



How the Fidelity Merger with LPS Negatively Impacts Independent Land Title Agents

“And when Alexander saw the breadth of his domain, he wept for there were no more worlds left to conquer.” - attributed to Plutarch (c. 100 AD)

The world’s largest title insurance underwriter, Fidelity National Financial, Inc. (FNF), is readying to become the largest mortgage technology and mortgage services provider in the United States following a proposed deal in which it would reacquire Lender Processing Services, Inc. (LPS), a former corporate affiliate, for \$2.9 billion dollars. The proposed transaction would “create a larger, broader, more diversified and **recurring revenue base** for FNF.”¹ (Emphasis added).

As part of the transaction, LPS will then be combined with FNF’s national settlement service operational arm known as ServiceLink to carry lender business activity from origination to foreclosure in a “cradle-to-grave” closed system of business which will help FNF create new revenue from ancillary operations.

Through the transaction, independent land title agents who currently write for FNF and those who do not write for FNF, but compete with them will be challenged to find other sources of business as the largest banks, including Wells Fargo and J.P. Morgan Chase, channel substantially all of their mortgage settlement refinance business to the FNF-created system.

The proposed merger is currently being reviewed by the Federal Trade Commission (FTC) which reviews all major corporate mergers and acquisitions for compliance with federal anti-trust law and, while approval is likely, the deal is being widely panned in the independent land title agent community who sees shrinking markets and disguised national underwriter competition as a threat to their overall survival. More importantly, independent land title agents also understand that the proposed transaction threatens real estate consumers who continue to have less choice at the closing table and little knowledge of the fact that settlement costs will ultimately rise when competition from independent land title agents is closed out of this affiliation.

¹ <http://www.bloomberg.com/news/2013-05-28/fidelity-national-to-buy-lender-processing-in-2-9-billion-deal.html> (visited September 4, 2013).

It is a basic axiom of business that competition helps to rein in prices. Without competition, there is no impediment to rising price levels. Eventually, what appears now as consumer discounts – disguised in the form of streamlined refinance pricing (as explained below) -- will turn into higher title insurance premiums and settlement costs. Even without the proposed transaction, rate increases are spreading across the United States.² The FNF/LPS merger is but another step in the steady threat against independent land title agents allowing the national underwriters to charge their own discounted rates for direct and quasi-direct business while at the same time forcing their independent land title agents to charge twice the streamlined rate and giving them far less market opportunity to reach consumers and sources of business.

The purpose of this paper is to try to understand the players in the FNF/LPS transaction and understand why this deal is being made. In addition, the purpose of this paper is to help independent land title agents understand why this reacquisition transaction sets the stage for less competition in the industry, higher long term consumer costs and the threat of future extinction for the independent business model.

NAILTA opposes the FNF/LPS merger. FNF and LPS are large organizations that are trying to address the pressures of creating shareholder equity. In that regard, FNF and LPS have every right to seek out the best partnerships that help create positive returns for their respective shareholders. FNF has a long and oft-imitated history of accomplishing these goals. However, the proposed FNF/LPS merger is bad for independent land title insurance agents because it helps to create a closed system of competition in which large national lenders and their national title insurance underwriting counterparts combine to control the flow of business away from independent settlement providers and in such a way that the harms to consumers and the title insurance industry are disguised as short term benefits. The result of a FNF/LPS merger will be less competition in the title insurance industry, higher costs to consumers over a longer period of time and the continued erosion of services that are provided as part of the title and closing experience.

The Proposed Merger and FNF Background:

From a Fidelity National Financial, Inc. (FNF) press release dated May 28, 2013:

Fidelity National Financial, Inc. (NYSE:FNF), a leading provider of title insurance, mortgage services and diversified services, and Lender Processing Services, Inc. (NYSE:LPS), a leading provider of integrated technology, services, data and analytics to the mortgage and real estate industries, have announced the signing of a definitive agreement under which FNF will acquire all of the outstanding common stock of LPS for \$33.25 per common share, for a total equity value of approximately \$2.9 billion.

