

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: Joseph J. Simons, Chairman
Noah Joshua Phillips
Rohit Chopra
Rebecca Kelly Slaughter
Christine S. Wilson

In the Matter of

Fidelity National Financial, Inc.,
a corporation

and

Stewart Information Services
Corporation,
a corporation.

DocketNo. 9385

5 (' \$ & 7 (' PUBLIC VERSION

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act (“FTC Act”), and by virtue of the authority vested in it by the FTC Act, the Federal Trade Commission (“Commission”) having reason to believe that Respondents Fidelity National Financial, Inc. (“Fidelity”) and Stewart Information Services Corporation (“Stewart”) have executed a merger agreement in violation of Section 5 of the FTC Act, 15 U.S.C. § 45, which if consummated would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint pursuant to Section 5(b) of the FTC Act, 15 U.S.C. § 45(b), and Section 11(b) of the Clayton Act, 15 U.S.C. § 21(b), stating its charges as follows:

I. NATURE OF THE CASE

1. Respondents Fidelity and Stewart are two of the four largest title insurance underwriters in the United States. Title insurance protects customers and lenders in real estate transactions from defects in the property’s title. Title insurance policies issue in nearly every real estate transaction in the United States. A title insurance underwriter bears the risk underlying each one of those policies.

2. Four underwriters dominate the U.S. title insurance industry. The industry recognizes these players as the “Big 4”: Fidelity, Stewart, First American Title Insurance Company (“First American”), and Old Republic National Title Insurance Company (“Old Republic”). On a national level, the Big 4 account for more than 85 percent of all title insurance

sales. The individual shares of the Big 4 vary by state. A merged Fidelity-Stewart would account for more than 43 percent of national sales on its own. No underwriter outside of the Big 4 exceeds 3.5 percent of the sales nationwide.

3. Fidelity's proposed merger with Stewart (the "Merger") is the latest in a series of transactions that have consolidated the title insurance industry, would reduce the Big 4 to a Big 3. This increase in concentration is likely to result in anticompetitive harm. As the former Chairman of Stewart's Board of Directors observed in 2016, "The industry has shrunk considerably to just 4 companies with double digit market power. Further consolidation at the top 2 companies could lead to a duopoly"

4. The Big 4 are the only underwriters that meaningfully compete to provide title insurance for large commercial transactions. For purposes of this Complaint, large commercial transactions are commercial real estate transactions involving title insurance liability amounts greater than \$20 million. Despite motivated efforts, smaller underwriters have been unable to establish themselves as viable competitors for these large commercial transactions. Merger Post

9. In at least 42 states and the District of Columbia, the merger is presumptively unlawful, as the Merger will result in a highly concentrated market and an increase in the HHI concentration measure of more than 200 points. For example, in Alaska, Maryland, New Mexico, and Virginia, the Merger results in increases of more than 1,000 points and a final HHI of more than 4,000 points. Under the thresholds established by the U.S. Department of Justice and Federal Trade Commission Horizontal Merger Guide (“HMG”), these states will experience an increase in concentration giving rise to a presumption of enhanced market power.

10. Reducing the Big 4—the “only real players on the commercial side,” per one key Fidelity executive—to the Big 3 threatens significant harm to customers purchasing title insurance for large commercial transactions. By merging with one of its closest rivals, Fidelity will eliminate an important competitor, entrenching and likely increasing the effectiveness of the existing oligopoly, and eliminating valuable head-to-head competition where it remains today.

11. Stewart has shown a greater willingness to undercut the other Big 4 underwriters on price, or offer more favorable coverage terms, in order to win business. Even within this four-firm “oligopoly,” Fidelity has been forced to reduce its prices in response to Stewart. Stewart also finds creative ways to mitigate or assume risk in order to compete for business and has been willing to provide coverage where Fidelity and others in the Big 4 have declined to do so unless the customers can meet additional burdensome conditions. Where the current oligopoly has already softened competition, Stewart’s approach has prompted others in the Big 4 to adjust their own competitive strategies to the benefit of customers.

12. New entry or expansion by existing market participants would not be timely, likely, or sufficient to counteract the anticompetitive effects of the Merger. There are significant barriers to entry into markets for the provision of title insurance for large commercial transactions and the provision of title information services, including secure registration, necessary capital, a national geographic footprint, and proven experience in handling large commercial transactions. These barriers make entry or expansion difficult, and incapable of constraining the merged entity. High entry barriers make timely and sufficient entry unlikely in the relevant markets for title information services.

13. Respondents cannot show cognizable efficiencies that would offset the likely and substantial competitive harm from the Merger.

II. JURISDICTION

14. Respondents are, and at all relevant times have been, engaged in activities in or affecting “commerce” as defined in Section 4 of the FTC Act, 15 U.S.C. § 44, and Section 1 of the Clayton Act, 15 U.S.C. § 12.

