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May 8, 2018

Supreme Court of Texas  
Supreme Court Building  
201 W 14<sup>th</sup> Street  
Suite 104  
Austin, TX 78711

**REF: Case #17-0816; RayMax Management, L.P. v. SBC Tower Holdings LLC**

Founded in 1908, the Texas Land Title Association (TLTA) is a statewide trade association representing the Texas title insurance industry and currently serving over 13,000 professionals involved in the safe and efficient transfer of real estate. In the course of their daily work, our membership serves over a million consumers each year. With active members in every Texas county, TLTA membership comprises over 90 percent of the title insurance agents and underwriters licensed to do business in Texas. From time to time, cases come before the Court that have significant impact on real estate commerce in Texas and which impact the ability of TLTA's members to safely insure title to real property. On those occasions, we will endeavor to share with the Court our support of those parties who advocate the sanctity of the Texas real property laws and doctrines. The TLTA has received no compensation for the preparation of this letter.

A mission of the TLTA and the title industry is to assure the integrity of the consumer's real property title and facilitate the transfer of title or the ability to utilize real property as collateral for borrowing. This is critical to effective commerce, on local, state and national levels. It is important to the owner and lender that the titled property be free and clear of adverse claims, including, importantly, encroachments onto the property. After a research of title, together with an appropriate survey by a licensed surveyor, the title industry typically insures against encroachments. Quite often an encroachment is a trespassing physical improvement. Under the current law, such an encroachment may not exist by right unless title has been established by a 10-year limitations period set out in Texas Civil Practice and Remedies Code Section 16.026.

The case at hand involves a leasehold interest, determination of the amount of property which was leased, and a potential trespass by reason of construction of cell tower facilities. It is a complicated case consisting of several decisions and with a primary focus on limitations for damages for trespass. To be clear, damages for the tort of trespass is not a land title issue which directly impacts the TLTA's scope of concern. However, the case history has potentially created incorrect precedent suggesting that a trespassing improvement of a permanent nature may remain as a right after a two-year period. As noted, Texas title insurance regularly insures against encroachments, and a two-year limitations period will serve to reduce available title insurance coverage, increase losses, and irreparably prejudice the property owner consumer. It is respectfully requested that this Court make clear that an encroachment by an improvement does

not gain a permanent right to do so after only two-years. Texas Civil Practice and Remedies Code Section 16.026 clearly sets out a 10-year requirement to establish real property rights.

Real property titles are harmed and rendered less secure by any implication that a party might acquire real property rights by reason of a two-year statute of limitations. Title by limitations is a long standing Texas legal principle that primarily cures defects in title in favor of a long term possessor, particularly those with record title. It is directly contrary to these principles to suggest that a trespass of a “permanent” character might result in real property rights after a two-year period. While the tort of trespass and claimed damages should rightfully be subject to a two-year limitations period, the result of the trespass should not be expanded into a real property right to possess the land. While a landowner is charged with vigilance against adverse possessors, this has never been shortened to a two-year period – and the Texas Civil Practice and Remedies Code Chapter 16 clearly mandates otherwise.

Therefore, TLTA asks the Court to clarify that a trespass of a permanent nature does not constitute title by adverse possession by reason of a two-year period. This interpretation is supported by some less than precise language in the prior opinions. The limitations period set out in Texas Civil Practice and Remedies Code Chapter 16 begins with a three-year limitations title by reason of a chain of title back to the State and then progresses to different standards for 5, 10, and 25 years. The 10-year statute clearly addresses simple “hostile” possession without record title. Shortening the period by reason of a physical trespass would completely undermine the current status of title by limitations, a statutory scheme that has been in place for many decades.

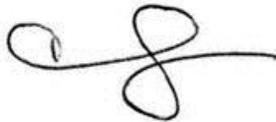
In this case, were the improvements by the tenant/subtenant within the leasehold premises, or not? This was never determined, and the lower courts appear to have avoided the question by going straight to limitations, an avoidance defense, rather than first finding if there was a trespass or an activity permitted by the lease. There are jury findings of a breach of lease, which breach is excused, but whether there is a trespassing improvement and if it may remain is never addressed. And, if there was a trespass for which a damages claim is barred by limitations, may the offending encroaching structure still be removed from the real property owned by another? May the Court order the removal, or may the landowner simply remove the encroachment? Stated differently, one can understand no damages based on limitations, but must the landowner allow the encroaching/trespassing of permanent structure to continue to exist? And after a 10-year limitations period, does that then ripen into title by adverse possession?

One can easily argue that the lower courts’ failure to address these questions has created a right to encroach or forever trespass after only two years. The tenant and subtenant seem to argue that the trespass can at least continue for the term of the lease – which can be decades. TLTA requests that the Court address and clarify these issues. The lower courts improvidently failed to do so, bypassing important issues by simply dismissing based on a two-year limitations period and creating confusion where there should be none. The correct approach can be found in *Gearhart v. Wardell*, No. 13-15-00096-CV, 2016 WL 7011402 (Tex. App.–Corpus Christi Dec. 1,

2016, no pet.), in which the Thirteenth Court of Appeals found a trespass claim for damages barred after two years, but that the right to remove a physical encroachment, or trespass, was governed by the 10-year limitations statute for adverse possession. It seems incongruous that a record title holder or a person with color of title may only adversely possess under the three- and five-year statutes, but a physical trespass can claim a right to remain after only two years. It also renders the 10-year statute meaningless in the face of an encroaching improvement.

Respectfully, the Court is requested to make it clear that an encroachment, or trespass of a permanent nature by reason of permanent improvement, cannot continue by right after only two years.

Sincerely yours,

A handwritten signature in black ink, appearing to be 'Aaron Day', with a stylized, cursive flourish extending to the right.

Aaron Day  
Director of Government Affairs & Counsel  
Texas Land Title Association  
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State Bar No. 24037899

**CERTIFICATE OF COMPLIANCE**

I certify that this document contains 1137 words in the portions of the document are subject to the word limits of the Texas Rule of Appellate Procedure 9.4(i), as measured by the undersigned's word-processing software.

/s/ Aaron Day  
Aaron Day

**CERTIFICATE OF SERVICE**

I hereby certify that on May 8, 2018, a true and correct copy of the foregoing amicus letter has been served by electronic mail to all attorneys of record.

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/s/ Aaron Day  
Aaron Day