Consumer Federation of America

March 26, 2018

Assistant Attorney General Makan Delrahim
Department of Justice Antitrust Division
950 Pennsylvania Ave. NW
Washington, DC 20530-0001

Dear Assistant Attorney General Makan:

On March 19, 2018, Fidelity National Financial announced it had signed a merger agreement to acquire Stewart Information Services.

As Housing Wire reported the merger, "Fidelity is already one of the nation's largest title insurance and settlement services provider, and now, it's set to acquire one of its biggest competitors."[1]

Based on 2016 data, the Fidelity Family of insurers was the largest writer of title insurance in the nation. The fourth leading in the nation was Stewart family. Fidelity had earned premiums of $4,696,850,347 and Stewart had earned premiums of $1,577,390,515. The total title insurance earned premium for all insurers in the nation was $13,941,529,885.[2]

Thus, Fidelity's market share in 2016 was 33.7% and Stewart's market share was 11.3%. Our calculation of the Herfindahl-Hirschman Index ("HHI") of market concentration shows that the HHI jumps from a moderately concentrated market level of 2,174 to a highly concentrated market level of 2,936 (See attached spreadsheet). According to your Horizontal Merger Guidelines:

> Mergers resulting in highly concentrated markets that involve an increase in the HHI of between 100 points and 200 points potentially raise significant competitive concerns and often warrant scrutiny. Mergers resulting in highly concentrated markets that involve an increase in the HHI of more than 200 points will be presumed to be likely to enhance market power. The presumption may be rebutted by persuasive evidence showing that the merger is unlikely to enhance market power.[3]

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[1] "Massive Title Insurance Merger: Fidelity National buying Stewart for $1.2 Billion," Housing Wire, March 19, 2018.
[2] Data from "Title Industry Statistical Analysis by Family and Company (2016 and 2015)," American Land Title Association
[3] Found at https://www.justice.gov/atr/horizontal-merger-guidelines-08192010#5c

The title insurance market is generally a non-competitive market even before the merger. Beyond the concentration illustrated by the HHI, the title insurance market is plagued by "reverse competition", where the ultimate consumer, the homeowner, has little say in which insurer writes the business, and insurer marketing efforts focus on distributing inducements to real estate professionals, which drive up prices.

Title Insurance, which is sold at the closing of a home sale, is in place to defend and compensate buyers and lenders in case of challenges to the title ownership. There are two types of policies – a lender's policy and an owner's policy – both of which are usually purchased by the homebuyer, not the lender. Rarely, though, do homeowners select their title insurers or receive information about the range of companies that could underwrite the coverage. Instead, most homeowners are simply provided a policy and a premium that has been selected for them as they approach the final stages of their purchase.

Studies have consistently revealed how inefficiencies in the title insurance market have harmed consumers through excessive premium prices, highlighted by the fact that title insurance has a shockingly low loss ratio of five percent nationally.[4] That is, for each premium dollar paid by homeowners, only five cents is paid to cover claims. Part of the reason for this low loss ratio, is the exorbitant expenses incurred by title insurers. Title insurers market their products to real estate professionals – real estate agents, mortgage lenders, mortgage brokers, attorneys, homebuilders – who can often steer consumers to a particular title agent or title insurer, which, in turn, often richly compensates the professional for the referral. In this relationship, title agents and title insurers often compete for the business of real estate professionals by offering them higher compensation and other considerations, driving up prices.[5] The grotesque lavishness of title industry efforts to woo real estate professionals has begun to place a spotlight on reverse competition in recent years. Further concentration of this already non-competitive market could generate an incentive among the remaining market players to increase the distribution of inducements (and increase premiums) to escape the shadow of a merged Fidelity and Stewart.

We call upon your Department to undertake careful analysis of this merger. We believe it should be stopped.

By a copy of this letter, we are also alerting the leadership of the National Association of Insurance Commissioners and the regulators of every state of our concerns. We call on them to act as well to not only stop this merger but to take action to moderate the adverse effects on American's consumers of rampant reverse competition in title insurance today.

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[4] Data for 2016 shows a 5.0% loss and loss adjustment expense ratio on earned premiums of $13.9 billion; in 2015 the ratio was 5.2% on $12.8 billion of earned premiums. Source: Title Industry Statistical Analysis by Family and Company (2016 and 2015), American Land Title Association

[5] A more complete discussion of title insurance can be found at: https://consumerfed.org/pdfs/NY_title_insurance_testimony_final.pdf

Sincerely,

J. Robert Hunter

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Director of Insurance
Consumer Federation of America