

# PADGETT LAW GROUP

---

*A people-driven place with a passion for performance and precision.*

# TITLE TRAINING

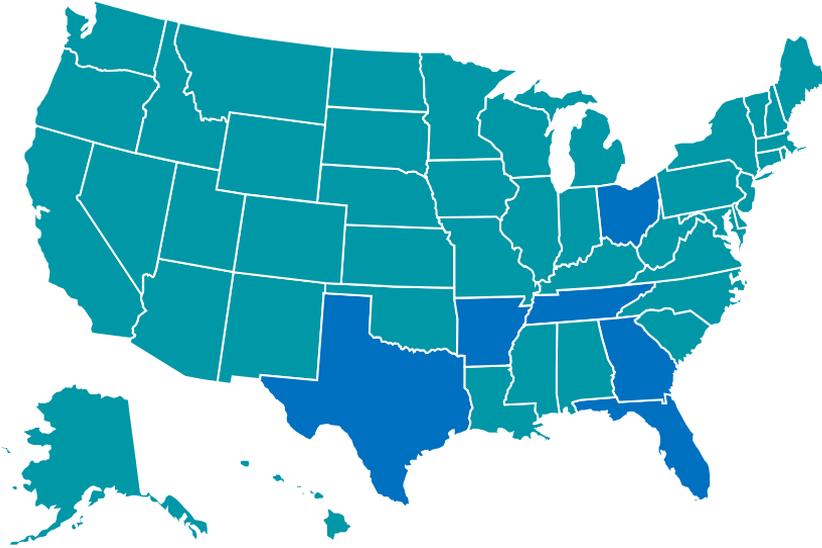
---



# #PADGETT PEOPLE

Ryan Martinez | Laura K. Conrad

# Padgett Law Group Footprint



**FLORIDA +  
GEORGIA +  
ARKANSAS +  
TENNESSEE +  
TEXAS +  
OHIO**



National BK Work



Full Service Practice



# What is Title?

---



Title is the legal term of art for ownership

# Why is important?

---



To ensure that the borrower/owner has full ownership interest in the real property so the collateral for the loan is properly secured.

# Title Insurance

---



Insures the owner's/lender's interest in the property.



Policy of indemnification: the title insurance company will cover issues if/when they arise and there is actual loss.



Often, the title insurance companies will choose not to act on actual issues because there is no party challenging the title to the property and there has been no damage/loss to the insured (at least for now).



Letters of indemnification – the title insurance company will agree to step in a future date if there is a challenge to the title and there is a loss/potential for loss.

# Title Insurance

---



- ➔ Agreement between specific title insurance companies to indemnify and hold each other harmless for some losses or damages for specific issues that are related to a potential title claim.
- ➔ Purpose is to expedite the resolution process – no claim or indemnification letter needed as the title insurance company has agreed to already cover/indemnify the issue.
- ➔ Must have an owners or loan policy for this to apply
- ➔ Only covers certain issues (defined within the agreements themselves)
- ➔ Not legally binding

# Marketable vs. Insurable Title

---

➔ Marketable title generally means the title is valid and is reasonably free from doubt.

- The property can be sold to a reasonable purchaser or secured by a loan by a reasonable person.

➔ Insurable title means the title to the property will be insured by a licensed title insurance company at its regular rates and only subject to standard exceptions in the policy.

- This could be a lesser standard than marketable, depending on the reasonable person standard.

# Important Considerations

---

➔ Loan type

- Different standards and accepted practices for government related loans such as FHA, VA, FNMA and FHLMC

➔ Priority of the loan

- Purchase money loan in first position, secondary loan, line of credit, construction, etc.

