FEATURES

Daubert and the Appraisal Expert Witness Revisited

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ABSTRACT

Since the *Daubert v. Merrell Dow Pharmaceuticals, Inc*. decision in 1993, plaintiffs and defendants have used two primary arguments in applying *Daubert* to expert witness testimony in real estate valuation cases: the use of a methodology and the qualification of an expert witness. This article examines cases involving the methodology used in real estate valuation situations and finds that although *Daubert* identifies four factors (theory testing, peer review and publication, known rate of error, and general acceptance) for the courts to consider, these factors have been interpreted differently in various courts. Several cases are summarized and the significance of different interpretations in the application of *Daubert* is noted.

The case of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[1] was decided in 1993 and has since been referenced and relied on in numerous lawsuits. Prior to *Daubert*, the admissibility of expert testimony was decided under an interpretation of Rule 702 of the Federal Rules of Evidence, known as the *Frye* rule.[2] Rule 702 determined qualified expert witnesses based on their knowledge, skill, experience, training, or education. The *Frye* rule examines testimony to determine its general acceptance in the scientific community.

Daubert, however, superseded the *Frye* rule in federal courts and many states. It places the court as a gatekeeper in evaluating the admissibility of testimony. Before the admission of expert testimony, the court must now consider whether the theory has or can be tested; if the theory has been subjected to peer review and publication; if there is a known rate of error; and the general acceptance of the technique in question. Since the *Daubert* decision, plaintiffs and defendants have used two primary arguments when applying *Daubert* to real estate testimony in valuation situations: the use of a methodology and the qualification of an expert witness.

The *Daubert* case and its progeny determine the admissibility of expert scientific and technical evidence in all court cases, including those that pertain to real estate expert witnesses. Thus, to fully understand the *Daubert* case's impact on real estate expert witnesses, it is necessary to examine how the courts have interpreted and applied it.

Four years after the *Daubert* decision, Hoyt and Aalberts published an article that presented four court cases involving *Daubert* and real estate valuation.[3] In a subse-

1. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 1509 U.S. 113, S. Ct. 2786, 25 L. Ed. 2d 469 (1993).
2. *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923); *Federal Rules of Evidence for United States Courts and Magistrates* (St. Paul, MN: West Publishing Co., 1975).
3. Richard W. Hoyt and Robert J. Aalberts, "New Requirements for the Appraisal Expert Witness," *The Appraisal Journal* (October 1997): 342–349. Of the four cases discussed there, one is discussed in this article (*United States v. 14.38 Acres of Land*). The remaining are as follows. In *Joy v. Bell Helicopter Textron, Inc*., 999 F.2d 549 (D.C. Cir. 1993), expert testimony was excluded because of "guesswork, speculation, and conjecture"; in *Frymire-Brinati v. KPMG Peat Marwick*, 2 F.3d 183 (7th Cir. 1993), the expert's discounted cash flow rationale was considered in error and his testimony was excluded; and in *Newport Ltd. v. Sears, Roebuck & Co*., 1995 WL 626188 (E.D. La. 1995), the court found use of multiple regression analysis met the requirements of *Daubert*.

quent article, pertaining to the *Kumho Tire* case, Hoyt and Aalberts outlined a clarification of how judges might assess expert testimony and related those assessments to the appraisal expert witness.[4] This was followed by other publications concerning the real estate appraiser and compliance with *Daubert* as well as compliance with accepted appraisal principles and standards and professional practice.[5]

Research Approach

For this article, court cases in the Westlaw database were researched using the search terms *Daubert* and *appraisal*. These two search terms were selected in order to access as many relevant cases as possible. From all of the cases in the search results, those pertaining to methodology were selected and examined. The methodology cases are the basis of this article.

The research results indicate that, although *Daubert* identifies four factors for the court to consider, these factors have been interpreted differently by various courts. This article summarizes those cases and notes the significance of the different interpretations in the application of *Daubert*. The relevance of how case law may be interpreted has implications for real estate appraisers and other real estate professionals who may be called on to act as expert witnesses. Such knowledge can help expert witnesses to best prepare their objective and scientific testimony for presentation in court.

Daubert and Appraisal Methodology Cases

The *Daubert*-related cases involving the appraisal methodology of the expert witnesses can be broken down according to the intended use of the appraisal assignment: condemnation, tax assessment, or value. The cases and their relevance to real estate appraisers are presented in Table 1. The case summaries that follow provide a narrative explanation of the courts' decisions.

Suna Associates

The *Federal Deposit Insurance Corp. v. Suna Associates, Inc.*[6] case involved 45 condominium units in a converted factory building, known as the Mill River Condominiums. The Federal Deposit Insurance Corporation (FDIC) took over the Connecticut bank that made the loan. Included in the takeover was a mortgage note, with personal guarantees, on 35 of the condominiums.

