

TRESPASS TO TRY TITLE ACTION IN TEXAS:
DAMAGES AND A CONFLICT IN THE TEXAS PROPERTY CODE

Amy Waller*

INTRODUCTION

The famous Davy Crockett is attributed with saying of Texas, “The best land and prospects for health I ever saw is here, and I do believe it is a fortune to any man to come here.”¹ Land has always played an important role in Texas history.² In the early years of its settlement, those who controlled Texas offered land to entice settlers.³ The succession of various sovereigns, from Spain, to the Republic of Mexico, to the Republic of Texas, to statehood, led to disputes over ownership of land based on conflicting land grants.⁴ Thus, nearly from its inception Texas has needed a method of resolving disputes as to who holds title to real property.⁵ Today, the exclusive method of resolving such disputes is the trespass to try title action.⁶

The trespass to try title action is codified in the Texas Property Code.⁷ In addition, Texas Rules of Civil Procedure 783–809 set forth unique and specific pleading requirements for the action.⁸ For instance, Texas Rule of

*Candidate for Juris Doctor, Baylor University School of Law, 2019. One footnote is far too limited a space to recognize all the people who deserve to be thanked here, so to those who are not named, please know that you have my sincere gratitude. I would like to thank Professor Bridget Fuselier for sparking my interest in this topic, and Professor Matthew Cordon for his guidance and expertise in the researching and editing process. To my husband Caleb, and my family, thank you for your love and support throughout my law school journey.

¹MICHAEL WALLIS, DAVID CROCKETT: THE LION OF THE WEST 292 (2011).

²See generally T. R. FEHRENBACH, LONE STAR: A HISTORY OF TEXAS AND THE TEXANS (2000); DE WITT CLINTON BAKER, A BRIEF HISTORY OF TEXAS FROM ITS EARLIEST SETTLEMENT (Austin, A.S. Barnes & Co. 1873).

³Baker, *supra* note 2 at 85–87.

⁴*Id.*

⁵*Id.*

⁶*Infra*, Part II; see TEX. PROP. CODE ANN. § 22.001(a); Martin v. Amerman, 133 S.W.3d 262, 267 (Tex. 2004).

⁷TEX. PROP. CODE § 22.

⁸TEX. R. CIV. P. 783–809.

Civil Procedure 783 includes a list of required content for the plaintiff's pleading, while Texas Rule of Civil Procedure 788 states that "the defendant in such action may file only the plea of 'not guilty'" rather than a general denial.⁹ A plaintiff who succeeds in a trespass to try title action is entitled to title to and possession of the land, as well as damages for the defendant's use and occupation of the land.¹⁰ A qualifying defendant in possession of the land may assert a claim for the value of good faith improvements to the land.¹¹

This modern version of the trespass to try title action developed from the 1840 statute over time.¹² The 1983 codification of the Texas Property Code was intended to provide greater clarity by modernizing the language of the statute.¹³ However, for the trespass to try title action, the revision highlighted an existing conflict in the damages provisions of the statute.¹⁴ The conflict in the damages provisions is the focus of this article.

The conflict arises in determining how the court should calculate and harmonize the plaintiff's damages award and the defendant's recovery for improvements.¹⁵ Texas Property Code Section 22.021(a) directly conflicts with Texas Property Code Section 22.021(d).¹⁶ Subsection (a) provides:

A defendant in a trespass to try title action who is not the rightful owner of the property, but who has possessed the property in good faith and made permanent and valuable improvements to it, is either: (1) entitled to recover the amount by which the estimated value of the defendant's improvements exceeds the estimated value of the defendant's use and occupation of and waste or other injury to the property; or (2) liable for the amount by which the value of the use and occupation of and waste and other injury

⁹*Id.* 783, 788.

¹⁰*Id.* 804–05; TEX. PROP. CODE § 22.003.

¹¹TEX. PROP. CODE § 22.021.

¹²ROY C. LEDBETTER, PREPARATION AND TRIAL OF A LAND SUIT (The Sw. Legal Found. 1959).

¹³Act of May 26, 1983, 68th Leg., R.S., ch. 576, § 1, secs. 22.001–.045, 1983 Tex. Gen. Laws 3475, 3729–30 (current version at TEX. PROP. CODE §§ 22.001–.045).

¹⁴*See* TEX. PROP. CODE § 22.021(a), (d).

