FIDELITY NATIONAL'S ROLE IN THE COVER-UP

I've got a slightly different take than DDay on the news that Fidelity just established a policy requiring lenders to warrant all foreclosure sales going forward.

> Fidelity National Financial Inc., the largest U.S. title insurer by market share, will require lenders to sign a warranty assuring their paperwork is sound before backing sales of foreclosed homes.
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> An indemnity covering "incompetent or erroneous affidavit testimony or documentation" must be signed for all foreclosure sales closing on or after Nov. 1, the Jacksonville, Florida- based company said in a memorandum to employees today. The agreement was prepared in consultation with the American Land Title Association and mortgage finance companies Fannie Mae and Freddie Mac, Fidelity National said.

DDay argues that Fidelity National is basically asking for a guarantee that it won't have to pay off any claims on title problems.

> I'm sure the health insurance market would love a clause that forced the maternity ward to sign a warranty that the baby they birthed into the world will be healthy their entire life, or else they pay up. I do understand the title insurers' complaint, and I'm glad they're forcing the issue with the lenders, but I can't help but find it a little weird. If the banks are paying on the insurance, I'm not sure we need a title insurance industry.

Now, I'm not an expert. I'm just someone who has been considering whether she should still be looking to buy a house in this market. But as I understand title insurance the biggest part of the service they offer—what you're paying them for—is not risk going forward, but rather a competent and thorough search for any outstanding title problems. Here's one explanation:

> Because title insurance protects against what may have happened in the past, most of the expense incurred by title companies or their agents is in loss reduction. They look to reduce losses by finding and fixing defects before the policy is issued, in much the same way as firms providing elevator or boiler insurance. These types of insurance are very different from life, property or mortgage insurance, which protect against losses from future events over which the insurers have no control.

So I take this move not as an effort to avoid paying any claims. I take it as an admission from Fidelity National that it cannot or will not adequately do that main part of its job: review the documents on a house and make sure the documents say what they appear to say. Instead of doing the forensics required to check that documentation (lawyers challenging foreclosures have proven fraud by showing notary stamps post-date the purported signing of the notarized document, comparing signatures to prove some are forgeries, and pointing to allonges not attached to the actual note, among other things) on every sale, they're simply demanding that banks claim they don't need to do that work.

Note, too, that Fidelity National instituted this policy (as distinct from the agreement it signed with Bank of America on the day BoA halted foreclosures) in consultation with Fannie and Freddie. That is, in consultation with government owned entities holding a majority of the mortgages out there.

So the government and Fidelity National have gotten together and said, “rather than actually check for fraud we’ve got abundant evidence exists not just in foreclosures being processed now, but in foreclosures already sold and—significantly—in performing loans that were securitized at the height of the boom, let’s just have the banks sign off on any foreclosures going forward.” As a particularly nice touch, they’re describing this fraud not as fraud, but “incompetent or erroneous affidavit testimony or documentation.”

From the standpoint of an industry and a government hoping to prevent people from learning about the extent to which our property system has been tainted by the banksters, that might be shrewd. After all, the most common time for real people to challenge bank conduct here is when they are foreclosed on or when they buy a house—when they are involved in a legal transaction. We only came to understand the true extent of foreclosure fraud after foreclosure and bankruptcy lawyers had dealt with such volume of cases that they came to learn the tricks of the servicers and even reviewed enough documents to have solid evidence of notary and robosigner fraud. By getting indemnity from the banks, Fidelity National (and our government acting through Fannie and Freddie) will ensure that one entity at least will continue to offer lenders title insurance, helping them unload those properties that may or may not have fraudulent title, but will never look closely at the documentation to see if there has been fraud. Fannie and Freddie just worked with Fidelity National to ensure that 38% (Fidelity National’s market share) of the 25% of all homes that are sold that are foreclosures will never have their title examined closely. 9.5% of homes will be sold without the thorough paperwork review that everyone knows should be done at this point, thereby ensuring not only that the market will continue to move, but also that banks always have a way to sell a house without the title insurer doing its job, but instead relying only on the bank’s say-so for the most likely title problem.

But the thing is, they may well get away with it (or, at the very least, minimize bank losses). As I said, we're only going to learn about faulty title during legal transactions. And title insurance is required for mortgaged home sales to protect the lender, but not to protect the homeowner. And the lenders are, as often as not, the same servicers that are trying to unload these properties. They, as an industry, have an incentive to get the homes into the hands of someone who will pay for it (regardless of how troubled the title) without much scrutiny on the practices of the last decade. Presumably they hope that ten and twenty years from now, no one will remember how troubled these titles really are.

And the only other time anyone is likely to look closely at these titles is if and when investors start demanding that the banksters take their shitpile back. But that will only be litigated on a loan by loan basis. Which means, for people still paying their mortgage, no one is going to look at whether the banks screwed up ownership during their bubblicious frenzy.

It is almost certainly not an accident that Fidelity National, in conjunction with Fannie and Freddie, just implemented this plan on the same day that the Administration rolled out its "look forward, never look backwards campaign." After all, for Shaun Donovan to claim with a presumably straight face that a review that has been ongoing since May has found no systemic problems, he has to be sure that most people will never check his claim.

> The lesser, third issue that has been raised, Donovan said, is whether the process underlying the securitization of mortgages is "in question."
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> "So that's the point that I'm trying to make, is that the issues that we are finding … that we're focused on are, 'Are there particular servicers that are

> not following these processes?'”
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> Donovan added that “we have not found any evidence at this point of systemic issues in the underlying legal or other documents that have been reviewed.”

And this deal–ensuring that the biggest title company will never look too closely–is a key part of making sure that no one will check Donovan’s claim.