**Georgia Quiet Title Law: Overview and Update**

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**I. OVERVIEW OF QUIET TITLE ACTIONS**

**A. What is a “Quiet Title” Action?**

Quieting title is a legal procedure to establish an individual’s right to ownership of real property against one or more adverse claimants. A quiet title action also is called a suit to remove a cloud in title. A cloud is any claim or potential claim to ownership of the property. The cloud can be a claim of full ownership of the property or a claim of partial ownership, such as a lien in an amount that does not exceed the value of the property or an easement that purports to give the respondent the right to use the property in some fashion. Said differently, a title to real property is clouded if the plaintiff, as the buyer or recipient of real property, might have to defend his/her full ownership of the property in court against some party in the future. A landowner may bring a quiet title action regardless of whether the respondent is asserting a present right to gain possession of the premises.

Such an action can be a “quasi-in-rem” proceeding (against one or more specific individuals) or a true “in rem” proceeding (against the whole world, claimants known and unknown). In effect, a “quiet title” action is a form of declaratory judgment in which the Court is declaring the rights of the parties in respect to the property in question.[[1]](#footnote-1) In Georgia, those types of actions are respectively also called Equitable Quiet Title and Statutory Quiet Title.

1. **Equitable Quiet Title.**

In an equitable quiet title action in Georgia, a court may cause to be delivered up and cancel any instrument which casts a cloud over the complainant’s title.[[2]](#footnote-2) This action is commonly known as a conventional proceeding *quia* *timet*. A cloud is an instrument that may give a claimant an apparent right to the property of the current possessor, such as an invalid deed or an obscured boundary line.[[3]](#footnote-3) When an action is brought challenging an identified cloud, the court determines the validity of the outstanding claim and issues a decree. The relief sought will be granted where the invalidity of the specific instrument sought to be canceled appears on its face or is revealed through outside facts.[[4]](#footnote-4) In granting the relief, the court may cancel instruments, construe them to avoid conflicts, grant injunctions, or use other available equitable power.[[5]](#footnote-5) This malleability of remedies is an advantage not found in the statutory proceeding. Generally, a party must be in possession of the property in order to assert an equitable claim to quiet title.[[6]](#footnote-6) In addition, a party must assert either current record title or current prescriptive title.[[7]](#footnote-7) However, there are some exceptions to this possession requirement such as when dealing with wild and unoccupied lands or in cases where there is another distinct head of equity jurisdiction sufficient to support the action.[[8]](#footnote-8)

1. **Statutory Quiet Title.**

By means of a statutory quiet title action, the Georgia legislature has provided an “efficient, speedy and effective way to adjudicate disputed title claims.”[[9]](#footnote-9) Such a proceeding is often referred to as a proceeding quia timet against all the world. Unlike an equitable quiet title action, the statutory proceeding is brought against the property and all the world, thus, eliminating the difficulty of determining the identity or residence of all the possible claims.[[10]](#footnote-10) Any party who claims an interest in the property may bring an action regardless of the fact that the party is not currently in possession.[[11]](#footnote-11) However, a party must assert a claim of current record title or current prescriptive title as in an equity action.[[12]](#footnote-12) Upon receipt of the verified petition and property plat, the court submits the information to an appointed special master who provides notice to interested parties and determines the validity of the claims.[[13]](#footnote-13) Any party to the proceeding may demand a jury trial instead of a special master’s determination.[[14]](#footnote-14) The court issues a decree based upon the findings of the special master or jury that quiets title and binds all parties known or unknown.[[15]](#footnote-15) The statutory proceeding has the clear advantage over the equitable action due to the breadth of the court’s decree. Owners, either currently in possession or not, do not have to join the specific individuals that may have outstanding claims to the property, as all outstanding claims are presumed adjudicated. However, failure to follow the specific requirements of the statute can be a bar to relief.[[16]](#footnote-16) An action to quiet title is a lawsuit filed to establish ownership of real property (which can be defined generally as land and the improvements affixed to that land). The plaintiff in a quiet title action seeks a court order that (a) establishes the plaintiff’s dominant title rights and/or (b) prevents the respondent(s) from making any subsequent claim to the property.

**B. Statutory Versus Common Law Quiet Title Actions**

The law on quiet title actions varies from state to state. Many states have quiet title statutes. However, other jurisdictions allow courts to fashion the law regarding quiet title actions. Under the common law, a plaintiff must be in possession of the property to bring a quiet title action, but many state statutes do not require actual possession by the plaintiff. In other states, possession is not relevant. In some states, only the person who holds legal title to the real estate may file a quiet title action, but in other states anyone with sufficient interest in the property may bring a quiet title action. Generally, a person who has sold the property does not have sufficient interest. When a landowner owns property subject to a mortgage, the landowner may bring a quiet title action in states where the mortgagor retains title to the property. If the mortgagee keeps the title until the mortgage is paid, the mortgagee, not the landowner, would have to bring the action.

The general rule under either approach in a quiet title action is that the plaintiff may succeed only on the strength of his own claim to the real estate, and not on the weakness of the respondent’s claim. The plaintiff bears the burden of proving that he owns the title to the property. A plaintiff may have less than a full fee simple ownership and still maintain an action to quiet title. The general foundational requirement is that the plaintiff’s interest be valid while the respondent’s competing interest is not.

