

MINUTES
HOUSE BUSINESS COMMITTEE

DATE: Tuesday, March 13, 2012

TIME: Upon Adjournment of the House

PLACE: Room EW41

MEMBERS: Chairman Black, Vice Chairman Henderson, Representative(s) Collins, Bilbao (Reynoldson), Chadderdon, Crane, Patrick, Bayer, Palmer, Thompson, Barbieri, DeMordaunt, Guthrie, Batt, Smith (30), Rusche, Cronin

**ABSENT/
EXCUSED:** Representative Palmer

GUESTS: Phil E. DeAngeli, citizen; Larry Benton, Tony Smith and Kris Ellis, Realty in Motion; John Eaton and Miguel Legarreta, Realtors; Erik Makrush, Idaho Freedom Foundation; Tom Donovan, Department of Insurance; Jeremy Pisca, Matt Davison, and Sean Evans, Newspaper Association of Idaho; Jason Kreizenbeck, AT&T; Colby Cameron, Asurion Insurance; Leonard C. Martin, Blackfoot Morning News; Scott Anderson, Teton Valley News; Tonja A. Hyder, Emmett Messenger Index; Pat Healy, Preston Citizen; John Dillon, Payette Independent Eclipse; Lyn Darrington, Idaho Business Review

Chairman Black called the meeting to order at 2:20 p.m.

MOTION: **Rep. Collins** made a motion to approve the minutes of March 7. **Motion carried by voice vote.**

H 624: **Jeremy Pisca**, an attorney representing the Newspaper Association of Idaho, presented **H 624**, which deals with residential home foreclosures. Mr. Pisca testified that Idaho law allows for a power of sale under a deed of trust. Because this process is easier than a judicial foreclosure procedure, it has more checks and balances as well as greater transparency. As a part of the foreclosure procedure, the trustee is required to publish a notice in a newspaper of "general circulation" in the county once a week for four consecutive weeks. This requirement is in place for two main reasons; first, it will attract more bidders, and second, it imposes a level of transparency.

Mr. Pisca said it is important to attract more bidders so the owners being foreclosed upon can receive the best possible price, since they still have to pay other expenses, including any taxes owed, any assessments, outstanding insurance premiums, trustee and attorney fees and the costs of the sale. The proceeds of the sale are distributed according to Idaho Code 45-1507. The trustee receives his fee first, then funds are paid to relieve any obligation of the homeowner, then recorded liens are paid. Although a surplus is rare, any surplus is paid to the grantor.

Addressing the transparency issue, **Mr. Pisca** said the publication should be done by an independent source. Publication creates a record and proof that the notices actually were published. The published notice is important to alert anyone having an interest in the property, including possible lienholders. If there is improper notice given, the sale can be undone.

Given these two reasons for notice publication, **Mr. Pisca** said it goes against public policy for a trustee to have an interest in a newspaper that publishes the notices. He noted one company in particular that controls every tier of the whole foreclosure process, owning a law firm and a title company, hiring a trustee, and now owning the newspaper that will print the public notices. Mr. Pisca said this trend could continue to expand.

Noting that profit is the only motive behind the newspaper ownership, **Mr. Pisca** said this is profiteering from those losing their homes. He said the business model of this company is not to purchase large daily newspapers but rather small weekly newspapers, which are less expensive to run. Because the publication rate is set by statute, the publication of these notices becomes a profit center for the small newspaper. Mr. Pisca said this trend started in Washington state, spread to Oregon, then to Hawaii and Alaska, and is now in Idaho, with the Kuna-Melba News. The owner of that newspaper has said he is not a journalist but rather a businessman providing a service.

Mr. Pisca stated that **H 624** removes the financial incentive to "self-deal" and bury the notices of sales in smaller publications. He said he believes public notices should be available to the broader public. The bill will make it unlawful for a trustee to place notices in newspapers in which they have a financial interest; the misdemeanor offense will be punishable by a fine, jail time, or both. He said Missouri and Florida have similar provisions, and he noted that newspaper associations in the Pacific Northwest are studying the issue as well.

Responding to committee questions, **Mr. Pisca** said he does not believe the legislation is anti-competitive, since trustees can still publish notices in other newspapers. He said it is against public policy to make publication decisions based on pocketbooks. **Rep. Henderson** noted that a newspaper of "general circulation" does not necessarily mean one with the largest circulation. He also clarified that the notices are "public" notices but not official legal notices. **Mr. Pisca** stated that these public notices must include specific information such as the names of the grantors or homeowners, the trustees, a description of the property, the debt still owing, any liens, and the date and time of the sale.