Under the terms of the definitive agreement, FNF will pay 50% of the consideration for the LPS shares of common stock in cash and 50% in shares of FNF common stock, subject to adjustment as described below.

² Rate increases are in process in New York, New Jersey, Ohio, Indiana, New Mexico, Pennsylvania and Texas.

The purchase price represents a 19% and 25% premium, respectively, to the prior 30-day and 60-day average closing prices for LPS' common stock through May 22, 2013, the last trading day before media reports regarding a potential transaction between FNF and LPS.

At closing, FNF will combine its ServiceLink business with LPS in a new consolidated holding company and sell a 19% minority equity interest in the new consolidated holding company to funds affiliated with Thomas H. Lee Partners, L.P. for approximately \$381 million in cash. FNF will retain an 81% ownership interest in the new consolidated holding company.³

FNF began trading as a publicly traded stock in 1987.⁴ Since then, the growth of FNF has been a fascinating example of entrepreneurial risk-taking, timely decision-making and good fortune. In 1996, FNF acquired Nations Title, Inc., the eighth largest title insurance underwriter in the United States, thereby making FNF the fourth largest title insurance underwriter in the country and doubling its existing agency base.⁵ In 2000, Fidelity acquired Chicago Title, Ticor Title and Security Union making the combined companies the largest title insurance underwriter in the world.⁶

The formation, sale and reacquisition of LPS is also an interesting tale. In 2003, FNF acquired the mortgage processing services unit of Alltel Corporation, which served as the precursor of what later became LPS. In 2006, FNF spun off its mortgage processing services division as a separate company called Fidelity National Information Services or FIS. In 2008, FIS spun off its mortgage processing services division as a separate company called Lender Processing Services, Inc. (LPS). Five years and \$2.9 billion dollars later, FNF announced that it intends on repurchasing LPS and returning LPS to the FNF family of companies.

What is LPS?

LPS is a leading provider of mortgage and consumer loan processing services, mortgage settlement services, default solutions and loan performance analytics, as well as solutions for the real estate industry, capital markets investors and government offices.⁷ LPS provides basic technology platforms for lenders to process their loan portfolios. Roughly 50% of all mortgages in the United States are serviced in some capacity by LPS. LPS works with the top 50 largest lenders in the United States based upon mortgage volume and supplies servicing solutions to lender clients through the life of an originated loan. Those solutions include the following:

- **Mortgage:** Lenders and servicers use LPS' comprehensive suite of technology and services which support the entire mortgage continuum from origination and servicing to risk management and default.

³ <http://www.investor.fnf.com/releasedetail.cfm?ReleaseID=767454> (visited September 5, 2013)

⁴ <http://www.servicelinkfnf.com/page/aboutServiceLink/history.html> (visited August 30, 2013)

⁵ Id.

⁶ Id.

⁷ <http://www.lpsvcs.com/LPSCorporateInformation/AboutUs/Pages/default.aspx> (visited August 30, 2013)

- **Real estate agents, brokers and Multiple Listing Services (MLS):** All across the country realtors can use offerings from LPS Real Estate Group, including LPS data mined from the largest proprietary mortgage, public records and real estate databases in the country.
- **Government:** From the U.S. Treasury to county courthouses and municipalities, use LPS information systems to achieve efficiencies and streamline work processes.
- **Consumer Lending:** Solutions from LPS enable lenders to obtain a deeper, more holistic view of their home equity portfolios and a more effective, more profitable risk management strategy with consumer lending solutions from LPS.
- **Capital Markets:** Clients use LPS' integrated suite of products and services to heighten portfolio transparency and boost investor confidence. With LPS' solutions, buyers, sellers and investors of mortgages or related securities have what LPS calls the most complete and accurate information on every mortgage pool, down to the individual loan and property. From property valuations and portfolio reviews to reliable data and analytics for prepayment and credit modeling, LPS prides itself on being the single-source provider for capital markets.