The property was valued and a deficiency judgment was granted by the district court. Suna, the developer corporation, contended the valuation testimony by the FDIC expert was unreliable, and therefore should be excluded.[7] The FDIC expert valued the 35 condominium units as one property for sale to a single purchaser. He used a blend of the sales comparison and income capitalization approaches to value, which Suna alleged was neither credible nor reliable.

Suna argued that the FDIC expert's opinion testimony "was based on a developmental analysis unknown to appraisal literature, unique to him and on factual assumptions which were without any reasonable foundation."[8] In its review, the court of appeals referred to *Daubert* and the role of the trial judge as a gatekeeper for reliable and relevant evidence. The court further referenced the testing, publication, and rate of error factors in *Daubert*.

However, the court of appeals also pointed out that in *Daubert* the court did not set out a specific checklist. For example, it quotes *Daubert* as follows: "[p]ublication … does not necessarily correlate with reliability," that "in some instances well-grounded but innovative theories will not have been published," and that "[s]some propositions … are too particular, too new, or of too limited interest to be published."[9] Consequently, the court of appeals found that the trial court did not abuse its discretion in finding the testimony of the FDIC expert to be reliable and relevant.

4. Richard W. Hoyt and Robert J. Aalberts, "Implications of the *Kumho Tire* Case for Appraisal Expert Witnesses," *The Appraisal Journal* (January 2001): 11–18.
5. Several of these publications are identified in the Additional Reading section of this article.
6. *Federal Deposit Insurance Corp. v. Suna Associates, Inc.*, 80 F.3d 681 (2nd Cir. 1996).
7. It is to be noted that a deficiency judgment is based on the value of a property as of a specific date and the amount claimed by the mortgagee. That is, given a stated claim, the lower the value of the property the greater the amount of the deficiency judgment.
8. *Suna Associates*, 687.
9. Ibid.

Table 1 Summary of Cases Involving *Daubert* and Expert Witness Methodology

Case	State (Year)	Appraisal Assignment	Court	Key Factors
Federal Deposit Insurance Corp. v. Suna Associates, Inc.	Connecticut (1996)	Value	U.S. Court of Appeals, Second Circuit	Analysis
United States v. 14.38 Acres of Land	Mississippi (1996)	Condemnation	U.S. Court of Appeals, Fifth Circuit	Analysis
Texaco Producing, Inc. v. County of Kern	California (1998)	Tax Assessment	CA Court of Appeal, Fifth District	Ratios and capitalization rates
Cayuga Indian Nation v. Pataki	New York (2000)	Value	U.S. District Court	Data and analysis
Exxon Pipeline Co. v. Hill	Louisiana (2000)	Condemnation	LA Court of Appeal First Circuit	Data
Rogers v. Horseshoe Entertainment	Louisiana (2000)	Value	LA Court of Appeal Second Circuit	Data and USPAP
Guadalupe-Blanco River Auth. v. Kraft	Texas (2001)	Condemnation	TX Court of Appeals	Data and analysis
Wilhite v. Rockwell International Corp.	Kentucky (2002)	Value	Supreme Court of Kentucky	Analysis
Mississippi Transportation Commission v. McLemore	Mississippi (2004)	Condemnation	Supreme Court of Mississippi	Analysis
Elliott v. Town of Stonington	Connecticut (2005)	Tax Assessment	CT Superior Court	Data and analysis
Verizon Northwest, Inc. v. Riverside Development Co.	Idaho (2006)	Condemnation	ID District Court, First Judicial District	Analysis
Tunica County v. Matthews	Mississippi (2006)	Condemnation	Supreme Court of Mississippi	Data and analysis
Lambrinos v. ExxonMobil Corp.	New York (2006)	Condemnation	U.S. District Court	Data and analysis

Note: All appraisers in these cases were considered to be qualified to act as an expert witness. An attempt to disqualify two experts in the *Cayuga Indian Nation* case was based on their quantitative skills; however, the court rejected the attempt by indicating that an interdisciplinary approach is often required. Also, in *Wilhite* the appraiser was considered qualified even though he had no experience in appraising contaminated properties because he had educated himself, conducted research, and conferred with other appraisers.

14.38 Acres of Land

In 1995, the U.S. District Court in *United States v. 14.38 Acres of Land*,[10] excluded from evidence the testimony of the defendant's expert witnesses, a real estate appraiser and a civil engineer. The defendant, Joseph C. Coker III, obtained compensation for an easement of 14.38 acres of farmland taken for construction of a new levee by the U.S. government. However, he sought additional compensation for the remaining farmland on the unprotected flood side of the levee, contending the remaining portion suffered a loss in value because it was subject to potential flooding.

