

**PJC 313.5 Monetary Damages Recoverable for Claims Involving
Real Property Interests (Comment)**

Generally, a claimant seeking damages for injury to a real property interest may recover either the cost to repair the damage or the loss in market value. *See, e.g., Crosstex North Texas Pipeline, L.P. v. Gardiner*, 505 S.W.3d 580, 610–11 (Tex. 2016); *Schneider National Carriers, Inc. v. Bates*, 147 S.W.3d 264, 276 (Tex. 2004). The Texas Supreme Court has said that, regardless of whether the claim sounds in tort or in contract, courts should use the same analysis to determine which measure of damages applies. *Gilbert Wheeler, Inc. v. Enbridge Pipelines (E. Tex.), L.P.*, 449 S.W.3d 474, 497 (Tex. 2014).

Under the *Gilbert Wheeler* line of cases, which includes *Schneider*, determining which measure of damages is proper generally turns on whether the injury is temporary or permanent. *Schneider National Carriers*, 147 S.W.3d at 275–76. In addition, the temporary–permanent determination controls accrual of causes of action for purposes of limitations. *Schneider National Carriers*, 147 S.W.3d at 275.

Whether a physical injury to real property is permanent or temporary is a question of law to be decided by the court. *Gilbert Wheeler, Inc.*, 449 S.W.3d at 481. However, questions regarding the facts that underlie the court’s legal determination, including the frequency, extent, and duration of the injury and the resulting amount of damages, must be resolved by the jury on proper request. *Gilbert Wheeler, Inc.*, 449 S.W.3d at 481.

The supreme court has stated that an injury to real property is considered permanent if (1) it cannot be repaired, fixed, or restored, *or* (2) even though the injury can be repaired, fixed, or restored, it is substantially certain that the injury will repeatedly, continually, and regularly recur, such that future injury can be reasonably evaluated. *Gilbert Wheeler, Inc.*, 449 S.W.3d at 480. Generally, the proper measure of damages for permanent injury is loss of fair market value caused by the injury. *Crosstex North Texas Pipeline, L.P.*, 505 S.W.3d at 611; *Gilbert Wheeler, Inc.*, 449 S.W.3d at 481. If loss of fair market value is the proper measure, it “should be ascertained at the date of trial, and it should be the market value of the property for any use to which it might be appropriated.” *Crosstex North Texas Pipeline, L.P.*, 505 S.W.3d at 610 (internal citations omitted).

An injury to real property is considered temporary if (1) it can be repaired, fixed, or restored, *and* (2) any anticipated recurrence would be only occasional, irregular, intermittent, and not reasonably predictable, such that future injury could not be estimated with reasonable certainty. *Gilbert Wheeler, Inc.*, 449 S.W.3d at 480. Generally, the proper measure of damages for temporary injuries is the cost of restoration (or repair) that is reasonable and necessary, plus loss of use. *Coinmach Corp. v. Aspenwood Apartment Corp.*, 417 S.W.3d 909, 921 (Tex. 2013) (“When the trespass causes a temporary injury, . . . [damage] generally includes the cost to repair any damage to the