In answer to further questions, **Mr. Pisca** explained that the "general interest" and "general circulation" requirement is usually understood to be the newspaper with the largest paid circulation within a political subdivision. He briefly explained a Supreme Court decision that found deed of trust notices are "private" notices, so they do not fall under the classification of "governmental" notices as used in the title to Idaho Code Section 60-106. He said the trustee is required to make three attempts at least 30 days prior to sale to reach the property owner. Mr. Pisca said following publication of the notices, the publication has to provide an affidavit and proof of publication.

Mr. Pisca was asked whether there is anything preventing a vertically integrated business from meeting the general circulation standard. He said they probably could meet the standard. He said, however, the business in question is profiting from placement of trustee sales. It is not in their economic best interest to purchase a large newspaper because it would be more expensive to operate. Mr. Pisca said this business is not meeting the "general circulation" standard in the true spirit or intent of the law, since the true intent is to get the notice out as broadly as possible. Notices need to reach anyone with an interest in the property. Mr. Pisca testified that the Idaho Statesman could not vertically integrate under this proposed legislation. If they chose to do so, by buying a title company, he still does not believe they would be meeting the spirit of the law.

Mr. Pisca was asked to explain the term "general circulation." He said this term in Idaho Code Section 60-106 means the newspaper with the largest paid circulation. Public notices, however, are not included in the category of "governmental" notices as cited in the title to that Code section, because of a Supreme Court decision that issued that opinion. Therefore, public notices do not fall under that requirement since a trustee is not a governmental entity. Mr. Pisca said the business model of purchasing a small newspaper and squirreling away the notices into the small paper solely to maximize financial gain is not good public policy because it does not

maximize the number of people who will see the notices. He also agreed that this arrangement sets up a perception of conflict of interest.

Answering further questions, **Mr. Pisca** said the notices are required to be printed in a newspaper in the same county as the property; the county is specified, in preference to the city, because it is a broader area of coverage. He said putting notices in smaller papers does limit the number of people who will see them and could negatively impact the sales price. He listed the current requirements of a qualified publisher, saying a weekly paper has to have been in continuous operation for 78 weeks and a daily paper for 12 months. Asked whether this problem could be approached by addressing a standardized qualifying parameter rather than through a perceived conflict parameter, Mr. Pisca said he did not believe so. He said he is dealing with a direct financial interest, based on the placement of the notification.

Phil E. DeAngeli, an attorney with Spink Butler, a business and real estate firm, testified **in opposition to H 624**. Mr. DeAngeli stated he is testifying on his own behalf. He said in the last five years title agents have been primarily processing foreclosures; many Idaho companies have subsisted on foreclosures alone. Mr. DeAngeli said it is his opinion that the problem addressed by H 624 could be better addressed in a section of Idaho Code that deals with the publishing industry.

Mr. DeAngeli reviewed the notice requirements in foreclosure cases. First, there are three good-faith attempts to notify the owner at the property; if no one is at the home, a notice of trustee sale is tacked on the front door. Then a certified or registered letter is sent to all parties who may be potential borrowers or defaulters under the deed of trust. Finally, the notice publication takes place. These measures are required so a person cannot lose a home to foreclosure without knowing it.

Mr. DeAngeli said trustees are defined by statute, and can include lawyers, banks, or title companies; some attorneys run giant foreclosure operations. These trustees are the people who will be criminalized by the language in H 624. Mr. DeAngeli also said the terminology "direct or indirect financial benefit" would be problematic because of its breadth. He testified that as a result of efforts by Fannie Mae and Freddie Mac to make all deeds of trust uniform, all costs of foreclosure are added to the financial obligations of the property owner. Requirements imposed by legislation like H 624 could add to the expenses because there will be fewer competitors. Mr. DeAngeli said everyone favors vertical integration for certain businesses, but opposes it when it negatively affects their own interests.

Answering committee questions, **Mr. DeAngeli** said the legislation clearly spells out that it shall be unlawful for a trustee to have a financial interest in a newspaper publishing a notice or to profit directly or indirectly based upon publication of the notice. Therefore, to the extent that a person profits, either directly or indirectly, he or she is punishable. He said the trustee who conducts a foreclosure sale automatically profits from the process, and part of that process is the publication of the notices.