The civil engineer's opinion was that construction of the new levee would result in some flooding to the remainder, but he did not know the extent of the problem. The real estate appraiser estimated a diminution in value of approximately 50% after the taking. The appraiser could not find any comparable sales or historical data to use in estimating a loss of value; however, he did discuss the situation with other real estate appraisers and brokers. Their conclusion was that there might be a perception among purchasers that land on the unprotected side of the levee is less desirable because of the potential of flooding.

Using *Daubert*, the court considered the testimony to be speculative and would not assist in determining just compensation. It stated, "[i]f the expert's opinion is not soundly based and is not relevant, then the opinion must be excluded."[11] Furthermore,

10. *United States v. 14.38 Acres of Land*, 884 F. Supp. 224 (N.D. Miss. 1995).
11. Ibid., 227.

"[t]heir opinions (and those which form the basis thereof) are based on events 'which, while within the realm of possibility, are not fairly shown to be reasonably probable.'"[12] Consequently, the testimonies of the real estate appraiser and of the civil engineer were excluded from evidence.

Upon appeal, the appellate court in *14.38 Acres of Land*,[13] indicated that "the experts' inability to predict the extent of flooding … does not render their testimony entirely speculative and therefore unreliable for purposes of admissibility."[14] The civil engineer's opinion was based on his review of maps, photographs, and physical inspection of the property. The real estate appraiser's valuation was predicated on the potential of flooding from the civil engineer's opinion, property inspection, discussions with real estate peers, and his experience as a real estate appraiser.

The court concluded, "[T]he perceived flaws in the testimony of Coker's experts are matters properly to be tested in the crucible of adversarial proceedings; they are not the basis for truncating that process."[15] The court of appeals vacated the district court judgment and remanded it for further proceedings.

Texaco Producing

In a case from California, *Texaco Producing, Inc., et al. v. County of Kern*,[16] Texaco appealed a judgment concerning the assessment of its oil and gas property. Texaco contended that the county assessor used two new ratios, capital and initial rate, when valuing Texaco's oil and gas properties. The assessor's appraiser had used the two ratios to help analyze comparable sales.

The capital ratio divides the purchase price into the sum of the purchase price plus the present value of projected capital costs. This ratio indicates the development risk of the comparable sale. The initial rate ratio divides the current rate of oil production by the purchaser's projection of the maximum rate of production. It is designed to measure risk in the purchaser's projection of oil production.

Texaco argued that these ratios were new scientific techniques and therefore were not generally accepted within the appraisal community. Since the ratios had not met the general acceptance factor in *Daubert*, their use was inappropriate and therefore should have been excluded from testimony. Therefore, Texaco contended, the appeals valuation hearing of the Kern County Assessment Appeals Board (Board) should be inapplicable due to this error.

The court of appeals noted that it did not use the newly created ratios to value the property, but instead used the ratios to show the differences between comparable sales. The court indicated that the ratios assisted in quantifying risk factors pertaining to projected cash flows so as to allow specific adjustments to those cash flows. As such, the court found that "the ratios did not constitute 'scientific evidence.' Therefore, *Daubert* is inapplicable,"[17] and the ratios were admissible.

The court further noted that Texaco's expert witness used a capital asset pricing model (CAPM) methodology to calculate market-derived band of investment discount rates that were not derived using the State Board of Equalization Rules, which set forth various valuation approaches to be used by county assessors. In response, one of the assessor's expert witnesses also used a band of investment method that included CAPM methodology.

In this case, however, the county's "discount rate calculation was consistent with the actual market rates of return of oil and gas companies,"[18] whereas the Board found Texaco's calculations were unreliable. The Board noted that CAPM was developed for short-term stock analysis and has not been reliable in valuing long-term property investments. Therefore, the court indicated that arguments about the use of CAPM were irrelevant, and the market-derived method was the preferred approach to discount rate derivation.

Cayuga Indian Nation

In the case of the *Cayuga Indian Nation v. Pataki*,[19] the Cayuga Indian Nation (Cayuga) sought compensation from the state for land that had been out of its possession for 204 years. The issue at hand involved the valuation methodologies used by Cayuga's expert witness and by two expert witnesses for the federal

12. Ibid.
13. *United States v. 14.38 Acres of Land*, 80 F.3d 1074 (5th Cir. 1996).
14. Ibid., 1078.
15. Ibid., 1079.
16. *Texaco Producing, Inc. v. County of Kern*, 66 Cal. App. 4th 1029, 78 Cal. Rptr. 2d 433 (Ct. App. 5th Dist. 1998).
17. Ibid., 1050.
18. Ibid., 1053.
19. *Cayuga Indian Nation v. Pataki*, 83 F. Supp. 2d 318 (N.D.N.Y. 2000).

and state governments. Although all three appraisers were considered to be acceptable in terms of specialized knowledge in real estate appraisal, a question arose concerning the qualifications of the two government appraisers to testify.

