, December 11, 2013 – BOISE

8:50 a.m. *State v. David Leroy Lee* #40330-2012
10:00 a.m. *Idaho Military Historical Society v. Holbrook Maslen*
..... #39909-2012
11:10 a.m. *State v. Thomas Edward Boyce* (Petition for Review)
..... #40861-2013

Idaho Court of Appeals Oral Argument for November 2013

Tuesday, November 12, 2013 – BOISE

9:00 a.m. *Tapp v. State* #40197-2012
10:30 a.m. *Schultz v. State* #40353-2012
1:30 p.m. *State v. Blankenship* #40354-2012

Thursday, November 14, 2013 – BOISE

9:00 a.m. *State v. Widner* #39908-2012
10:30 a.m. *Taylor v. Taylor* #40479-2012
1:30 p.m. *State v. Brown* #40171-2012

Tuesday, November 19, 2013 – BOISE

9:00 a.m. *Snowball v. State* #40089-2012
10:30 a.m. *State v. Howard* #40239-2012
1:30 p.m. *State v. Barber* #40113-2012
3:00 p.m. *State v. Petersen* #39643-2012

Thursday, November 21, 2013 – BOISE

9:00 a.m. *State v. Kingsley* #39917-2012
10:30 a.m. *State v. Mendel* #40416-2012
1:30 p.m. *State v. Alley* #40428-2012

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Idaho Supreme Court and Court of Appeals
NEW CASES ON APPEAL PENDING DECISION
(Updated 09/1/13)

CIVIL APPEALS

Agency

1. Whether the district court erred in failing to conclude that Horn was personally liable as an undisclosed principal of Frontier Development Company.
Frontier Development Group v. Caravella
 S.Ct. No. 40581
 Supreme Court

Contempt

1. Whether there was substantial and competent evidence to support a conclusion that Carr made a reasonable request for out of state travel that Pridgen unreasonably refused in violation of the parenting plan.
Carr v. Pridgen
 S.Ct. No. 40883
 Supreme Court

License suspension

1. Did the loss of Peck's commercial driver's license violate his right to substantive due process because he was not operating a commercial vehicle at the time of his arrest for DUI?
Peck v. Idaho Department of Transportation
 S.Ct. No. 40808
 Court of Appeals

Negligence

1. Did the district court identify and apply the correct legal standard for gross negligence?
Fidelity Nat. Title Ins. Co. v. North Idaho Title Ins., Inc.
 S.Ct. No. 40638
 Supreme Court

Nuisance

1. Did the evidence support the trial court's conclusion that Spirit Ridge Mineral Springs had failed to show an ongoing and continuing nuisance created by the County's gun range?
Spirit Ridge Mineral Springs v. Franklin County
 S.Ct. No. 40865
 Supreme Court

Post-conviction relief

1. Did the court err in denying Wicklund's petition for post-conviction relief in which he raised claims of ineffective assistance of counsel?
Wicklund v. State
 S.Ct. No. 40269
 Court of Appeals

2. Did the district court err by not affording Olson sufficient time to discuss his potential claims with post-conviction counsel so that he might develop them into viable post-conviction claims?
Olson v. State
 S.Ct. No. 40293
 Court of Appeals

3. Did the court err by summarily dismissing Jimenez's petition for post-conviction relief?
Jimenez v. State
 S.Ct. No. 40109
 Court of Appeals

4. Whether the district court erred when it ordered resentencing as a remedy for breach of a plea agreement rather than withdrawal of the guilty plea.
McAmis v. State
 S.Ct. No. 40417
 Court of Appeals

5. Did the court err when it summarily dismissed Wilbanks' ineffective assistance of counsel claim?
Wilbanks v. State
 S.Ct. No. 40555
 Court of Appeals

6. Did the court err in denying Baird's petition for post-conviction relief after an evidentiary hearing on his claims of ineffective assistance of counsel?
Baird v. State
 S.Ct. No. 40779
 Court of Appeals

Substantive law

1. Did the trial court err in ruling that the Idaho Consumer Protection Act did not apply to the mortgage relief services relied on by Pierce?
Pierce v. McMullen
 S.Ct. No. 40368
 Supreme Court

Summary judgment

1. Did the trial court err by concluding there was no material question of fact regarding the unity of interest between the Schelhorns and their closely held entity, Piper Ranch, and by entering summary judgment on Schism's claims against the Schelhorns seeking to impose liability for the obligations of Piper Ranch on the basis of alter ego/entity piercing?
Wandering Trails v. Big Bite Excavation
 S.Ct. No. 40124
 Supreme Court

2. Did the court err as a matter of law in determining that AgriSource, Inc., had no notice that Johnson was an agent for Johnson Grain, Inc.?
Agrisource, Inc. v. Johnson
 S.Ct. No. 40340
 Supreme Court

3. Did the court err in granting summary judgment to Kevic Corporation on Shea's claim of negligence?
Shea v. Kevic Corporation
 S.Ct. No. 40563
 Supreme Court

Termination of parental rights

1. Whether the finding that the minor child was neglected was supported by sufficient evidence to meet the standard of clear and convincing proof.
John Doe I and Jane Doe v. John (2013-20) Doe
 S.Ct. No. 41380
 Court of Appeals

**Idaho Supreme Court and Court of Appeals
NEW CASES ON APPEAL PENDING DECISION
(Updated 09/1/13)**

2. Whether the court erred by finding aggravating circumstances.

Dept. of Health & Welfare v. Jane (2013-22) Doe
S.Ct. No. 41383
Court of Appeals

3. Whether the court erred in granting the motion to set aside the order granting termination of parental rights and adoption of the minor child.

Jane (2013-23) Doe v. John Doe
S.Ct. No. 41387
Supreme Court

CRIMINAL APPEALS

Due process

1. In closing argument, did the prosecutor violate Galvan's Fifth Amendment rights by commenting on Galvan's post-arrest, post-Miranda silence?

State v. Galvan
S.Ct. No. 40223/40224
Court of Appeals

Evidence

1. Did the court err when it excluded evidence of an alternate perpetrator as inadmissible hearsay?

State v. Fair
S.C. No. 39255/40628
Court of Appeals

2. Did the court err in admitting the victim's out of court statements through the video recording of Parker's second interrogation where he was confronted with allegations made by the victim?

