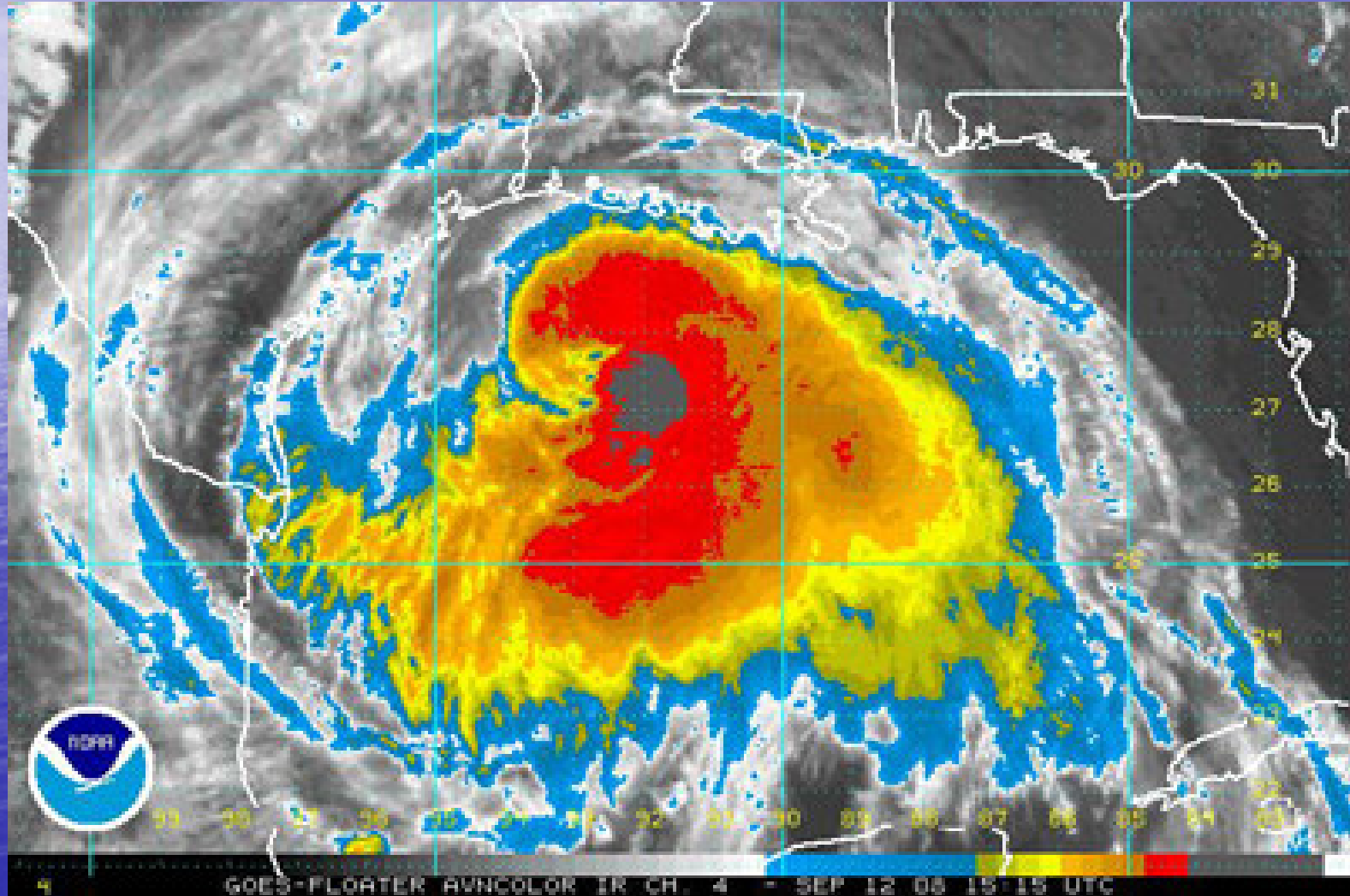


# DEFENDING HURRICANE IKE CLAIMS

R. Brent Cooper  
Elliott T. Cooper  
T. Micah Dortch  
Dana Harbin  
JoAnna Tollenaere

# Hurricane Ike and It's Impact on the Insurance Industry



- HURRICANE IKE WAS THE THIRD MOST DESTRUCTIVE HURRICANE TO MAKE LANDFALL IN THE US.
- SEPT 1, 2008 IT WAS A TROPICAL STORM WEST OF THE CAPE VERDE ISLANDS
- SEPT 5, 2008 IT WAS A CATEGORY 4 HURRICANE

- IKE HAD THE HIGHEST IKE (INTEGRATED KINETIC ENERGY) OF ANY ATLANTIC STORM IN HISTORY.
- INTEGRATED KINETIC ENERGY IS A MEASURE OF STORM SURGE DESTRUCTIVE POTENTIAL
- ON A SCALE OF 1 TO 6, IKE REACHED 5.6

- SEPT 13, 2008 IKE MADE U.S. LANDFALL AT GALVESTON TEXAS
- IT WAS A CATEGORY 2 HURRICANE WITH WINDS OF UP TO 110 MPH
- IKE HIT THE COMMUNITIES ALONG THE UPPER TEXAS GULF COAST.
- THIRTY FOUR COUNTIES WERE DECLARED DISASTER AREAS

- IN THE FIVE COUNTIES HARDEST HIT (ORANGE, HARRIS, GALVESTON, CHAMBERS, AND JEFFERSON), THE TOTAL REAL PROPERTY LOSSES ARE ESTIMATED TO BE OVER \$10 Billion
- HURRICANE IKE IS THE MOST COSTLY AND DESTRUCTIVE STORM TO HIT TEXAS

- IKE IS ESTIMATED TO BE THE THIRD COSTLIEST STORM IN U.S. HISTORY BEHIND HURRICANES ANDREW (1992) AND KATRINA (2005)
- THE PRIMARY FORMS OF DAMAGE WERE TYPICAL OF HURRICANES: WIND, FLOOD, AND SURGE
- IN GALVESTON BAY, ON THE EAST SIDE, IT IS THOUGHT THAT THE SURGE REACHED BETWEEN 15 AND 20 FEET

- As of today, there have been 3,927 Hurricane Ike claims filed this year in Gulf Coast counties
- Most, if not all, will sue on coverage and for extra-contractual damages
  - Removal
  - Appraisal
  - Coverage
  - Litigation
  - Extra-contractual



A faint, light blue background image of a pair of scales of justice, positioned on the right side of the slide. The scales are slightly out of focus and serve as a subtle backdrop for the text.

# REMOVAL & FRAUDULENT JOINDER

Elliott T. Cooper

[elliott.cooper@cooperscully.com](mailto:elliott.cooper@cooperscully.com)  
214-712-9552

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900 Jackson Street, Suite 100  
Dallas, Texas 75202