In essence, the argument against the two appraisers was that they did not have proper quantitative skills and therefore they were not qualified to testify about quantitative areas in valuation methodology. However, the court found that both appraisers could rely on quantitative disciplines as part of their appraisal methodologies and their qualifications to testify were not affected.

The court recognized that with the complex world "many problems cannot be resolved without taking an interdisciplinary approach."[20] The court concluded that because of the novel valuation situation in this case, none of the reliability and relevancy factors of *Daubert* were helpful. However, the court stated that *Daubert* still served a useful purpose in ascertaining that expert testimony in the courtroom is comparable to the activities of expert practitioners in relevant fields.

The methodology used by Cayuga's expert witness was the generally recognized sales comparison approach. Yet, the court found that application of the approach was suspect. The court did not believe that the expert witness's testimony satisfied the "reliability and relevancy considerations identified in *Daubert*."[21] The selection of the witness's comparable sales was questioned.

The expert witness for Cayuga subjectively selected four sales for each year and, after typically discarding the high and low sales, calculated an average price per acre for each year. The average price per acre per year was then multiplied by the number of acres in the claim to arrive at a value per year. The expert witness then computed the value for use and occupancy at 10% of the annual value.

The court was not able to determine with any degree of specificity how Cayuga's expert witness selected his comparable sales, thereby limiting the reliability of the witness's testimony. Furthermore, although his data analysis used a grid system, which recognized the possibility of adjustments to the comparable sale prices, he made no adjustments. Also, his sales data was not always accurately reported.

The court stated that the expert for Cayuga also used a discount rate that was based on speculation and had no reliable basis, and even if his appraisal report was reliable, the portion pertaining to the discount rate should have been excluded. In sum, although Cayuga's expert was qualified as an appraiser, his testimony was not reliable, was "outside the range where experts might reasonably differ,"[22] and so did not stand up to *Daubert* standards.

As for the two government appraisers, the court observed that both appraisers used some subjectivity in their sales analyses, particularly in estimating value for pre-1900 sales, but they both used reliable, objective data to extrapolate their conclusions. Both appraisers testified that the valuation methodologies used in the case were not used in previous situations. It was found that the methodologies were reliable and relevant and that they did not have to be perfect, just good.

The court indicated that even if there were flaws in the two government appraisers' methodologies, their opinions were admissible because their testimony was reliable and relevant. Since the court determined that their opinions passed the requirements of *Daubert*, it was left up to "the jury to decide which, if either, expert witnesses' testimony it [chooses] to accept."[23]

Exxon Pipeline

The *Exxon Pipeline Company v. Hill*[24] case in Louisiana involved valuation methodology used in an eminent domain situation. Exxon was seeking to add an additional pipeline to a preexisting right-of-way. Exxon's expert witness contended the highest and best use of the land was agriculture on an interim basis with industrial being the long-term highest and best use. Exxon's appraiser then used comparable land sales to derive a unit sale price per acre and subsequently prorated that to a square footage amount, which was then depreciated by 80% for each subsequent servitude (easement), an accepted deduction.

Hill's expert witness used a unit value of price paid per rod of pipeline (one rod equals 16.5 linear feet). The

20. Ibid., 321.
21. Ibid., 323.
22. Ibid., 326.
23. Ibid., 328.
24. *Exxon Pipeline Co. v. Hill*, 763 So. 2d 144 (La. App. 1st Cir. 2000).

rod is a standard measurement in pipeline right-of-way negotiations, in contrast to area unit measurements, such as price per acre or price per square foot.

The trial court found the approach of Hill's expert witness to be unreliable and inadmissible because it failed on all four tests of *Daubert*. Hill's expert admitted he used an evolving technology, he had not published his technique, his approach had not been used in previous court testimony, nor had it been subjected to peer review. Hill's expert, however, explained that his methodology was in conformity with the Uniform Standards of Professional Appraisal Practice (USPAP) and was used in the market approach.

The appeals court found that at the time of the trial court's inadmissible ruling there was insufficient information concerning these kinds of reliability issues. The *Kumho Tire Company*[25] decision thus allows more flexible standards. Under *Kumho*, the specialized knowledge and experience of Hill's expert witness were used as evidence that his opinion was reliable.

Hill's appraiser had over 35 years of appraisal experience, had testified in over 200 cases, had a background in utility rights-of-way, and had appraised pipeline servitudes. In 1995, he appraised an additional servitude over one existing since 1936 on the Hill's property. At that time, he questioned the logic of the typical unit price per square acre/foot method and formulated the theory he currently uses on the price per rod. His premise still used the market approach, but was consistent with right-of-way sales for pipeline acquisitions.