State v. Parker
S.Ct. No. 38956
Supreme Court

3. Did the court violate Thomas's right to present a defense by excluding testimony that would have supported his defense and by finding it lacked relevance or probative value when weighed against the prejudicial effect?

State v. Thomas
S.Ct. No. 39776
Court of Appeals

4. Did the court err in permitting the State, pursuant to I.R.E. 404(b), to introduce evidence of Cardoza's prior drug dealings with the confidential informant and evidence of his other charged crimes in Oregon?

State v. Cardoza
S.Ct. No. 39811
Court of Appeals

5. Did the court abuse its discretion by admitting a hearsay statement as an excited utterance?

State v. Rhoads
S.Ct. No. 39989
Court of Appeals

Mistrial

1. Whether the district court erred by not declaring a mistrial after the potential jury pool was tainted by comments on Anderson's incarceration by a prospective juror.

State v. Anderson
S.Ct. No. 39510
Court of Appeals

Restitution

1. Did the court abuse its discretion when it awarded \$79,518.55 in restitution to Ada County Indigent Services?

State v. Torrez
S.Ct. No. 40506
Court of Appeals

Search and seizure – suppression of evidence

1. Whether the district court erred in denying the motion to suppress because the police officer lacked reasonable suspicion to seize Paez.

State v. Paez
S.Ct. No. 40491
Court of Appeals

2. Did the court err in denying Proffitt's motion to suppress and in finding the stop of his car was supported by reasonable suspicion?

State v. Proffitt
S.Ct. No. 40680
Court of Appeals

Sentence review

1. Did the court act in manifest disregard of I.C.R. 32 and I.C. § 19-2522 when it failed to sua sponte order a mental health evaluation of Farr prior to sentencing?

State v. Farr
S.Ct. No. 40499
Court of Appeals

2. Did the court abuse its discretion by revoking Gleese's probation or by not sua sponte reducing his sentence?

State v. Gleese
S.Ct. No. 40402/40403/40404/40405
Court of Appeals

3. Did the court err in denying Moon's Rule 35 request to vacate his conviction for escape?

State v. Moon
S.Ct. No. 40538
Court of Appeals

Substantive law

1. Did the district court err when it reversed the magistrate's order denying Trusdall's motion to dismiss, concluding a utility type vehicle is not a motor vehicle for purposes of the DUI statute and that Trusdall's conduct was governed exclusively by I.C. § 67-7114?

State v. Trusdall
S.Ct. No. 40421
Court of Appeals

**Summarized by:
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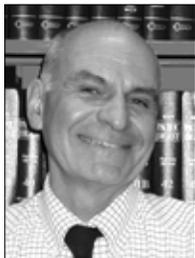
Getting Techy: How to Catch Up on the New Basics

John Hasko

In the past decade, the pace of technological innovation has been unprecedented. During that period of time, cell phones have been replaced by Smartphones and iPads. It's challenging enough to master the features of the equipment as they evolve, but even more challenging has been the mastery of new applications that have been developed to work with that new equipment.

The practice of law has not been spared the growing pains that have accompanied these applications, and several of them have been successfully adapted to work very well in handling legal issues. But, using these applications is nowhere near intuitive, and making them work in the legal world has been a chore for many. So, how do attorneys become aware of these applications, and learn how to apply them to law?

The most logical vehicle for doing this, of course, is to talk with your kids. They can get you introduced to the applications, but how to apply them to legal practice may be more of a challenge. Not to worry. For the past couple of years, the Law Practice Management Section of the American Bar Association has been producing manuals dealing with emerging technologies and applications for them in its *in One Hour for Lawyers and Litigators* series. An analogy can possibly be drawn



to the ubiquitous *for Dummies* series, with the major difference being that, unlike the *for Dummies* series, which covers a plethora of different topics, many of which are recreational in nature, the *in One Hour* series is much more focused, and on a higher educational plain.

Being in the *in One Hour* series suggests that the coverage in each title will be easy to understand and succinct, and that is the case. The page counts in the titles in the series range from 100 to 196 pages, indexing is complete, and explanations are clear, very often supplemented with screen captures to illustrate what the different applications would look like.

At present, the ABA *in One Hour* series includes the following titles:

- Jared Correia, *Twitter in One Hour for Lawyers* (2012)
- Dennis Kennedy & Allison C. Shields, *Facebook in One Hour for Lawyers* (2012)
- Dennis Kennedy & Allison C. Shields, *LinkedIn in One Hour for Lawyers* (2012)
- Carole A. Levitt & Mark E. Rosch, *Google Gmail and Calendar in One Hour for Lawyers* (2013)
- Tom Mighell, *iPad Apps in One Hour for Lawyers* (2d ed. 2012)
- Tom Mighell, *iPad in One Hour for Lawyers* (2012)
- Tom Mighell, *iPad in One Hour for Litigators* (2013)
- Ben M. Schorr, *Microsoft OneNote in One Hour for Lawyers* (2012)
- Daniel J. Siegel, *Android Apps in One Hour for Lawyers* (2013)

Being in the *in One Hour* series suggests that the coverage in each title will be easy to understand and succinct, and that is the case.

- Ernie Svenson, *Blogging in One Hour for Lawyers* (2012)

All the titles in the series are in paperback, with a regular price ranging from \$34.95 to \$49.95, and are available from the ABA (www.americanbar.org). If you are an ABA Law Practice Division member, the member prices range from \$19.95 to \$39.95. ISB members can receive 15% off all ABA publications by entering online code PAB7EIDB.

So, if you find yourself faced with the seemingly daunting task of finding your way through the constantly growing and emerging world of technology, especially as it applies to the practice of law, and using that technology to improve and make more efficient that practice, the ABA is there to help you. Its *in One Hour* series provides an inexpensive and effective means for adding to your repertoire of skills.

About the Author

John Hasko received his J.D. from St. Mary's University in San Antonio, Texas and his M.S. in Library Science from the University of Illinois/Urbana-Champaign. He has been the Director of the University of Idaho College of Law Library since 1997.



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Crafting Clear, Correct Sentences

Tenielle Fordyce-Ruff

Ever stared at a sentence as you were editing, knowing it just wasn't right but not knowing quite how to fix it? This column is for you, then. Today we are going to talk about fixes for some common sentence faults. We writers tend to make fairly predictable errors, so learning a few simple fixes can greatly improve our sentences.