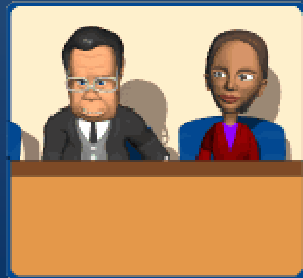
**YOU HAVE BEEN SUED**

**NOW WHAT DO YOU DO?**



# ANALYZE THE VENUE

1. JUDGE
2. JURY
3. PLAINTIFF'S LAWYER
4. **THE COURT**

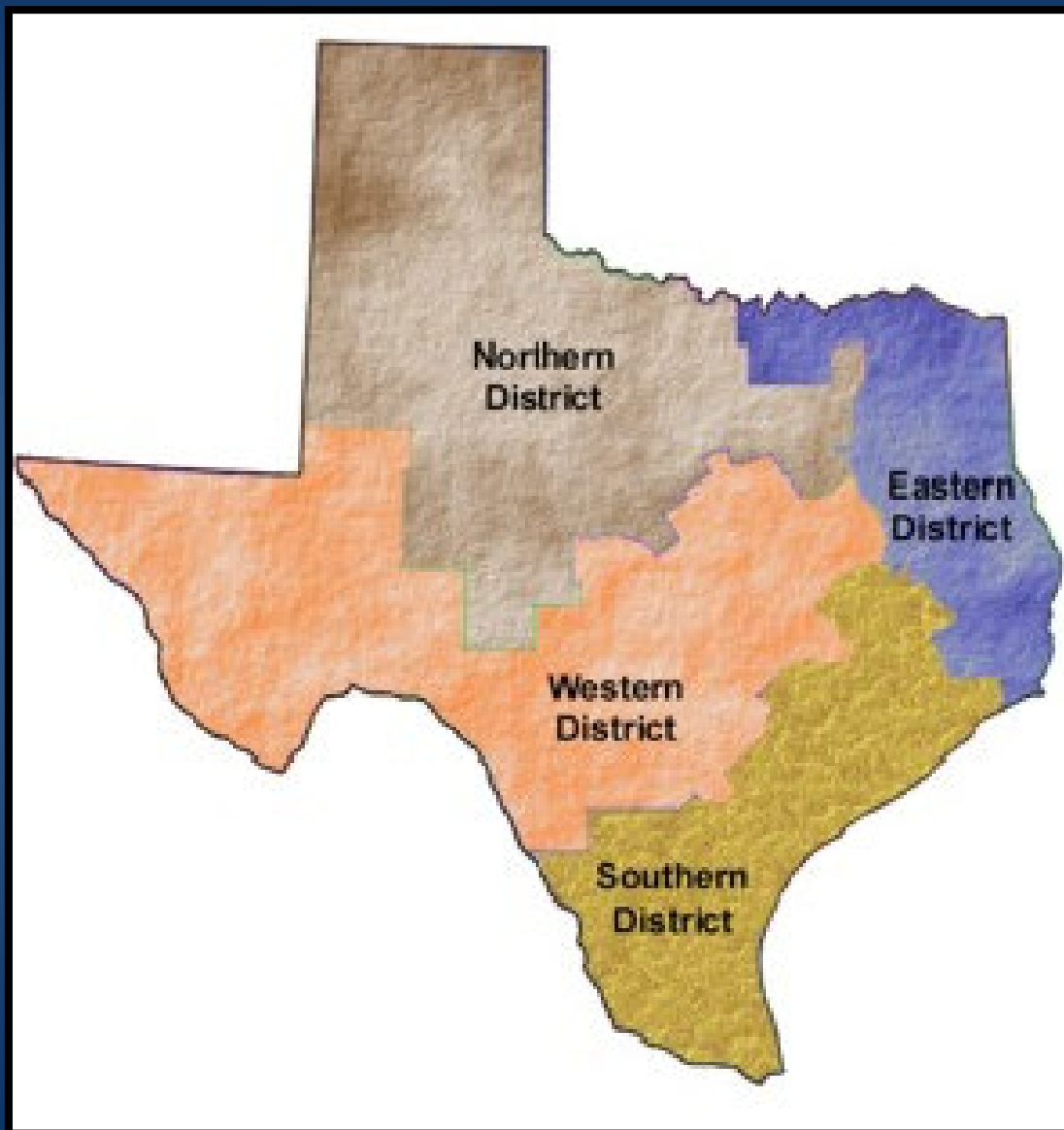


# **FEDERAL vs. STATE COURT**

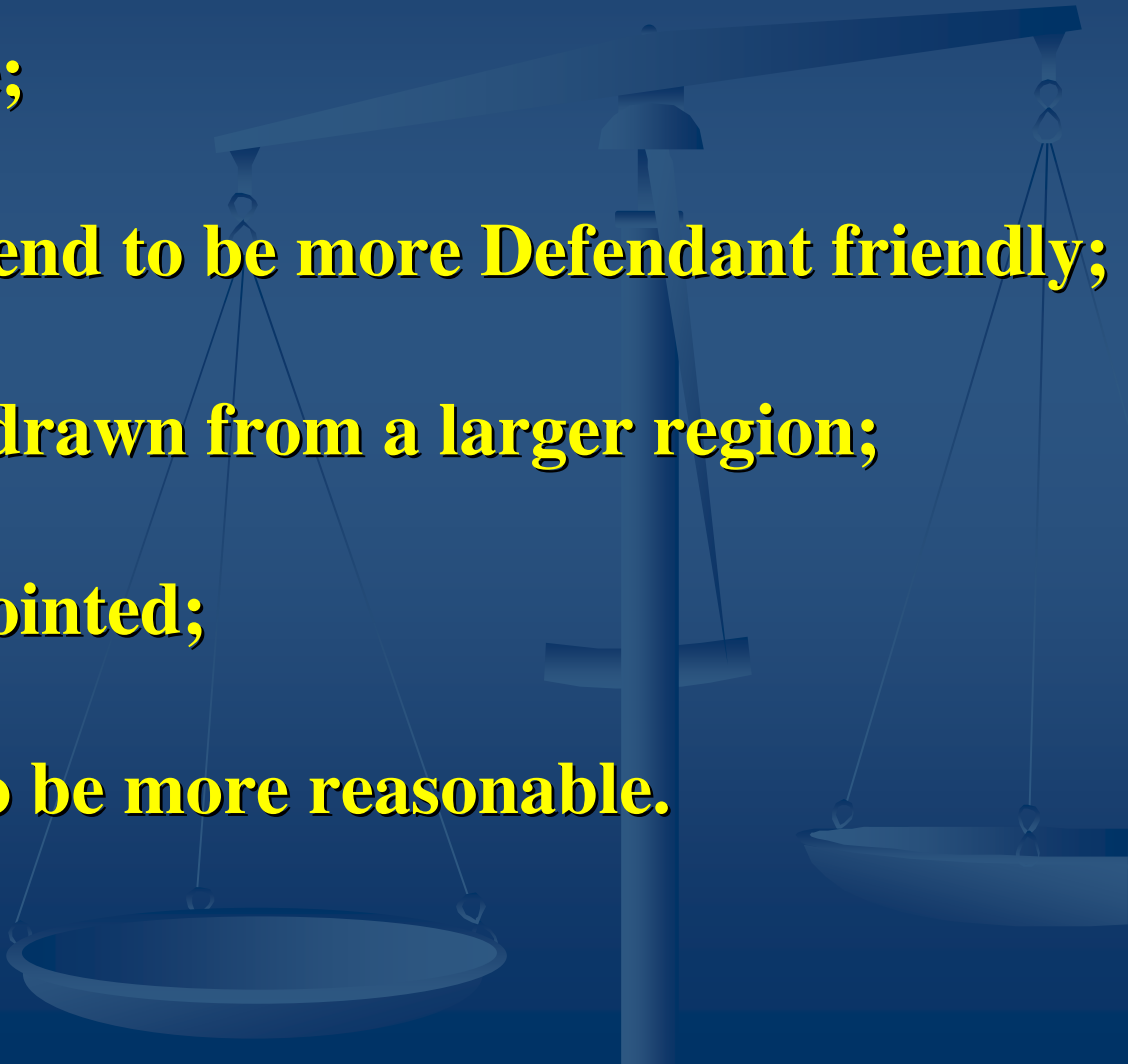
**WHERE WOULD  
YOU RATHER BE?**



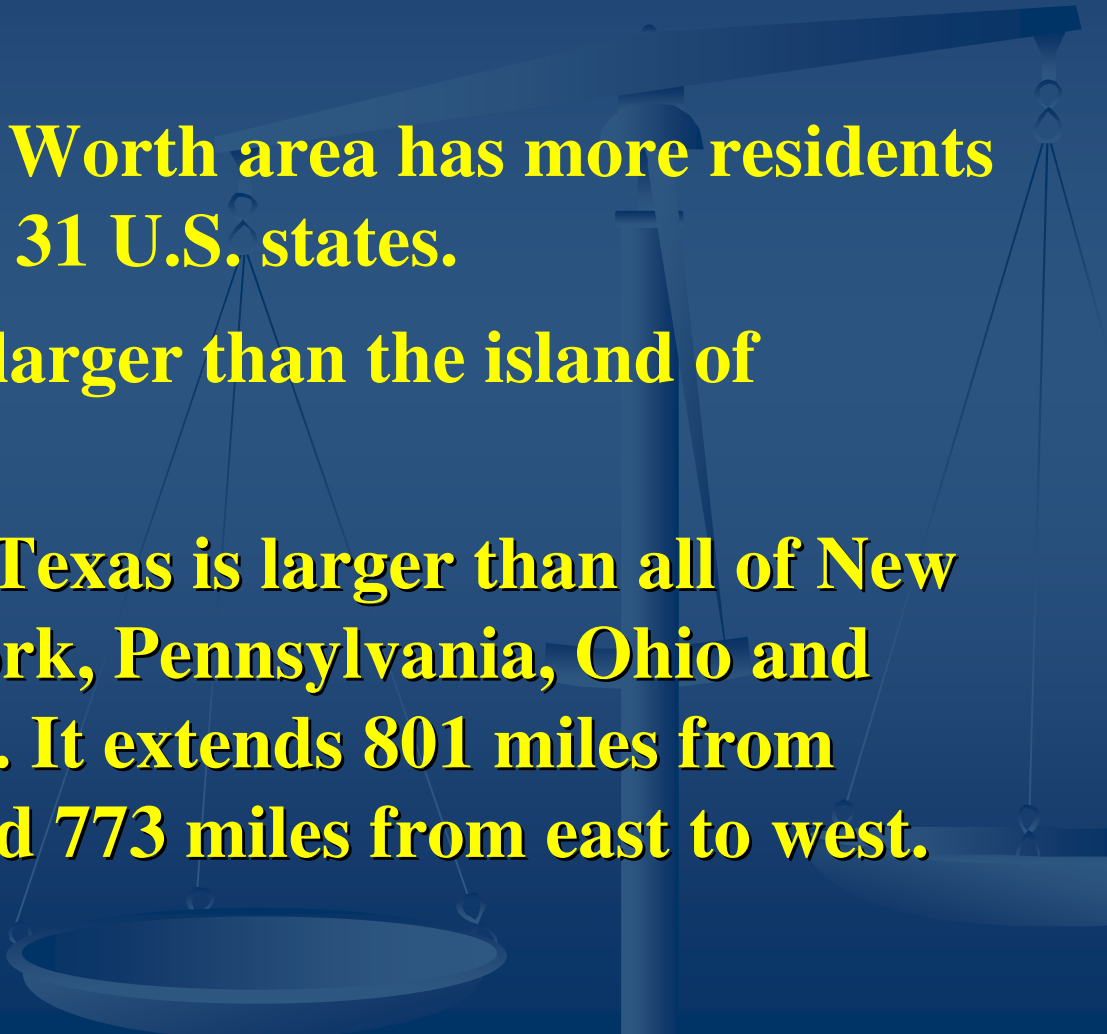
# FEDERAL COURT



# ADVANTAGES OF FEDERAL COURT

1. **More Structure;**
  2. **Federal Rules tend to be more Defendant friendly;**
  3. **Jury Pools are drawn from a larger region;**
  4. **Judges are appointed;**
  5. **Verdicts tend to be more reasonable.**
- 