John Eaton, Government Affairs Director for the Idaho Association of Realtors, testified **in support of H 624**. He said the intent of publishing the notices should be to get the notice of foreclosure out to as many potential bidders as possible. Mr. Eaton said it doesn't make sense to have properties selling in Boise being noticed in Kuna. He said in Idaho a deficiency can be forgiven by a bank, but the homeowner then owes income tax on the amount forgiven. Noticing in a manner that will not attract the highest bid is making a person's financial situation even worse and is profiteering off of people's financial difficulties.

Mr. Eaton was asked whether it would be possible to develop standards that would facilitate the broadest public notice without automatically eliminating a vertically-integrated business. He said a business interested in making money will purchase the smallest available paper in a county because of the higher profit

margin. A business like this has no intention of meeting the current statute. He said the publication fee is set by statute and, based on the Supreme Court's decision, someone has figured out that all the public notices can be swept into a smaller newspaper. Mr. Eaton said this is probably a unique situation as far as business models go.

It was pointed out that "broad notice" may not be the right goal for notice publications. In order to maximize the number of bidders, perhaps the goal should be to target those interested in real estate investing, which may require publication in an investment publication or other paper besides the one with greatest circulation. **Mr. Eaton** agreed, noting that in Ada County the previous publisher of most notices was the Idaho Business Review. He said, however, that vertical integration can lead to abuse of the current requirements.

Matt Davison, Publisher and President of the Idaho Press Tribune, testified **in support of H 624**. Mr. Davison said he is also testifying on behalf of the Newspaper Association of Idaho. He said newspapers try to distribute notices to as many as possible. Having an interest that will result in financial gain will not benefit the public. If an independent third party is taken out of the equation, the notice process itself is in jeopardy. If any part of the process can be called into question, this can further delay the process of foreclosures, which in turn impacts jobs, the housing market, and the economic recovery.

In response to committee questions, **Mr. Davison** said the requirement of newspapers to achieve the status of having a second-class postage permit is a federal government requirement. Mr. Davison testified the Idaho Press Tribune's circulation is 22,000 daily and 30,000 on Sunday, compared to the Kuna Melba News circulation of around 1,000, some of which are unpaid subscriptions. Mr. Davison said the Kuna-Melba News does not have a physical office in Melba.

Sean Evans, Vice President of the Idaho Business Review and Chairman of the Legislative Committee for the Newspaper Association of Idaho, testified **in support of H 624**. He said the legislation will restore independence, transparency and accountability to the publication process, noting that there is an inherent conflict of interest for a trustee to pay himself and verify for himself. Mr. Evans said the bill will also protect the integrity of the public archive.

Mr. Evans was asked to explain his statement about a newspaper "verifying" itself. He said newspapers offer verification that they ran notices on stated dates and that they included all statutorily-required information. This is verified by an affidavit and also by clippings that the notice ran as required. The affidavit is provided to the trustee, the party requesting publication of the notice. If the parties acting as trustees are also publishing the paper, they would in effect be giving themselves notice. Mr. Evans said H 624 will stipulate that to be a violation of public policy. He said an independent third party needs to do the verification. There should be no question of the intent of the trustee; the intent should be to get the widest possible circulation for the notices.

Eric Makrush, Idaho Freedom Foundation, testified in opposition to **H 624**, saying the Foundation has scored this legislation at a minus 4 because it creates a new and inexplicable regulatory restriction on newspapers, accompanied by a jail term or a fine. Mr. Makrush said this interferes with the private sector and restricts the free market. Specifying that a trustee may not have an interest in a newspaper publishing notices of trustee sales is anti-competitive and restricts the rights of business owners. He stated that vertical integration is the model of many media companies. Saying the bill could have unintended consequences, Mr. Makrush requested that an interim committee be set up to work on possible solutions.

Mr. Makrush was asked what will happen if this legislation does not move forward this year. He said the bill singles out one company in Melba, which does not represent a big problem, although this arrangement could become a bigger problem in the future. He stated his understanding that there was not a great deal of communication among interested parties to reach consensus, and he thinks some of the problems could be worked out over the interim. Mr. Makrush said if he were someone who wanted to buy a foreclosed property, he would find out where the notices are published and would go to that publication, regardless of its size. He also said in today's media environment, publication on the internet might be a better solution for foreclosure notices.