**II. Legislative Update**

In 2016, the Georgia General Assembly did little in the way of passing substantive new law regarding real property. However, Georgia HB 1004 was passed which revises the requirements, procedures, and certifications necessary for the filing of maps, plats, and plans in superior court and provides for electronic recording and access to maps, plats, plans, and other real estate instruments. This Act will amend O.C.G.A. Sections 15-6-67, 15-6-68, 44-2-2, 44-2-25, 44-2-26, 44-2-27, 44-2-28, 44-2-237, 44-3-74, and 44-13-13 and goes into effect on January 1, 2017.

 Although generally outside the scope of this particular seminar, if you practice in real property and deal with recording plats/maps, this new law is worth reviewing – and, of course, going forward, we can see how improperly recording a plat, etc. could play a role in quiet title actions. Although not much has been written regarding the passage of this new series of laws, one of the more controversial provisions (at least in the eyes of the professional surveyors of the state) is the certification requirement:

**(New) O.C.G.A. § 1567(a)(2): Surveyor certification box.**

Each map, plat, or plan shall provide a box which contains the following language and the applicable certifications of the registered land 61 surveyor required pursuant to subsection (c) of this Code section:

As required by subsection (c) of O.C.G.A. Section 15-6-67, the Registered Land Surveyor hereby certifies that this map, plat, or plan has been approved for filing in writing by any and all applicable municipal, county, or municipal-county planning commissions or municipal or county governing authorities or that such governmental bodies have affirmed in writing that approval is not required. The following governmental bodies have approved this map, plat, or plan for filing:

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ Name and date (mm/dd/yyyy)

 \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ Name and date (mm/dd/yyyy)

The following governmental bodies have affirmed that approval is not required:

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ Name and date (mm/dd/yyyy)

 \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ Name and date (mm/dd/yyyy)

Such approvals or affirmations should be confirmed with the appropriate governmental bodies by any purchaser as to intended use of any parcel. The Registered Land Surveyor further certifies that this map, plat, or plan complies with the minimum standards and specifications of the State Board of Registration for Professional Engineers and Land Surveyors and the Georgia Superior Court Clerks' Cooperative Authority.

**III. JUDICIAL UPDATE**

As will come to no surprise to practitioners in this area of the law, the Georgia appellate courts’ most recent quiet title decisions do not necessarily move the needle in terms of ground- breaking substantive precedent. However, a number of relatively recent cases make excellent study guides for practice pointers and clarification on the myriad of procedural and evidentiary issues that can run rampant in quiet title actions.

1. **Sovereign Immunity.**

**TDGA, LLC v. CBIRA, LLC, 298 Ga. 510, 783 S.E.2d 107 (2016).**

**Held: Sovereign immunity does not bar in rem quiet title actions against the state.**

TDGA, LLC acquired property from another entity that had purchased the property at a tax sale. Afterwards, TDGA followed the non-judicial process of foreclosing any right of redemption to the property pursuant to O.C.G.A. §§ 48-4-45 and 48-4-46. TDGA then provided notice of the foreclosure of the redemption rights to all interested parties in the property, including the Georgia Department of Revenue and the Georgia Department of Labor (collectively the “Departments”), each of which held recorded tax liens against the property.

Post-foreclosure, TDGA filed a conventional quiet title action pursuant to OCGA § 23–3–40 to obtain a ruling that all redemption rights had been properly foreclosed, which TDGA intended to use to show that it held marketable title to the property. After being served with the quiet title action, the Departments, which never released their respective liens, filed a joint motion to dismiss, arguing that the suit was barred by sovereign immunity. In its initial favorable ruling on behalf of the Departments, the trial court determined that, although TDGA had properly foreclosed the right of redemption of all parties (including those of the Departments), the suit was nonetheless barred by sovereign immunity pursuant to the law of cases like Ga. Dept. of Nat’l Res. v. Ctr. For a Sustainable Coast, 294 Ga. 593, 755 S.E. 2d 184 (2014) (holding that the doctrine of sovereign immunity bars injunctive relief against the State at common law and noting that the appropriate relief in this case would have been to seek injunctive relief against the individual state officers).[[17]](#footnote-17)

The TDGA court noted that the Georgia Constitution’s sovereign immunity clause does preclude “actions or claims against the state and its departments, agencies, officers and employees.”[[18]](#footnote-18) Thus, according to the TDGA court, in the most general sense, the State and its agencies are immune from suit unless the Legislature provides otherwise.[[19]](#footnote-19) However, the TDGA court also found that the concept of sovereign immunity does NOT mean that Georgia law fails to provide a mechanism for quieting title against all potential claimants, including the State.[[20]](#footnote-20)

A quiet title action under O.C.G.A. § 23–3–60 is an *in rem* action. Such a suit is not an action against the State or any other person or entity; it is an action against the underlying property, itself, the purpose of which is to remove any and all clouds on the title of that property.[[21]](#footnote-21) In an “action in rem,” the named defendant is real or personal property. So, by its very nature, an in rem quiet title action is not subject to sovereign immunity because it does not involve a claim against the State, though the State may certainly make a claim to the property in question during the pendency of the quiet title action.[[22]](#footnote-22)

 The TDGA court went on to opine that

 For the purposes of clearing title to any piece of property, it is necessary to include a full consideration of the State’s rights, if any, because “title to all lands originates . . . from the state[,]” . . . and “all [r]ealty in this state is held under the state as the original owner thereof” [internal citations omitted]. But the State cannot assert title to otherwise privately-held land simply by issuing an edict or imposing a lien that cannot be effectively challenged and impairs the marketability of the property. In rem quiet title actions, in which the property is the only defendant and sovereign immunity is not applicable, prevent this problem.[[23]](#footnote-23)