# FACTS ABOUT TEXAS

1. **267,339 square miles**
  2. **254 Counties**
  3. **The Dallas-Fort Worth area has more residents 5,221,801 - than 31 U.S. states.**
  4. **DFW airport is larger than the island of Manhattan**
  5. **The land area of Texas is larger than all of New England, New York, Pennsylvania, Ohio and Illinois combined. It extends 801 miles from north to south and 773 miles from east to west.**
- 

# FACTS ABOUT TEXAS



>





# IS IT REMOVABLE?



**Federal Question/based on a Federal Statute;**

**or**

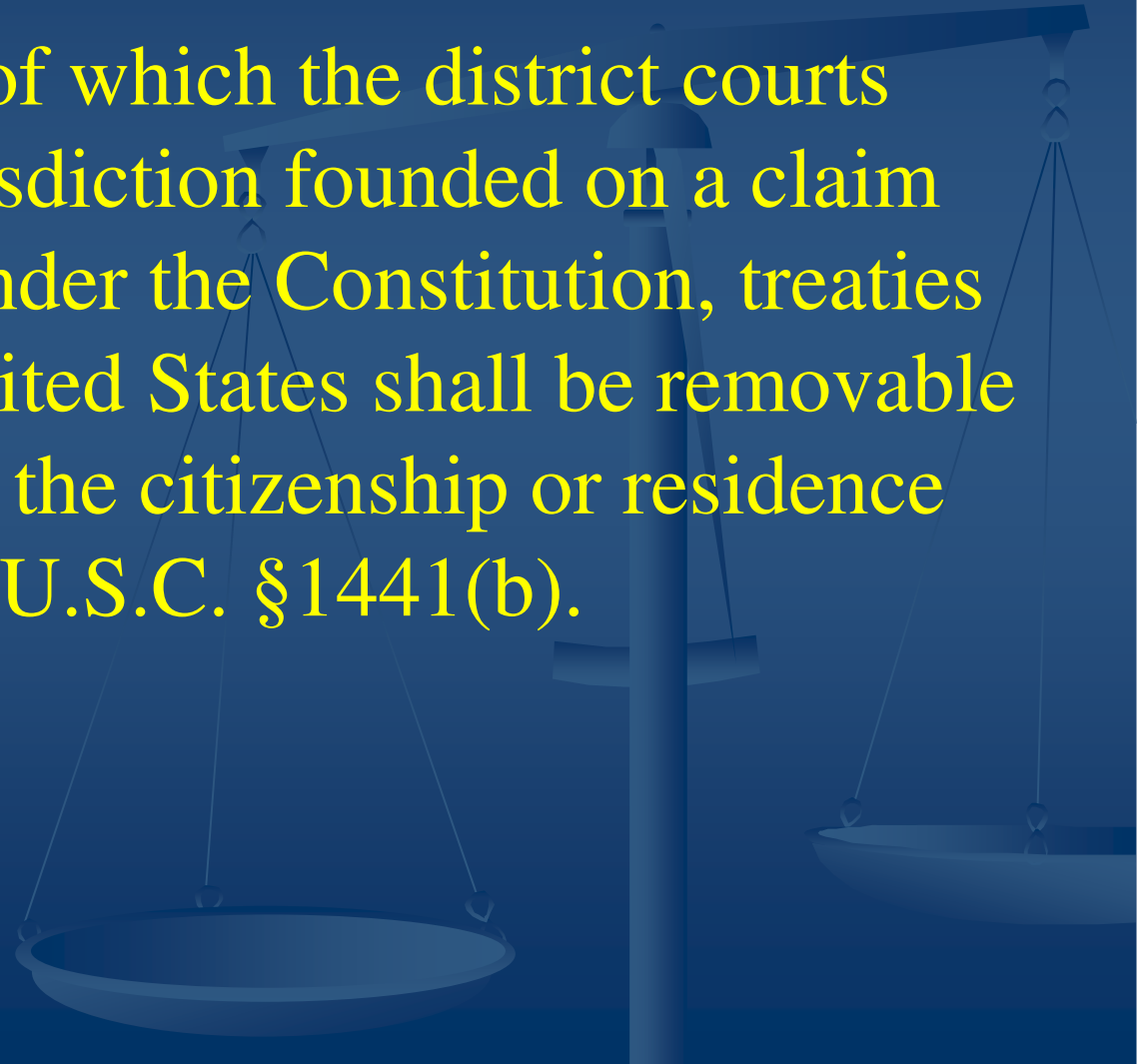
**All Defendants are citizens of different states and agree on removal;**

**Amount is over \$75,000;**

**Removal is sought within 30 days of service.**

# REMOVAL DUE TO FEDERAL QUESTION JURISDICTION

- Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. 28 U.S.C. §1441(b).

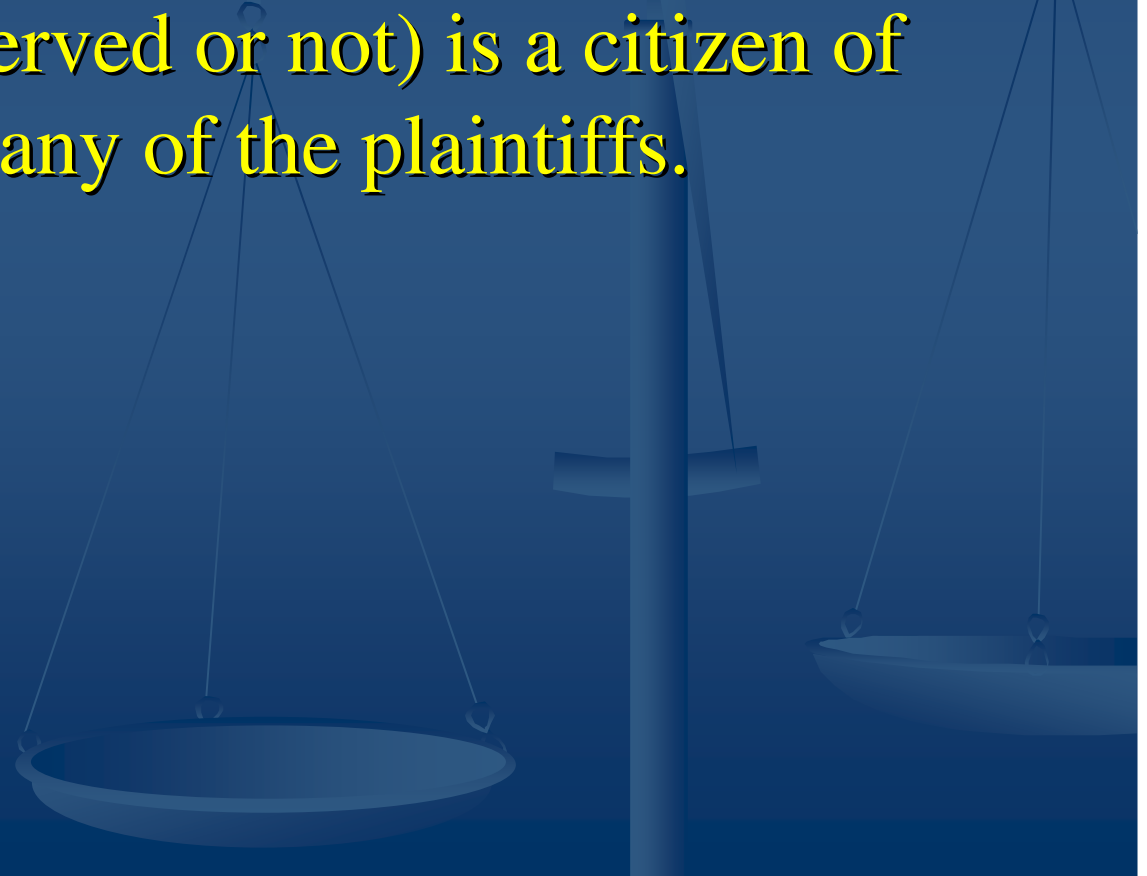


# REMOVAL DUE TO DIVERSITY OF CITIZENSHIP

- Diversity jurisdiction exists over any civil action in which the amount in controversy exceeds the sum or value of \$75,000, exclusive of costs and interest, and the action is between citizens of different states. 28 U.S.C. §1332(a).

# DIVERSITY DEFINITION

- Diversity jurisdiction exists only where there is complete diversity, which occurs when none of the defendants (served or not) is a citizen of the same state as any of the plaintiffs.