LPS also manages to operate their own joint venture title insurance agency known as LSI Local Solutions, or in some states as LSI Agency, Inc.⁸ LSI acts as a title agent for LPS related transactions and is underwritten by Chicago Title Insurance Company, Fidelity National Title Insurance Company and National Title Insurance of New York, Inc. In this regard, it currently provides LPS with unrivaled access to the largest fifty banking institutions in the United States under the FNF banner.

Despite the market jargon and high-sounding promises of service, LPS has had a troubled history since being spun off from FNF back in 2006.

On November 23, 2010, a class action securities lawsuit was brought against LPS alleging that LPS failed to disclose material adverse facts about LPS' true financial condition specifically relating to actions involving its default service practices. The suit was brought by shareholders of LPS stock. On May 6, 2013, the suit was settled for an undisclosed sum.

In 2011, the Federal Deposit Insurance Corporation (FDIC) filed a lawsuit accusing LPS of negligence and breach of contract demanding \$154.5 million dollars in losses on behalf of loans LPS serviced for Washington Mutual Bank (WaMu).⁹ The FDIC lawsuit alleged that WaMu hired LPS subsidiary LSI Appraisal, LLC (LSI) in July 2006 as its appraisal branch wherein LSI agreed it would "conform to federal and state law, including adhering to Uniform Standards of Professional Appraisal Practice (USPAP)". The FDIC lawsuit alleged that LSI used appraisers who lacked the skill, experience and qualifications necessary to perform the appraisals requested. The crux of the allegations centered upon the belief that appraisals provided to WaMu were "substantially inflated appraisal values."¹⁰

⁸<https://gateway.insurance.ohio.gov/UI/ODI.Agent.Public.UI/AgentLocator.mvc/DisplayBusinessEntityDetail/54322> (visited September 5, 2013)

⁹<http://agbeat.com/housing-news/fdic-suing-lender-processing-services-lps-for-154-5-million/> (visited September 6, 2013)

¹⁰ Id.

In February of 2013, the United States Department of Justice (DOJ) announced that LPS had agreed to pay \$35 million dollars in criminal penalties and forfeiture to address its participation in a six-year scheme to prepare and file **more than 1 million fraudulently signed and notarized mortgage-related documents** with property recorders' offices throughout the United States.¹¹ (Emphasis added). The settlement followed a felony guilty plea from the chief executive officer of wholly owned LPS subsidiary, DocX, LLC, on charges of conspiracy to commit mail and wire fraud.¹²

On February 1, 2013, LPS agreed to pay \$127 million dollars to settle complaints by the attorneys general of 46 states and the District of Columbia over the company's role in the allegations of robo-signing foreclosure documents concluding a three year investigation of the company by federal and state authorities.¹³

Shortly after the proposed merger with FNF was announced, an investor who holds LPS shares filed a new lawsuit to stop the proposed takeover claiming that the proposed purchase price was too low.¹⁴ That lawsuit remains pending.

What is ServiceLink?

ServiceLink is the national lender platform for FNF. ServiceLink provides mortgage origination products and services, including appraisal and valuation review, title insurance, closing, escrow and default services.¹⁵ ServiceLink also provides software packages such as iClose, which is a web-based closing program that actually allows ServiceLink employees to stand in the shoes of borrowers to execute important loan documents on their behalf through limited powers of attorney.¹⁶

ServiceLink is a licensed title insurance agent in every state in the United States and offers reduced title insurance and closing programs for eligible refinance transactions ordered only through ServiceLink. A ServiceLink eligible loan is any of the following:

- First mortgage refinance – including HARP loans
- Maximum loan amount not to exceed \$1,500,000.00.¹⁷
- LTV and CLTV not to exceed 100%
- No cash-out limit.
- For loan amounts above \$1,500,000.00, traditional filed insurance rates apply
- 24/7 professional signing agent closings – iClose web-based signings

¹¹ <http://www.justice.gov/opa/pr/2013/February/13-crm-206.html> (visited September 6, 2013).

¹² Id.

¹³ http://www.jaxdailyrecord.com/showstory.php?Story_id=538668 (visited September 6, 2013).