➔ Marketability and insurability of the property after the foreclosure

➔ Investor requirements

# Common Title Issues

---

- Open prior loans
- Prior liens
- Execution issues
- Recording issues
- Federal and state tax liens
- Legal description errors
- Easements
- Encroachments
- Missing interests

## Open Prior Loans

---

- Unreleased prior security instrument shown in the chain of title
- Identify type of open loans
  - Lines of credit are more concerning – potential that there is a balance on the credit line even if it was paid down to a zero balance at the prior closing
    - Close account or “kill” letter to show the account was closed
- **Possible resolutions:**
  - Expiration/reversion based on maturity date
  - Search for a missed or incorrectly indexed release/cancellation/satisfaction
  - Covered by title insurance
    - Does the MIA apply? (consider loan type)
    - File a claim - Letter of Indemnity (LOI)
      - Is this acceptable for this loan type or investor?
  - Obtain release from the lender
    - Search for assignments – need the last assignee to execute the release

# Prior Liens

---

- ➔ Determine if the liens are against a predecessor in title or the current owner/borrower
- ➔ Purchase money rule
  - Prior liens against the borrower will be subordinate to the security instrument if the loan is for the purchase of the property (simultaneous transfer of title to the borrower with the execution of the security instrument)
  - The purchase money security instrument takes priority over the prior liens regardless of when the liens were recorded
  - Does not apply to refinance transactions
- ➔ Prior liens against predecessors in title must be addressed
  - Is it even a match for the prior owner?
  - Expired by recording date
    - Can it be refiled to extend the expiration date?
  - Covered by title insurance?
  - Search for missed releases or obtain a release

# Execution Issues

---

- ➔ Was the vesting deed and security instrument executed according to state law?
- ➔ Appropriate number of witnesses
- ➔ Properly notarized
  - Acknowledgment vs. attestation
    - Acknowledgment – the signor states that they executed the document to the notary (not necessarily in the presence of notary)
    - Attestation – the notary actually witnessed the signor execute the document
- ➔ Possible resolutions:
  - Corrective deed to fix the execution issue
  - Affidavit from the witness or notary to correct the attestation of the document

# Recording Issues

---

- ➔ Was the document properly recorded in the county where the property is located?
  - Search other counties and/or statewide for improper recording
- ➔ Properties that lie in multiple counties must also be recorded in those multiple counties
- ➔ Does the recording date affect the priority of the security instrument or the borrower's interest in the property?
- ➔ Possible resolutions:
  - Re-record the document in the proper county.
  - Record an affidavit with a copy of the document to provide notice and properly record the document in the correct county.

# After Acquired Title Theory

---

- ➔ If the owner is later properly conveyed title to the property, a prior conveyance is considered to be valid and as if the owner had title at the time of the earlier conveyance.
- ➔ Example:
  - The property records show that A owns the property. B executes a security instrument security the same property as collateral. A later conveys the property to B. The security instrument is deemed to be a valid conveyance because B later acquired title to the property, even though it was after B executed the security instrument.

# Federal and State Tax Liens

---

- ➔ Must be recorded in the county where the property is located
- ➔ Special requirements for junior Federal Tax Liens (FTL)
  - One year right of redemption by the federal government
  - Requires notice as part of the foreclosure process
  - Recording date of the FTL is very important
    - Recording date of the FTL is very important
    - Notice required if the FTL is recorded more than 30 days prior to the sale
    - Notice must be sent at least 25 days prior to the sale
  - Proper notice shortens the right of redemption from one year to 120 days
- ➔ Senior FTLs
  - Confirm the last date of refiling (may be expired – generally 10 years)
  - Require release if not expired
    - File a title claim
    - Partial release of the property from the IRS in certain situations (high loan balance, low equity, etc.)



# Federal and State Tax Liens<sub>CONT</sub>



## State tax liens

- Different priority rules depending on the state
  - Check with your attorney to determine state specific rules
- Generally, state tax liens must be paid.
- Possible resolutions:
  - File a title claim
  - Pay the taxes – may be more expedient depending on the amount of taxes owed.