Justice Nahmias, concurring, further noted that the Land Registration Law of 1917, O.C.G.A. §§ 44-2-40 to 44-2-253, a little known and little used equitable relief statute that is actually found in the property code, establishes a proceeding *in rem* against the land at issue with the Court’s decree operating as to all those who are parties either by name or under the general designation of “whom it may concern.”[[24]](#footnote-24) The statutory language regarding who is bound by the judgment in such a proceeding is broad and expressly includes the State.[[25]](#footnote-25)

1. **Counterclaimant sufficiently pled elements of quiet title action against bank for alleged improper foreclosure on property.**

**Cronan v. JP Morgan Chase Bank, N.A., 336 Ga. App. 201, 784 S.E.2d 57 (2016)**

**Held: Mortagee’s counterclaim sufficiently plead elements of quiet title claim such that grant of motion to dismiss was error.**

Unfortunately, the facts of this case are not terribly uncommon in the context of the vast number of foreclosures that occurred at the height of the recent economic crisis. In Cronan, an individual mortgagor bought a primary residence in 2010. Mortgagor obtained a loan from mortgagee and executed a security deed to secure the debt. The deed listed a parcel ID number and property address for “2215 Dawnville Beaverdale Road.”[[26]](#footnote-26) However, it would later come to light, without dispute, that the legal description contained in the security deed actually was for “2253 Dawnville Beaverdale Road.”[[27]](#footnote-27)

In September 2012, after mortgagee had defaulted on the loan, mortgagor foreclosed on the property. The advertisement of the foreclosure identified the “2253” address as the property to be foreclosed upon. After the Deed Under Power was recorded, mortgagee assigned its interest in the property to Fannie Mae, but Fannie Mae sought a writ of possession for the “2215” address. The Magistrate Court found that Fannie Mae did have an ownership interest in the “2253” property but did NOT have a lien or ownership interest in the “2215” property and granted Fannie Mae a writ of possession only for the “2253” property.[[28]](#footnote-28)

In February of 2014, the mortgagee filed an Affidavit of Title asserting that it intended for the security deed to encumber the “2215” address, that mortgagor had defaulted on the loan, and that it had discovered the “error” in the security deed’s legal description.[[29]](#footnote-29) Mortgagee then filed suit seeking equitable reformation of the deed, declaratory judgment, and other equitable relief to (i) correct the legal description in the deed to reflect the intended encumbrance on the “2215” address; (ii) void the foreclosure sale; (iii) reinstate the security deed; and (iv) return the parties to their respective positions prior to the foreclosure.[[30]](#footnote-30) Mortgagor answered and counterclaimed for libel and abusive collection. Mortgagee eventually filed a second Affidavit of Title and dismissed its lawsuit.[[31]](#footnote-31)

Eventually, mortgagor amended its counterclaim to bring a Quiet Title action, asserting that the first and second affidavits and the reporting to credit agencies of the foreclosure of the “2215” property cast a cloud on the title of the property.[[32]](#footnote-32) Mortgagor asserted that only the “2253” property was intended to be encumbered and that the “2215” property was just a mailing address. Mortgagee, of course, argued that the parties intended to encumber “2215” and moved to dismiss for failure to state a claim.[[33]](#footnote-33) The trial court, in fact, did dismiss the counterclaim. The Court of Appeals reversed and held that the property owner would be entitled to relief if he could prove the allegations contained in the counterclaim – namely that (i) Mortgagor held unencumbered legal title to the “2215” property; and (ii) Mortgagee, through the filing of Affidavits of Title and the foreclosure and resulting Deed Under Power cast a cloud on that title.[[34]](#footnote-34)

1. **Timing Is Everything When Requesting a Jury**

**Wyatt v. Hizer, 337 Ga. App. 767, 788 S.E.2d 866 (2016)**

**Held: Demand for jury trial on factual issues so triable must be filed before the commencement of Special Master’s hearing.**

Petitioner brought an action in quiet title alleging that she was the owner of “Lot 2” of Buena Vista subdivision, as shown on the “Campbell Plat,” and that Defendants had claimed an interest in the subject property and had entered onto the subject property without authorization.[[35]](#footnote-35) Defendants answered and counterclaimed in quiet title asserting that they were the owners of the subject property, identified as “Lot 1” on the “Morrison Plat,” by virtue of a quit claim deed to them.[[36]](#footnote-36) Both parties asked for a special master under O.C.G.A. § 23-3-63.[[37]](#footnote-37)

The Court appointed a special master, and a hearing was set for June 13, 2013 at 9:30 a.m.[[38]](#footnote-38) Neither party requested that the special master hearing be recorded, nor did they provide a transcript or re-creation of the events of the special master hearing on appeal. Defendants filed a “Demand for Jury Trial” at some point on June 13, 2013; however, the clerk’s office only file stamped the pleading and did not time-stamp it.[[39]](#footnote-39) The face of the Demand averred that the Demand was made “prior to the hearing with the special master,” but did NOT affirmatively represent that the demand was filed prior to the hearing.[[40]](#footnote-40) Petitioner provided testimony into the record that “at the start of the special master hearing, but before oral testimony was given, attorney for Defendants . . . presented opposing attorneys and the Special Master with an unfiled copy of a Demand for Jury Trial . . . .”[[41]](#footnote-41)