Rep. Patrick stated his opinion that this bill will increase competition because it will eliminate a trustee sending notices to his own newspaper. **Mr. Makrush** said preventing someone from publishing certain notices does not prevent him from owning a paper.

Kris Ellis, representing Realty in Motion, testified **in opposition to H 624**. Ms. Ellis said vertical integration is not a new business model and, in fact, it is being touted as a good direction for the health care industry. She would characterize vertical integration as simply bringing functions "in-house" for efficiency purposes. She asked why it is a problem for a company to buy a newspaper and make money. She does not agree that this business model puts small newspapers in jeopardy, noting that the Kuna newspaper has had to increase staff. Ms. Ellis said she has concerns about unconstitutional vagueness in the bill, particularly the language about someone who profits "directly or indirectly." This could be interpreted to include a trustee owning stock in a newspaper or a person with newspaper stock in his or her mutual fund. If they make a profit on those investments, they could go to jail. She expressed concern about unintended consequences if the bill passes.

Ms. Ellis recommended that the committee hold the bill and asked them to request an interim or ad hoc committee. She said the Attorney General's office is agreeable to this idea, as is the Association of Idaho Cities, The Idaho Bankers Association, the Idaho Association of Counties, and the Idaho Land Title Association. Ms. Ellis said if the real purpose is to get the broadest possible notice, interested parties can access notices online or from title companies, sometimes before a newspaper is even published. She also said the industry needs to move to a system that is less expensive, one that would benefit both seller and buyer. She said if there is no funding for an interim committee, there is support for an ad hoc committee that would not need to be funded. She said the Attorney General suggested notices could be publicized by the Department of Administration which would centralize them and make them more accessible than they are now.

Responding to questions from the committee, **Ms. Ellis** said the business model of Realty in Motion is not necessarily new or unique. She said trustees, who are either attorneys, banks or financial institutions, are licensed either by the Department of Insurance or by the Department of Finance, and those departments have regulatory control over the trustees to make sure they are meeting the requirements of the law. Therefore, accusations of misconduct in this case are misplaced.

Jeremy Pisca was recognized to conclude his testimony. He reiterated that the purpose of publishing notices of foreclosure is not just to notify the person losing his home. Rather, the purpose is to notify the widest possible number of interested bidders. A newspaper publication is a statutory requirement, not a backup. He said the only thing prohibited by this legislation is profiting by the placement of notices. He also stated there had been allegations that the company in question was charging more than the statutory rate. Mr. Pisca said the Attorney General's office had not expressed any concerns to him about the legislation. With regard to publishing on

the internet, he said the newspaper association congregates all notices and puts them on one central website. Finally, Mr. Pisca distributed a newspaper article about Realty in Motion, as an illustration of the problem addressed in H 624.

MOTION: **Rep. Crane** made a motion to send **H 624** to the floor with a **DO PASS** recommendation.

SUBSTITUTE MOTION: **Rep. DeMordaunt** offered a substitute motion to **HOLD H 624** in committee. He agreed that the issue of broad notification is a valid concern, but he does not want to penalize or criminalize a vertically integrated company. He said the notices need to be published appropriately and to the right people, but he asked whether a different standard could be set in order to do so. He questioned whether the "general circulation" standard is the correct one to use in order to achieve the best notice. He suggested the issue should be studied further.

Arguing in opposition to the original motion, **Rep. Bayer** said he is not convinced there is a cause and effect with regard to a vertically integrated business model, but said he is not sure an interim committee is necessary. He said standards need to be in place that serve the public interest. He is concerned with the possible interpretations of the term "indirectly" on page 2, line 25, noting there are numerous degrees of possible affiliation with a newspaper. Rep. Bayer said minimizing notices in order to maximize profits is criminal and said the issue of standardization may need to be addressed further. Stating that he does not see an automatic conflict of interest, he cannot support the legislation's language as it stands.

AMENDED SUBSTITUTE MOTION: **Rep. Barbieri** made an amended substitute motion to return the bill to its sponsor. He said he thinks the discussion concerning **H 624** has highlighted more issues than just the notice issue, stating that it has touched on the deficiency and conflict of interest issues as well. He said the practice addressed by H 624 appears to be noncompetitive, but he is not sure this statute remedies that problem.

MOTION WITHDRAWN: It was pointed out that a bill cannot be returned to sponsor, so the motion was not proper. **Rep. Barbieri** withdrew his amended substitute motion.