¹⁴ <http://globenewswire.com/news-release/2013/06/10/553057/10035768/en/Lender-Processing-Services-Inc-LPS-Investor-Lawsuit-Against-Takeover-for-33-25-announced-by-Shareholders-Foundation.html> (visited September 6, 2013)

¹⁵ <http://www.servicelinkfnf.com/page/services/origination/technologyProducts.html> (visited August 30, 2013).

¹⁶ Id.

¹⁷ May vary bank-to-bank and state-to-state.

To understand the discounted nature of the rates that are charged by ServiceLink through their streamlined refinance programs, consider the following offering that ServiceLink charges U.S. Bank customers in Cincinnati, Ohio:

Loan Amount	Title Rates¹⁸
\$0 - \$250,000	\$320
\$250,001 - \$500,000	\$400
\$500,001 - \$750,000	\$460
\$750,001 - \$1,000,000	\$520
\$1,000,001 - \$1,250,000	\$630
\$1,250,001 - \$1,500,000	\$750

By comparison, an independent land title agent in Ohio, whether writing for FNF or not, would have to charge \$925 for a \$250,000.00 loan policy exclusive of endorsements and search fees or \$1,550.00 for a \$500,000.00 loan policy exclusive of endorsements and search fees.¹⁹ A refinance for \$1,500,001.00, or just one single dollar more than the final capped rate under the ServiceLink model would incur a traditional rate charge of \$3,800.00 exclusive of endorsements and search fees, yet with the difference of only one dollar, be charged at a rate of merely \$750.00 under the ServiceLink streamline model in Ohio. Clearly, the price discounts given in support of the ServiceLink program are well-below the traditional filed rates in a state such as Ohio and beg the question no one in the title insurance industry wants to acknowledge -- whether the traditional filed rate for title insurance is either too high or the ServiceLink filed rate is too low.

What Will the Proposed Merger Do For FNF and LPS?

FNF's plan to reacquire LPS would create a new revenue stream for the title insurer at a time when demand for bundles of technology and services is increasing across the mortgage industry.²⁰ Both companies share the Alexandrian conundrum that each has reached the point where their deep market penetration -- FNF is the world's largest title insurance underwriter and LPS is the system of record for 50% of all U.S. mortgages -- has made further organic growth within their respective markets nearly impossible.²¹

The deal reportedly gives FNF leverage to "cut deals" and have relationships with a large number of large lenders who will reportedly, in turn, receive "great benefits" as far as functionality and a single-source provider.²² This arrangement comes at the expense of FNF's own independent title agents and the non-FNF independent title agents who have attempted, albeit unsuccessfully, to compete on price and service for the same lender settlement business.

¹⁸ Title rates includes title endorsements and search fees in Ohio.

¹⁹ See Ohio Title Insurance Rating Bureau filed rates; see also <http://ratecalculator.fnf.com/?ZipCode=44146&ID=fidelitytitle> (visited September 9, 2013)

²⁰ <http://www.nationalmortgage.com/mortgage-technology/fidelity-national-reported-bid-for-lps-reflects-quest-for-growth-1036550-1.html> (visited September 4, 2013).

²¹ Id.

²² Id.

What Will The Fidelity/LPS Deal Do for Independent Title Agents?

In order to understand how the FNF/LPS transaction will impact independent land title agents, it is important to understand where independent land title agents reside in the statistical footprint of the title insurance industry. According to statistical data maintained by Demotech, Inc., 59% of the national title insurance market identifies themselves as independent settlement service providers or roughly \$6.6 billion dollars in nationwide 2012 gross premiums.²³ NAILTA represents the interests of those independent settlement service providers who serve over 11 million real estate purchase consumers per year.²⁴ NAILTA represents the interests of \$514.8 billion dollars' worth of refinance mortgages that were closed in 2011.²⁵ NAILTA also represents the interests of \$1.67 trillion dollars in total national title insurance liability written in 2011.²⁶

While overall title insurance premium dollars written in the industry have risen with the resurgence of the American housing market, the overall percentage of business for independent, non-affiliated sources continues to fall.

