Comments of the Center for Economic Justice to the Title Insurance Guaranty Fund (C/E) Working Group

Regarding the November 9, 2012 Working Group Memo and Recommendations Regarding a Title Guaranty Fund Model Law

November 12, 2012

The Center for Economic Justice has extensive experience in title insurance issues and offers the following comments on the working group's memo of November 9, 2012.

CEJ is not currently in favor or in opposition to the development of an NAIC title insurance guaranty fund model law or guideline. CEJ does disagree with the working group memo's central conclusion that there is no title insolvency problem. The working group's memo fails to include relevant information and analysis for regulators and interested parties to meaningfully evaluate the need for and potential structure of a title guaranty fund system and, consequently, contains unsupported recommendations. The working group's memo provides insufficient information and analysis for its recommendation.

There is a serious title insolvency problem

The memo concludes that there is no serious title insolvency problem based a relatively small number of title insurance companies becoming insolvent since 2008 and because the few existing state title insurance guaranty funds have paid out relatively little in insolvency payment since 2008.

The memo fails to include important and relevant information. First, in the absence of a guaranty fund, when a title insurer becomes insolvent, the ramifications on consumers and mortgage markets are severe. If a title insurance company becomes insolvent, the title insurance policies issued by that insurer disappear. Unlike other forms of insurance that require ongoing premium payments to maintain coverage, a single premium paid for title insurance at loan closing keeps that policy in place until the mortgage loan is paid off (for the lenders policy) and until the home is sold (for the owners policy). In the event homeowners with mortgages lose the lenders title policies because of the insurer insolvency, the lenders would require these borrowers to obtain new title insurance policies to protect the lenders interest.

It is important to consider the implications of the above paragraph in connection with the market structure of the title insurance market. Currently four title insurer groups write 87.1% of the countrywide title insurance premium with Fidelity at 34.0%, First American at 26.6%, Old Republic at 13.5% and Stewart at 13.1%[1]. These four insurers' share of policies in force is even greater because the market share of these four insurers (including the failed LandAmerica acquired by Fidelity) has been greater than 85% in past years. For 2007, the countrywide market share of the five insurer groups was 93.0% with 30.0% for First American, 26.4% for Fidelity, 19.3% for LandAmerica, 10.2% for Stewart and 5.5% for Old Republic.[2]

[1] ALTA 2nd Quarter Market Share Family Company Summary
[2] ALTA 2007 Market Share Family Company by State

Given this extremely high market concentration, insolvency by any of the current top four title insurer groups means the elimination of millions of title policies. In the case of First American and Fidelity, insolvency would mean the elimination of more than ten million title policies with lenders requiring more than ten million borrowers to obtain new title insurance.

The memo notes the insolvencies of Lawyers Title Insurance Company and Commonwealth Land Title Insurance Company and that these insurers (part of the LandAmerica failure) were rehabilitated. In fact, LandAmerica, with 20% of the countrywide title insurance market at the time, became insolvent and was acquired by Fidelity. Had Fidelity or First American not acquired LandAmerica, the LandAmerica insolvency would have had severe negative impact on consumers and mortgage markets. The potential for a healthy title insurer to acquire an insolvent title insurer is not a substitute for a formal mechanism to protect consumers and lenders in the event of a major title insurer insolvency.

In addition, the memo's historical review does not go back far enough in time to capture the major title insolvencies in Texas in the 1980's which prompted the creation of the Texas title guaranty fund. The memo should also discuss the LandAmerica insolvency in much greater detail to explain how the insolvency occurred, what the implications of the failure of an insurer with 20% market share would have been and the circumstances that allowed Fidelity to acquire LandAmerica.

Comments on Specific Conclusions and Recommendations

First, as explained in the previous section, CEJ strongly disagrees with the working group conclusion that a serious title insurer insolvency problem does not exist. This conclusion can only arise through the omission of key information.

Second, the conclusion that a guaranty fund model would not be adopted by a sufficient number of states is premature, without support and reflects circular reasoning. There are several factors that could motivate states to adopt a guaranty fund model law, including demonstration of the consumer harm and systemic risk arising from the absence of any guaranty fund mechanism, the specific content and requirements of a guaranty fund model, adding a requirement for a title insurance guaranty fund statute to accreditation standards and the threat of federal intervention in the absence of state insurance regulatory activity.

Further, it is unclear how the diversity of state title insurance regulation affects the ability to devise a guaranty fund mechanism adopted by the states. Title insurance regulation does vary significantly by state in some important areas, like rate and form regulation, oversight of title agents and reserve requirements. It does not appear that financial regulation of title insurance companies varies significantly by state given that all title insurers are subject to the same statutory annual statement reporting requirements and financial analysis and examination procedures. Personal auto insurance regulation also varies significantly by state – in some ways more significantly than title insurance – yet a state-based guaranty fund exists for personal auto insurance.

Third, the fact that regulators have introduced new solvency surveillance tools over the past several years is no more a justification for the absence of a title guaranty fund that it would be for the absence of property casualty or life guaranty funds. The same or similar solvency surveillance tools exist for property casualty and life and health insurers, yet no one has proposed eliminating the guaranty funds for those lines of insurance. Further, it is likely, given the relatively small number of title insurance companies, that regulatory knowledge of and skills for financial oversight of title insurance companies lags the knowledge and skills for financial oversight of insurers in other lines of insurance.

Fourth, the memo fails to consider any insolvency alternatives to individual state guaranty fund mechanisms as an effective and efficient method of addressing title insurer insolvencies.

In summary, CEJ is not currently in favor or in opposition to the development of an NAIC title insurance guaranty fund model law or guideline. CEJ does disagree with the working group memo's central conclusion that there is no title insolvency problem. The working group's memo fails to include relevant information and analysis for regulators and interested parties to meaningfully evaluate the need for and potential structure of a title guaranty fund system and, consequently, contains unsupported recommendations.