# Legal Description Errors

---

- ➔ Very common
- ➔ Determine root cause of the error (drafting error, error copied from prior deeds, significance of error)
- ➔ Scrivener's Affidavit
  - Obtained from the drafter of the deed to correct the error
  - Depends on the significance of the error (incorrect lot number vs. misspelling of subdivision name)
- ➔ Affidavit of Title / Attorney Affidavit
  - Possible resolution in some states and situations where the error is slight and obvious.
- ➔ Corrective deed from the grantor with the correct legal description
  - Go back to the last deed with the correct legal description

# Legal Description Errors cont

---

- ➔ Loan modification to correct the legal description in the security instrument if the error is significant
- ➔ Litigation may be needed depending on the specific error in the legal description
- ➔ Missing legal description:
  - Re-record original security instrument (determine potential priority issues)
  - Corrective security instrument
  - File a title claim

# Easements and Legal Access

---

- ➔ Legal right of ingress and egress across one property to access another
- ➔ Different rights and considerations depending on whether the easement is across the subject property vs. the subject property benefits from the easement across a neighboring property
- ➔ Needed for access to the property?
- ➔ Other uses: access roads, driveways, waterfront access, etc.
- ➔ Recorded easements that are in the chain of title
  - Known easements are not issues, but it is important to understand if the property benefits from the easement or if it is burdened by the easement
- ➔ Subordinate easements will be wiped out by a foreclosure
  - Determine if the easement is desirable
  - Add language to include subordinate easement so it will survive the foreclosure

# Encroachments

---

- ➔ A physical structure that goes beyond the boundary lines of the property onto the neighboring property
- ➔ Most common encroachments:
  - Driveways, fences access roads, garages, sheds, or the home itself
- ➔ Determine the extent of the encroachment
- ➔ Is the encroachment coming onto the subject property or is the structure going onto the neighboring property?
  - Important in determining resolution and bargaining power
- ➔ When was the structure built?
  - Post origination encroachments will not be covered by title insurance
- ➔ Possible resolutions:
  - Can the encroachment be easily moved?
  - File a claim (depending on when the encroachment was built)
  - Encroachment agreement with neighbor

# Missing Interest

---

- ➔ In the back chain of title
  - Determine if the interest is truly missing (joint tenancy or address via probate)
- ➔ Current owner
  - All parties with an interest in the property must sign the security instrument
  - Marital status/spousal considerations depending on the state
    - Best practice is for a non-title spouse to sign the security instrument
    - May be required based on state specific law
- ➔ Possible resolutions:
  - Obtain deed from the missing interest holder in the back chain
  - File a title claim if the missing interest involves the current owner who should have signed the security instrument

# Common Non-Litigation Resolutions:

---

- ➔ Two main methods of non-litigation resolutions
  - Title claims
  - Title curative
- ➔ Letters of indemnity
  - The title insurance company will defend the insured if/when the issue is raised or challenged
- ➔ Rely on the MIA
  - Policy required
  - Limited situations
  - Consider the loan type
- ➔ Corrective deeds
  - Determine the difficulty in obtaining the documents (age of conveyance, what party is needed to sign, etc.)

# Common Non-Litigation Resolutions cont

---

- ➔ Affidavits
  - Scrivener's
  - Attorney
- ➔
  - Affidavit of Title
  - Notary
    - Determine difficulty in obtaining the documents (is the person still in business/practicing law, alive and/or willing to sign the document?)
- ➔ Easement/Encroachment agreements
  - Most often for shared driveways or access roads

# Title Litigation

---

- ➔ What issues will most likely require title litigation to resolve?
  - Significant legal description errors (incorrect lot, etc.)
  - Missing power of sale (non-judicial foreclosure states)
  - Missing interest of prior owner in back chain or current owner
  - No access to the property (easement required from neighbor but does not exist in property records)
  - Challenges to the current owner's title to the property
- ➔ Determine if the issue will be covered by title insurance
- ➔ Quiet title actions
  - Required to ensure the current owners are vested in full interest of the property against all others and the world