The table below describes this phenomenon:

Year	Direct	Independent	Affiliated with UW	Total ²⁷
2008	16.86%	60.93%	22.20%	\$9,883,883,767
2009	14.02%	62.36%	23.62%	\$9,385,616,392
2010	14.25%	61.15%	24.60%	\$9,455,149,369
2011	14.63%	60.19%	25.17%	\$9,263,154,823
2012	11.74%	59.05%	29.20%	\$11,287,330,571

Generally speaking, national underwriters have been trending away from direct operations. Recent data from 2Q 2013 suggests a sudden increase in direct operations nationally, but the trend has been fairly consistent. The national underwriters compete for business against independent land title agents, including those that write for the national underwriters. To explain the decline in direct operations is to focus on the growth of a third category – business affiliated with an underwriter – or in other words, title insurance written on a particular underwriter by an agency that the underwriter shares ownership in. National underwriters have more recently created a steadily growing number of joint ventures with referral sources such as real estate

²³ See Demotech Performance of Title Insurance Companies 2013, p. 98. Non-affiliated (independent) premiums written in 2012 totaled \$6,665,638,903 or 59.05% of the overall total title insurance market, down from \$5,575,537,135.00 or 60.19% of the overall title insurance market written in 2011.

²⁴ <http://www.realtor.org/sites/default/files/reports/2012/embargoed/2012-09-ehs/ehs-09-2012-overview-2012-10-19.pdf> (visited October 25, 2012).

²⁵ <http://www.mbaa.org/ResearchandForecasts/ForecastsandCommentary> (visited October 26, 2012). Estimates based upon 2011 figures.

²⁶ Assuming a \$3.00 per thousand average national rate of insurance premium and over \$5.6 trillion dollars in independent service provider-related written title insurance liability per annum. See Demotech, p. 104, supra.

²⁷ See Demotech Performance of Title Insurance Companies 2009 – 2013.

firms, lenders, mortgage companies, homebuilders and developers to augment their bottom lines. These joint ventures give national underwriters the flexibility to argue that they are not directly competing against independent land title agents, while at the same time actually competing with independent land title agents under the guise of affiliation.²⁸ It is a growing and concerning trend in the title insurance industry with fluctuations between direct and affiliated with underwriter percentages continuing to grow and independent percentages of business continuing to lag in the sub-60% range.²⁹ The Fidelity/LPS proposed transaction reinforces this trend.

FNF has its reasons for wanting to close out a system of recurring revenue from its own independent land title agents. One such reason is the fact that it does not have to share the premium with an independent land title agent in the direct or affiliated model. Most independent land title agents enjoy eighty to eighty-five percent of the title insurance premium from refinance title business in a typical agency-underwriter relationship. In a direct or quasi-direct model, FNF gets one hundred percent of the premium to apply against its expenses. There is no sharing. There is only taking.

Another reason comes from the blame game. Proponents of the Fidelity/LPS merger cite growing concerns over regulatory compliance as one of the reasons the merger will help lender-clients streamline their refinance work under one location. However, there is little support for the assertion that regulators will treat relationships with independent land title agents any differently than those with affiliated agents, such as ServiceLink or that the use of ServiceLink or similar companies' services will provide a necessary "safe harbor" to regulatory compliance issues. In light of business models that allow ServiceLink closing employees to act under limited powers of attorney to sign closing documents on behalf of borrowers or that permit lenders to control certain aspects of the title insuring process as part of their relationship to FNF or LPS, it seems as though regulatory and industry attention would be needed on companies who offer services that restrict choice and neutrality, not the opposite. That said, the CFPB has not declared independent land title agents as non-compliant service providers. Instead, it appears from the proponent argument for the FNF/LPS merger that someone in that camp has made that declaration by themselves.

It is undisputed that similar merger transactions like FNF/LPS will result in negative consequences for independent land title agents because none of the lender-underwriter affiliate mergers contemplate increased usage of independent settlement providers, such as independent land title agents. In fact, they intend to unapologetically force the opposite result. While companies like FNF and LPS have the right to seek the best deal for their shareholders, that right conflicts with the independent land title agents who represent FNF and other title insurance underwriters who will be "locked out" of the opportunity to compete for large lender refinance or purchase business by virtue of the merger.