¹⁵*Id.*

¹⁶*Id.*

2019]

TRESPASS TO TRY TITLE ACTION IN TEXAS

529

to the property exceeds the value of the improvements and for costs.¹⁷

In contrast, subsection (d) provides:

The defendant is not liable for damages under this section for injuries or for the value of the use and occupation more than two years before the date the action was filed, and the defendant is not liable for damages or for the value of the use and occupation in excess of the value of the improvements.¹⁸

Subsection (a) indicates that the court will offset the defendant's recovery in a claim for improvements against the plaintiff's damages award, and that the defendant may be liable for any outstanding amount after the court applies the offset.¹⁹ However, (d) indicates that the plaintiff's recovery for damages is capped at the value of the defendant's permanent improvements.²⁰ Thus, these provisions directly conflict with one another.

For a more tangible understanding, consider this simplified hypothetical. A plaintiff brings a trespass to try title action against a defendant, who is in possession of the property. At trial, the plaintiff receives a damages award in the amount of \$200,000 for the use and occupation of the property. The defendant properly asserts a claim for the value of good faith improvements and receives a \$50,000 damages award for the value of the improvements. If the court follows subsection (a), the court would offset these two amounts, with the result that the defendant owes the plaintiff \$150,000. However, if the court follows subsection (d), then the court would cap the plaintiff's recovery of damages at the value of the defendant's permanent improvements, which is \$50,000. These two results are clearly inconsistent.

To understand the current state of the statutory trespass to try title action, including this conflict in the damages provision, it is helpful to review the action's history and development. While under Spanish control, Texas followed the civil law.²¹ The civil law procedure remained in place from 1821 to 1840, while Texas was under Mexican control.²² Despite this civil law presence, Texas appellate court opinions do not reflect any influence of civil

¹⁷ *Id.* § 22.021(a).

¹⁸ *Id.* § 22.021(d).

¹⁹ *Id.* § 22.021(a).

²⁰ *Id.* § 22.021(d).

²¹ Ledbetter, *supra* note 12, at 1.

²² *Id.*

law procedure with respect to land suits.²³ Instead, early Texas law followed the common law ejectment action.²⁴ At one time, this common law action was a suit for possession for a term under a lease, in which the lease entry and ouster had to be alleged and proved.²⁵ When the ejectment action evolved into an action for title, these procedural pleading requirements essentially became a fictitious vestige of the action's prior purpose.²⁶ In 1840, the Congress of the Republic of Texas created the statutory trespass to try title action to abolish fictitious proceedings and to simplify the common law ejectment action.²⁷

From 1840 to the present day, there have been several bulk revisions to the trespass to try title legislation.²⁸ These revisions added various procedural requirements and elaborated on the form of the pleadings.²⁹ Over time, these additions created layers of procedural complexity in the trespass to try title action.³⁰ Much of the content from the original 1840 enactment remains part of the statute, along with the later additions.³¹ In 1983, the Texas Legislature codified the modern Texas Property Code Section 22.021.³² The Legislature's intent was to modernize the language and improve the organization of the statute without changing its substance.³³

Despite these complexities, the trespass to try title suit remains the exclusive cause of action used to determine title to real property in Texas.³⁴ Although Texas no longer has a succession of sovereigns granting land, "the discovery of oil and gas as well as the general increase in values of land from other causes have again given prominence to the suit for land."³⁵ In addition, the judgment in a trespass to try title action has serious consequences for the

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* at 1–2.

²⁹ *Id.*

³⁰ *See id.* at 2.

³¹ *See* TEX. PROP. CODE ANN. § 22.

³² Act of May 26, 1983, 68th Leg., R.S., ch. 576, § 1, secs. 22.001–.045, 1983 Tex. Gen. Laws 3475, 3729–30 (current version at TEX. PROP. CODE §§ 22.001–.045).

³³ *Id.* at 3730.

³⁴ *Infra*, Part I; *see* TEX. PROP. CODE § 22.001(a); *Martin v. Amerman*, 133 S.W.3d 262, 267 (Tex. 2004).

³⁵ Ledbetter, *supra* note 12, at 1.

parties involved, as it conclusively establishes which party has title and the right to possession of the land.³⁶ Thus, the trespass to try title action still serves an important role in the Texas judicial system. As the exclusive method for determining title to real property in Texas, the trespass to try title action should be clear and provide certainty to the parties who seek to use it.

The Texas Legislature should amend the statute to clarify how courts should calculate the damages in a trespass to try title suit with a claim for improvements. Because this conflict arose when modernizing ambiguous language, the Legislature should not merely seek to restate the previous language in a clearer way. Instead, the Legislature should amend the statute and determine how the damages provision should function going forward, taking into account public policy considerations and not just the language of the previous statutes. Otherwise, the statute will continue to confuse parties and their attorneys, hindering the utility of the trespass to try title action.