The special master conducted the hearing and issued a report in favor of Petitioner some time later.[[42]](#footnote-42) Defendants filed an objection to the report in respect to certain factual issues related the boundary between Lots 1 and 2 which Defendants believed had been reserved for a jury trial.[[43]](#footnote-43) At the hearing in superior court, Petitioner noted that two affidavits from the clerk of court had been filed into the record – the first affidavit indicated that the Demand had been filed prior to the hearing, but the second affidavit contradicted and corrected the first and indicated that the clerk had no knowledge if the Demand was filed prior to the hearing – only that the Demand was filed at some point on June 13.[[44]](#footnote-44)

Petitioner argued that the Demand had been given to the Special Master prior to the hearing but that it had not been filed until AFTER the hearing. Defendants’ counsel stated, and later provided a sworn statement, that he did file the Demand prior to the hearing.[[45]](#footnote-45) The Trial Court took the matter under advisement and eventually entered an order adopting the Special Master’s report and holding that Defendants had not timely invoked their statutory right to a jury trial. The Trial Court held that, as a matter of fact, the clerk’s second affidavit controlled and indicated that Defendants had failed to file prior to the hearing.[[46]](#footnote-46)

The Court of Appeals, ruling *en banc*, reversed.[[47]](#footnote-47) Parsing O.C.G.A. § 23-3-66, the Court of Appeals noted that

[a]lthough no case directly so holds, the great majority of Supreme Court cases addressing the timing of a jury demand in a quiet title action state that the demand must be “filed” prior to the special master hearing.

The Court of Appeals placed great weight on the statement from Defendants’ counsel, noting that attorneys take an oath upon admission to the bar and are deemed to speak the truth and to be bound by statements in open court.[[48]](#footnote-48) The Court of Appeals further noted that the clerk’s second affidavit averred that he had no knowledge as to the specific timing of the filing for the Demand and that the clerk’s office had no official record that could prove that the Demand was filed prior to the hearing.[[49]](#footnote-49) The Court of Appeals opined that what was missing from the clerk’s affidavit was as important as what was included: there was no averment that the clerk’s records were capable of proving what time a document was filed, that the clerk knew at what time the hearing was held, or that the clerk had a record indicating that the Demand was filed *after* the commencement of the Special Master’s hearing.[[50]](#footnote-50) Thus, according to the Court of Appeals, the clerk’s affidavit did NOT contradict the statement of Defendants’ counsel – instead, it created “at best, a mere inconclusive inference insufficient to [create an issue of fact].”[[51]](#footnote-51)

 Ultimately, the Court of Appeals formally (i) held that the Trial Court erred in finding as a matter of fact that the Demand was filed after the commencement of the Special Master’s hearing; (ii) reversed the Trial Court’s judgment; (iii) reversed the Trial Court’s entry of the Special Master’s findings, since it included findings of fact; (iv) reserved for remand the issue of the scope of the jury demand itself; and (V) remanded the issue back to the Trial Court for further proceedings consistent with the Court of Appeals’ opinion.[[52]](#footnote-52)

1. **Standing to Bring Quiet Title Actions is Fairly Broad.**

**Johnson v. Bank of Am., N.A., 333 Ga. App. 539, 773 S.E.2d 810 (2015), reconsideration denied (July 29, 2015), cert. granted (Apr. 26, 2016).**

**Held: Property owner need not be party to assignments of security deeds to challenge them in quiet title action.**

Plaintiff property owner purchased the Property in fee simple pursuant to a 2006 warranty deed. Pine State Bank held a security interest in the Property but, apparently, assigned that interest in 2011 or 2012 to Bank of America, N.A. and The Bank of New York Mellon (collectively “Assignees”). Plaintiff brought an in rem quiet title action as to the ownership of the property, alleging that Pine State’s assignments were invalid as a matter of law and constituted a “cloud recorded against Plaintiff’s title to the Property.”[[53]](#footnote-53)

BoA filed a motion to dismiss on the grounds that Plaintiff lacked standing to contest the assignments of the Pine State security deed since Plaintiff was not a party to those assignments. The trial court granted BoA’s motion and dismissed the action.[[54]](#footnote-54) The Georgia Court of Appeals disagreed with the trial judge and reversed the entry of dismissal.[[55]](#footnote-55)

The Court of Appeals noted that a plaintiff in a quiet title action need not be a party to possible clouds upon title in order to bring a quiet title action in an attempt to remove those clouds[[56]](#footnote-56). The Act is to be liberally construed, and the remedy is to be cumulative, not exclusive.[[57]](#footnote-57) BoA argued on appeal that O.C.G.A. § 9-2-20(a) was controlling, which provides that an action on a contract be brought in the name of the party in whom the legal interest in the contract is vested.[[58]](#footnote-58) However, the Court of Appeals found that Plaintiff was not attempting to enforce any rights under the assignments and, therefore, had not brought an action on the contracts.[[59]](#footnote-59) Thus, the fact that the property owner was not a party to the assignments that he challenged did not destroy his standing to assert that those assignments are clouds upon his title.