Rep. Guthrie argued in support of the original motion, noting that there is an obligation to assure the best possible outcome of a foreclosure. He said the notices need to be published in papers with the broadest circulation in order to get the greatest value out of the properties. **Rep. Patrick** also supported the original motion, reminding the committee of the recent lawsuit against the country's five largest banks, in which transparency in real estate transactions was an issue. He said professional conduct is at the heart of this discussion.

Rep. Henderson stated his support for the substitute motion, noting that the issue could be handled by redoing the qualifications and setting different standards for the newspapers publishing the notices. His suggestion would be to include language on page 2, line 19, that the newspaper would be "one having audited paid circulation and/or one selected as the legal newspaper for the local unit of government where the property is located."

ROLL CALL VOTE ON SUBSTITUTE MOTION: A roll call vote was requested on the **substitute motion to HOLD H 624** in committee. **Substitute motion failed by a vote of 4 AYE and 12 NAY, 1 Absent/Excused.** Voting in favor of the substitute motion: **Reps. Henderson, Bayer, Barbieri and DeMordaunt.** Voting in opposition to the substitute motion: **Reps. Collins, Bilbao (Reynoldson), Chadderdon, Crane, Patrick, Thompson, Guthrie, Batt, Smith (30), Rusche, Cronin, and Black.** **Rep. Palmer was absent and excused.**

VOTE ON ORIGINAL MOTION:

Chairman Black called for a vote on the original motion to send **H 624** to the floor with a **DO PASS** recommendation. **Motion carried by a voice vote. Reps. Henderson, Barbieri and DeMordaunt** requested that they be recorded as voting **NAY**. **Rep. Crane** will sponsor the bill on the floor.

H 649:

Colby Cameron, representing Asurion Insurance, presented **H 649**. Mr. Cameron said this legislation creates a better licensing mechanism for vendors who sell portable electronics insurance in Idaho. This bill clarifies and minimizes regulation on vendors, requiring them to obtain one insurance license that will cover all their stores and employees who sell these devices. Mr. Cameron said the legislation had been reviewed by other insurance providers and is supported by the Idaho Association of Commerce and Industry (IACI). He pointed out the change made to the previous version of this legislation, noting that the fingerprinting requirement for adjusters was removed. The requirements will simply default to whatever the Department of Insurance requires.

Eric Makrush, Idaho Freedom Foundation, testified **in opposition to H 649**. Mr. Makrush acknowledged that some changes had been made to **H 471** but said this new bill still offers government regulation as a solution to a problem that does not exist. He testified he does not think this type of insurance should be added to the Code; there is no public demand for it and no prevailing issues requiring it. He said it is his belief that the true intent of the bill is to subject the market to limitations that will make it harder to enter the field, and said it appears to be aimed at benefiting only one company. He also questioned the "emergency" clause since the effective date is July 2013.

In response to a question from the committee, **Mr. Makrush** said this bill's freedom index rating was improved to a minus 5, slightly better than the previous bill.

Jason Kreizenbeck, Lobby Idaho, representing AT&T, a major provider of wireless services, testified in support of H 649. He said the bill will lower the regulatory burdens on portable electronic device providers and will take the burden off their sales staff. Mr. Kreizenbeck said he does not believe this will limit entry but rather will create surety for insurance companies offering this coverage.

Tom Donovan, Department of Insurance, was recognized to respond to questions from the committee. Mr. Donovan said this legislation will require the Department to develop some new sections containing reduced requirements for a limited lines insurance producer. He said the Department has reviewed the legislation and does not foresee any problems in implementing it. He said if an individual seller of this type of insurance does something in violation of Code, the vendor will either pay a penalty or will bar that individual from acting on their behalf. Alternatively, the vendor could lose its license to sell this insurance. Mr. Donovan said this kind of insurance is currently sold by a licensed carrier; in other words, a person selling it would have a producer license. The coverage offered by these policies is broader than that offered under service contracts. He said some specific provisions of this legislation will offer greater consumer protection than is currently available.

MOTION:

Rep. Thompson made a motion to send **H 649** to the floor with a **DO PASS** recommendation. **Motion carried by voice vote. Rep. Black** will sponsor the bill on the floor.

ADJOURN:

There being no further business to come before the committee, the meeting was adjourned at 4:30 p.m.

Representative Max C. Black
Chairman

MaryLou Molitor
Secretary