



## **Damages Experts in Construction Defect Cases – You Need Two**

By Ryan M. McLane

Some confusion has arisen in construction defect cases as to the proper measure of damages and the evidence needed to prove them. The two competing theories for measure of damages are: 1) the cost of repair or restoration; and 2) the diminution in value of the property resulting from the defect. The Kentucky Courts answer the question by stating that the measure of damages is the cost of remedying the defect *as long as it is reasonable to do so* or the diminution in the value of the building by reason of the defect, in the alternative.

Simply put, the cost of repair is “unreasonable” if it exceeds the loss in value to the property caused by the defect. The methodology for calculating those damages implicates two types of expert witness testimony: 1) an expert for determining the cost of repair; and 2) an expert for determining the diminution in value to the property. These experts are typically a construction professional and a property appraiser, respectively.

Despite this framework, litigants often attempt to get by with only one expert or the other. Although this approach economizes expert witness fees, it risks an adverse verdict on damages. The Kentucky Supreme Court has moderately reduced that risk by holding that evidence of the cost of repair creates a reasonable inference that the market value of the property has been diminished by that precise amount. However, this single-expert tactic still risks a jury choosing a defense expert’s opinion of the diminution of property value (rest assured, that number will be substantially less than the cost of repair) over the plaintiff’s evidence on cost of repair. Furthermore, the approved wording of jury instructions in these cases invites the jury to do just that.

For these reasons, I recommend that plaintiffs in construction defect cases retain experts for both cost of repair and diminution in market value. Although a plaintiff can survive directed verdict by offering expert opinion testimony on cost of repair only, this tactic allows a jury to choose the defense expert appraiser’s smaller figure for diminution of value. The present conservative economic environment heightens the risk of this happening. Of course, the companion advice to defendants in construction defect cases is to retain an expert for diminution of value.