Here are six faults you can eliminate to fix your sentences: Redundancy, Repetition, Subject-Verb Separation, Misplaced Modifiers, Dangling Participles, and Unparallel Phrasings.

Redundancy

Redundant writing uses unnecessary words.

The litigant made the same identical argument below.

Jack and Jill both frequented Starbucks on a regular basis.

Same and *identical* provide the reader with the same (or identical) information. Likewise, *frequent* and *on a regular basis* both let the reader know that (both) Jack and Jill go to Starbucks often.

Redundancies in writing can crop up when we don't pay attention to our work or because some redundancies are common place.



How often have you heard about an *absolute necessity* or created *future plans*? Do you think that companies *merge together*? Does reading these redundancies make you *pause for a moment*?

As you edit your work, be on the look out for these types of phrases.¹



Then, simply choose one of the options to leave in your sentence. Your writing won't lose any meaning, and your reader won't pause.

Repetition

Certain types of repetition can work well in writing. For instance, anaphora (or beginning sentences with the same words) can add eloquence to your writing. Needless repetition, however, can damage an otherwise fine idea.

Only parties who have signed the settlement agreement are bound by the settlement agreement, and only two of the parties have signed the settlement agreement.

This sentence could be fixed with the addition of a few pronouns.

Only parties who have signed the settlement agreement are bound by it, and only two of the parties have signed it.

Likewise, repeating the same root close together can cripple a sentence.

The legislative services office serves the role of answering legislators' questions about the impact of proposed legislation.

The repetition of the roots *legislate* and *serve* creates an awkward

How often have you heard about an *absolute necessity* or created *future plans*? Do you think that companies *merge together*? Does reading these redundancies make you *pause for a moment*?

sentence. Using synonyms in these instances helps.

The legislative services office answers lawmakers' questions about the impact of proposed bills.

So, look for unnecessary repetition and choose a more concise version of the word or phrase.

Subject-verb separation

Subjects and verbs form the core of a sentence. Too much space between them leaves the reader grasping

ing for the meaning of the sentence. The reader might also ignore the words in between the subject and verb as she waits to finally make sense of the basic action in the sentence.

Plans unveiled last year in Boise for a streetcar to connect the east and west ends of downtown, provide free transportation through the downtown corridor, and connect to the already existing bus system between Ada and Canyon counties have been updated.

Revising sentences like this to put the subject and verb close together helps tighten the sentence. It also allows the reader to focus her attention on the meaning of the sentence.

Officials updated plans for a Boise streetcar that would connect the east and west ends of downtown, provide transportation through the downtown corridor, and connect to the already existing bus system between Ada and Canyon counties.

This type of revision takes some time, but clarity in the new sentence makes your taking the time worth the effort.

Misplaced modifiers

Modifiers can come in many places in a sentence, but oddly placed modifiers can create misreadings.

He described the suspect as a short man with a mustache weighing about two hundred pounds.

Wow, that is one heavy mustache! *Plaintiff alleges the hotel discriminated against him because he is disabled in violation of the ADA.*

Last I checked, the ADA did not prohibit disabilities.

The solution is to put the modifier next to what it is modifying.

He described the suspect as a short man weighing about two hundred pounds and with a mustache.

Plaintiff alleges the hotel violated the ADA by discriminating against him because he is disabled.

Dangling participles

A participle dangles when the sentence has a participle phrase but no proper subject in sight. Okay, let's unpack that bit of grammar. For this discussion, a participle is a verb in present tense that is used like an adjective: to modify nouns.

The officers followed the speeding car.

The participle can become part of a participle phrase and modify the subject of a sentence.

Following the car, the officers turned on their flashing lights.

Following the car modifies *the officers*. But sometimes the participle simply suggests an actor that isn't named in the sentence. This is a dangling participle.

Even construing every possible factual inference in plaintiff's favor, plaintiff has failed to create a genuine issue of material fact sufficient to survive summary judgment.

The subject in this sentence is *plaintiff* but logically the plaintiff couldn't be construing her own factual inference. Instead, this participle phrase suggests an actor that isn't mentioned in the sentence: the court. To fix dangling participles, revise the sentence to make the suggested actor the subject of the independent clause.

Even if the court construes every possible factual inference in plaintiff's favor, plaintiff has failed to create a genuine issue of material fact sufficient to survive summary judgment.

Unparallel phrasings

Finally, readers crave order and balance. Sentences that lack the rhythm created by parallel structure jar the reader.

The driver drove down the middle of the road, ran a red light, and two stop signs.

The unparallel phrasing in this sentence makes it awkward and hard to read. Express parallel ideas and lists in parallel form. Noun + Noun + Noun or Verb + Verb + Verb or Adjective + Adjective + Adjective. This helps the reader see how the ideas in a sentence relate to each other.

The driver drove down the middle of the road, ran a red light, and went through two stop signs.

The parallel use of verbs makes the sentence not awkward at all.

Conclusion

See, a few quick fixes can help your ideas shine through; even if, like me, you tend to draft with some faulty constructions.

Sources

- Bryan A. Garner, *Garner's Modern American Usage*, 701 (3d. ed. Oxford University Press 2009).
- Diana Hacker, *A Writer's Reference*, 63, 71 (3d ed. St. Martin's Press 1995).
- Mignon Fogarty, *Dangling Participles*, <http://www.quickanddirtytips.com/education/grammar/dangling-participles> (accessed September 13, 2013).

Endnotes

1. Garner's *Modern American Usage* has a handy list of common redundant phrases. Bryan A. Garner, *Garner's Modern American Usage* 607, 701, 761 (3d. ed. Oxford University Press 2009).

About the Author

Tenielle Fordyce-Ruff is an Assistant Professor of Law and the Director of the Legal Research and Writing Program at Concordia University School of Law in Boise. She is also Of Counsel at Rainey Law Office, a boutique firm focusing on civil appeals. You can reach her at tfordyce@cu-portland.edu or [tfr@raineylawoffice.com](http://raineylawoffice.com).



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New Love the Law! Pipeline Program Exposes Underrepresented Idaho Students to the Legal Profession

For many Idaho high school students, especially those from minority, low-income, and underrepresented populations, the legal system is shrouded in mystery and careers in the legal profession are viewed as unattainable. Through its new pipeline program, Love the Law!, the Idaho State Bar Diversity Section is attempting to change that.