I. MODERN STATUTORY REQUIREMENTS FOR THE TRESPASS TO TRY TITLE ACTION

Since 1840, the Texas Legislature has modernized the language and recodified the content of the trespass to try title action into Texas Rules of Civil Procedure 783–809 and Chapter 22 of the Texas Property Code.³⁷ The Texas Rules of Civil Procedure provide strict, specific pleading requirements for the trespass to try title action, and the Texas Property Code provides further provisions concerning the substantive aspects of the claim, including available remedies.³⁸

Texas Rule of Civil Procedure 783 specifies that the plaintiff's petition must contain: (1) the names and residences of parties; (2) a description of the property at issue; (3) the interest claimed by plaintiff; (4) that plaintiff was in possession or plaintiff is entitled to possession; (5) that defendant unlawfully entered and withholds possession; (6) facts establishing rents, profits, damages; and (7) a prayer for relief.³⁹

Texas Rule of Civil Procedure 788 states that “the defendant in such action may file only the plea of ‘not guilty.’”⁴⁰ Taken literally, this language requires the defendant to file a plea of “not guilty” rather than a general

³⁶TEX. R. CIV. P. 804–05; TEX. PROP. CODE § 22.003.

³⁷TEX. PROP. CODE § 22; TEX. R. CIV. P. 783–809.

³⁸TEX. PROP. CODE § 22; TEX. R. CIV. P. 783–809.

³⁹TEX. R. CIV. P. 783.

⁴⁰*Id.* 788.

denial. This is an example of a specific pleading requirement that may be overlooked by attorneys. Some courts are reluctant to require strict compliance with this unique pleading requirement.⁴¹ For instance, in 1964 in *Brinkley v. Brinkley*, the Houston Court of Appeals directly asserted that “[a] defendant is not required to file a plea of not guilty. He may file a general denial and special pleas.”⁴² In *Brinkley*, a divorced husband filed a trespass to try title suit to attempt to regain ownership of land awarded to his ex-wife in the divorce proceeding.⁴³ The trial court granted the ex-wife’s motion for summary judgment based on the divorce decree.⁴⁴ On appeal, the court rejected the ex-husband’s argument that the trial court erred in granting his ex-wife’s summary judgment motion because she filed a general denial instead of a “not guilty” plea.⁴⁵ This case demonstrates how some courts have softened this rule of procedure.

Other Texas Rules of Civil Procedure provide additional pleading requirements. Rule 788 provides that the defendant must specially plead a claim for the value of permanent improvements to the land.⁴⁶ Rule 789 provides that the defendant may assert any lawful defense to the action, except that the defendant must specially plead a defense of limitations.⁴⁷

In addition to the statutory pleading requirements, there are other procedural aspects of the claim that are unique to the trespass to trial action. To prevail, a plaintiff must prove the strength of his or her own title, rather than the weakness of the defendant’s title.⁴⁸ There are only four ways the plaintiff can prove the superiority of his or her title.⁴⁹ The plaintiff may establish superior title out of a common source.⁵⁰ If there is no common source, the plaintiff may follow the more difficult method of proving a

⁴¹ *Brinkley v. Brinkley*, 381 S.W.2d 725, 727–28 (Tex. Civ. App.—Houston 1964, no writ); *see also* *Butcher v. Tinkle*, 183 S.W.2d 227, 229 (Tex. Civ. App.—Beaumont 1944, writ ref’d w.o.m.); *Robb v. Robb*, 41 S.W. 92, 94 (Tex. Civ. App. 1897, no writ).

⁴² 381 S.W.2d at 727.

⁴³ *Id.* at 726.

⁴⁴ *Id.*

⁴⁵ *Id.* at 728.

⁴⁶ TEX. R. CIV. P. 788.

⁴⁷ *Id.* 789.

⁴⁸ *Hejl v. Wirth*, 343 S.W.2d 226, 226 (Tex. 1961).

⁴⁹ *Land v. Turner*, 377 S.W.2d 181, 183 (Tex. 1964).

⁵⁰ *Id.*; TEX. R. CIV. P. 798.

regular chain of conveyances from the sovereign.⁵¹ The plaintiff may also prove title by limitations, also called adverse possession.⁵² This is often asserted as an alternative argument to one of the other methods. Finally, in certain circumstances a plaintiff may resort to proving title by prior possession, with proof that possession was not abandoned.⁵³

II. HISTORY AND DEVELOPMENT OF THE TRESPASS TO TRY TITLE ACTION IN TEXAS

To fully appreciate the ambiguities and complexity in the modern trespass to try title action, it is beneficial to review the history and development of the action. The trespass to try title action existed even before Texas became a state.⁵⁴ The Congress of the Republic of Texas created the cause of action in 1840.⁵⁵ The purpose of creating the statutory cause of action was to abolish fictitious proceedings and to simplify its predecessor, the common law ejectment action.⁵⁶ Over time, the Texas Legislature further elaborated on the procedural requirements in several revisions to the statute.⁵⁷

A. *Background and Purpose of the Trespass to Try Title Action*

The trespass to try title action serves an important purpose because it is the exclusive cause of action to determine title to real property in Texas.⁵⁸ The suit provides a means of vesting and divesting title to realty and allows the plaintiff to recover possession of realty unlawfully withheld from the owner and to which he has the right of immediate possession.⁵⁹ The importance of the trespass to try title action is further emphasized by the variety of situations in which it applies.