This case is also noteworthy for two other reasons:

1. It provides a succinct summary of the requirements for a quiet title petition under O.C.G.A. § 23-3-62(b):[[60]](#footnote-60)

i. Particular description of the land

ii. Specification of the petitioner’s interest in the land

iii. Whether petitioner’s interest is based upon written instrument, adverse possession, or both; and

iv. Said allegations should be accompanied by a plat of survey and copies of any written instruments on which petitioner’s interest or that of an adverse claimant is/are based.

1. It re-emphasizes the relative relationship between a request for a Special Master and a jury trial demand:[[61]](#footnote-61)
2. If a jury trial demand is filed before a special master holds a hearing, the trial court has jurisdiction to proceed to trial and, correspondingly, to make findings of fact and grant summary judgment.[[62]](#footnote-62)

ii. Conversely, if no jury trial is demanded before the time a special master hears the case, the special master is the arbiter of law and fact and decides all issues in the case.

**N.B.** The Georgia Supreme Court granted certiorari on BoA’s petition and heard oral argument in the matter on July 11, 2016. As of the date of this paper, the Court has not yet issued its opinion.

**IV. MARKETABLE TITLE ISSUES**

1. **What is “Marketable Title”?**

In Georgia, the title to real property is the means or the evidence by which an owner establishes rights in land. The possession of legal title to land is entitlement to rights of ownership of that land, the minerals below the land, the air space above the land, and to some extent, the waters contained on or flowing through the land. “A good title means not merely a title valid in fact, but a marketable title which can again be sold to a reasonable purchaser or mortgaged to a person of reasonable prudence as a security for the loan of money.”[[63]](#footnote-63) In other words, a good and marketable title is one proven to be free of legal defects by all the means available to prove the quality of the title. And, the way one proves that title is good and marketable is typically through a title search.

In Georgia, the Marketable Title Act has a 40 year title search requirement: “a prima facia case shall be made out in actions respecting title to land upon showing good record title for a period of 40 years, and it shall not be necessary under such circumstances to prove title to the original grant from the state.”[[64]](#footnote-64)  However, it typically is local custom to follow the State Bar of Georgia title standards:

A record title covering a period of **50 years** or more is considered sufficient to determine marketability; provided that the basis thereof is a warranty deed, one or more quitclaim deeds supported by a reasonable proof that they convey the full title, or a grant from the state, a probate proceeding in which the property is reasonably identifiable, a security deed if subsequently regularly foreclosed or any other instrument which shows of record reasonable probability of title and possession thereunder; provided further that the period actually searched does not refer to or indicate prior instruments or defects in title, in which case such prior instruments may be used in turn as a start, and that the period actually searched discloses instruments which confirm and carry forward the title to be established. (Emphasis added).[[65]](#footnote-65)

 **B. How Does “Insurable Title” Differ from Marketable Title?**

In contrast, an insurable title does, or may have, a known defect or defects in the chain of title.  However, with an insurable title, a title insurance company has agreed in advance to provide insurance against the defects ever affecting the ownership or value of the property.

   If a property does not have a current, valid title insurance policy and there is a defect in the chain of title, then the defect must be cured or repaired before a seller can convey marketable title.  If there is a current policy, rather than curing or fixing the defect, which can be very expensive and time consuming, the title insurance company may elect to insure against any problem the defect may cause in the future.  That is, the insurance company agrees to fix the problem only when – and IF – it ever becomes an immediate problem.  Some defects in title may never become a problem or threaten the value or ownership of the property.  Title insurance companies, like any insurance companies are in the business of risk management, and whenever possible would rather defer the risk then to pay to address/correct it.

One of the biggest problems with insurable title is that a buyer of a property accepting insurable title (rather than marketable title) is taking a risk of their own.  It’s not that the defects may ever threaten the value or ownership of the property, but that upon resale of the property the next buyer may not be as willing to accept the insurable title and may demand a marketable title.

**C. Types of Title Defects**

**1. Apparent Breaks In Chain Of Title**

Apparent breaks are not actually breaks in the chain of title. They are cases or situations in which certain necessary information, reflecting actual facts, has not been filed for record. Once this information is made part of the land records, the break disappears.

Among the most common apparent breaks, we can cite:

* Unrecorded Instruments. These are validly executed and acknowledged instruments that have not been filed for record. This apparent break can be eliminated by filing these instruments of record.
* Matters of Probate.
	+ Lack of Proceedings. In the absence of probate proceedings, and after the expiration of the allowed statutory period of time for commencement, this apparent break can be eliminated by the filing for record of a satisfactorily and properly executed affidavit of heirship stating the necessary heirship information.
	+ Probate Proceedings in Different Jurisdiction. The recordation of proper transcripts of probate proceedings can eliminate the apparent break.
* Matters of Corporation. The recordation of proper certificates of merger, acquisition, or change of value can eliminate the apparent break.
* Divorce Proceedings in Different Jurisdictions. The recordation of proper transcripts of the divorce proceedings can eliminate the apparent break.
* Proof of Death. The recordation of a death certificate or a proper affidavit can eliminate the apparent break.
* Variation in Names. It is essential to a record title to land that the various instruments in the chain show a direct connection between the different owners.  Any substantial variation between the name of the grantee in one instrument and of the grantor in the following instrument will render the title unmarketable. If there is a variance between the name of the grantee in a deed to him/ her and the name of such person as grantor in a subsequent deed from him/her, title under the latter deed is unmarketable unless the two names can be identified as those of one and the same person.
	+ Where there are variations between the Christian name of the grantee in one instrument and the grantor in the following instrument, between the surnames of a grantee in one instrument and the grantor in the following instrument, or between the name of the mortgagee in a mortgage and his/her name in a subsequently executed release or satisfaction, affidavits or corrected deeds must be executed in order to cure the defect in title.  A mistake in the name of a party to the deed may be proven by an affidavit made at the time of changing the deed to correct the mistake.  Often affidavits or a corrected deed is all that is needed to cure the defect.