Each school year, the Love the Law! Committee plans several events for both northern and southern Idaho high school students. For example, last school year, students in the Treasure Valley observed an oral argument in front of the Idaho Court of Appeals, participated in a mock law school class at Concordia University School of Law, and viewed “The Color of Conscience: Human Rights in Idaho,” a one-hour film documenting the fall of the Aryan Nations in northern Idaho. Meanwhile, students in northern Idaho toured the University of Idaho College of Law, observed an oral argument in front of the Navajo Nation Supreme Court, and participated via videoconference in the viewing of “The Color of Conscience” and in a follow-up panel discussion.

Although Love the Law! is only in its second year of existence, according to Committee Chairperson Jana Gómez, word of the program is spreading fast. The Committee has already reached its maximum capacity of 70 students for its next Treasure Valley event, “Ada County Law & Motion Day,” scheduled to occur on November 5, 2013. During that event, students will observe sentencing in front of the Honorable Ronald Wilper, hear presentations from various Ada County employees, play a trivia game to test their knowledge of the legal system, and enjoy lunch. In addition to Ada County Law &



Motion Day, Love the Law! has three similar events planned in northern Idaho, covering Latah County, Kootenai County, and Lewis County.

“Law school sounded terrifyingly intimidating to me and you all make it actually look achievable and appealing to me,” one enthusiastic student wrote after attending the Spring 2013 event at Concordia. Numerous other comments from evaluation forms showed that the program is effective in changing students’ ideas about what is possible.

All Love the Law! events are provided at no cost to the participating students and high schools. “They are doing this on their own, without Idaho State Bar resources,” points out Idaho State Bar Deputy Director Mahmood Sheikh. So from where does funding for Love the Law! come? According to Ms. Gómez, Love the Law! funded last year’s activities through three key sponsors: Parsons Behle & Latimer, the Idaho State Bar Litigation Section, and two DiscoverLaw grants from the American Bar Association, which were secured with help from the University of Idaho College of Law. This year, Love the Law! plans to expand its fundraising efforts by applying for several local and national grants. Additionally, Concordia University School of Law recently made a generous contribution to the program. If sufficient funding can be secured, Ms. Gómez indicates that Love the

Ms. Gómez indicates that Love the Law! would like to begin offering scholarships to help offset the costs of studying for the LSAT, taking the LSAT, and applying for law school as some Love the Law! students near that stage of their education.

Love the Law! would like to begin offering scholarships to help offset the costs of studying for the LSAT, taking the LSAT, and applying for law school as some Love the Law! students near that stage of their education. Additional funds would also be helpful to offset transportation costs for northern Idaho schools, which must travel significant distances to attend regional Love the Law! events.

According to Ms. Gómez, the ultimate goal of the Love the Law! program is to promote diversity, equality, and cultural understanding throughout the Idaho State Bar in order to better serve Idaho’s diverse citizenry. For more information or to get involved, contact Jana Gómez at (208) 287-7700.

Idaho Embraces Pro Bono in a Big Way

Mary Hobson, Director of Idaho
Volunteer Lawyers Program

In Idaho, the principle of equal justice for all is alive and well. In 2012, more than 765 Idaho lawyers worked with the Idaho Volunteer Lawyers Program to provide more than 16,000 hours of volunteer legal assistance to more than 2,200 low-income individuals.

While impressive, these staggering numbers don't fully convey the level of goodwill, and personal benefit derived from pro bono service. To celebrate these attorneys' good works, we recognize the National Pro Bono



National Pro Bono Celebration
October 20 - 26, 2013

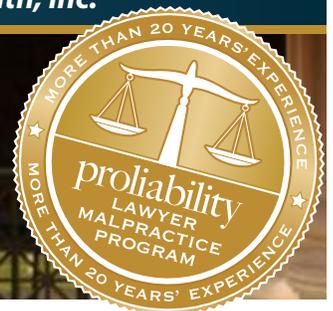
Celebration, October 20-26, and *The Advocate* will continue to celebrate these accomplishments all year long.

The Idaho Pro Bono Commission and the Idaho Supreme Court have expressed

their commitment to equal justice by advancing the following visionary resolution. And a few vignettes printed herein help illustrate the personal experiences of those touched by pro bono service.

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¹"Profile of Legal Malpractice Claims: 2008-2011," American Bar Association, September 2012.

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Resolution Designating Idaho Pro Bono Week

WHEREAS, we are a nation dedicated to “liberty and justice for all,” and equal justice and the fair administration of justice are fundamental to our system of government; and

WHEREAS, the promise of equal justice under the law is not realized for individuals and families who have no meaningful access to the justice system because they are unable to pay for legal services; and

WHEREAS, this de facto denial of equal justice has an adverse impact on these individuals, families, and society as a whole, and works to erode public trust and confidence in our system of justice; and

WHEREAS, as a consequence of a slow economic recovery many individuals and families are experiencing critical civil legal problems they cannot afford to address; and

WHEREAS, Idaho’s lawyers and judges strongly support the provision of free-of-charge legal services to those can’t afford them and have joined together in a collaborative effort to support pro bono services through the establishment of the Idaho Pro Bono Commission; and

WHEREAS, in 2012, more than 765 public and private attorneys, working in association with the Idaho Volunteer Law-

yers Program, provided more than 16,000 hours of volunteer attorney assistance to more than 2,200 low-income individuals and family members, including providing legal representation in more than 600 state cases, while in 2013 volunteer lawyers provided 1,114 hours of pro bono service in federal court cases, resulting in the provision of a combined total of free legal services valued at almost \$3,000,000; and

WHEREAS, many Idaho lawyers, acting upon their volition, generously provide many untalented hours of pro bono service to the citizens of our State without receiving recognition for their unpaid services; and

WHEREAS, the graduating class of 2013 at the University of Idaho College of Law compiled approximately 12,172 hours of pro bono services, under the supervision of lawyers and judges, as part of the College’s distinctive pro bono program in which every student participates; and

WHEREAS, students and faculty at Concordia University School of Law contributed 816 hours of pro bono service in their inaugural year, and are committed to expanding access to justice through their pro bono service requirement, their on-site legal clinic, and providing pro bono training for Idaho lawyers; and

WHEREAS, October 20–26 has been designated as National Pro Bono Week; and

WHEREAS, the Idaho Pro Bono Commission, consisting of the state courts of Idaho, the United States Courts for the District and Bankruptcy Courts for the District of Idaho, the Idaho State Bar, the Idaho Law Foundation, and the University of Idaho College of Law, and Concordia University School of Law, recognizes the need to expand the delivery of legal services to economically disadvantaged persons and families;

NOW, THEREFORE, the Idaho Pro Bono Commission and its constituent members recognize Pro Bono Week, October 20-26, 2013, as a time for Idaho, along with the rest of the Nation, to honor the work of those who provide volunteer legal services, to address the growing need for civil legal assistance on matters of profound urgency, and to remind all attorneys of their responsibility to assist in meeting the legal profession’s sacred commitment to equal justice under the law.