²⁸ Historical numbers trending back to 1994 show that percentages of direct vs. independent business has been trending to a decrease on the side of independents.

²⁹ ALTA Market Share Data 2Q 2013 – 28% Affiliated with UW; 59% Independent; 13% Direct.

What About the Consumer?

Lost in the discussion of competition between directs, affiliates and independents is the fact that mergers like the proposed FNF/LPS transaction will end up harming consumers in direct and indirect ways and constrict their ability to voluntarily choose a disinterested fiduciary to represent them and their interests at settlement. The creation of closed systems of competition or “one-stop” shops and the steering of consumers into low cost streamlined business models are perfect opportunities for those with more knowledge of the settlement process to take advantage of those with less knowledge. Surveys continue to report that consumers lack understanding of “one-stop” shops or the value that “one-stop” shops allegedly provide.³⁰ Nevertheless, these types of joint ventures continue to grow and consumers are not benefitting from them.

“One-stop” shops and closed competition systems in the title insurance industry give unlicensed referral sources access to profits generated by licensed title insurance agents who seek out these referral source alliances in order to maintain revenue. Simply put, these relationships are nothing more than conduits for the payment of referral fees and provide limited value in terms of overall service. While many state insurance codes restrict or otherwise limit access to the title insurance industry from referral sources, lax enforcement and lobbying pressure from the banking, realtor and mortgage industry has allowed consolidation to continue unabated. Consumers are ignorant of the harms caused by consolidation because their access to the real estate process is individually limited and commenced without a significant amount of prior investigation. Most consumers simply listen to their realtor or lender without realizing that they have a legally protected right to shop for the best prices or protections to avoid obvious conflicts of interest presented by “one stop” shops.

Proponents of the FNF/LPS merger point to the lower cost of streamlined refinance rates and the speed and alleged efficiency of service providers such as ServiceLink as a reason for why the merger will help consumers. These lower cost incentives which are provided by ServiceLink and FNF to consumers are short term offers. It is doubtful that any alleged cost reductions could be maintained over time, especially as markets consolidate over the same period. Open system competitors cannot offer streamlined rate discounts and maintain adequate levels of capital or reserve.

The balance of rates and reserves are the province of state regulators. Title insurance is subject to a variety of different forms of rate regulation in the United States. Some states such as Kentucky have very little or no rate regulation. California and Indiana are so-called “file and use” states meaning that title insurance companies must file proposed rates with the Department of Insurance and wait thirty days before implementing them. Stricter forms of regulation exist in so called “prior approval” states. There are several states with title insurance rating bureaus such as Ohio and Pennsylvania. Finally, in Texas, Florida and New Mexico there is the most onerous rate regulation where the insurance commissioner “promulgates” the rates that insurers can charge for title insurance.

In most states, the largest title insurance underwriters have helped to create footholds in the rate regulation arena. An example of this practice is in Ohio where the Ohio Title Insurance Rating

³⁰ OAITA Settlement Preference Survey 2009-2010. www.oaita.org.

Bureau or OTIRB files title insurance rates and forms for approval to the Ohio Department of Insurance. The relationship between bureau and regulator is a close one. The title insurance underwriters recommend rate filings to the ODI, but sometimes individual underwriters file deviated rate filings outside of the Bureau. The streamlined rate filing filed by FNF for ServiceLink customers is just such a filing and is approved for use in Ohio by FNF.

As a basic fundamental of the title insurance industry, large scale discount streamlined refinance rates cannot be sustained long term. Every insurer must reserve premium dollars against risk. If an insurer does not collect enough to adequately reserve against the risk, the insurer may not have enough reserve in the event of a claim. The results of this problem can be catastrophic.