⁵¹ *Kilpatrick v. McKenzie*, 20 S.W.3d 207, 207 (Tex. App.—Houston [14th Dist.] 2006, no pet.).

⁵² *Coleman v. Waddell*, 249 S.W.2d 912, 912 (Tex. 1952).

⁵³ *Phillips v. Wertz*, 546 S.W.2d 902, 902 (Tex. Civ. App.—Dallas 1977, writ ref'd n.r.e.).

⁵⁴ Act approved Feb. 3, 1841, 5th Cong., R.S., § 1, 1841 Repub. Tex. Laws 7, reprinted in 2 H.P.N. Gammel, *The Laws of Texas 1822–1897*, at 465 (Austin, Gammel Book Co. 1898).

⁵⁵ *Id.*

⁵⁶ Ledbetter, *supra* note 12, at 1.

⁵⁷ *Infra* Part II, B.

⁵⁸ See TEX. PROP. CODE ANN. § 22.001(a); *Martin v. Amerman*, 133 S.W.3d 262, 267 (Tex. 2004).

⁵⁹ *Hardy v. Beaty*, 19 S.W. 778, 780 (Tex. 1892).

For instance, the action adjudicates boundary disputes between tracts of land that involve questions of title.⁶⁰ It is the method for resolving disputes between two title holders who obtained title from a common source.⁶¹ It is used to adjudicate adverse possession claims.⁶² Parties can also use the action to gain possession of a premises from tenants where a detainer suit is pending, or even where there has been an adverse judgment.⁶³ It is available where one of several joint owners of the property controverts the rights of the other joint owners.⁶⁴ A purported oil and gas lessor who asserts ownership of mineral interests against the lessor and lessee can use the action.⁶⁵ An owner who asserts that the land has been appropriated for public use without payment of compensation can also use the action.⁶⁶ Finally, trespass to try title is available where a party seeks recovery of land for a breach of either a condition precedent or a condition subsequent.⁶⁷ These examples demonstrate the broad reach of the trespass to try title action. A cause of action that is so widely used should contain clear damages provisions.

B. Revisions of the Trespass to Try Title Action

The trespass to try title action was adopted in 1840, and the first revision occurred in 1844.⁶⁸ In this 1844 revision, the Legislature added the plea of “not guilty” as a procedural requirement.⁶⁹ This revision requires the defendant to file a plea of not guilty in the answer, rather than a general denial.⁷⁰ This procedural requirement is still in effect, although it is now codified in Texas Rule of Civil Procedure 788.⁷¹

⁶⁰Ellis v. Jansing, 620 S.W.2d 569, 569 (Tex. 1981).

⁶¹State v. Noser, 422 S.W.2d 594, 594 (Tex. Civ. App.—Corpus Christi 1967, writ ref’d n.r.e.).

⁶²Kilpatrick v. McKenzie, 230 S.W.3d 207, 207 (Tex. App.—Houston [14th Dist.] 2006, no pet.).

⁶³Slay v. Fugitt, 302 S.W.2d 698, 701 (Tex. Civ. App.—Dallas 1957, writ ref’d n.r.e.); see Lorino v. Crawford Packing Co., 175 S.W.2d 410, 416 (Tex. 1943).

⁶⁴Yoast v. Yoast, 649 S.W.2d 289, 289 (Tex. 1983).

⁶⁵Wolfe v. Devon Energy Prod. Co., 382 S.W.3d 434 (Tex. App.—Waco 2012, pet. denied).

⁶⁶32 TEX. JUR. 3D *Eminent Domain* § 460 (2018).

⁶⁷McDowell v. Greenland, 259 S.W.2d 305 (Tex. Civ. App.—Austin 1953, writ ref’d n.r.e.).

⁶⁸Ledbetter, *supra* note 12, at 1.

⁶⁹*Id.*

⁷⁰TEX. R. CIV. P. 788.