# DETERMINING CORPORATE CITIZENSHIP

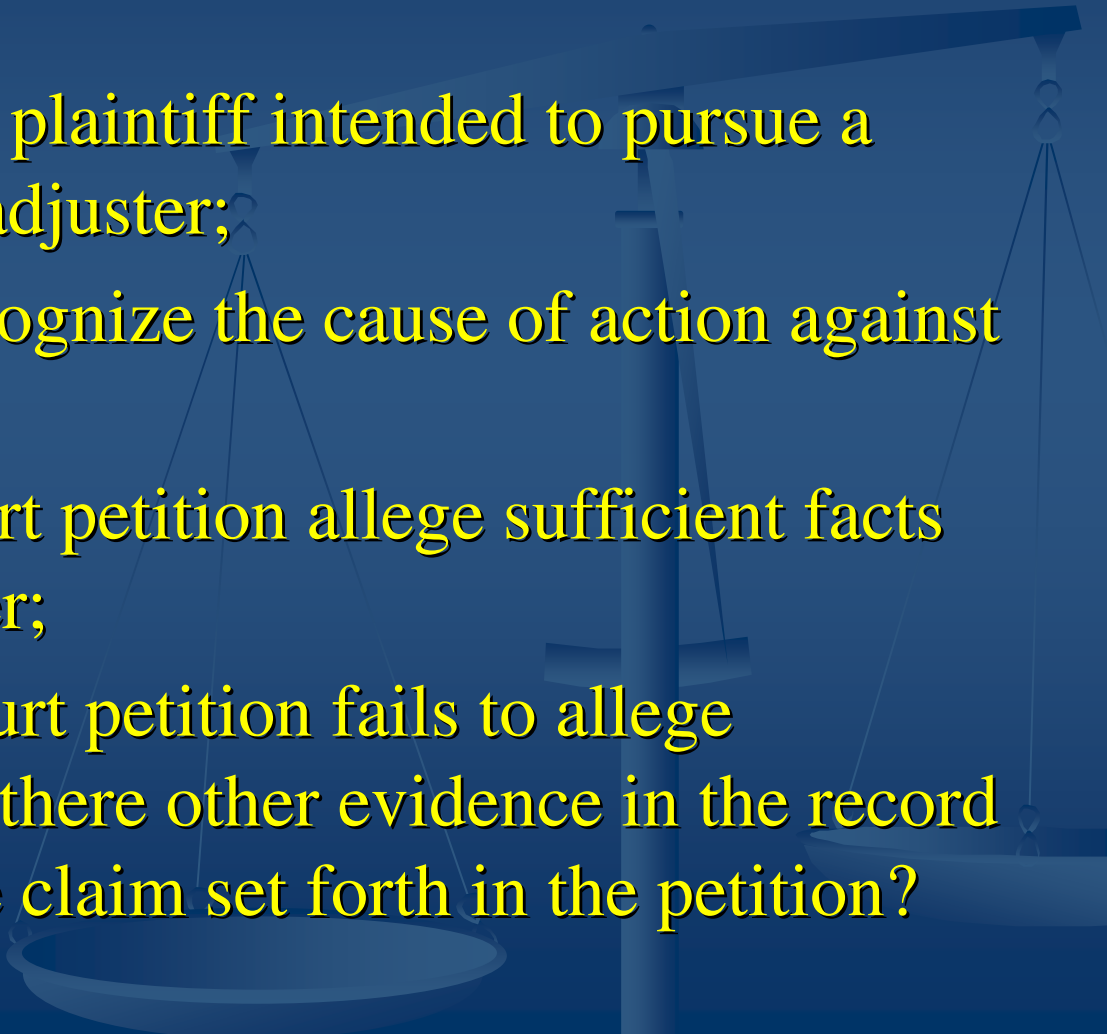
- A corporation is a “citizen” both of the state in which it was incorporated and of the state where it has its principal place of business. 28 U.S.C. §1332(c)(1).
- Therefore, actions brought in the courts of either state cannot be removed to federal court.

# DEFEATING DIVERSITY VIA FRAUDULENT JOINDER

- In some cases, a party is added as a Defendant in order to eliminate diversity of citizenship between the parties
- Generally, this is referred to as “fraudulent joinder”
- To prove fraudulent joinder, the removing party must prove either:
  - (1) actual fraud in the pleading of jurisdictional facts, or
  - (2) plaintiff’s inability to establish a cause of action against the non-diverse party in state court.

*Smallwood v. Illinois Cen. R.R. Co.*, 385 F. 3d 568, 573 (5<sup>th</sup> Cir. 2004).

# ANALYSIS OF FRAUDULENT JOINDER OF INSURANCE ADJUSTERS

1. Does it appear the plaintiff intended to pursue a claim against the adjuster;
  2. Does state law recognize the cause of action against the adjuster;
  3. Does the state court petition allege sufficient facts against the adjuster;
  4. When the state court petition fails to allege sufficient facts, is there other evidence in the record which clarifies the claim set forth in the petition?
- 

# ANALYSIS OF FRAUDULENT JOINDER OF INSURANCE ADJUSTERS

## 1. Does it appear the plaintiff intended to pursue a claim against the adjuster?

-- Petition usually controls

-- Factors:

1. whether the defendant is only minimally mentioned;
2. whether any actionable facts or causes of action are specifically alleged against the defendant; and,
3. whether the defendant was ever served.

*First Baptist Church of Mauriceville, Texas v. GuideOne Mut. Ins. Co.*, 2008 WL 4533729 (E.D. Tex. Sep. 29, 2008)



# ANALYSIS OF FRAUDULENT JOINDER OF INSURANCE ADJUSTERS

## 2. Does state law recognize the cause of action against the adjuster?

- If the court determines that a plaintiff cannot recover from the resident-adjuster because the asserted claims are not valid under state law, the individual is not properly joined.

*First Baptist Church of Mauriceville, Texas v. GuideOne Mut. Ins. Co.*, 2008  
WL 4533729, at \*4 (E.D. Tex. Sep. 29, 2008)

# ANALYSIS OF FRAUDULENT JOINDER OF INSURANCE ADJUSTERS

## 2. Does state law recognize the cause of action against the adjuster?

<b><i>BREACH OF DUTY OF GOOD FAITH AND FAIR DEALING *</i></b>	<u>In-House Adjuster</u>	<u>Independent Adjuster</u>
May be liable		
NOT Liable	X	X

\* Absent any contractual relationship between the insured and the adjuster

# ANALYSIS OF FRAUDULENT JOINDER OF INSURANCE ADJUSTERS

## 2. Does state law recognize the cause of action against the adjuster?

<b><i>BREACH OF CONTRACT *</i></b>	<u>In-House Adjuster</u>	<u>Independent Adjuster</u>
May be liable		
NOT Liable	X	X

\* Absent any contractual relationship between the insured and the adjuster

# ANALYSIS OF FRAUDULENT JOINDER OF INSURANCE ADJUSTERS

## 2. Does state law recognize the cause of action against the adjuster?

<b><i>BREACH OF EXPRESS WARRANTY *</i></b>	<u>In-House Adjuster</u>	<u>Independent Adjuster</u>
May be liable		
NOT Liable	X	X

\* Absent any contractual relationship between the insured and the adjuster

# ANALYSIS OF FRAUDULENT JOINDER OF INSURANCE ADJUSTERS

## 2. Does state law recognize the cause of action against the adjuster?

<b><i>VIOLATIONS OF TEXAS INSURANCE CODE §541</i></b>	<u>In-House Adjuster</u>	<u>Independent Adjuster</u>
May be liable	X	X (unsettled)
NOT Liable		

# ANALYSIS OF FRAUDULENT JOINDER OF INSURANCE ADJUSTERS

## 2. Does state law recognize the cause of action against the adjuster?

<b><i>VIOLATIONS OF DECEPTIVE TRADE PRACTICES ACT (DTPA)</i></b>	<u>In-House Adjuster</u>	<u>Independent Adjuster</u>
May be liable	X (unsettled)	X (unsettled)
NOT Liable		

# ANALYSIS OF FRAUDULENT JOINDER OF INSURANCE ADJUSTERS

## 2. Does state law recognize the cause of action against the adjuster?

<b><i>NEGLIGENT CLAIMS HANDLING</i></b>	<u>In-House Adjuster</u>	<u>Independent Adjuster</u>
May be liable		
NOT Liable	X	X

# ANALYSIS OF FRAUDULENT JOINDER OF INSURANCE ADJUSTERS

## 2. Does state law recognize the cause of action against the adjuster?

<b><i>NEGLIGENT ACTS PERFORMED OUTSIDE SCOPE OF ADJUSTING DUTIES</i></b>	<u>In-House Adjuster</u>	<u>Independent Adjuster</u>
May be liable	X	X
NOT Liable		



# ANALYSIS OF FRAUDULENT JOINDER OF INSURANCE ADJUSTERS

## 2. Does state law recognize the cause of action against the adjuster?

<b><i>FRAUD</i></b>	<u>In-House Adjuster</u>	<u>Independent Adjuster</u>
May be liable	X	X
NOT Liable		

# ANALYSIS OF FRAUDULENT JOINDER OF INSURANCE ADJUSTERS

## 3. Does the state court petition allege sufficient facts against the adjuster? (FACTUAL FIT ANALYSIS)

1. whether the defendant is only minimally mentioned;
2. whether any actionable facts or causes of action are specifically alleged against the defendant; and,
3. whether the defendant was ever served.

Identifying only what law forms the basis of the complaint, without identifying how a defendant violated that law, proves only that there is a theoretical possibility that a cause of action could be stated against the defendant, not that the plaintiff did state a cause of action. *First Baptist Church of Mauriceville, Texas v. GuideOne Mut. Ins. Co.*, 2008 WL 4533729, at \*4 (E.D. Tex. Sep. 29, 2008)

A defendant may defeat remand (to state court) by showing that the petition fails to allege “specific actionable conduct” sufficient to support the cause of action. *Id.*

# ANALYSIS OF FRAUDULENT JOINDER OF INSURANCE ADJUSTERS

**4. When the state court petition fails to allege sufficient facts, is there other evidence in the record which clarifies the claim set forth in the petition?**

-- A federal court has discretion to consider other evidence in the record to clarify the claims alleged in the petition.... [C]ase law indicates that summary judgment-type evidence contained in the record may be considered *to the extent that the factual allegations contained therein clarifies or amplifies the claims actually alleged in the petition....* Examples of such evidence include affidavits and deposition testimony.

