



In-House Counsel Committee Newsletter

LEGAL NEWS – DAUBERT RAISES ITS UGLY HEAD AGAIN

For our many attorney-readers, we've constantly stressed the need to pay extremely close attention to the mandates of *Daubert* and *Kumho* tire when selecting and preparing a real estate expert witness. (For more on this subject, please see my article on that subject, co-authored with Bill Mundy and Dave McLean, in the special Fall, 1999, edition of *Real Estate Issues* devoted to real estate law and litigation.)

Recently, the Kentucky Supreme Court hammered yet another nail in the coffin of this issue in the case of *Vance Wilhite, et. al, v. Rockwell* (2002 Ky. LEXIS 91). The facts of the case are not terribly in dispute – Rockwell polluted the Mud River in Kentucky with PCB's, which then contaminated properties owned by Mr. Wilhite and his class-action neighbors. Nor is there much dispute over the unimpaired value of the properties – about \$7.6 million.

The lower court then awarded the property owners \$7.6 million in actual damages and \$210 million in punitives (the cleanup costs) based on the expert valuation testimony of a local real estate appraiser. This appraiser had years of experience and all of the requisite education and licensing necessary to be an appraiser.

However, the *Daubert* standard sets a substantially higher bar for expert testimony, particularly in cases where some degree of specialization is needed. As such, the court of appeals in Kentucky threw out the award, based on the expert's failure under *Daubert*, and the Supreme Court affirmed, remanding the case for a re-trial.

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