⁷¹*Id.*

In 1871, the Legislature made several important additions to the statute.⁷² The Legislature added a method for proving a common source of title.⁷³ When applicable, this is a somewhat easier path to establishing title than tracing title back to the sovereign. In this same revision, the Legislature provided for recovery of damages for injury to the premises.⁷⁴ This is in addition to the damages already available for use and occupation of the premises. Finally, the Legislature also established that the first judgment, rather than the second, would be conclusive as to who held title to the property.⁷⁵

In 1879, the Legislature elaborated on the content of the petition and answer.⁷⁶ Many of these additions are now codified in Texas Rules of Civil Procedure 783–809.⁷⁷ Because there are so many technical requirements, there are also secondary sources that offer guidance and form pleadings that conform to the statute.⁷⁸

III. EXAMINATION OF DAMAGES IN THE MODERN TRESPASS TO TRY TITLE ACTION

With this broader historical understanding in place, the stage is set to examine the damages provisions in the modern trespass to try title action. A claim for recovery for the value of good faith improvements only arises in a trespass to try title action when the party making the improvements fails to establish title to the property and the improvements cannot be removed without substantial and permanent damage to the land.⁷⁹ Thus, the conflicting provisions of the Texas Property Code discussed in this article are implicated when the party in possession of the land fails to establish superior title, but has successfully pleaded a claim for the value of improvements on the land that cannot be removed. This article will discuss the damages for the trespass to try title action in that context.

⁷²Ledbetter, *supra* note 12, at 1.

⁷³*Id.*

⁷⁴*Id.*

⁷⁵*Id.*

⁷⁶*Id.*

⁷⁷TEX. R. CIV. P. 783–809.

⁷⁸See 12 TEX. JUR. PL & PR. FORMS § 231:5 (2d ed. 2017); 17 William V. Dorsaneo III, *Texas Litigation Guide* § 250.100 (2018).

⁷⁹Hurst v. Webster, 252 S.W.2d 793, 794 (Tex. Civ. App.—Fort Worth 1952, writ ref. n.r.e.).

A. *The Effect of a Judgment for the Plaintiff*

A judgment for the plaintiff in a trespass to try title action (1) conclusively establishes that the plaintiff has title and the right to possession; (2) entitles the plaintiff to damages for defendant's use and occupation of the premises; and (3) entitles the plaintiff to recovery of damages for special injury to the property.⁸⁰ Damages for defendant's use and occupation of the premises are measured by the fair rental value of the land.⁸¹ In addition, the plaintiff who succeeds in obtaining judgment for title and possession is entitled to any improvements defendant may have made to the property, if the improvements cannot be removed without substantial and permanent damage to the land.⁸² The defendant may assert a claim for the value of the improvements.⁸³

B. *Defendant's Claim for Improvements*

The Texas Property Code also requires a defendant to specifically plead a claim for the value of improvements to the land to recover for the value of the improvements.⁸⁴ Texas Property Code Section 22.021(c) requires that a defendant who makes such a claim to plead: (1) the defendant and those under whom defendant claims have had good faith adverse possession of the property for at least one year before the date the action began; (2) that they made permanent and valuable improvements to the property while in possession; (3) the grounds for the claim; (4) the identity of the improvement; and (5) the value of each improvement.⁸⁵

To qualify as a good faith adverse possessor, the defendant must believe he owned the land, have a reasonable basis for that belief, and must have examined the public records.⁸⁶ The specific requirements of the good faith adverse possession element reduces the number of claimants who may otherwise assert a claim for improvements. Perhaps this limiting element is one reason that the claim for the value of improvements is not raised more

⁸⁰TEX. R. CIV. P. 804–05; TEX. PROP. CODE ANN. § 22.003.

⁸¹*Anderson v. Bundick*, 245 S.W.2d 318, 325 (Tex. Civ. App.—Eastland 1951, writ ref'd n.r.e.).

⁸²*American Cement Plaster Co. v. Acme Cement Plaster Co.*, 181 S.W. 257, 259–60 (Tex. Civ. App.—Amarillo 1915, writ ref'd); *Barton v. Chrestman*, 275 S.W. 401, 405 (Tex. Civ. App.—El Paso 1925, writ dism'd w.o.j.).

⁸³*See* TEX. PROP. CODE § 22.021.

⁸⁴*Id.* § 22.021(c).

⁸⁵*Id.*

⁸⁶*Miller v. Gasaway*, 514 S.W.2d 90, 93 (Tex. Civ. App.—Texarkana 1974, no writ).

often, and thus why the conflict in the damages provisions have not received more attention from the courts.