The appeals court concluded that measurement by the rod was well accepted in the pipeline industry as a measure and value determination methodology. Therefore, the court allowed Hill's expert witness testimony and based the award on his valuation.

Rogers

In the *Rogers v. Horseshoe Entertainment*[26] case, the court of appeals held that the district court erred in admitting an affidavit of value from the plaintiff's (Rogers's) real estate appraiser. Horseshoe Entertainment contended that the affidavit was inadmissible because it represented solely the opinion of the plaintiff's appraiser and was not based on the standards set forth in *Daubert*.

Rogers's appraiser owned one of Louisiana's largest appraisal services, had been in business over 20 years, and claimed that his appraisal conformed with USPAP. In conducting the valuation, the appraiser inspected the property, reviewed documents in the transaction, and examined the public records of the appropriate parish (county). The appeals court found, however, that he did not comply with USPAP because he did not outline his specific appraisal methodology "so that it could be subjected to peer review or duplication so as to ensure against error."[27]

Furthermore, the court found that the appraiser for Rogers did not comply with USPAP Rule 4-4 [sic][28] since he did not delineate the market area, analyze supply and demand for the market area, and did not forecast the effect of the proposed development. In fact, it stated that his value opinion "appears to have required no specific expertise or specialized skills other than the use of a calculator. As such, the appraisal represents a 'subjective belief or unsupported speculation' which is inadmissible under *Daubert*."[29] The case was remanded only for determination of value and any money due the plaintiff.

Kraft

In a condemnation case in Texas, *Guadalupe-Blanco River Authority v. Kraft*,[30] the appellate court ruled on the value of real estate acquired for a pipeline easement, 30-feet wide by 4,600-feet long, or 3.2 acres out of a tract of 272 acres. The expert for Kraft (the property owner) valued the easement in the amount of $64,400 whereas the condemning authority offered a damage award of $7,630. The Guadalupe-Blanco River Authority (Authority) contended that the owner's expert witness used an unreliable methodology, therefore, the trial court should not have admitted the testimony, and consequently there was no evidence of $64,400 in damages.

Kraft's expert witness explained the three approaches to value and then testified that he used the sales comparison approach. Kraft's appraiser

25. *Kumho Tire Company, Ltd. v. Carmichael*, 526 U.S. at 147, 119 S. Ct. at 1174 (1999).
26. *Rogers v. Horseshoe Entertainment*, 766 So. 2d 595 (La. App. 2d Cir. 2000).
27. Ibid., 606.
28. The reference used from Westlaw referred to "Uniform Standards of Professional Appraisal Practice Rule 4-4," however there is no Rule 4-4 in the Standards. It appears that the reference should actually be Standards Rule 1-3 and/or 1-4(f).
29. *Rogers*, 606.
30. *Guadalupe-Blanco River Auth. v. Kraft*, 39 S.W.3d 264 (Ct. App. Austin. 2001).

did not have comparable sales of narrow strips of land, but used two small-acreage sales with what he considered typical utility. One sale was 418 feet deep with 208 feet of frontage on a state highway, comprising two acres. The second sale was 144 feet by 302 feet, or 1.08 acres.

The Authority contended that testimony valuing a 30-foot by 4,600-foot site as a hypothetical rectangular tract is not recognized in the appraisal field. Furthermore, the value was "based on an assumption materially different from the undisputed facts."[31] The expert witness from the Authority "stated that in his opinion, an appraiser should 'look at the whole property; you look at the 272 acres, you take a portion or pro rata part of that, and that's the way you go about valuing the property.'"[32]

The Authority's expert contended that the easement was not a self-sufficient economic unit independent from the remaining property and, therefore, valued it as part of the whole, using the sale of large tracts. The question for the court was whether the method used by Kraft's appraiser, which used small-acreage tracts, could be a reliable valuation method and be admitted into testimony.

The court followed the reasoning that if one party presented evidence of market value then the other party should be able to present evidence of their competing theory. The court also recognized that expert testimony has special significance in eminent domain situations because the issue is one of property value "not abstract questions as to what may or may not be considered by the jury in assessing damages."[33]

Consequently, the court concluded that the use of small-acreage tracts was a reliable methodology and discrepancies in the shapes and sizes of tracts falls on the weight of the evidence and not admissibility. Therefore, the court affirmed the judgment of the trial court.

Wilhite

In a Kentucky Supreme Court case, *Wilhite v. Rockwell International Corporation*,[34] an exclusion of testimony ruling by the Court of Appeals of Kentucky[35] was upheld. Rockwell had discharged polychlorinated biphenyls (PCBs) into streams that flowed past farms, thereby contaminating adjoining farm properties. Wilhite's expert witness testified at the original jury trial that the impact of the contamination exceeded the value of the properties, and, therefore the value of the property after contamination was worthless. The trial court awarded over $7.5 million in compensatory damages and $210 million in punitive damages.

