

# Exposure and Stigma

Recent Developments in Exposure Actions,  
and the Uncertain Future of Stigma Damages

William R. Keffer

## Major Recent Cases

- *Gilbert Wheeler, Inc. v. Enbridge Pipelines (East Texas), L.P.*, 449 S.W.3d 474 (Tex. 2014)
- *Houston Unlimited, Inc. Metal Processing v. Mel Acres Ranch*, 443 S.W.3d 820 (Tex. 2014)
- *Cerny v. Marathon oil*, No. 04-14-00650-CV, 2015 WL 5852596 (Tex. App.—San Antonio Oct. 7, 2015, pet. filed)

## Temporary v. Permanent Injury

- The measure of damages for injury to real property depends on whether the injury is temporary or permanent
  - Damages for temporary injury restore the land to its previous condition
  - Damages for permanent injury account for the change in fair market value

## Temporary v. Permanent Injury

- Three main points of *Gilbert Wheeler*:
  - Temporary v. permanent distinction applies to contract actions AND tort actions
  - Reformulated definitions of temporary and permanent
  - Acknowledged two exceptions to the general rule

## Temporary v. Permanent in Contract Actions

- The temporary v. permanent paradigm has always been applied to actions sounding in tort
  - Courts of Appeals were split on whether it applied to damages stemming from breach of contract
- “We see no reason to compensate a party differently because the wrongful conduct that caused the identical injury stems from breaching a contract rather than committing a tort”
  - *Gilbert Wheeler*, 449 S.W.3d at 479.

## Reformulating the Definitions

- Permanent if:
  - “it cannot be repaired, fixed, or restored” *or*
  - “it is substantially certain that the injury will repeatedly, continually, and regularly occur, such that future injury can be reasonably evaluated”
- Temporary if:
  - it “can be repaired, fixed, or restored,” *and*
  - “anticipated recurrence would only be occasional, irregular, intermittent, and not reasonably predictable”

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the [UT Law CLE eLibrary \(utcle.org/elibrary\)](http://utcle.org/elibrary)

## Title search: Exposure and Stigma: Recent Developments in Exposure Actions and the Uncertain Future of Stigma Damages

Also available as part of the eCourse

[2016 Page Keeton Civil Litigation eConference](#)

First appeared as part of the conference materials for the  
40<sup>th</sup> Annual Page Keeton Civil Litigation Conference session

"Recent Developments in Exposure Actions and the Uncertain Future of Stigma Damages"