The measure of compensation for the claim for improvements is the difference in the value of the premises with the improvements and the value of the premises without the improvements.⁸⁷ Texas Rule of Civil Procedure 806 provides that when the defendant or person in possession has made a claim for improvements, the court will consider it and act on it in connection with the plaintiff's claim for use and occupation and damages.⁸⁸ This rule of procedure works with Texas Property Code Sections 22.021(a) and 22.021(d) to address how the court handles damages in a trespass to try title suit that involves a claim for improvements.⁸⁹

IV. CONFLICT IN DAMAGES PROVISIONS IN TEX. PROPERTY CODE SECTIONS 22.021(A) AND 22.021(D)

Texas Property Code Section 22.021(a) directly conflicts with Texas Property Code Section 22.021(d). Subsection (a) provides:

A defendant in a trespass to try title action who is not the rightful owner of the property, but who has possessed the property in good faith and made permanent and valuable improvements to it, is either: (1) entitled to recover the amount by which the estimated value of the defendant's improvements exceeds the estimated value of the defendant's use and occupation of and waste or other injury to the property; or (2) liable for the amount by which the value of the use and occupation of and waste and other injury to the property exceeds the value of the improvements and for costs.⁹⁰

In contrast, subsection (d) provides:

The defendant is not liable for damages under this section for injuries or for the value of the use and occupation more than two years before the date the action was filed, and the

⁸⁷ *St. Louis Southwestern Ry. Co. of Tex. v. Larue*, 27 S.W.2d 862, 863–64 (Tex. Civ. App.—Waco 1930, no writ).

⁸⁸ TEX. R. CIV. P. 806.

⁸⁹ See TEX. PROP. CODE § 22.021(a), (d).

⁹⁰ *Id.* § 22.021(a).

defendant is not liable for damages or for the value of the use and occupation in excess of the value of the improvements.⁹¹

Subsection (a) indicates that the court will offset the defendant's recovery in a claim for improvements against the plaintiff's damages award, and that the defendant is liable for any outstanding amount after the court applies the offset.⁹² However, subsection (d) seems to indicate that the plaintiff's recovery for damages is capped at the value of the defendant's permanent improvements.⁹³ Thus, these provisions directly conflict with one another.

A. *Historical Application of the Statute*

Historically, some courts have offset the defendant's claim for improvements against the plaintiff's damages award in the trespass to try title action, which is consistent with the current provision in Texas Property Code Section 22.021(a). As early as 1901, the Texas Supreme Court treated this calculation as an offset.⁹⁴ In *Garner v. Black*, the defendant failed to establish superior title, but properly pleaded a claim for the value of improvements.⁹⁵ The Texas Supreme Court upheld an appellate court's judgment that the defendant should recover "the difference between the rent of the place during the time that Garner had possession of it and the value of the improvements which Garner made upon the lot."⁹⁶ Although this decision predates the current statute, it establishes a historical precedent for how courts interpreted the language of the earlier statute. In fact, in this case, the Court was not even primarily focused on analyzing whether the damages of the plaintiff and the defendant should be offset.⁹⁷ The Court's decision to apply the offset was accepted without challenge by either party and was made without much commentary by the Court.⁹⁸ This indicates the practice was established and not an issue of contention.

⁹¹ *Id.* § 22.021(d).

⁹² *Id.* § 22.021(a).

⁹³ *Id.* § 22.021(d).

⁹⁴ *Garner v. Black*, 65 S.W. 876, 877 (Tex. 1901).

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

B. The Recodification of the Statute Highlights the Conflict

However, the damages calculation under the modern statute is not so clear-cut. In 1984, when the Texas Legislature recodified Art. 7395 into the modern Texas Property Code Section 22.021, the new subsections drew attention to the existing conflict in the statute.⁹⁹

The Legislature faced a difficult task in modernizing the language of the statute because it was ambiguous and somewhat difficult to follow. Art. 7395 is the source of some of the confusion. The entire language of Art. 7395 stated:

If the sum estimated for the improvements exceeds the damages estimated against the defendant and the value of the use and occupation as aforesaid, there shall then be estimated against him, if authorized by the testimony, the value of the use and occupation and the damages for injury done by him or those under whom he claims, for any time before the said two years, so far as may be necessary to balance the claim for improvements, but no further; and he shall not be liable for the excess, if any, beyond the value of the improvements.¹⁰⁰

This is the language that became (d) in Section 22.021 of the Texas Property Code. In writing the language of (d), the reviser of the statute seemed to focus on the concept that the defendant's liability would be capped at the value of the improvements.

Art. 7396 also contributed to the confusion. The entire language of Art. 7396 stated:

If it shall appear from the finding of the court or jury under the two preceding articles that the estimated value of the use and occupation and damages exceed the estimated value of the improvements, judgment shall be entered for the plaintiff for the excess and costs in addition to a judgment for the premises; but should the estimated value of the improvements exceed the estimated value of the use and

⁹⁹Act of May 26, 1983, 68th Leg., R.S., ch. 576, § 1, secs. 22.001–.045, 1983 Tex. Gen. Laws 3475, 3729–30 (current version at TEX. PROP. CODE §§ 22.001–.045).