DATED this 14th day of October, 2013, by the IDAHO PRO BONO COMMISSION, and its constituent members: SUPREME COURT OF IDAHO, UNITED STATES DISTRICT AND BANKRUPTCY COURTS FOR THE DISTRICT OF IDAHO, IDAHO STATE BAR, IDAHO LAW FOUNDATION, UNIVERSITY OF IDAHO COLLEGE OF LAW, AND CONCORDIA UNIVERSITY COLLEGE OF LAW.



Photo by Dan Black

Reese Verner sits at his office in Nampa. He said he has enjoyed giving legal service to those who can't afford it – part of his personal philosophy to give back to the community.

Pro Bono Profiles: Attorneys Reese Verner and Danielle Scarlett

*Kerry Michaelson
Michaelson Mediation & Law*

Reesee Verner has practiced law in Nampa since he moved to Idaho in the 1970s. His practice focuses on estate planning. Verner was drawn to this field because of a self-professed “soft spot” for elderly clients. He said many of his clients have limited resources to devote to legal fees. “There are some people out there who may not have a dime in the bank. It doesn’t change the fact they need help.”

That’s why Verner makes pro bono work a priority in his practice. “If you didn’t go to law school with the goal of helping people, in my

opinion, you went for the wrong reasons.”

Verner is nearing retirement. Providing free legal help is something he said he’ll probably continue to do, he joked, until he’s the one in need of it. “If you possess a law degree you are so fortunate compared to many others. If you have forgotten that, go volunteer on a case where folks couldn’t hire an attorney because coming up with a retainer as small as \$300 was impossible for them. It’s humbling.”

Danielle Scarlett

Danielle Scarlett is a recent recipient of the Idaho State Bar

Denise O’Donnell Day Pro Bono Award. Scarlett’s Nampa-based practice is concentrated on family law matters. “My biggest problem is if someone needs help I can’t say no,” Scarlett stated with a laugh.



Danielle Scarlett

Despite her heavy court calendar Scarlett makes time for pro bono cases. “There are days I accept cases knowing full well I won’t get paid. But, I will help someone who really needs it. Sometimes it’s just about doing the right thing.”

Client grateful for guardianship

A few years ago Payette resident Kim Hammar was in search of an attorney who would just do the right thing. Hammar has two sons who were born with developmental disabilities. She believed it was in their best interests to establish permanent guardianship-conservatorships but was at a total loss as to how to accomplish that in court. Hammar said the prospect of drafting documents and going to court, “scared [her] to death.” She lacked the financial resources to retain an attorney.

Hammar turned to the Idaho Volunteer Lawyers Program for help. She recalled feeling a deep sense of relief and gratitude when she was advised that attorneys had agreed take her cases. “They were an answer to my prayers,” Hammar said. Verner was one of those attorneys.

Hammar turned to the Idaho Volunteer Lawyers Program for help. She recalled feeling a deep sense of relief and gratitude when she was advised that attorneys had agreed take her cases.

Today, Hammar is the permanent guardian and conservator for both of her sons. “I am now their guardian and can make sure both boys are being taken care of the right way. The boys wanted me to be the one to help them so it has worked out for all of us,” she said. Helping those who need it. Do-

ing the right thing. Whatever the motivation, Hammar encourages all attorneys to consider doing pro bono work: “There are people out there in the same boat that I was in. I think when you see the look of relief and thanks on their faces you will see that [volunteering] is a wonderful thing to do.”



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No-Fuss Pro Bono: Limited Representation at Federal Court

April M. Linscott

Owens & Crandall, PLLC

The Federal Court Pro Bono Program — good for the client, good for opposing counsel and opposing party, good for the courts and good for the firm providing the pro bono services. What's stopping you from participating?

Recently I was asked by the federal court pro bono liaison Trudy Hanson Fouser if I would be willing to serve as pro bono counsel for a pro se plaintiff in a consumer protection type case. Since I had never served as pro bono counsel in a federal court case, I was a little apprehensive. As it turned out, there was no need for my apprehension, as the court was willing to allow me to appear in as much or as little of the case as I wanted.

At the time I appeared in the case, limited discovery had already taken place and a settlement conference had been scheduled. After reviewing the pleadings and discovery, I believed that I would be able to assist at least through the settlement conference, but probably not the entire case. Therefore, my representation was limited to the settlement conference only.

The Court, true to its promise, allowed me to appear in only my preferred limited capacity. The settlement conference judge and my new clients were aware of my limited representation prior to the time that I met with either of them; so, there was no need for me to do

My client had been able to find help on the internet in drafting a complaint and discovery pleadings; but, quickly found that the rest of the litigation was over his head.

any awkward explanation of my position.

I was able to interact with the settlement Judge and other court staff in a very positive and meaningful way. If asked whether I would take another pro bono assignment, I would say, definitely yes.

When my client was asked about his experience with the pro bono process he stated that the pro bono program saved him not only a lot of heartache and confusion, but a lot of time and money as well. My client had been able to find help on the internet in drafting a complaint and discovery pleadings; but, quickly found that the rest of the litigation was over his head.

He said, "The pro bono program came at just the right time." He was at the point of not knowing what to do next, but still wanted to go forward with his case. He was intimidated by the procedures. When asked if he would participate in the process again responded, "definitely"

I was able to speak with opposing counsel prior to the settlement conference, where we had an opportunity to explore some creative settlement ideas and were then prepared to offer our ideas to the settlement judge. The settlement conference was very

productive, and we were able to settle the case where I believe both sides were happy with the outcome.