 **2. Real Breaks In Chain Of Title**

Conversely, real breaks are actual breaks in the chain of title. These situations cannot be cured by adding certain additional information to the records. These situations relate to parties who claim and hold certain rights, title or interest in the property which are adverse to those being claimed by the present record owners. These real breaks can be corrected by the elimination of the rights and interests of these claimants through one of the following methods:

* The execution and filing for record of a proper quitclaim deed.
* The filing and completion of a quiet title action or a trespass to try title action with a certified copy of the final judgment or decree filed for record.
* The provisions of the state's marketable title act, if any.
* In some jurisdictions, by recording an affidavit of adverse possession relative to the uninterrupted period of adverse possession established by state law.

1. Errors in public records. Clerical or filing errors could affect the deed or survey of the property and cause undo financial strain in order to resolve them.

2. Unknown liens. Prior owners of property may not have been meticulous bookkeepers — or bill payers. And even though the former debt is not the buyer’s, banks or other financing companies can place liens on property for unpaid debts even after a buyer has closed on the sale. This is an especially worrisome issue with distressed properties.

3. Illegal deeds. While the chain of title on the property may appear perfectly sound, it's possible that a prior deed was made by an undocumented immigrant, a minor, a person of unsound mind, or one who is reported single but in actuality married. These instances may affect the enforceability of prior deeds, affecting prior (and possibly present) ownership.

4. Missing heirs. When a person dies, the ownership of his home may fall to his heirs, or those named within his will. However, those heirs are sometimes missing or unknown at the time of death. Other times, family members may contest the will for their own property rights. These scenarios — which can happen long after you have purchased the property — could affect your rights to the property.

5. Forgeries. Sometimes forged or fabricated documents that affect property ownership are filed within public records, obscuring the rightful ownership of the property. Once these forgeries come to light, rights to the property may be in jeopardy.

6. Undiscovered encumbrances. At the time of purchase, a buyer may not know that a third party holds a claim to all or part of her property — due to a former mortgage or lien, or non-financial claims, like restrictions or covenants limiting the use of the property.

7. Unknown easements. An unknown easement may prohibit a buyer from using her property as she would like, or could allow government agencies, businesses, or other parties to access all or portions of the property. Although usually non-financial issues, easements can still affect the right to enjoy property.

8. Boundary/survey disputes. A buyer may have seen several surveys of the property prior to purchasing, however, other surveys may exist that show differing boundaries. Therefore, a neighbor or other party may be able to claim ownership to a portion of the property.

9. Undiscovered will. When a property owner dies with no apparent will or heir, the state may sell his or her assets, including the home. When a buyer purchases such a home, she assumes her rights as owner. However, even years later, the deceased owner's will may come to light and buyer’s rights to the property may be seriously jeopardized.

10. False impersonation of previous owner. Common and similar names can make it possible to falsely "impersonate" a property owner.

**11. Easements.** Any easements that appear on the title commitment should be located on the survey.  It is also important to have copies of the easement documents for review. In connection with utility easements, if underground utilities are located on the property, the surveyor, if requested to do so, can review plans of the utility company to determine where the easements are located.  Otherwise, they can hire companies  with special equipment to detect where the utilities are located.

In addition to easements located on the property, appurtenant easements which benefit the property should also be shown on the survey.  Sometimes, it will be necessary to obtain an appurtenant easement in case a utility runs off the property without any apparent supporting easement.  If this is the case, it must be created and the adjoining owners will need to grant it. Sometimes, it becomes apparent from the survey that there is an appurtenant easement that does not appear on the title commitment.  It is not unusual for a title company, once the order is placed on a particular parcel of property, not to include an appurtenant easement on the title commitment.  If this happens, it is important that the survey be discussed with the title company in connection with researching the title to the appurtenant easement.

Easements may appear on the surveys that are not shown on the title commitment.  Perhaps a gravel road across the property has been observed and placed on the survey by the surveyor.  It is important for the attorney to review these sorts of items with the title company to make sure that an easement is created or that it is taken into account in the title insurance policy.  Other matters that ought to be recognized by a surveyor and shown on a survey might be a possible prescriptive easement or right of way that is unrecorded affecting the property.  This may only be apparent from a visual inspection of the property by the surveyor.  If such an easement is discovered, it should be thoroughly investigated and proper documents to validate it be drafted.

Moreover, sometimes, an easement appearing on the title commitment does not affect the property and the surveyor will be able to determine this and the attorney can then request deletion from the title commitment. As mentioned above, in connection with encroachments of improvements onto a property or over a property line, the easement areas should also be carefully followed  for encroachments lying within them.  In connection with title insurance matters, some encroachments are not extremely risky or would be inexpensive to remove and a title company is likely to insure over them.  However, more permanent items, such as a swimming pool lying in the middle of a utility easement crossing the property would be another matter and likely need more significant measures to deal with removing them.