*Griggs v. State Farm Lloyds*, 181 F.3d 694, 699-700 (5<sup>th</sup> Cir. 1999)

# APPRAISAL



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214-712-9530

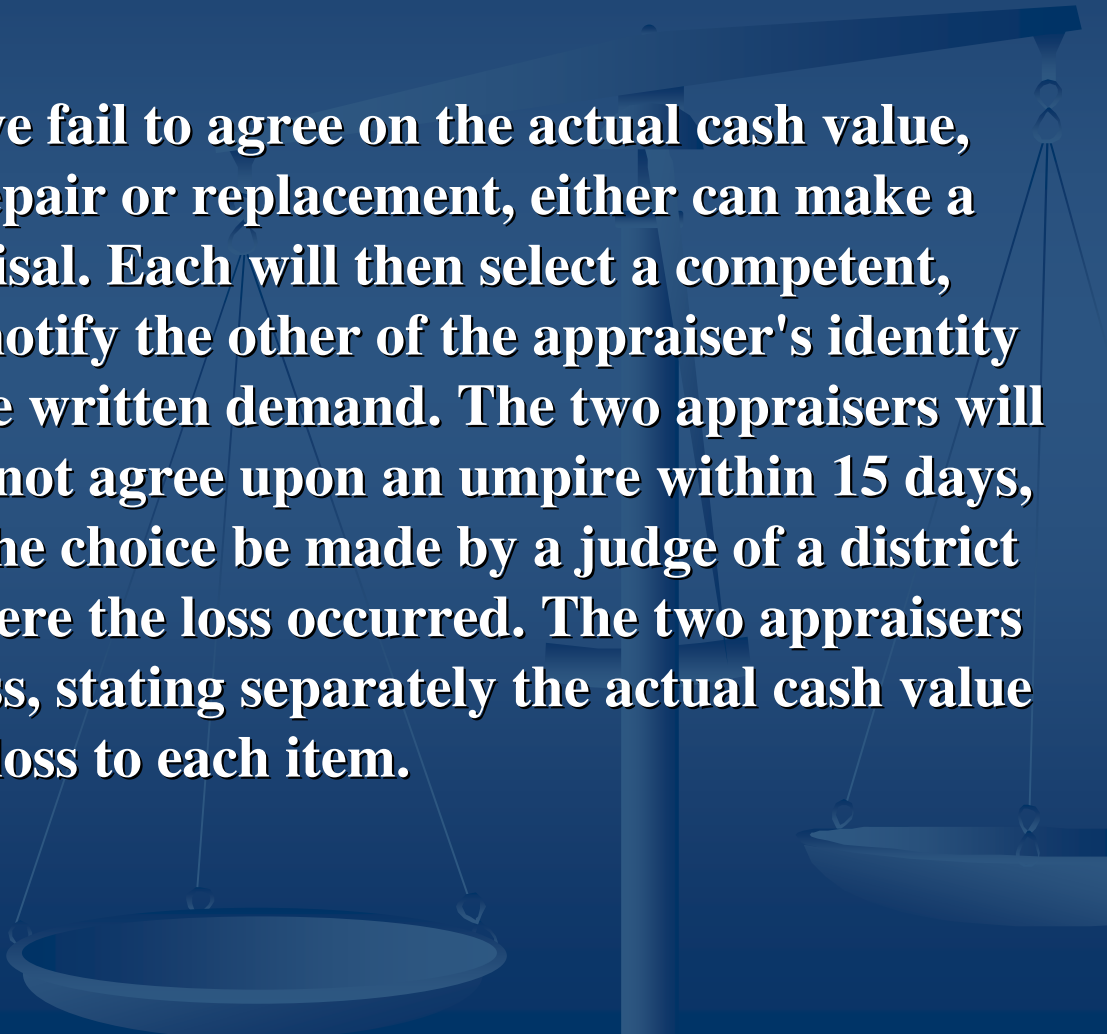
Cooper & Scully, P.C.  
900 Jackson Street, Suite 100  
Dallas, Texas 75202

# WHAT IS AN INSURANCE APPRAISAL?



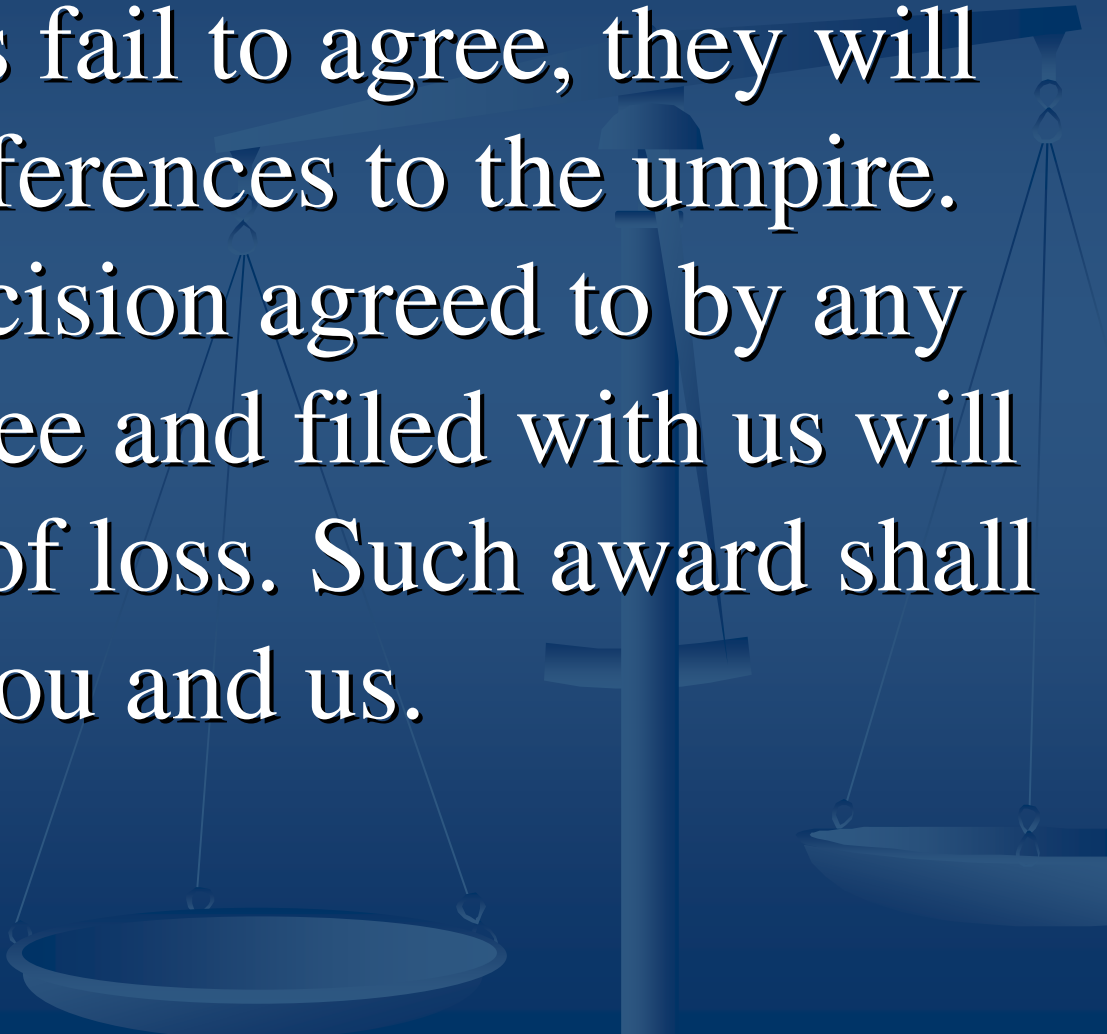
# APPRAISAL PROVISION

**Appraisal. If you and we fail to agree on the actual cash value, amount of loss, or cost of repair or replacement, either can make a written demand for appraisal. Each will then select a competent, independent, appraiser and notify the other of the appraiser's identity within 20 days of receipt of the written demand. The two appraisers will choose an umpire. If they cannot agree upon an umpire within 15 days, you or we may request that the choice be made by a judge of a district court of a judicial district where the loss occurred. The two appraisers will then set the amount of loss, stating separately the actual cash value and loss to each item.**



# APPRAISAL PROVISION

If the appraisers fail to agree, they will submit their differences to the umpire. An itemized decision agreed to by any two of these three and filed with us will set the amount of loss. Such award shall be binding on you and us.

A faint, stylized image of a scale of justice is visible in the background, centered behind the text. The scale has two pans hanging from a central beam, and the entire image is rendered in a light blue color against the dark blue background.

# **WHAT DO APPRAISERS AND UMPIRES DO IN AN APPRAISAL?**

**TWO APPRAISERS (ONE FOR EACH SIDE)  
SUBMIT THEIR OPINIONS AND VIEWS OF  
THE VALUE OF A LOSS TO AN UMPIRE  
WHO DETERMINES THE FINAL VALUE**





# INVOKING APPRAISAL

A DEMAND FOR APPRAISAL MUST BE IN WRITING



AND MADE WITHIN A “REASONABLE”  
TIME FOLLOWING A DISAGREEMENT ON  
THE AMOUNT OF THE LOSS

# THE APPRAISAL AWARD IS GENERALLY BINDING

If appraisal is properly invoked, carried out, and awarded, the amount of loss is binding on the insurer and the insured.