Without counsel, the plaintiffs would not have settled because they had unrealistic expectations of the value of their case and the powers of the court. Had the case continued through trial with the pro bono plaintiff, I can only image that the court, opposing counsel and both parties would have been frustrated and the process would have been greatly elongated.

The federal court pro bono program is for the good of the public; good for the courts, good for the parties and good for counsel. If you get approached to volunteer, I sincerely encourage you — don't hesitate.

About the Author

April Linscott practices in the areas of Civil Litigation, Landlord Tenant, Real Estate Law, Employment Law, and handles Foreclosure, Bankruptcy and Probate matters. Ms. Linscott is an approved mediator with the Idaho State Courts and has practiced before the Ninth Circuit Court of Appeals and the U.S. Supreme Court. She works for Owens & Crandall, PLLC in Hayden and is involved with the Panhandle Backcountry Horsemen of Idaho.



April M. Linscott

New law firm handles water law

McHugh Bromley PLLC specializes in water law and administrative water rights issues and litigation. Candice McHugh and Chris Bromley, both former Idaho Deputy Attorneys General, join their expertise in litigating, adjudicating, and resolving Idaho's most complex water rights issues before the Idaho Department of Water Resources, the SRBA District Court, and Idaho's Supreme Court. "We have dedicated our careers to understanding Idaho water law and solving problems for Idaho's water user community." McHugh Bromley PLLC is located at 950 W. Bannock, Ste. 1100 Boise, ID 83702 and their emails are: cmchugh@mchughbromley.com and cbromley@mchughbromley.com.



Candice McHugh



Chris Bromley

Cahill, Campitiello join Evans Keane LLP; Firm adds west coast office

Evans Keane LLP, a Boise, Idaho based business law firm has announced that Madeline Cahill and Larry Campitiello have joined the firm as partners. Ms. Cahill, who focuses her practice in employment, commercial real estate and corporate law is based in the firm's Boise office and serves as Evans Keane's West Coast Strategic Partner. Ms. Cahill will divide her time between Boise and the firm's new Carlsbad office located at 5740 Fleet Street, Suite 140, Carlsbad, Calif. Mr. Campitiello, who focuses his practice on com-

mercial, employment and real estate litigation and business transactions, is based in the firm's new Carlsbad office.

According to Jim Hovren, Evans Keane's managing partner, the addition of Cahill and Campitiello uniquely positions the firm to take advantage of its planned expansion beyond Idaho.

"Having worked with Madeline and Larry during the past several years, and knowing their extensive legal backgrounds and strong ties to the Southern California marketplace, we knew how valuable they would be in helping us strengthen our West Coast presence," said Mr. Hovren. "So when the opportunity arose for them to join us, we jumped on it."

Ms. Cahill, who has more than 25 years of legal, business and law firm administration experience, most recently served as managing partner for a mid-sized San Diego law firm. She has represented Fortune 500, international and start-up companies in a variety of industry sectors during her career. Recently featured in the American Bar Association Journal as one of six female law firm leaders in the nation, Cahill is a frequent speaker and expert resource for the media on various legal topics, ranging from changes in employment law to new trends in law firm management. Ms. Cahill received her J.D. from the University of California, Hastings College of Law.



Larry Campitiello



Madeline Cahill

With nearly 30 years of transactional and litigation experience, Mr. Campitiello represents financial institutions, contractors, manufacturers, distributors, insurers, landlords, real estate brokers and property managers. He has served as president of the North San Diego County Bar Association and was named Attorney of the Year by the organization in 2013. He currently serves on the San Diego County Bar Association's board of directors. Mr. Campitiello earned his J.D. from Loyola Law School.

Hawley Troxell welcomes Sarah Reed

Hawley Troxell is pleased to welcome Sarah Reed to the firm as an associate attorney in the banking and real estate groups. Ms. Reed has been working for the firm as a contract attorney since June, and became a member of the firm on Oct. 1. Her practice focuses on real estate and finance and she has significant experience in real estate transactions and management, including leases, restrictive covenants and easements, and the resolution of property management issues. Reed is also a member of the business and corporate law and real property sections of the Idaho State Bar.



Sarah Reed

Ms. Reed formerly practiced law at Fiore, Racobs & Powers in Irvine, Calif. for five years. She received her J.D. from the University of North Dakota School of Law in 2005 and her B.A. from California State University, Long Beach, in 2001.

NEW ADMITTEES
Admitted 10/02/13 and 10/03/13



At the admissions ceremony on Oct. 2, J. Kelso Lindsay proudly holds his license to practice law in the state of Idaho. At the ceremony Idaho Supreme Court Justice Jim Jones congratulated the new admittees and challenged them to register with the Idaho Volunteer Lawyers Program and to do at least 40 hours of pro bono each year, as is prescribed in Rule 6.1 of the Rules of Professional Conduct.

Photo by Dan Black

Agidius, Erin Melissa Carr
 Alkire, Travis B.
 Allan, Collin Scott
 Amen, Mackenzie Anne
 Anderson, Reed Philip
 Axtell, Katie A.
 Bayuk, Christopher W.
 Bischoff, Brock Hill
 Bishop, Joshua Andrew
 Blackwell, Michelle A.
 Boyd, Christopher D.
 Bradshaw, Matthew V.
 Brown, Christopher Fraser
 Brown, Jason Michael
 Bybee, Marc Jason
 Call, Anson Ladell II
 Callahan, Joan Elizabeth
 Caplin, Nathan Gregg
 Cecchini Beaver, Mark Francis
 Charlton, Regan
 Childress, Bil
 Christensen, Douglas Taylor
 Clayton, Bertha Joann
 Courtney, Anna Elizabeth
 Cousin, David Wayne
 Cuoio, Nathan John
 Damren, Nathaniel James
 Dance, Timothy
 Davis, Patrick James