# Resolution Timing

---

- ➔ Can the issue be resolved post-foreclosure?
  - Some issues can be passed on during the pre-foreclosure process
  - Benefit of only resolving the issue if the property is not sold to a third party
- ➔ Pre-foreclosure resolutions
  - Does the foreclosure have to be put on hold?
  - Can the resolution be pursued at the same time?
- ➔ Post-foreclosure resolution as part of the REO process
  - Certain issues are not necessary to be addressed until REO
  - PLG can assist with REO closings to fix any title issues that are appropriate to address post-foreclosure

# Recent Legal Updates

---

- ➔ **Arkansas** –AR Supreme Court answered a certified question from the U.S. Bankruptcy Court for the Western District of Arkansas regarding the sufficiency of the language in a Notice of Default and Intention to Sell (“NOD”) in a related nonjudicial foreclosure action.
  - A general reference to a breach of a provision in the applicable security instrument does not comply with the statute.
  - PLG’s NOD has language that complies with the statute’s standard because it states that the default is in “payment” as opposed to other general and potential events of default.
  - Local title insurance companies have reviewed PLG’s NOD and affirmatively stated they will insure the lender at REO following the foreclosure without any curative action being needed. Some other firms are being required to take curative action.
  
- ➔ **Florida** – new law regarding curative procedures for scrivener’s errors in deeds (Fla. Stat. § 689.041)
  - Effective July 1, 2020
  - Allows for curative notice (affidavit) to be recorded to fix scrivener’s errors in deeds
  - Cures the first deed with the error and all subsequent deeds
  - To be used in specific scenarios listed in the statute
  - Approved by at least one title insurance company to be used in lieu of a reformation count in the complaint for foreclosure

# Current Environment

---

- ➔ Continue to watch for changes and new laws regarding electronic/remote notarizations
  - Remote online notarization (RON)
  - E-closing (full RON with e-Note, etc.)
  - Hybrid (document preview, e-signing, etc., but no e-notarizations)
  - Accelerated in some states due to COVID-19
  - Temporary changes in some jurisdictions
  
- ➔ Title Insurance Companies stances on foreclosure moratoriums
  - Some title insurance companies have taken conservative positions regarding the moratoriums and will not insure any transactions (REO, conveyances) for foreclosures held during the moratoriums
    - Regardless of occupancy status of the property
  - Other title insurance companies have less strict positions regarding the moratoriums
    - May require additional affidavit and/or indemnity for them to insure
    - Affirmation from the foreclosing entity that the foreclosure did not violate the moratorium and/or sworn statements the property was vacant or abandoned
    - Research local underwriting practices and requirements and know what the title insurance company will insure prior to going under contract (REO) or conveyance

# PLG Difference



- ➔ Attorneys review title to the property on every file in all of our states.
- ➔ Identify potential title issues
- ➔ Eliminate non-title issues and only set out title issues that must be resolved.
- ➔ Recommend appropriate resolution options based on all important factors including upcoming deadlines, loan type, insurability, client priorities and likelihood of quick resolution.
  - Simultaneous title claim and curative work for the most expeditious results.
- ➔ Creative resolutions for uncommon title issues



# Understanding Title and Common Resolutions

---

- ➔ Provide clients with general understanding of frequent title issues and common resolutions
- ➔ Work together to achieve desired goals and prioritize loan types



**LAURA K. CONRAD**  
General Counsel & Vice President  
[Laura.Conrad@Padgettlawgroup.com](mailto:Laura.Conrad@Padgettlawgroup.com)



**RYAN MARTINEZ**  
REO & Title Operations Supervising Attorney  
[Ryan.Martinez@Padgettlawgroup.com](mailto:Ryan.Martinez@Padgettlawgroup.com)

# PADGETT LAW GROUP

---

*A people-driven place with a passion for performance and precision.*