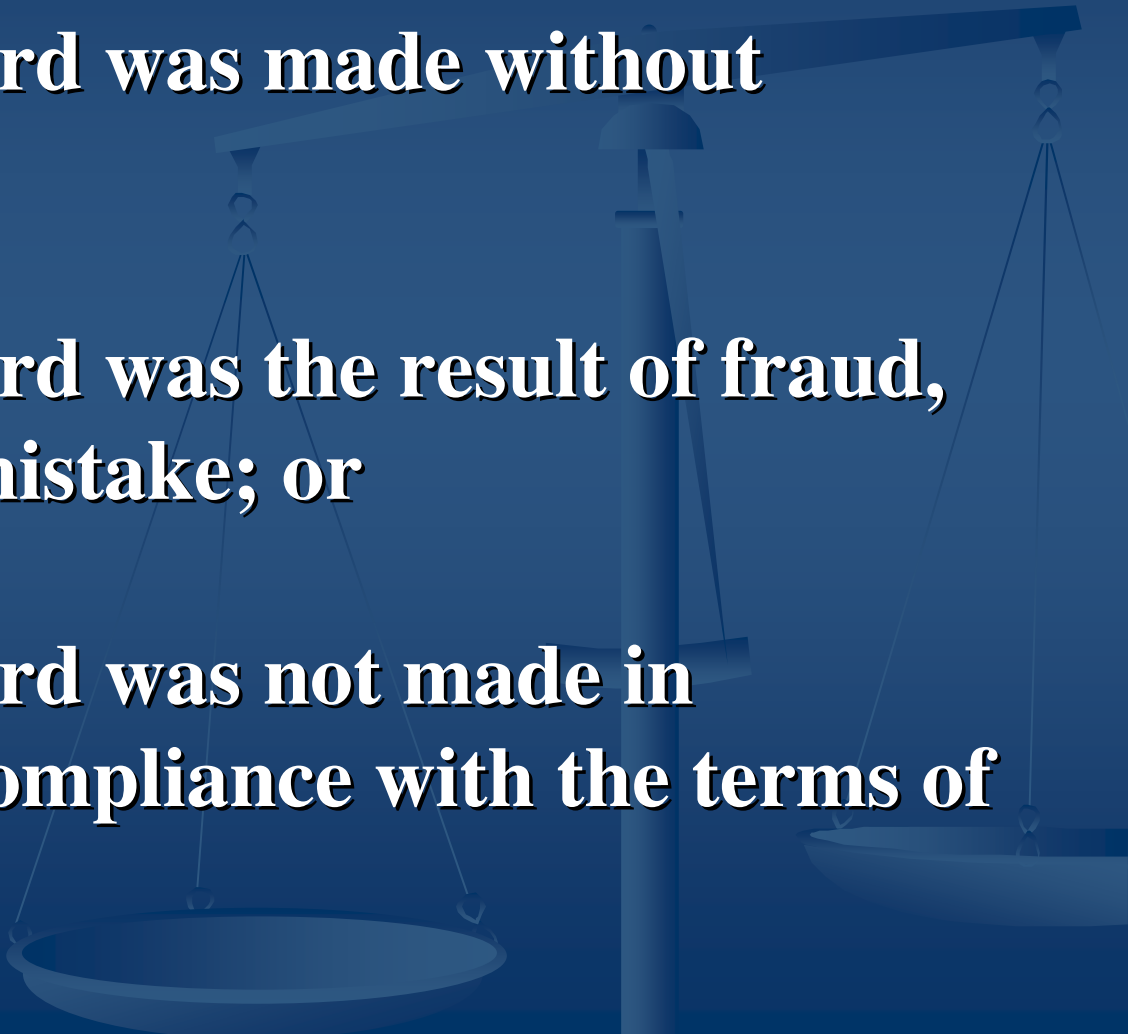


If signed by the umpire and one of the appraisers.

**IN AN APPRAISAL, THERE IS  
GENERALLY A WINNER  
AND A LOSER**

**THE LOSER OFTEN FILES  
SUIT ALLEGING ONE OF  
THREE GROUNDS**

# THREE GROUNDS FOR CHALLENGING THE AWARD

1. when the award was made without authority; or
  2. when the award was the result of fraud, accident, or mistake; or
  3. when the award was not made in substantial compliance with the terms of the contract.
- 

# **AWARD MADE WITHOUT AUTHORITY**

**GENERALLY, AN UMPIRE AND  
APPRAISER EXCEED THEIR  
AUTHORITY IF THEY DETERMINE  
ISSUES OF COVERAGE**

*Wells vs. American States Preferred Ins. Co.*

# NOT IN COMPLIANCE WITH THE POLICY

**The policies generally require appraisers to be disinterested, non-biased, and impartial.**

*Spring Creek v. General Star Indemnity Company*

# *Spring Creek v. General Star Indemnity Company*

**Insured's appraiser was paid 5% of the umpire's award if it was less than \$2,000,000 or 6% if the award was over \$2,000,000**

**Court said this made the appraiser interested in the outcome of the process and therefore not impartial**

# **APPRAISERS HAVE TO BE COMPETENT**



**A ROOFER SHOULD NOT APPRAISE A  
JEWELRY CASE AND AN PLUMBER  
SHOULD NOT APPRAISE AN AUTO LOSS**



# **QUALIFICATIONS FOR BEING AN APPRAISER AND/OR UMPIRE**

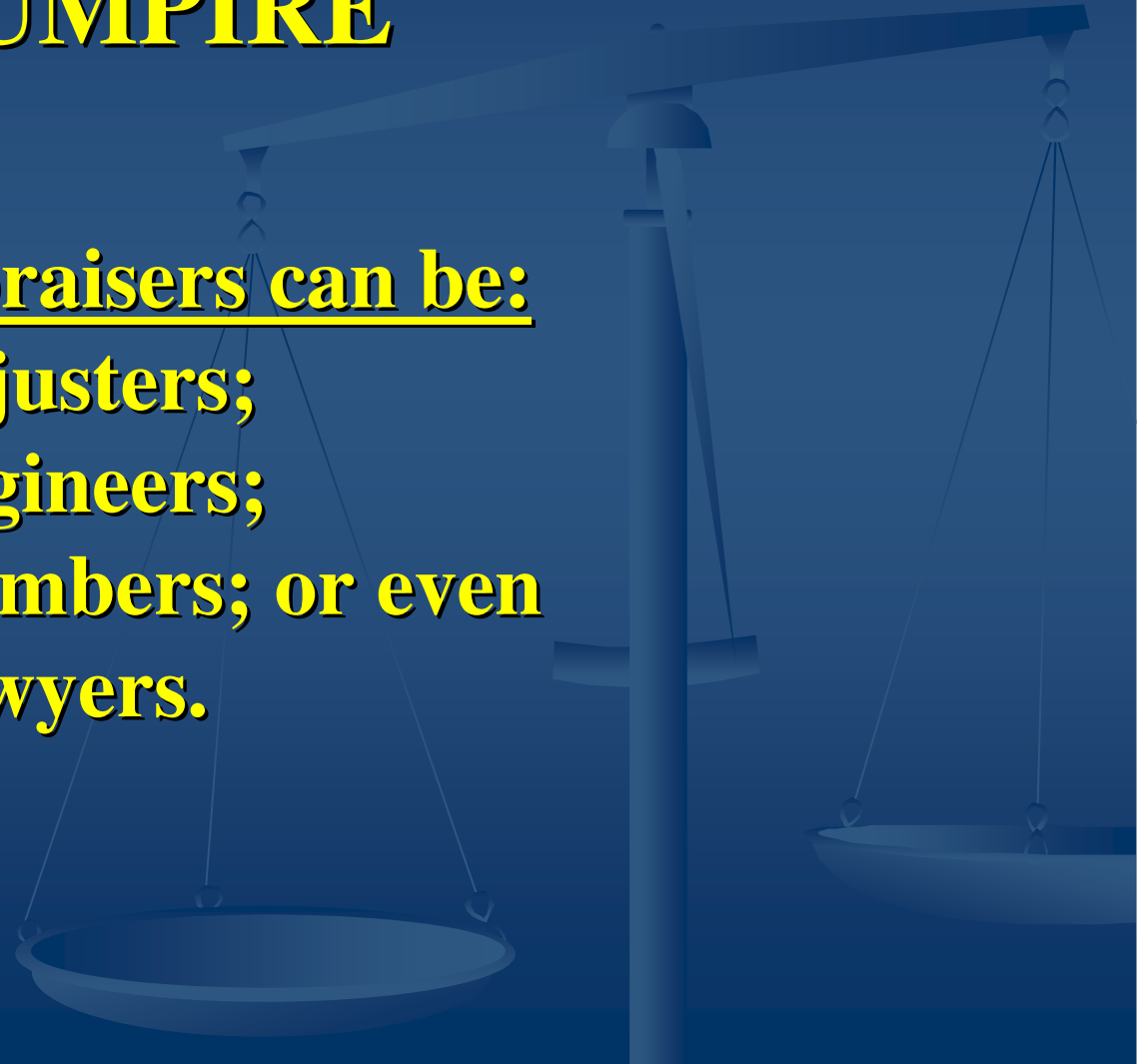
**CASE BY CASE BASIS**



# QUALIFICATIONS FOR BEING AN APPRAISER AND/OR UMPIRE

## Appraisers can be:

- Adjusters;
- Engineers;
- Plumbers; or even
- Lawyers.