15. The Merger constitutes a merger subject to Section 7 of the Clayton Act, 15 U.S.C. § 18.

III. RESPONDENTS

16. Fidelity is a for-profit, publicly traded corporation existing and doing business under and by virtue of the laws of Delaware, with its office and principal place of business

located at 601 Riverside Avenue, Jacksonville, Florida 32204. Fidelity is the country's largest title insurance company. It underwrites title insurance under several brands, including Fidelity National Title Insurance Company, Chicago Title Insurance Company, Commonwealth Land Title Insurance Company, Alamo Title Insurance, and National Title Insurance of New York, Inc. Fidelity issues policies in all 50 states and the District of Columbia. Through a subsidiary, Fidelity also owns title plant assets throughout the United States. In 2018, Fidelity's revenues totaled \$7.594 billion, of which \$7.526 billion derived from title premiums, escrow, title information services, and other fees related to the provision of title insurance.

Stewart is a for-profit, publicly traded corporation existing and doing business under and by virtue of the laws of Delaware, with its office and principal place of business located at 1360 Post Oak Blvd., Suite 100, Houston, Texas 77056. In the United States, Stewart provides title insurance and related services through its subsidiaries, Stewart Title Guaranty Company and Stewart Title Insurance Company. Stewart issues policies in all 50 states and the District of Columbia.

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whose paper the policy is written bears the risk underlying the policy. Agents often maintain relationships with multiple underwriters, enabling them to choose which underwriter's paper to use for each individual transaction.

23. A customer typically places an order for a title insurance policy at or near the start of a real estate transaction. After receiving an order, the underwriter or its agent conducts a title search to identify potential title defects or other encumbrances on the property, such as liens, easements, usage restrictions, and transfer restrictions.

24. In many parts of the country, underwriters and their agents do not have title plants when conducting the title search. If there is no title plant for a specific county, title searchers must turn to less efficient options such as public institutions (e.g., county recorder and assessor offices).

25. Once the title search is complete, the underwriter or title agent issues a title commitment listing any defects found during the title search that will be excluded or excepted from the final insurance policy unless cured before closing.

26. Customers prefer title insurance policies with fewer exceptions. As the real estate transaction progresses, the customer may seek to convince an underwriter that an excepted risk should be covered by the title insurance policy. In such situations, the underwriter may have to spend additional resources working with the customer to understand the peculiarities of the specific transaction.

27. Alternatively, an underwriter may be willing to accept additional risk for a fee by allowing the customer to purchase an endorsement that provides coverage for a specified issue. Underwriters may vary in the conditions they impose on the insured before agreeing to issue a given endorsement.

28. An escrow officer or closer—often an employee of the underwriter or its agent—conducts the closing in most real estate transactions. Upon closing, the escrow officer transfers the funds from the buyer to the seller. At this time, the buyer pays the title insurance premium. The underwriter then issues the final title insurance policy, either directly to the customer or through an agent.

29. When an underwriter issues the title insurance policy directly, it retains the entire title insurance premium and any additional fees (e.g., fees for endorsements). When an agent issues the title insurance policy on behalf of an underwriter, the agent receives the entire premium and additional fees. The agent then must remit a contractually established or negotiated portion of this revenue to the underwriter. The division between the agent's retained revenue and the amount remitted to the underwriter is referred to as the "split."

30. Each state and the District of Columbia independently regulates the provision of title insurance. State regulators impose various restrictions on title insurance providers, including licensing rules and regulations governing title insurance premiums and related fees.

31. In general, state regulation

34. Commercial real estate transactions involving the sale or financing of non-residential real property—essentially, any properties other than single-family homes, individual condominium units, and multi-family residential buildings with four or fewer units in commercial transactions, property buyers or their counsel typically use the title insurance underwriter subject to lender approval.

35. Each large commercial transaction requires an individual title insurance order with transaction-specific negotiation over a variety of terms. The negotiated terms may include price, scope of coverage, service levels, and ancillary fees and services. This transaction is subject to 2 (d) a (c) 6

familiarity with the customer's business and real estate processes can also provide pricing, coverage, and service benefits

B. Title Information Services

39. Title information services refers to providing access to title plant information, whether by direct access to title plants via ownership or subscription, or indirect access to information contained in title plants (e.g., search services). Typically, title plants are specific to a single county because the information contained in most title plants comes from county records. In some metropolitan areas, however, a single title plant may cover multiple counties.

40. Title information services customers require property information covering the county in which the property at issue is located, and title information services providers usually provide access to title plants on a county-by-county basis. Title information services customers cannot substitute title information services products that do not cover the relevant county for ones that do.

41. Relevant product markets for title information services include, but are not limited to, title information services covering the following counties or county-equivalents:

- a. Santa Cruz County, Arizona;
- b. Marin County, California;
- c. Monterey and Santa Cruz Counties, California;
- d. San Mateo County, California;
- e. Sonoma County, California;
- f. Fremont County, Colorado;
- g. Gunnison County, Colorado;
- h. Cook County, Illinois;
- i. Cascade County, Montana;
- j. Bernalillo, Sandoval, and Valencia Counties, New Mexico;
- k. Clackamas, Multnomah, and Washington Counties, Oregon;
- l. Harris County, Texas;
- m. Hays County, Texas; and
- n. Cowlitz County, Washington.