Rockwell appealed and the appellate court found that the testimony of Wilhite's expert witness did not satisfy the requirements of *Daubert* and should have been excluded. All courts involved agreed that Wilhite's expert was qualified as an appraiser to testify. Although Wilhite's expert witness had no experience in appraising contaminated properties, he educated himself by attendance at seminars, conducted research, and conferred with other appraisers. He then developed an empirical model to use for his valuation estimate, rather than using one of the commonly accepted appraisal valuation models.[36]

The opinion of Wilhite's expert was that "a reasonable person would not farm or otherwise use PCB contaminated property until it has been thoroughly tested and, if necessary, remediated."[37] However, Wilhite's expert "admitted that this was merely his subjective opinion and pointed to no scientific evidence to support his view."[38] The appellate court stated that Wilhite's expert witness's empirical model, "constructed for this case and untested in any other forum, finds no support in the literature. It has not been subjected to peer review … [t]here is no scientific basis for the assumption upon which it rests."[39]

In referring to Wilhite's expert, the Kentucky Supreme Court stated the "testimony was not insufficient,

31. Ibid., 267.
32. Ibid.
33. Ibid., 271.
34. *Wilhite v. Rockwell International Corp.*, 83 S.W.3d 516 (Sup. Ct. Ky. 2002).
35. *Rockwell International Corp. v. Wilhite*, 2000 WL 95282 (Ky. App. Jan. 14, 2000).
36. The commonly accepted appraisal models are the sales comparison approach, the cost approach, and the income capitalization approach. See Appraisal Institute, *The Appraisal of Real Estate*, 12th ed. (Chicago: Appraisal Institute, 2001), 62–63.
37. *Wilhite*, 519.
38. Ibid.
39. Ibid., 520.
40. Ibid., 522.

it was inadmissible. As it was persuasive evidence supporting the verdict and final judgment, the Court of Appeals properly reversed and we affirm that portion of the decision."[40] The case was then remanded to the previous courts for matters other than valuation.

McLemore

In an interstate highway condemnation case, *Mississippi Transportation Commission v. McLemore*,[41] the Supreme Court of Mississippi held that testimony by the defendant's expert was inadmissible and remanded the case back to the trial court for a new trial. The McLemores owned 1,980 acres of land, of which 174 acres was required for construction of an interstate highway. Negotiations for acquisition failed and the trial court awarded the McLemores $1,370,000 for compensation and damages. The Mississippi Transportation Commission appealed based on *Daubert*, arguing that the court has a gatekeeping responsibility in requiring that the admissibility of expert testimony focus on relevance and reliability.

The focus of the appeal concerned reference by the McLemores' expert witness to a 750-foot line of damage method. The expert's 750-foot method concluded that there was a buffer zone between 500 feet and 1,000 feet from the proposed interstate right-of-way where construction of the interstate highway would not affect the property's desirability. The appraiser arbitrarily split the buffer zone in half to arrive at the 750-foot distance. He then determined that the buffer zone contained 317 acres, an area that suffered from greater damage than the remainder of the property.

In testimony, the McLemores' expert witness stated, "This is what I consider breaking new ground in that there is a situation here where I think there is no question that the after value is affected by this highway."[42] He further commented that the use of existing methods of valuation were inapplicable because the same situation(s) did not exist.

Upon cross-examination, the expert testified that the method he used was not printed in any textbook, and was not taught in seminars or in any courses he had completed to obtain his appraiser's licenses. He also testified that the 750-foot line method was unique to the McLemores' appraisal and was not a "principle of any kind."[43]

The court found the testimony by the McLemores' expert witness to be speculative and inadmissible under the requirements of *Daubert*, and the testimony should therefore have been excluded. The court pointed out that the expert's 750-foot method had not and could not be tested, because the 750-foot boundary line was not based on any principle in the appraisal field; the methodology had not been peer reviewed; there was a high potential for error with the method; there were no standards controlling the 750-foot line method; and since the method was unique to the McLemores' appraisal, the appraisal community had not accepted the theory and therefore it was not generally accepted in the appraisal field.

Elliott

In *Elliott v. Town of Stonington*,[44] the plaintiffs appealed a residential property tax assessment of $1,263,800 arguing that the fair market value was instead $1,100,000. Elliott's expert witness analyzed three comparable sales that occurred within one year of the valuation date. The sales were similar in size, location, and physical features as the subject property. Elliott's expert witness used the Uniform Residential Appraisal Report form to make adjustments to each comparable sale.