Eisele, David Anthony
 Elmer, Piper Ashton
 Elsaesser, Katherine Alexander
 Erikson, Nicholas Jeffrey
 Ericson, Maren Caroline
 Ferre, Barbra
 Fielding, Spencer Bowen
 Finigan, Tanya May
 Freeman, Catherine Ann
 Fugate, Kristina N.
 Garner, Jeremy Foster
 Gordon, Jane Catherine
 Goyden, Joshua Paul
 Gurule, Malisa Lenora
 Hagelberg, Luke Andrew
 Hanson, Eric Scott
 Harmer, James Eldon
 Hawkins, Katherine Anne
 Haynes, John Matthew
 Hillyard, Joshua G.
 Hippach, Denise Marlana
 Holmes, Kay Dee
 Hooper, D. Aaron
 Hovda, Jaclyn Terese
 Howarth, Lucas M.
 Hunter, Ryan Scott
 Jacobs, Melissa Annette
 Jacobson, William Paul Joseph III
 James, Jayde Christine

Jensen, Jennifer Meling-Aiko
 Jensen, Ryan K.
 Johnson, Jerald Von
 Knapton, Nicholas Ross
 Knight, Shanna C.
 Koskella, Neal Andrew
 Little, Dustin Arthur
 Lierman, Wendy Marie
 Lindsay, J. Kelso
 Lityoung, Samuel Vannasin
 Logue, Jeffrey Michael
 Lund, Casey Lynn
 Lutz, Michael Finton
 Mix, Cassondra Nicole
 Monnette, Jess Rawlings
 Morgan, Nicholas Robert
 Nielsen, Cory Wayne
 Nielson, Nathan Henrie
 Nye, Jeffery D.
 Oborn, John David
 O'Donnell, Daniel Mark
 Palmer, Nathan Ross
 Parker, Allison Cass
 Probst, Brindee Lee
 Rakes, Matthew Aaron
 Rawlins, Pace William
 Richardson, Steven J.
 Ritter, Kathryn A.

Roberts, Richard Waters Jr.
 Robinson, Jaron Andrew
 Scheihing, Cassandra C.
 Scholl, Tessa Ann
 Schwab, Kurt Herzog
 Shanayeva, Jenya
 Sheldon, Brian Douglas
 Shoff, Allen James
 Snow, Kresten Thomas
 Starr, Matthew Christopher
 Stein, Benjamin Edward
 Stucki, Matthew Paul
 Swanson, Andrew Lloyd
 Swinford, Jenevieve Clair
 Taylor, J. Todd
 Taylor, Robert James
 Thompson, Mark William
 Tibbitts, Tayler Wayne
 Todeschi, Robert Douglas
 Trammell, Brian David
 Vessey, Kate H.
 Volkema, Michelle Ann
 Wade, Carolyn Graff
 Wilk, Nichole Hannah
 Winchester, Michael F.
 Workman, Trevin G.
 Zollinger, Zachary S.

IN MEMORIAM

Calvin G. McIntyre 1922 - 2013

Calvin G. McIntyre, 91 of Twin Falls, died June 6, 2013, at Bridgeview Estates, Twin Falls, after a long illness following a stroke.

Cal was born April 20, 1922, in Jerome, Idaho, to Calvin Alfred and Adelaide Smith McIntyre. His mother died when he was six years old. In school, Calvin enjoyed playing the trombone and was selected to play in the National High School Orchestra in Los Angeles. He graduated from Jerome High School in 1940.

He attended Monmouth College in Monmouth, IL. He enlisted in the Army Air Corps during World War II, where he was stationed in the U.S.



Calvin G. McIntyre

Guam and Saipan. Cal played the trombone in college and in the Army. He married Betty Keller on June 6, 1947 and they had three children. They were later divorced. Cal graduated with a law degree from the University of Idaho in 1948, first in his class.

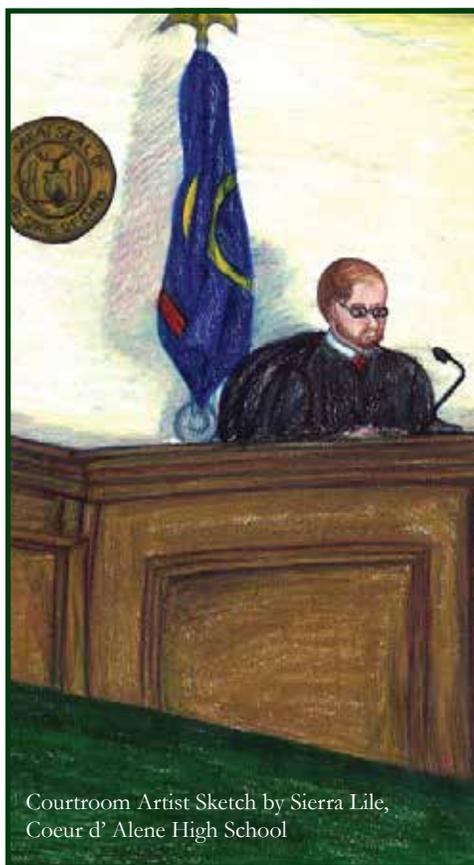
After graduating from law school and admission to the bar, Cal was employed by the Kansas City, Mo., law firm of Stinson, Magg, McElfresh & Fresell for one year. He then returned to Idaho and joined the Twin Falls firm of Parry, Keenan, Robertson and Daly. Following the death of his father in 1951 Cal practiced law in Jerome and Hailey and served as an insurance adjuster for State Farm Mutual Insurance Company.

In October, 1957 he rejoined Parry, Robertson and Daly, where he practiced until 1979 when he, Bert Larsen and John Coleman established the firm

of Larsen, McIntyre and Coleman. At the time of his retirement in 1987, he was a partner of the firm Coleman, McIntyre, Ritchie and Robertson. He was licensed to practice law for 63 years.

In 1982 he married Lillian Tegan Shaff, whom he met on a boat in Alaska. He had a life-long love of music and he and Lillian attended the Sun Valley Jazz festival for many years. Cal was a lifelong member of the First Presbyterian Church in Twin Falls, where he served as an Elder and in many other capacities. He was a world traveler and visited Thailand with his wife, Lillian at the age of 79.

He is survived by his wife of 31 years, Lillian McIntyre; his daughter Mary McIntyre of Duval, Wash.; a son David McIntyre of Louisville, five grandchildren and five great-grandchildren. He was preceded in death by his son, Duncan McIntyre.



