Title Insurance Protection and Safety and Casualty Insurance

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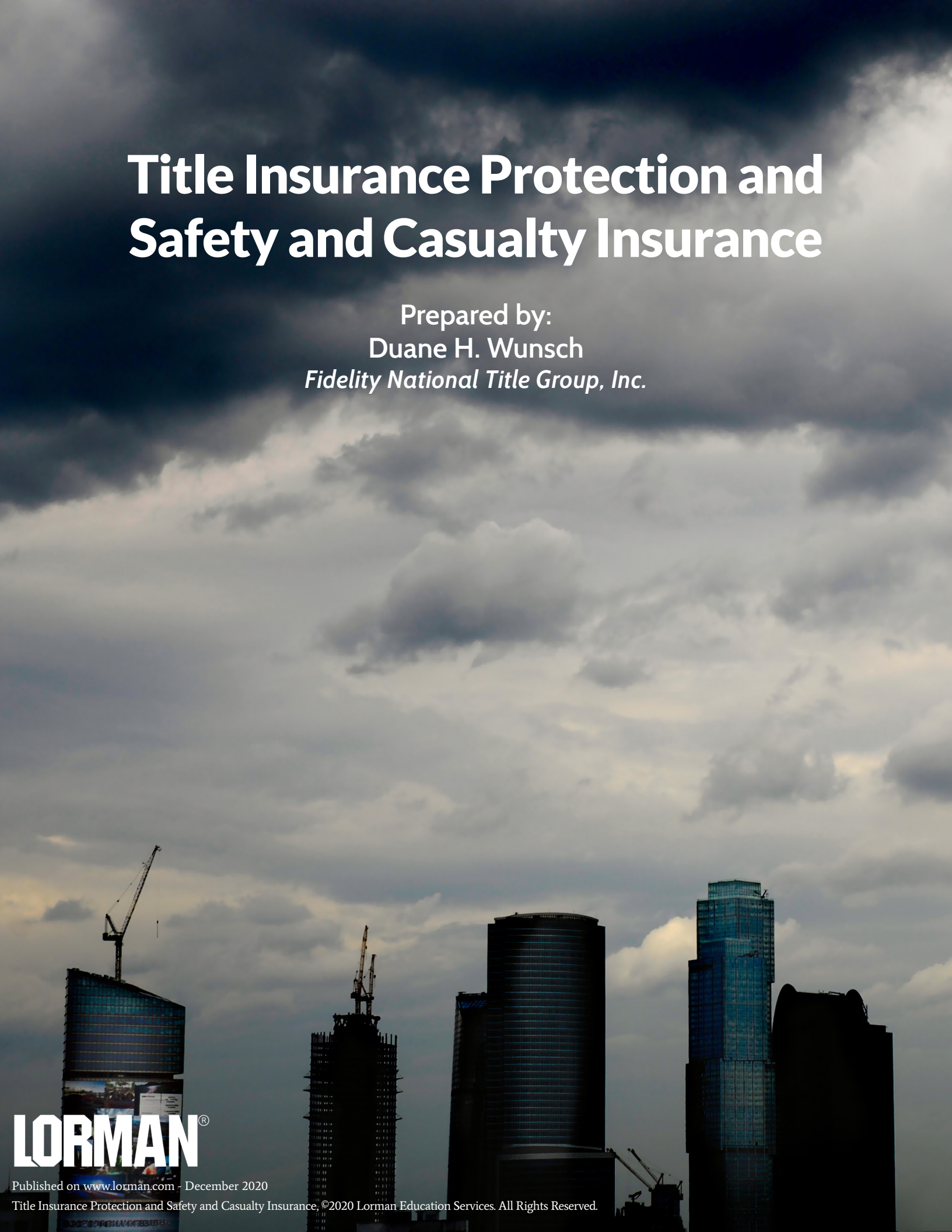

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Published on www.lorman.com - December 2020

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I. Purpose and Nature of Title Insurance

A. Protection and Safety

Several different methods of searching and examining the title to real estate are followed in the United States and based upon the recording acts. In New England, the Southeast and in some Midwestern states, a search of the public land records is made by the attorney or someone under their direction and an abstract made of notes thereof, followed by an opinion of title. In other areas, a search is made by an abstractor who compiles an abstract showing all recorded instruments affecting the land and certified that it is accurate and complete. Finally, in many states and in most metropolitan areas, a search of the records is made by the staff of title insurers or of title agencies, and a commitment for title insurance is issued. Paul E. Bayse, Clearing Land Titles §3, at 13-14 (2d ed. 1970 & Supp. 2004). Regardless the prevailing method of searching the public land records in the locality, investors are certain to locate a title insurance company or law firm office offering title insurance.