¹⁰⁰*Id.*

occupation and damages, judgment shall be entered for the defendant for the excess.¹⁰¹

This is the language that became (a) in Section 22.021 of the Texas Property Code. Here, the focus is on the concept of offsetting the defendant's award for the value of the improvements against the plaintiff's damages award. The provision also clearly states that the defendant is liable for any excess damages remaining after the setoff.

C. Secondary Sources Reflect the Confusion Generated by the Conflict

Even though the Legislature modernized the language when they recodified the statute, the ambiguity remains. Thus, confusion about how to calculate damages in the trespass to try title action also remains. The discussion of the subject in secondary sources illustrates this confusion. For instance, McDonald & Carlson's Texas Civil Practice Guide attempts to explain these contradicting provisions by using different calculations based on the value of the improvements and when the defendant caused the damages.¹⁰²

The authors assert that there are three possibilities in the context of a claim for improvements that cannot be removed from the land.¹⁰³ The first possibility is that the plaintiff's damages award for damages caused by the defendant "during the two years immediately before suit was filed" exceeds the value of the improvements made by the defendant.¹⁰⁴ The authors assert that in this situation, judgment is awarded to the plaintiff for the excess, but is capped at the value of the improvements.¹⁰⁵ In other words, the authors indicate that the court should offset the plaintiff's damages award and the defendant's award for the value of the improvements, but then state that the defendant is only liable for the difference up to the amount of the value of the improvements.

Texas Property Code Section 22.021(a)(2) and (d) is the authority the authors cite to support this explanation.¹⁰⁶ The authors seem to have

¹⁰¹ *Id.*

¹⁰² 5 ROY W. McDONALD & ELAIN A. GRAFTON CARLSON, McDONALD & CARLSON TEXAS CIVIL PRACTICE § 27:26 (2d ed. 2017).

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

concluded that (d) controls over (a), but they offer no discussion of the conflicting provisions. Subsection (d) contains the two-year limitation as well as the cap on the plaintiff's judgment.¹⁰⁷ They attempt to harmonize (a) by stating that the court should make the offset, then apply the cap.¹⁰⁸ But they do not address the language in (a) which clearly states that the defendant is liable for the excess after the setoff is applied.¹⁰⁹

The second possibility that the authors discuss is that the plaintiff's award for damages caused by the defendant during the two years immediately before suit was filed may be less than the value of the improvements made by the defendant.¹¹⁰ The authors assert that "in this event, the value of the use and occupation and the damages caused by the defendant more than two years before suit was filed is added to the amount for the two years before suit, and the total is used as a recoupment."¹¹¹ The authors go on to say that if the total value of the damages caused by the defendant during the entire period of defendant's possession exceeds the value of the improvements, then "the excess is ignored, but the defendant does not recover any sum for the improvements."¹¹²

Texas Property Code Section 22.021(a)(1) and (d) is the authority the authors cite to support this explanation.¹¹³ Here, their explanation does not seem consistent with either (a) or (d). Subsection (d) states that the defendant is not liable for damages that occurred more than two years before the date the action was filed.¹¹⁴ This is not consistent with the authors' assertion that the damages incurred more than two years before the suit should be added to the calculation merely because the damages within the two-year limit are less than the value of the improvements.¹¹⁵ The explanation is not consistent with (a) either, because the authors state that the excess should be ignored, while (a) states that the defendant is liable for the excess.¹¹⁶ This confusion is a reflection of the conflicting language in the statute.

¹⁰⁷TEX. PROP. CODE ANN. § 22.021(d).

¹⁰⁸5 McDonald & Grafton Carlson, *supra* note 102, at § 27:26.

¹⁰⁹*Id.*

¹¹⁰*Id.*

¹¹¹*Id.*

¹¹²*Id.*

¹¹³*Id.*

¹¹⁴TEX. PROP. CODE ANN. § 22.021(d).

¹¹⁵*See id.*

¹¹⁶*Id.* § 22.021(a); 5 McDonald & Grafton Carlson, *supra* note 102, at § 27:26.

McDonald & Carlson's Texas Civil Practice Guide is a highly valued and trusted resource for practitioners. Yet, the authors' explanation of the damages calculation in the trespass to try title suit is confusing, as they try to make sense of the ambiguity created by Texas Property Code Section 22.021(a) and (d). If even the experts find these provisions difficult to explain in a clear and straightforward manner, how much more difficult is it for practitioners and their clients to understand the provisions? The Texas Legislature should amend the statute to simplify the damages calculation and provide clarity for litigants and courts.

V. PROPOSED SOLUTION

The Texas Legislature should address the conflict in the statute. There are two primary approaches the Legislature could take in addressing this issue. First, the Legislature could look back, historically, to try to preserve the meaning of the repealed statutes, legislative history, and how those repealed statutes were applied by courts. The second, and better approach, would be for the Legislature to look forward and amend the statute with a view towards simplifying the cause of action for future litigants and attorneys.

