



First American Title Insurance Company

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To: All Agents Authorized to Conduct Business in the District of Columbia and First American Employees

From: Elisabeth C. Zajic, Vice President, District Manager & Senior Counsel *EZ*

Subject: **DISTRICT OF COLUMBIA TENANTS' FIRST RIGHT OF PURCHASE UNDER TOPA and MORTGAGORS HOLDING OVER AFTER FORECLOSURE**

We are experiencing an increase in claims arising from transactions involving the referenced title risk issues. The purpose of this bulletin is to make sure you are aware of our underwriting guidelines for each issue, and to request your strict adherence to those guidelines.

I. **TENANTS' FIRST RIGHT OF PURCHASE UNDER TOPA**

The Tenant Opportunity to Purchase Act (the "Act") is codified in Title IV of D.C. Act 3-86, the Rental Housing Conversion and Sale Act of 1980, as amended. It gives a tenant or tenants' association a first right of purchase in connection with any sale of residential real property, as "sale" is defined by the Act. The applicable D.C. Code Section is 42-3404.02.

In the past several years, a strong real estate market in the District of Columbia has resulted in a significant increase in apartment building sales. This affects tenants and tenants' associations, who have become more knowledgeable and proactive in the exercise of their TOPA rights triggered by these sales. The predictable result is a spate of lawsuits contesting what constitutes a "sale" under the Act.

At present, legal challenges are pending in both D.C. and federal courts relative to sales of partial tenant-in-common interests in residential housing accommodations. Tenant groups have taken the position that partial interest transfers trigger TOPA rights, and are seeking to invalidate previous partial sales. These challenges are mounted primarily against "95/5 transfers", in which the seller conveys a 95% undivided interest to the purchaser, retaining a 5% undivided interest. However, there is also presently pending in the U.S. District Court for the District of Columbia a suit which seeks to set aside the conveyance of a 50% undivided interest in a multi-unit apartment building.

Because of pending challenges to the validity of partial transfers, First American Title Insurance Company will not presently offer coverage against rights of tenants under TOPA in connection with partial transfers of undivided interests in residential rental property.

As always, please do not hesitate to contact this office about title coverage for any underwriting risk. If you are a new and/or out-of-state agent who would like information about TOPA, please contact us. Also, as a reminder, commercial transactions of all kinds usually exceed agent underwriting dollar limits and should be sent to this office for review and approval.

II. MORTGAGORS HOLDING OVER AFTER FORECLOSURE

A claim will almost invariably arise when title derives from foreclosure and the mortgagor whose property interest was extinguished in the foreclosure sale remains in possession of the property. The claim is precipitated when the successful bidder at the foreclosure sale seeks to evict the former owner/mortgagor in an action for possession, who will respond with a plea of title seeking to invalidate the foreclosure sale. The plea of title gives rise to a duty of defense and indemnification to the foreclosure sale buyer who purchased an owner's title insurance policy.

Because of the near certainty of litigation giving rise to a duty of defense under the title policy issued, we will not insure title out of foreclosure when the mortgagor remains in possession of the property. Please amend the foreclosure requirements to be listed in your commitment for title insurance as follows:

1. Recording of Notice of Foreclosure in the Office of the Recorder of Deeds for the District of Columbia pursuant to which captioned property is sold to the proposed insured.
2. Proof of mailing of the notice by certified mail with return receipt to the record owner, complying with the terms of Section 42-815(b) of the District of Columbia Code and the terms of the Deed of Trust relating to notice of sale.

3. Proof of Publication of Notice in the Washington Post or other English language newspaper with general circulation in the District of Columbia. The proof also must establish that the notice was published five times within a ten-day period.
4. Certificate of Sale and Auctioneer's Report.
5. True copy of Deed of Trust note.
6. Copy of Affidavit in compliance with Soldier's and Sailor's Civil Relief Act of 1940.
7. Proof of notice of the sale to all junior lienholders known or of record.
8. **Proof that possession of the premises has been surrendered to the insured owner/or assigns.**

Proof of relinquishment of possession should be in the form of a signed statement from a person who has actual knowledge of the physical condition of the property, such as a real estate agent or property manager. The statement should address the length of time the property has been vacant and the circumstances which lead to the conclusion that the property is vacant.

In the event that a purchaser out of foreclosure is willing to buy the property without title insurance coverage for the claims of mortgagors in possession, the following exception must be taken in the policy:

“The Company has been advised that the mortgagors under Deed of Trust dated _____ and recorded _____ as Instrument No. _____ among the Land Records of the District of Columbia through the foreclosure of which the title of the insured herein derives, remain in possession of the insured premises.

The Company will not pay loss or damage, nor will it pay costs, attorneys' fees and expenses, incurred by the insured in any court proceeding or any other action taken to gain possession of the insured premises, to include a plea of title or any title-related defense to any action for possession, for which the coverages of this policy are expressly excluded.”

This will, as a rule, be a viable solution only in all-cash purchases, since the same exception will have to be taken in any purchase money loan policy, and most lenders not agree to the exception. In the event that the purchaser elects to go forward with the plea of title exception from coverage, you must obtain a signed waiver of coverage similar to the attached.

AGREEMENT REGARDING LIMITATIONS ON TITLE INSURANCE COVERAGE

We, the undersigned, being purchasers at foreclosure of the property located in the District of Columbia at Lot _____ in Square _____ being more commonly known as _____, do hereby certify and affirm that we have been informed of the following in connection with the limitation of the title insurance policy to be issued to us:

1. The title insurance policy issued to us will contain as an exception to coverage the following:

“The Company has been advised that the mortgagors under Deed of Trust dated _____ and recorded _____ as Instrument No. _____ among the Land Records of the District of Columbia, through the foreclosure of which the title of the insured herein derives, remain in possession of the insured premises.

The Company will not pay loss or damage, nor will it pay costs, attorneys’ fees and expenses, incurred by the insured in any court proceeding or any other action taken to gain possession of the insured premises, to include a plea of title or any title-related defense to any action for possession, for which the coverages of this policy are expressly excluded.”

2. This exception shall serve, in addition to all other matters included therein, to relieve First American Title Insurance Company from any and all liability or obligation to pay loss or damage, costs, attorneys’ fees or expenses which may arise from any eviction action instituted by the insured and/or his agent to remove the former owners or occupants of the property. It is expressly understood that First American Title Insurance Company will not pay any of the above even if the former owners and/or occupants raise defense(s) to the eviction actions based on or relating to title matters which may otherwise impose liability under the title insurance policy.

This Agreement shall be attached to the title insurance policy issued in connection with this transaction and shall serve to clarify the limitations on coverage set forth therein.

WITNESS our hands and seals this _____ day of _____, 200__.