42. There is no substitute for the provision of title information services covering these counties or county equivalent areas. In each case, county recorders and other public sources for information pertaining to real estate are insufficient substitutes for title plants because of the reduction in accuracy or increase in cost associated with using public records in place of a title plant.

VII. RELEVANT GEOGRAPHIC MARKETS

A. Title Insurance Underwriting for Large Commercial Transactions

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customers must be able to access relevant information efficiently for manual review; thus, they require local providers.

VIII. MARKET PARTICIPANTS

55. In addition, lenders often require their borrowers to use the Big 4 for title insurance for their large commercial transactions.

56. Market participants in the relevant markets for title information services vary by

67. Absent competition from an independent Stewart, Fidelity will not need to

In at least 31

today. Respondents are close competitors for many large commercial transactions.

U.S. states and the District of Columbia, it combines two of the top three commo

the increased telephone communication system. The system is a 100 percent owned system. It is a 100 percent owned system. It is a 100 percent owned system.

B.

would occur, this delay would allow the anticompetitive effects of the transaction to accrue for several years.

83. Once licensed, an insurer must still clear significant additional hurdles to become operational in each state. In order to replicate Stewart's operational presence, a new entrant would need to establish a national network of commercial services offices, local direct offices, and agency operations in every state and the District of Columbia.

84. In addition, to participate in the relevant underwriting markets, an entrant must procure title information services. Title information services are essential to underwriting title insurance. Some states explicitly require title plant access or ownership as a condition of licensure. For example, Oregon requires title companies to own a title plant in every county in which they sell title insurance. The costs and time required to construct title plants or otherwise procure access to title information services can be significant. The Merger's likely effects in markets for title information services may increase this barrier to entry where Respondents own overlapping title plant assets.

85. In order to replicate Stewart's competitive significance in the relevant markets, insurer must do more than clear these barriers in a single state; it must clear them in substantially all states. Thus, an additional barrier to entry facing a firm looking to enter or expand is the need to have a national footprint and the ability to provide a single point-of-contact who can access that footprint.

86. Even if an underwriter could establish or expand its operations and licenses to replicate Stewart in a timely manner, additional barriers to entry remain, including capital requirements. An underwriter's surplus determines its ability to compete for large commercial transactions, and no other underwriter comes close to Stewart's surplus outside of the Big 4.

87. It is extremely unlikely that any fringe competitor or new entrant would be able to develop surplus on par with Stewart. Outside of the Big 4, the next largest underwriter in terms of surplus is approximately one-sixth and one-tenth the size of Stewart. Growing surplus through business operations would take considerable time, and securing cash from investors is unlikely, given the relatively low rate of return that one would expect from an investment in a title insurer.

88. Demonstrated expertise underwriting large commercial transactions is also a barrier to entry. Customers prefer using those underwriters that have the indisputable expertise to underwrite (and address any arising claims) in a timely manner. Given the amount of money at issue in large commercial transactions, customers place increased importance on the underwriter's expertise. The Big 4 have a strong incumbency advantage from their historical experience underwriting large commercial transactions. It is highly unlikely, therefore, that any entry in the near term could be sufficient to prevent the anticompetitive effects flowing from the Merger.

89. In order to enter or expand, an underwriter must recruit and hire competent and experienced salespeople, underwriters, and title officers. Hiring enough employees to enter or expand on a sufficient scale to constrain the merged firm would take a significant amount of time.

and effort, particularly in light of noncompetition agreements and retention bonuses that the Big 4 have

NOTICE

Notice is hereby given to the Respondents that the fourth day of February, 2020, at 10:00 a.m., is hereby fixed as the time, and the Federal Trade Commission headquarters offices at 600 Pennsylvania Avenue, N.W., Room 532, Washington, D.C. 20580, as the place, when and where an evidentiary hearing will be had before an Administrative Law Judge of the Federal Trade Commission, on the charges set forth in this complaint, at which time and place you will

the Commission may order such relief against Respondents as is supported by the record and is necessary and appropriate, including, but not limited to:

1. If the Merger is consummated, divestiture or reconstitution of all associated and necessary assets, in a manner that restores two or more distinct and separate, viable and independent businesses in the relevant markets, with the ability to offer such products and

APPENDIX A

States in Which the Merger is Presumptively Unlawful

Alabama	Missouri
Alaska	Montana
Arizona	Nebraska
Arkansas	Nevada
California	New Hampshire
Colorado	New Jersey
Connecticut	New Mexico
Delaware	New York
District of Columbia	North Carolina
Florida	Ohio
Georgia	Oklahoma
Idaho	Oregon
Illinois	Pennsylvania
Indiana	Rhode Island
Kansas	South Carolina
Kentucky	Tennessee
Maine	Texas
Maryland	Utah
Massachusetts	Virginia
Michigan	West Virginia
Minnesota	Wyoming
Mississippi	

States in Which the Merger Warrants Scrutiny

Louisiana
Washington
Wisconsin