**V. Curative Instruments**

In some instances, a lawyer may have options other than instituting a full blown quiet title action in order to clarify ownership or right to a certain piece of real property. Consider the following options:

* Rental Division Order

Used to clarify undivided ownership and/or direct allocation of bonus, or and rental income in a manner other than equally.

* Lease Ratification.

Ratifications evidence that a party in interest by title, grant of authority, or act of law confirms and adopts the specific act of another party in interest without altering the terms of the original act. (e.g., Execution of an oil and gas lease, mortgage, assignment,

etc.) Most notably used for NPRIs (non-participating royalty owners) so they are bound by lease pooling provision.

* Lease Amendments

The lease contains a drafting error, or a proper provision is omitted. Terms, description, etc. If the legal description does not adequately identify the land covered by the lease with reasonable certainty, the lease is VOID from inception.

* Lease Amendments - Extension of Primary Term

If the lease does not contain an Option to extend, the Lessee has the option to pay a bonus to extend the primary term. However, there are times when the secondary term of a lease might be questionable. In these instances an Affidavit might be negotiated and filed to provide notice that both parties agree the primary lease has been extended.

* Release of Lien, or Deed of Trust

A lien, or deed of trust is a claim on the property that can be exercised upon the default of the first party. Oftentimes a release, or partial release is filed if the lease is conveyed, in whole, or part, and the lease is subject to a mortgage.

* Subordination Agreement

A subordination agreement is used to place parties on notice that an agreement (usually a lease agreement) takes precedence over another agreement. For example, a mortgage agreement. If a mortgage is filed against the surface owner who is also the mineral owner, in the event of loan default, the mortgagee could claim the oil and gas lease was taken after the mortgage and, therefore null and void.

* Quitclaim Deed

A Quit‐Claim Deed is used to disclaim title to interests that may or may not exist or to confirm or repair title when ambiguities exist as a result of prior conveyances. This is a curative instrument.

* Affidavit of Joint Tenancy

Affirms the existence of a joint tenancy at the time of death of one of the joint tenants and evidences the passing of the interest of the joint tenant by operation of death.

* Affidavit of Identity

Corrects inconsistencies in a party’s name as it appears in the public record.

* Affidavit of Heirship

Provides record notice that an interest is claimed to have been transferred by death to the putative heirs or devisees of a decedent without the benefit of probate. Affidavits of Heirship do not convey title.

* Affidavit of Adverse Possession

Identifies party in possession of the land and states the duration and nature of use. Claims open, notorious and continuous possession

* Affidavit of Use and Possession

Avoid claims of adverse possession. Recites history of land and identifies all parties in possession and their nature and duration of use.

Based on the facts of the case, any of these curative instruments might be more appropriate, and, frankly, less time consuming that engaging in full litigation. The desirability and practicality of these curative solutions will, of course, depend on the facts of your case and the goal which your client is seeking to obtain.

**VI. Taking the Case**

 Practitioners must keep in mind that, unlike many other types of civil claims, a quiet title claimant can only succeed on the relative strength of his own claims and not on the weaknesses of the defenses of others. In almost every circumstance, the quiet title plaintiff keeps that burden throughout the lawsuit. So, at a minimum, evaluating the merits of the new case includes:

* Strength of evidentiary support:
	+ Title exam results – often not available right away, title examination is often a key to knowing whether a case stands a chance to be successful. Most potential clients will not walk in your door with a 50-year title exam in hand; thus, establishing a good working relationship with a competent title examiner (for those who will not be doing their own exams) is an absolute necessity.
	+ Conflicting Documents – What do the defendant or defendants have in hand that has led to this dispute? Getting cooperation early on from opposing counsel or pro se litigants to turn over documents is important in evaluating the potential strength of your client’s claims.
* In Rem or Quasi-in-Rem? – Understand the difference between the two procedurally and which track suits your facts and your client’s goals the best.
* Time Horizon – Is the Property facing an immediate threat of irreparable harm? Do not assume that you can get all the potential problems straightened out with your quiet title action. The necessity/propriety of obtaining temporary and/or interlocutory injunctive relief should be considered in every situation. Principles of equity will apply to your case, and allowing the defendants to proceed with construction, etc. is going to make your life much harder in the long run.
* Budgetary Constraints – Quiet title actions may (or may not) be good candidates for flat fees or hybrid fee structures. But, be sure to consider the nature of the dispute – adverse possession disputes may require much more intensive factual scrutiny and discovery (depositions, etc.) than a battle over, say, an alley agreement which everyone agrees is THE controlling document but for which no one can agree as to the proper interpretation of the language at issue.
* Special Master or Jury? See above for the discussion of the Johnson case and the relationship between special masters, jury trial requests, and summary judgment. Do NOT be caught unaware of potential procedural issues in your case, and, knowing your procedural choices likely will play a role in setting your client’s expectations on budgets, timing, and the likelihood of success, all of which will affect the desirability of taking on the new matter.
1. The use of equitable causes of action, such as rescission or reformation, effectively to quiet title is outside the scope of this presentation. [↑](#footnote-ref-1)
2. O.C.G.A. § 23-3-40; Duffee v. Jones, 208 Ga. 639, 68 S.E.2d 699 (1952). [↑](#footnote-ref-2)
3. O.C.G.A. § 23-3-42. [↑](#footnote-ref-3)
4. O.C.G.A. § 23-3-41. [↑](#footnote-ref-4)
5. See 25 *Encyclopedia of Georgia Law, Quieting Title*, § 3 (1986 Rev.). [↑](#footnote-ref-5)
6. Smith v. Georgia Kaolin Co., Inc., 264 Ga. 755, 449 S.E.2d 85 (1994). [↑](#footnote-ref-6)
7. In re Rivermist Homeowners Ass’n Inc., 244 Ga. 515, 260 S.E.2d 897 (1979). [↑](#footnote-ref-7)
8. Vaughn v. Vaughn, 253 Ga. 76, 317 S.E.2d 201 (1984). [↑](#footnote-ref-8)
9. Cowron & Co. v. Shehadeh, 268 Ga. 383, 490 S.E.2d 82 (1997); O.C.G.A. §§ 23-3-60 to 72. [↑](#footnote-ref-9)
10. Smith, 264 Ga. 755, 449 S.E.2d 85 (1994). [↑](#footnote-ref-10)
11. Id.; O.C.G.A. § 23-3-61. [↑](#footnote-ref-11)
12. Id. [↑](#footnote-ref-12)
13. O.C.G.A. §§ 23-3-64, 65. [↑](#footnote-ref-13)
14. O.C.G.A. § 23-3-65. [↑](#footnote-ref-14)
15. O.C.G.A. § 23-3-67. [↑](#footnote-ref-15)
16. Piedmont Cotton Mills, Inc. v. Woelper, 1998 Ga. LEXIS 272 (February 23, 1998). [↑](#footnote-ref-16)
17. The holding in Sustainable Coast expressly overrules Intl. Bus. Machines Corp. v.. Evans, 265 Ga. 215, 216, 453 S.E.2d 706, 707 (1995) (finding that sovereign immunity did not protect Department of Administrative Services from injunctive relief, and noting that "[t]o avoid the harsh results sovereign immunity would impose, the court has often employed the legal fiction that such a suit is not a suit against the state, but against an errant official, even though the purpose of the suit is to control state action through state employees”). [↑](#footnote-ref-17)
18. TDGA, 783 S.E.2d at 107-108. [↑](#footnote-ref-18)
19. Id. at 108. [↑](#footnote-ref-19)
20. Id. [↑](#footnote-ref-20)
21. Id. [↑](#footnote-ref-21)
22. Id. at 109. [↑](#footnote-ref-22)
23. Id. [↑](#footnote-ref-23)
24. Id. at 109-110. [↑](#footnote-ref-24)
25. See O.C.G.A. § 44-2-83. [↑](#footnote-ref-25)
26. Cronan, 336 Ga. App. at 201. [↑](#footnote-ref-26)
27. Id. [↑](#footnote-ref-27)
28. Id. at 201-202. [↑](#footnote-ref-28)
29. Id. at 202. [↑](#footnote-ref-29)
30. Id. [↑](#footnote-ref-30)
31. Id. [↑](#footnote-ref-31)
32. Id. at 203-204. [↑](#footnote-ref-32)
33. Id. [↑](#footnote-ref-33)
34. Id.at 204. [↑](#footnote-ref-34)
35. 337 Ga. App. at 767. [↑](#footnote-ref-35)
36. Id. [↑](#footnote-ref-36)
37. Id. [↑](#footnote-ref-37)
38. Id. at 768. [↑](#footnote-ref-38)
39. Id. [↑](#footnote-ref-39)
40. Id. [↑](#footnote-ref-40)
41. Id. [↑](#footnote-ref-41)
42. Id. [↑](#footnote-ref-42)
43. Id. [↑](#footnote-ref-43)
44. Id. [↑](#footnote-ref-44)
45. Id. at 769. [↑](#footnote-ref-45)
46. Id. [↑](#footnote-ref-46)
47. J. Branch wrote the opinion with JJ. Andrews, Dillard, Peterson concurring. J. Ray concurred in the judgment only. JJ. Ellington, Phipps, Mercier and Doyle dissented. [↑](#footnote-ref-47)
48. 337 Ga. App. at 770. [↑](#footnote-ref-48)
49. Id.at 770-771. [↑](#footnote-ref-49)
50. Id.at 771. [↑](#footnote-ref-50)
51. Id. [↑](#footnote-ref-51)
52. Id. [↑](#footnote-ref-52)
53. 333 Ga. App. at 539-540. [↑](#footnote-ref-53)
54. Id. [↑](#footnote-ref-54)
55. Id. at 543. [↑](#footnote-ref-55)
56. Id. at 542. [↑](#footnote-ref-56)
57. Id.at 540. [↑](#footnote-ref-57)
58. Id. at 542. [↑](#footnote-ref-58)
59. Id. [↑](#footnote-ref-59)
60. Id.at 541. [↑](#footnote-ref-60)
61. Id. at 543. [↑](#footnote-ref-61)
62. See III.C *supra* for a detailed discussion of this rule in the case of Wyatt v. Hizer. [↑](#footnote-ref-62)
63. Ardex, Ltd. v. Brighton Homes, 206 Ga. App. 606, 608(2), 426 S.E.2d 200 (1992); see also Cowdery v. Greenlee, 126 Ga. 786, 790, 55 S.E. 918 (1906). [↑](#footnote-ref-63)
64. O.C.G.A. § 44-2-22. [↑](#footnote-ref-64)
65. Georgia Title Standards, § 2.1 [↑](#footnote-ref-65)