Courtroom Artist Sketch by Sierra Lile,
Coeur d' Alene High School

SAVE THE DATE

2014 Mock Trial Competition Volunteer Judges Needed

- ★ Regional Competitions: March 8 in Blackfoot, Coeur d' Alene, or Caldwell
- ★ State Competition: March 19 to 21 in Boise

To find out more about volunteering to judge, visit the **Mock Trial Page** on the Idaho Law Foundation website at www.idaholawfoundation.org or contact Carey Shoufler at cshoufler@isb.idaho.gov or (208) 334-4500.

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Lawrence, Kansas*



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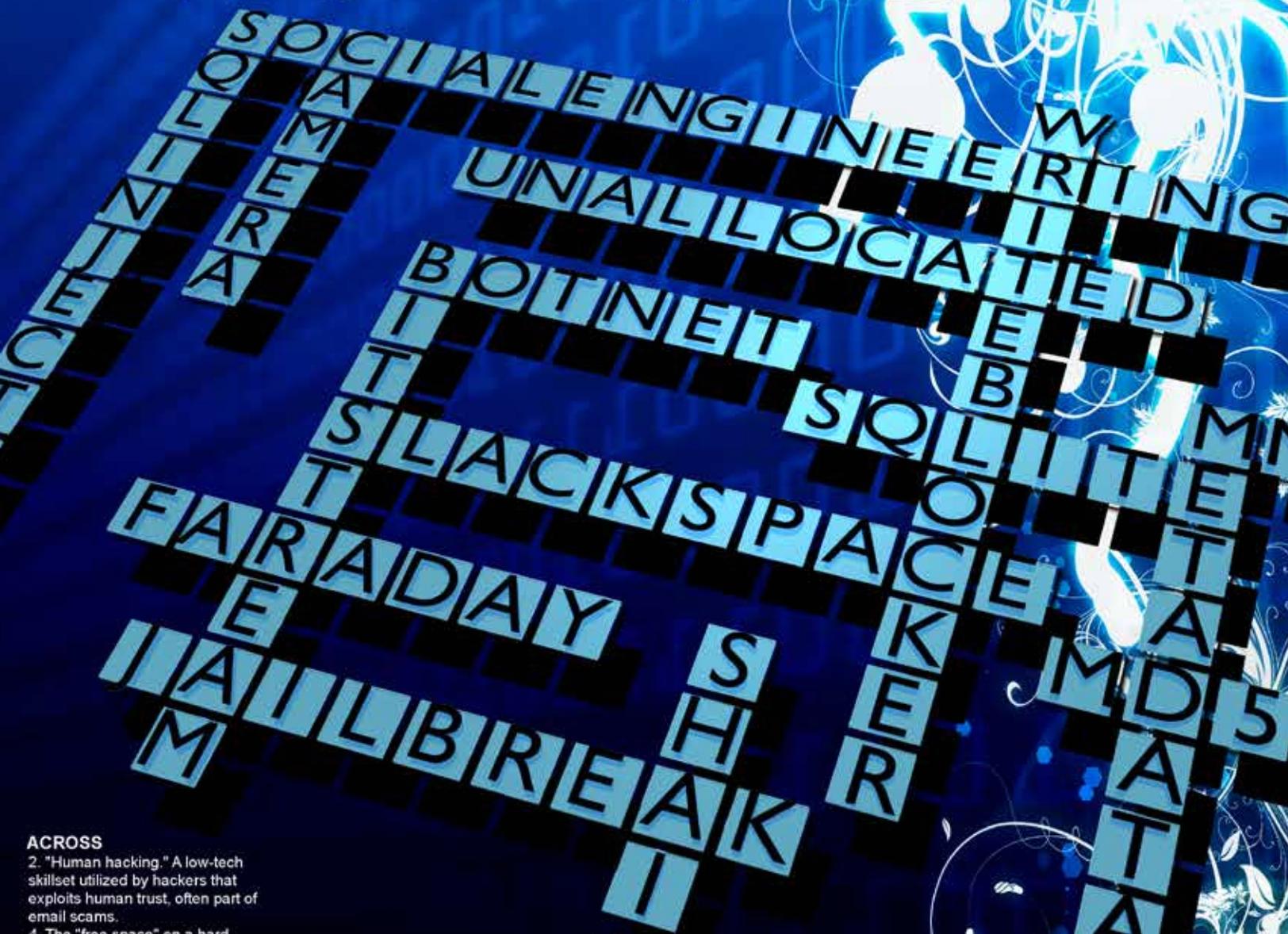
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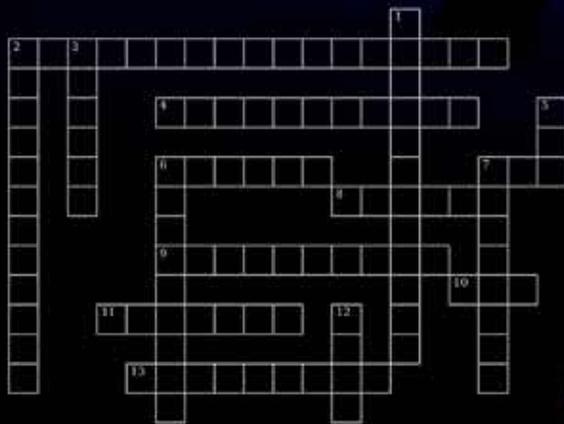
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ACROSS

- 2. "Human hacking." A low-tech skillset utilized by hackers that exploits human trust, often part of email scams.
- 4. The "free space" on a hard drive where deleted files can be found.
- 6. A type of "virus-network" that utilizes infected victims for combined computing, DDOS attacks, and more.
- 7. Format of cell-phone picture messages.
- 8. On Android devices, databases of evidentiary value are stored in this format.
- 9. Extra space at the end of a file where deleted data can exist.
- 10. Algorithm used to ensure evidence integrity, the "data fingerprint."
- 11. Type of container used to shield seized mobile devices from radio waves.
- 13. Verb: to gain administrative access on an iOS device.



DOWN

- 1. Hardware device used to ensure that evidence drives are not contaminated during acquisition.
- 2. A common web vulnerability where a hacker executes malicious code to alter a database.
- 3. The first piece of hardware a forensic examiner reaches for when responding to a computer-crime.
- 5. Text message format, limited to 160 characters.
- 6. Term for forensic disk images containing every bit of an evidence drive.
- 7. "Hidden" data such as date-time stamps and GPS coordinates, often part of picture files.
- 12. Newer type of cryptographic hash, also used to verify evidence integrity.

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