The expert witness for Stonington looked at 14 sales ranging from three years prior to the date of valuation to two years after the valuation date. Stonington's expert testified that he ignored one sale within six months of the valuation date because it was a two-family property; however, Elliott's expert witness, who also used the sale, indicated in his testimony that it sold as a single-family home.

Furthermore, Stonington's expert used another comparable that was a two-family home that was sold as a two-family home. Stonington's expert did not use another comparable sale within one year of the valuation date, thereby leaving only one sale within one year of the valuation. The remaining sales used were one year old or more after the valuation date.

After discounting sales that he felt were not comparable, Stonington's expert had eight sales remaining

41. *Mississippi Transportation Comm'n. v. McLemore*, 863 So. 2d 31 (Sup. Ct. Miss. 2004).
42. Ibid., 41.
43. Ibid.
44. *Elliott v. Town of Stonington*, 2005 WL 1153621 (Conn. Super. Ct. Apr. 15, 2005).

for analysis. For his adjustments, he used a methodology that was not accepted in the appraisal industry, namely making adjustments to the comparable sale prices in plus or minus 5% increments. Furthermore, his analysis showed inconsistencies in many of the categories in which he made adjustments.

The plaintiff cited *Daubert* as grounds to exclude the testimony of the expert witness for Stonington. Stonington's expert witness argued that he used a valid appraisal method and "the court should look to Connecticut law and Connecticut rules of evidence and not federal case law and federal rules of evidence."[45]

The court found that the appraisal of Elliott's expert witness was superior to that of Stonington's expert and that his methodology was easily understood and a method utilized by appraisers. Also, the comparables were closest in time of sale to the date of valuation and had similar location and physical attributes. The court stated that Stonington's "appraisal appears to be results driven by employing a suspect methodology that was poorly explained, inconsistent and not standard in the appraisal industry."[46]

The court noted that in previous cases, appraisals by Stonington's expert witness have been rejected in favor of those prepared by the expert witness used by Elliott. The court directed the Town of Stonington to adjust the assessment in favor of the plaintiff.

Verizon Northwest

Appraisal methodology was questioned in a condemnation case, *Verizon Northwest, Inc. v. Riverside Development Co.*,[47] where the defendant argued that the appraisal report by Verizon's appraiser did not meet the *Daubert* test and should therefore be excluded. The property was an easement acquisition in Idaho and because the parties could not reach an agreement, a lawsuit was brought for damages.

Riverside contended the appraisal report by Verizon's expert witness was deficient because it did not use the before and after rule, which "is universally *recommended* for a partial taking easement acquisition"[48] and he did not include severance damages. Verizon's expert used a highest and best use analysis and the sales comparison approach to estimate a value per square foot for the part taken.

Idaho law allows compensation for the portion taken, plus damages to the remainder, if any. The court said it could not find any Idaho case law indicating that the larger parcel always must be appraised. Furthermore, although industry standards may recommend the before and after rule, the use of a different approach does not make the appraisal "deficient or junk science."[49] Finally, the court said that even though Verizon's appraiser did not report any severance damages, the lack thereof did not make the methodology deficient, and he remained qualified to testify as an expert.

Matthews

In a Mississippi airport condemnation case, *Tunica County v. Matthews*,[50] the county was expanding an existing airport and contested a value of $4,500 per acre for the Matthews's land, as determined in the Special Court of Eminent Domain. Matthews's expert witness valued the land as a highest and best use of commercial or industrial property with a value of $4,500 per acre. The county's expert, however, considered the highest and best use as limited residential or institutional with an agricultural interim use with a value of $2,000 per acre.

Both experts agreed that the proper methodology to value the land was the comparable land sales approach. However, Tunica filed a motion to exclude the testimony of the expert for Matthews. This motion was granted, in part, because "the trial court found the use of commercial sales as comparables and the reliance on a highest and best use of commercial and industrial to be unreliable."[51] After reanalysis, the value opinion of Matthews's expert remained unchanged, at $4,500 per acre.

In his new analysis, the expert witness for Matthews claimed to use a different approach. In the new valuation, out of the nine sales previously used, the five highest-valued comparable sales were excluded, which ranged from $26,000 to $100,000 per acre. The expert retained the remaining four sales, which

45. Ibid., *3.
46. Ibid., *4.
47. *Verizon Northwest, Inc. v. Riverside Development Co.*, 2006 WL 620360 (1st Dist. Ct. Id. Mar. 1, 2006).
48. Ibid., *2.
49. Ibid., *3
50. *Tunica County v. Matthews*, 926 So. 2d 209 (Sup. Ct. Miss. 2006).
51. Ibid., 215.

> "Expert witness appraisers appear to have some latitude in using new methodologies."

ranged from $5,000 to $18,500 per acre. The appraiser also based part of his opinion on a land-use study of the airport expansion.