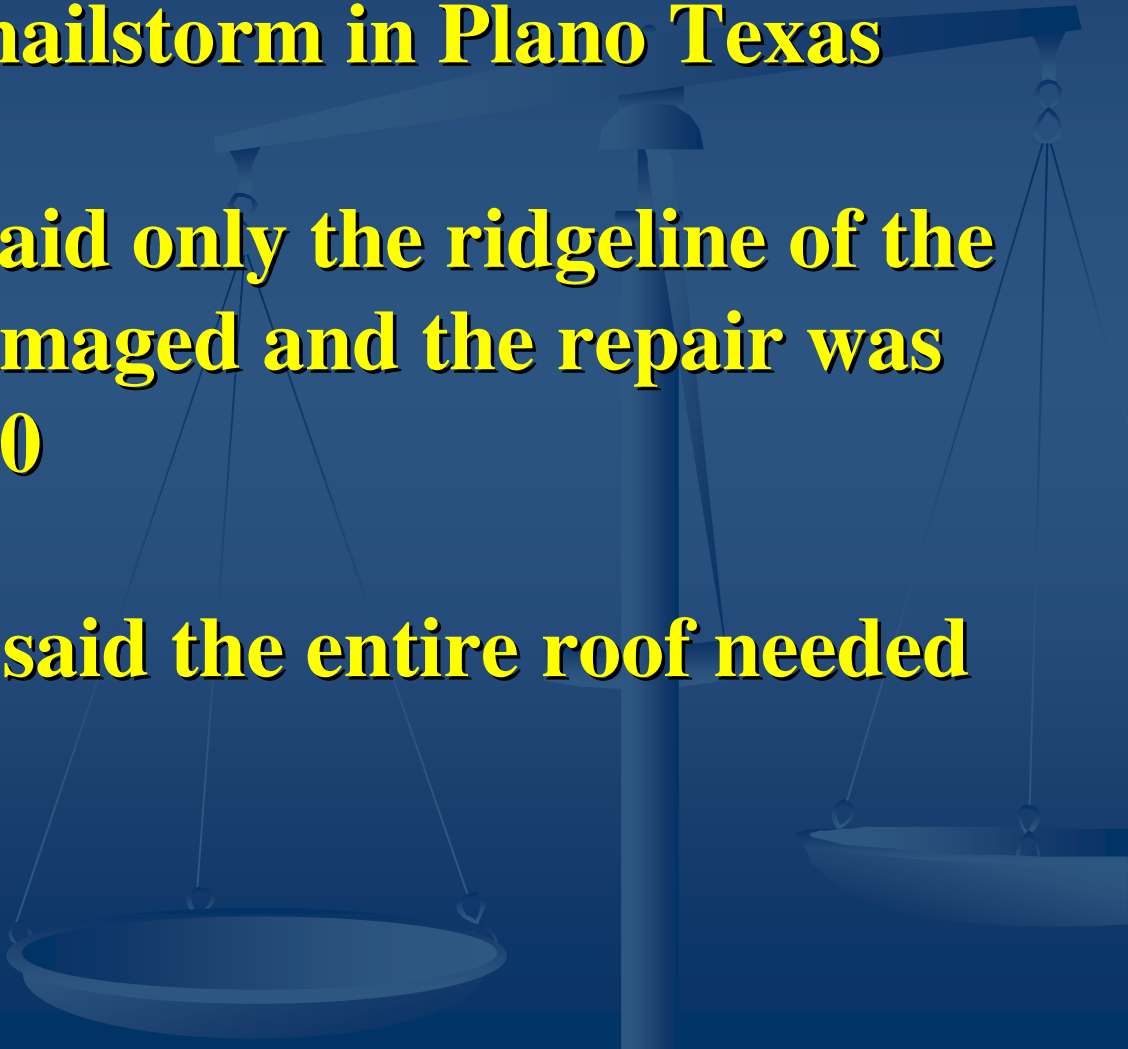


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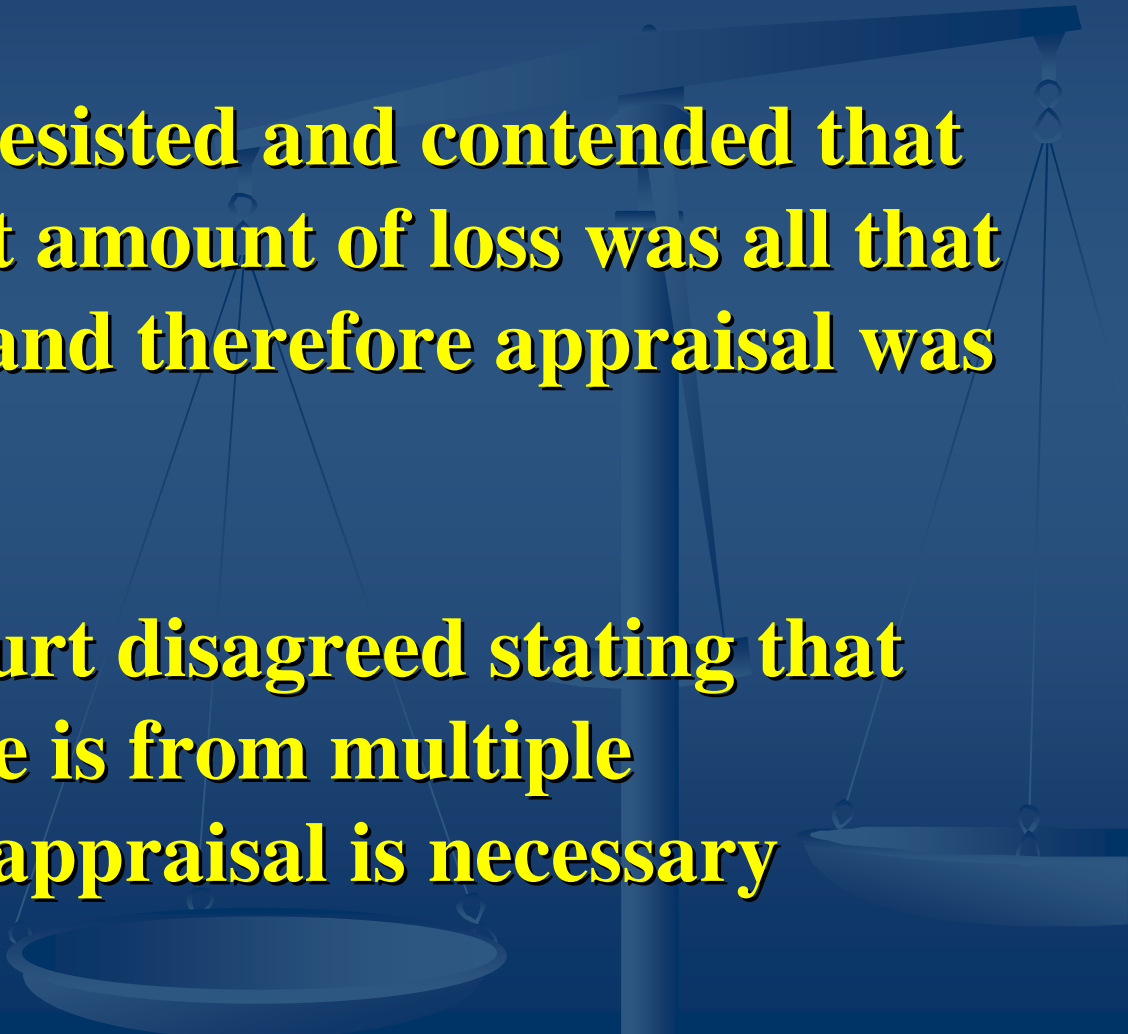
**CAN APPRAISERS MAKE  
COVERAGE  
DETERMINATIONS**