The risk of loss from a title defect relative to a refinance transaction closed by an affiliated company is no different than the risks faced by the independent title agent. Both must perform a search. Both must clear title issues that appear. Both must close the transaction. Both typically handle the escrow. Both must record in a timely and effective fashion. Where the two differ is in the execution of the service offered. Unbeknownst to most consumers is the fact that not all title agents perform the service function the same. A direct or affiliated venture such as ServiceLink can count on internal resources to underwrite the risk. In some cases, that results in a faster process for the consumer because many of the advantages that ServiceLink offers relate to speed and efficiency. Unfortunately, those “advantages” come at a price to service quality, due diligence and care. Most searches are performed by “off-shore” resources that lack on-site access to the recording venue. Other searches are done without researching the title records to the industry standard root of title. Still more searches are simply updated from the prior title without an inspection. These processes may be faster, but they do not result in higher quality outcomes. Claims rates are higher than they have ever been.

Affiliate providers like ServiceLink have little incentive to provide quality service to their consumers because the real “consumer” is the referral source – i.e. the lender. Moreover, theirs is a volume business. The only metric is speed. Quality is considered a problem for the title insurer to resolve once there is the predictable claim, not before. This approach is a casualty approach, not a title insurance one.

A common criticism of the rate process is that if a company files a streamlined refinance rate, all companies should do the same. Unfortunately, it is not that simple. If all underwriters, national and regional, matched FNF or any of the national underwriters who have filed such a rate, there would be two problems: first, the pricing structure in the title insurance industry would collapse causing a crisis of confidence in the sustainability of title insurers; and second, those who could not afford to compete on the streamlined pricing because they did not have the customers or volume to accomplish the move would soon fail. These results are bad for regulators because they would be left to liquidate or receive the failed insurers. These results are worse for consumers because the title insurance policies they purchased may not be backed with sufficient reserves in the event of an insurer failure.

What Can Be Done to Improve Quality for Consumers and Competition?

This is an existential question for the title insurance industry. On the one hand, you have the largest title insurance underwriter in the world and their sycophants creating the model for the end of independent business structures as we know it and on the other hand, you have the independent land title agents lacking the ability to gain access to consumers and business sources, but still continuing to write and issue policies with the companies so deftly sealing their collective fates. In order to stop this cycle, one must recognize their participation in it.

The first and most important step for independent land title agents is recognition. Independent land title agents are more than half of all business being conducted by the title insurance industry. That is a powerful number. Independent land title agents must recognize they can stop these actions through their own market choices and conduct.

The second step for independent land title agents is advocacy. Streamlined rates are anti-competitive. Most states prohibit rate structures that are inadequate or excessive. A case could be made that streamlined rates are inadequate as compared to the rate reserve requirements in a given jurisdiction. This was already done in Colorado where the Department of Regulatory Authorities (DORA) issued a bulletin prohibiting the practice in the state.³¹ To challenge unfair market practices, independent land title agents need to advocate against them. NAILTA provides such a mechanism and efforts are already underway in multiple jurisdictions to review these unfair rate structures with state departments of insurance.

The final step is education. Consumers need to understand the value of providing a full and complete title search to accommodate a title insurance policy. Because our industry has acquiesced in the idea that referral sources should market our services to consumers we have lost considerable ground in this arena. Independent land title agents should not only take time with their consumers to explain the value of their service but also with the referral sources such as lenders, realtors and mortgage brokers who thoroughly lack knowledge of our product. Independent land title agents cannot stop there. Regulators and legislators are equally ignorant of the fundamental differences between a title insurance policy and an automobile insurance policy. Repeated efforts at educating the consuming public, including the sources of business, must be made part of the marketing efforts of independent land title agents.

The FNF/LPS merger is bad for the independent land title agent because it stifles competition in the title insurance industry, it insulates consumers from meaningful choice concerning settlement providers and it obscures the role of a fiduciary in the real estate settlement process. None of these outcomes is a positive for American consumers who lack adequate fiduciary representation at real estate settlements and nothing in the FNF/LPS merger, other than the naked promise of being cheap, can argue otherwise.

³¹ See Colorado DORA Bulletin No. B-5.33, Centralized and Streamlined Title Insurance Rates, March 27, 2013.