Because the appraised value remained unchanged, Tunica sought to exclude Matthews's expert witness testimony because it offended basic scientific principles and was based on improper methodology. Matthews argued that "appraisal is much more complicated than a simple mathematical calculation, but instead requires analysis of all applicable information and data."[52] Furthermore, the land value of $4,500 per acre was lower than all of the expert witness's comparable sales both before and after the court order, and lower than six of the nine comparable sales used by the county.

The Supreme Court of Mississippi found that the correct valuation of the land was a jury question and the trial judge was correct in admitting the testimony of the expert witness for Matthews. The expert's testimony "was based upon sufficient facts or data, was the product of reliable principles and methods and was based on principles and methods reliably applied to the facts of the case"[53] and therefore met the *Daubert* test.

Lambrinos

In the contamination case, *Lambrinos v. ExxonMobil Corporation*,[54] the plaintiffs brought suit concerning the contamination of their property by benzene and gasoline releases. In a motion for summary judgment, ExxonMobil was found liable. The current case involved the amount of damages to be awarded to clean up the plaintiffs' property.

Both parties filed *Daubert* motions questioning the admissibility of the testimony of each other's expert witness. Of interest to real estate appraisers was the intended testimony of Lambrinos's expert concerning the value of the property, land, and improvements on the property.

Lambrinos's concern, in the event the property was not restored to its prespill condition, was the value of the property without environmental contamination. If the property could not be restored to its prespill condition, then the damages would include the loss in value plus the cost of repairs. If this were the case, the court could then consider evidence concerning a stigma on the property value resulting from the oil spill.

The expert testimony Lambrinos intended to submit was an appraisal report dated October 18, 1999. ExxonMobil argued that under *Daubert* the testimony and appraisal report of Lambrinos's expert witness must be excluded because it was not relevant. The court agreed and excluded presentation of the appraisal report because it "is simply too outdated to be probative as to the value of the property seven years later, in 2006."[55]

Conclusion

In two cases (*Texaco Producing* and *Exxon Pipeline*), ratios not previously used in appraisals were considered acceptable. In the *Texaco* case the two ratios were not considered to be scientific evidence, but instead were used to show differences in comparable sales. In the *Exxon* case the ratio was typically used in the pipeline industry for valuation purposes.

In *Suna Associates*, the court found new methodology was acceptable because it was reliable and relevant, even though it did not specifically meet the four tests of *Daubert*.

In *14.38 Acres of Land*, *Cayuga Indian Nation*, *Rogers, Wilhite,* and *McLemore*, the courts ruled that subjective data and arbitrary data were not admissible. However, the *Cayuga* court indicated that some subjectivity was acceptable if objective data was used to extrapolate conclusions. It was up to the jury to decide which testimony to accept.

Similarly, in *Kraft*, *Verizon Northwest*, and *Matthews*, the courts said that the correct value was left to the jury when testimony was based on reliable methods and sufficient data. The court in *Elliott* emphasized the admissibility of evidence when the methodology was understood and used by appraisers versus methodology that was poorly explained, inconsistent, and not typically used by appraisers.

52. Ibid., 214.
53. Ibid., 216.
54. *Lambrinos v. ExxonMobil Corp.*, 2006 WL 2238977 (N.D.N.Y. Aug. 4, 2006).
55. Ibid., *7.

Finally, the courts have found that data must be current to be relevant. This is standard appraisal practice and was of importance in *Lambrinos* and *Elliott*.

A major lesson learned from the legal cases presented in this article is that expert witness appraisers appear to have some latitude in using new methodologies when preparing their appraisal reports. In fact, the methodologies do not have to strictly comply with the four *Daubert* tests (testing, peer review, error rate, and acceptance). Furthermore, these cases indicate that the methodology and data must be reasonable, reliable, and easily understood. The data must comply with generally accepted appraisal practices to hurdle the *Daubert* gatekeeper function and remain as expert evidence.

Although mentioned in only *Rogers*, one can conclude that compliance with the Uniform Standards of Professional Appraisal Practice and generally accepted appraisal practices should have a positive effect on the court gatekeeper in accepting the methodology used by the appraisal expert witness.

Of interest to real estate appraisers is the discovery that the courts are taking disparate directions, and currently there does not appear to be any visible pattern among the courts.

Another issue pertaining to an appraiser expert witness, other than the use of methodology, involves the qualifications of that expert to present testimony. This is an area of future research and the authors intend to address the subject of appraisal expert witness qualification under *Daubert* in a subsequent paper.

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The authors wish to thank the Lied Institute of Real Estate Studies for its support of real estate education and research at the University of Nevada, Las Vegas.

Additional Reading

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