A. *It Is Not Sufficient for the Legislature to Try to Preserve the Meaning of the Repealed Statutes*

The first possible approach is that the Legislature could review the repealed statutes to determine what the language in those statutes meant and how they were applied by courts. The Legislature could compare the language of the repealed statutes with the current language of Texas Property Code Section 22.021 to examine whether the modern language accurately translated the meaning of the repealed statutes. The Legislature could then amend the current statute as needed to bring it into compliance with the meaning of the repealed statutes.

The problem with this approach is that the source laws themselves were ambiguous and confusing provisions.¹¹⁷ In 1983, during the recodification, the reviser of the statutes even noted that “[t]he source law contains ambiguous provisions regarding the amount and the period during which a defendant may be liable for the value of the use and occupation of, and damages to, a plaintiff's property. Resolution of these ambiguities is outside

¹¹⁷ Act of May 26, 1983, 68th Leg., R.S., ch. 576, § 1, secs. 22.001–.045, 1983 Tex. Gen. Laws 3475, 3729–30 (current version at TEX. PROP. CODE §§ 22.001–.045).

the scope of this revision.”¹¹⁸ The Legislature was aware of the “ambiguity” or contradiction in the statute, but chose not to address it at the time of recodification. Thus, advocates and parties in the trespass to try title suit are left to guess how the court will calculate damages.

B. The Legislature Should Look Forward and Amend the Statute to Clarify and Simplify the Damages Provisions

The better approach is for the Legislature to amend the statute to clarify how the damages provisions should work in the future, rather than trying to recapture how they worked in the past. Here, the Legislature would have the opportunity to amend the provisions based on additional considerations other than the original language of the repealed statutes, which was ambiguous from the outset. The Legislature could simplify the way damages are calculated, to provide greater clarity and certainty for parties in the trespass to try title action.

For instance, the Legislature could simply remove the second half of the sentence in Texas Property Code Section 22.021(d) from the statute. Currently, subsection (d) states:

The defendant is not liable for damages under this section for injuries or for the value of the use and occupation more than two years before the date the action was filed, and the defendant is not liable for damages or for the value of the use and occupation in excess of the value of the improvements.¹¹⁹

The Legislature could end the sentence at the comma, removing the part of the sentence that caps the damages at the value of the improvements. If the Legislature made this change, subsection (d) would simply state: “The defendant is not liable for damages under this section for injuries or for the value of the use and occupation more than two years before the date the action was filed.”¹²⁰ With this change, the Legislature could leave (a) as it is, but still remove the conflict between subsection (a) and subsection (d). Subsection (a) currently states:

¹¹⁸ *Id.*

¹¹⁹ TEX. PROP. CODE § 22.021(d).

¹²⁰ *See id.*

A defendant in a trespass to try title action who is not the rightful owner of the property, but who has possessed the property in good faith and made permanent and valuable improvements to it, is either: (1) entitled to recover the amount by which the estimated value of the defendant's improvements exceeds the estimated value of the defendant's use and occupation of and waste or other injury to the property; or (2) liable for the amount by which the value of the use and occupation of and waste and other injury to the property exceeds the value of the improvements and for costs.¹²¹

Under this change, where a defendant proves up a claim for improvements and the plaintiff has a damages award, the court would simply apply subsection (a) and offset the two amounts.¹²²

CONCLUSION

Ownership of land remains a value of fundamental importance in the state of Texas.¹²³ Ownership of land plays an indispensable role the state's industry and its economy, and gives residents the personal satisfaction of owning a home.¹²⁴ The trespass to try title suit is the exclusive cause of action for a judicial determination of title to real property, and thus its provisions should be clear, unambiguous, and accessible.¹²⁵

The conflict in the damages provision of the trespass to try title statute creates confusion for experts, practitioners, and parties.¹²⁶ The Legislature should address this conflict, not by attempting to resurrect the historical language of the statute, but by evaluating and revising the provision in light of current policy concerns and practicalities. In doing so, the Legislature can provide clarity and make the cause of action more accessible to litigants, practicing attorneys, and courts.

¹²¹ *Id.* § 22.021(a).

¹²² *See id.*

¹²³ *See* D'Ann Petersen & Laila Assanie, *The Changing Face of Texas: Population Projections and Implications*, FEDERAL RESERVE BANK OF DALLAS, October 2005, at 37–38.

¹²⁴ *See id.*

¹²⁵ *Supra*, Part II; *see* TEX. PROP. CODE § 22.001(a); *Martin v. Amerman*, 133 S.W.3d 262, 267 (Tex. 2004).

¹²⁶ *Supra*, Part IV, B.