In assessing which form of guaranty of title best suits its needs, the purchaser will evaluate what remedy or recourse exists in the event that, contrary to the title guaranty document, the title should prove impaired or unmarketable. Liability of the abstractor is governed by applicable state law, and limitations may preclude recovery. Thus, in one state it was held that an abstractor is not liable to persons who may suffer losses by reason of the abstractor's negligence unless privity of contract exists between them. Peterson v. Gales, 191 Wis. 137, 210 N.W. 407 (1926). In states that limit liability to instances where privity exists, the purchaser should require that the abstract contain a

statement certifying that it is furnished for the use and benefit of all owners and their successors in title, and mortgagees. In order to assure that recovery is realized, the purchaser should also establish that a policy of abstractor's errors and omissions insurance is in force. Notwithstanding a qualifying abstractor's certificate and policy of errors and omissions insurance, gaps in coverage will nonetheless occur where the abstractor ceases its operations and no tail coverage is in force.

B. Abstracts of Title Compared

Another factor in assessing the appropriate form of guaranty of title is the scope of risks covered by the guaranty. Title insurance insures against loss occasioned by various risks that abstracts of title do not cover:

- Invalidity of conveyances by reason of mental incapacity.
- Deed in lieu of foreclosure set aside on the basis of duress.
- Lien of federal estate tax.
- Invalidity of deed by reason of the failure of the spouse to have co-signed where necessary.
- Invalidity of mortgage given by corporation accompanied by resolution without requisite quorum

Title insurers are not immune from business cycles. As regulated businesses, however, insurers will maintain the requisite statutory loss reserves necessary to pay losses. Where circumstances warrant and as required by the regulator, title insurers will obtain reinsurance in order to sustain a loss caused in connection with the

issuance of a policy that exceeds amounts covered by applicable state reinsurance regulations.

C. Casualty Insurance Distinguished

What types of risks or defects in, or encumbrances against, the title are likely to be the subject of title insurance, and will result in a dialogue if not negotiations between the insured's counsel and the insurer? As is the case for most real estate related services, there is a marketplace for title insurance in which the results are determined by supply and demand. Not being a social service or government agency, there is no legal or moral mandate upon the title insurer, a commercial enterprise, to agree to insure every insured or to insure every risk presented to it, and as a result, some aspiring insureds and some proffered risks will ultimately go uninsured. For example, property discovered by the rightful owners to have been conveyed by deed by a family member to herself without the owners' authorization, will not find title insurance available to indemnify themselves in the event they are unsuccessful in suing the offending grantee to declare the deed invalid and quiet the title (Exhibit 3). Thus, the title insurer does not owe a duty to members of the public to issue insurance to a parcel of land where the title, a tax title, is flawed or fraught with risk. "While title insurers may not discriminate among purchasers on the basis of the purchasers' race, ethnicity, religion, gender or other personal characteristics…, they may opt to limit their potential liability by declining certain risks without violating any statutory or common law obligation." Quelimane Co. v. Stewart Title Guar. Co, 19 Cal. 4th 26, 77 Cal Rptr.2d 709 (1998).

Title insurance does not ordinarily compensate the insured for loss occasioned by an event that, like a fire or personal injury, occurs *after* date of policy and within a future period. Instead, title insurance compensates the insured for loss occasioned by an event already *in existence at date of policy*. The title insurer, by having conducted a painstaking search and examination of the title, believes that it has largely eliminated the risk of such events. Thus, by searching the public land records for mortgages and liens, in the usual case, the title insurer specifically identifies these in the commitment for title insurance prepared before the land is to be acquired, so that the proposed insured has at its disposal the identity of the lien holders who are to be paid and from whom releases are to be obtained, thus eradicating risks of liens and perfecting the title.

Although generalizations are useful, they carry an analysis of the practical applications of the title insurance policy only so far. Opportunities to acquire real estate in the marketplace, both site locations and modern estates or interests, including fee simple estates, leaseholds, sufferances, options, and air rights, are highly varied. Which among these are likely to be considered insurable? First, several examples of interests in land are unlikely to be insured or defects or claims against which title insurance is unlikely, if requested prior to or during the closing for the purchase, to be provided:

- Ownership of a cruise ship cabin condominium unit.
- A revocable license to cross land of an adjoining owner.
- An option to purchase land that is not recorded in the public land records.

- A claim of ownership by adverse possession as the result of enclosure of land by a boundary fence coupled with longtime occupation.
- A right to use and maintain, as a means of private vehicular access, a bridge constructed by a predecessor in title over a navigable river without government permit.
- A covenant not to compete benefiting the owner of a building housing a theatre and preventing operation of other theatres in the vicinity.

Interests in land that are widely regarded as insurable, and that are likely to meet with acceptance among insurers include:

- Fee simple title to a tract of land, a continuous chain of title for which exists in the public land records.
- The first and paramount lien of a mortgage executed by the property's co-owners and duly recorded.
- Title to a condominium unit in a building constructed on land and created by applicable instruments duly recorded.
- An easement for vehicular access appurtenant to land titled of record in the insured owner pursuant to easement by express grant duly recorded.