***WELLS CASE v. JOHNSON CASE***

# ***STATE FARM v. JOHNSON***

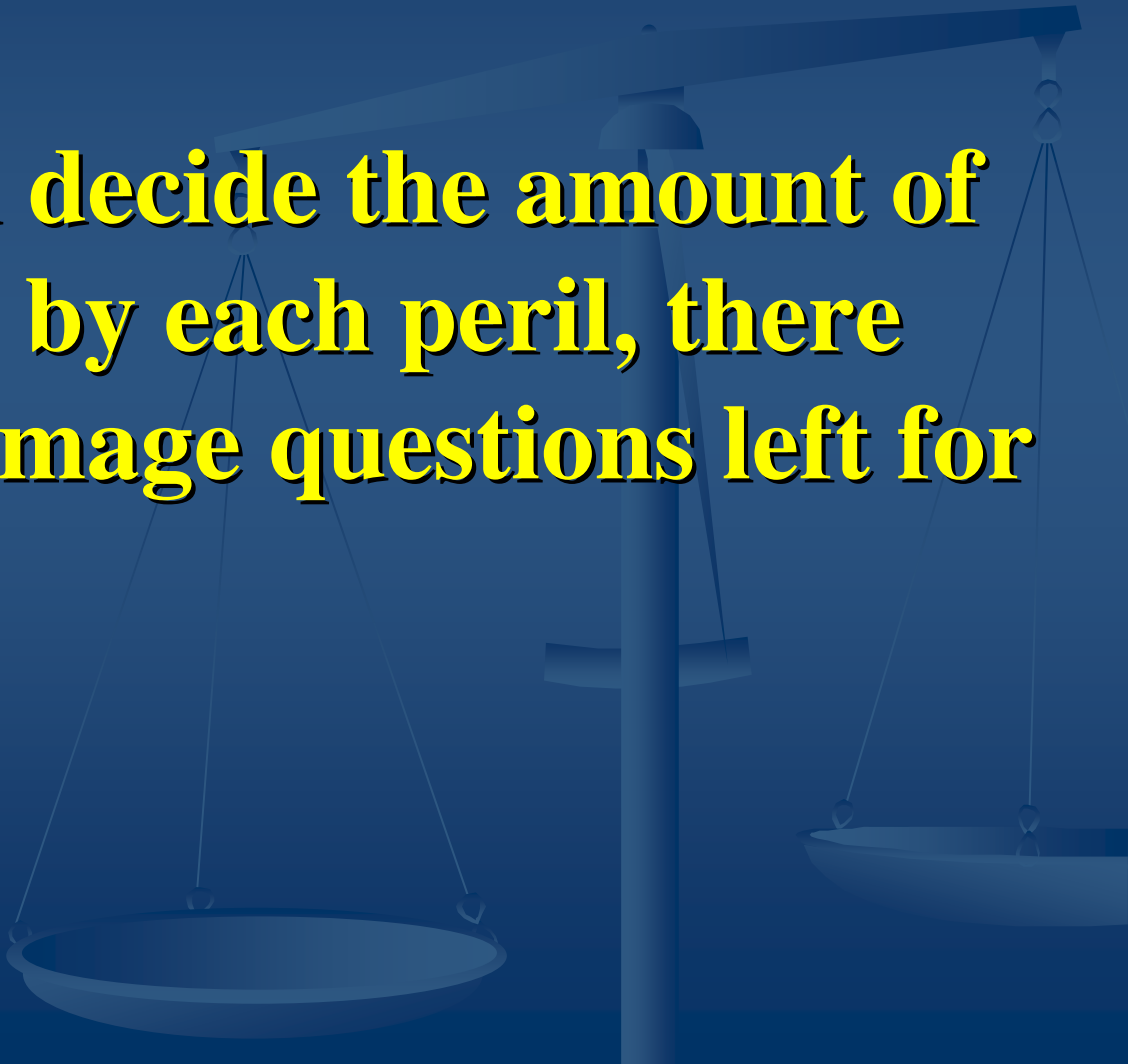
- **April 2003 hailstorm in Plano Texas**
  - **State Farm said only the ridgeline of the room was damaged and the repair was less than \$500**
  - **Insured's rep. said the entire roof needed replacement**
- 

# *STATE FARM v. JOHNSON*

- **Insured filed suit to compel appraisal**
  - **State Farm resisted and contended that causation not amount of loss was all that was at issue and therefore appraisal was not proper**
  - **Supreme Court disagreed stating that when damage is from multiple occurrences appraisal is necessary**
- 

# *STATE FARM v. JOHNSON*

**If Courts could decide the amount of damage caused by each peril, there would be no damage questions left for the appraisers**



# COVERAGE

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## ➤ HOMEOWNERS

- HO-A - limited actual cash value
- HO-A AMENDED POLICIES – may include limited replacement cost coverage (not included in HO-A)
- HO-B - replacement cost coverage
- HO-C – most extensive coverage
- APPROVED ALTERNATIVE POLICIES – varying levels of coverage



# **INSURING AGREEMENT - COVERED PERIL**

## **SECTION I – PERILS INSURED AGAINST COVERAGE A (DWELLING) AND COVERAGE B (PERSONAL PROPERTY)**

We insure against physical loss to the property described in Coverage A (Dwelling) and Coverage B (Personal Property) caused by a peril listed below, unless the loss is excluded in Section I Exclusions.

\* \* \*

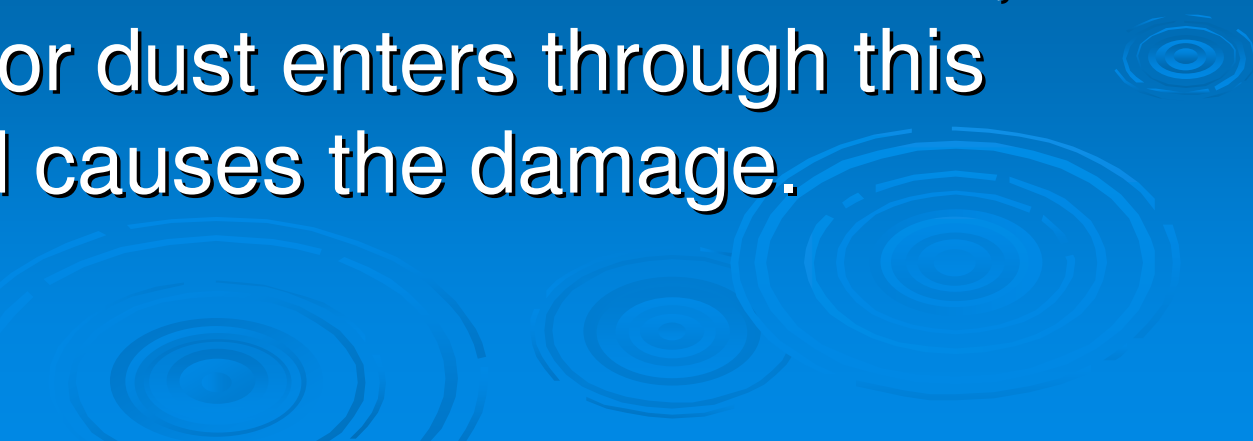
### **3. Windstorm, Hurricane and Hail**

# INSURING AGREEMENT – EXCEPTION

## **3. Windstorm, Hurricane and Hail**

This peril does not cover:

b. loss caused by rain, snow, sand or dust, whether or not driven by wind, unless the direct force of wind or hail makes an opening in the roof or wall and the rain, snow, sand or dust enters through this opening and causes the damage.



# SECTION I – EXCLUSIONS

The following exclusions are added:

8. We do not cover loss consisting of, resulting from, arising out of or in any way caused by faulty, inadequate or defective:

\* \* \*

- b. design, specifications, workmanship, repair, construction, renovation, remodeling, grading, compaction;

of property whether on or off the **residence premises** by any person or organization. However, we do cover loss to property described in Coverage A (Dwelling) which is ensuing from this peril, unless otherwise excluded or excepted in this policy.

# Evidence

- Coverage disputes ruled by Experts
  - Experts
  - Circumstantial Evidence

# Commercial Property Claims

- Burden of Proof – same
- Appraisal Clause – same
- Covered peril
  - Direct physical loss or damage
  - Covered Cause of Loss – Windstorm
  - Damage entering through wind or hail damage

# Exclusions

- Water – Flood, surface water, waves, tides, tidal waves, overflow of any body of water, or their spray, all whether driven by wind or not
- Mudslide or mudflow
- Fungus, wet rot, dry rot and bacteria

# LITIGATION

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# 11th Judicial District in Harris County

- Issued an **Order of Transfer and Notice of Status Conference** on April 16, 2009 stating that the court's docket would consist of all Residential Hurricane Ike cases and that new residential Hurricane Ike cases would be transferred to there when filed.



- All existing docket control orders or scheduling orders in said cases were voided and a new **Standing Pretrial Order** was entered.
- The purpose is to expedite pretrial matters in order to achieve the efficient handling of the claims.

# Standing Pretrial Order Requirements

- Electronic filing;
- Agreement on mediator and mediation date, which must be done within 100 days after the carrier makes an appearance, OR after the date of the Order, whichever is later;
- Abatement of the case;

# Standing Pretrial Order Requirements

- Best efforts to exchange information and/or documentation within 60 days of appearance by carrier or Order.
- Some of this information includes, but is not limited to:
  - Expert reports;
  - Engineering reports;
  - Estimates of damage or repairs;
  - Photos;
  - Repair receipts or invoices;
  - The estimate the flood payment was made on; and
  - Non-privileged portions of the carrier's and adjusting company's clam files, etc.

# Standing Pretrial Order Requirements

- Expert reports, engineering reports, contractor estimates or any other estimates of damages or repairs obtained by directive of counsel for settlement demand, or mediation purposes and exchanged prior to mediation, shall be for "mediation purposes only," and shall be considered confidential.
- However, if the reports are part of the claims file and were obtained during the claims handling, they shall not be considered confidential.

# Standing Pretrial Order Requirements

- One inspection of the residence prior to mediation;
- However, if mediation is unsuccessful, the Defendants may re-inspect the residence with the same, new or additional experts pursuant to the Texas Rules of Civil Procedure.

# Protective Order

- The 11<sup>th</sup> Judicial District issued a Protective Order on March 8, 2010.
- The confidential information will be shared as follows:
  - Institutional discovery and Insurer and third party adjuster employee-specific files may be shared among Qualified Persons involved in the same litigation.
  - The same applies to case specific underwriting files.

# Shared Discovery

*Sanchez v. Prop. & Cas., Inc. of Hartford*, 2010  
U.S. Dist. LEXIS 6295 (S.D. Tex., Jan. 27, 2010).

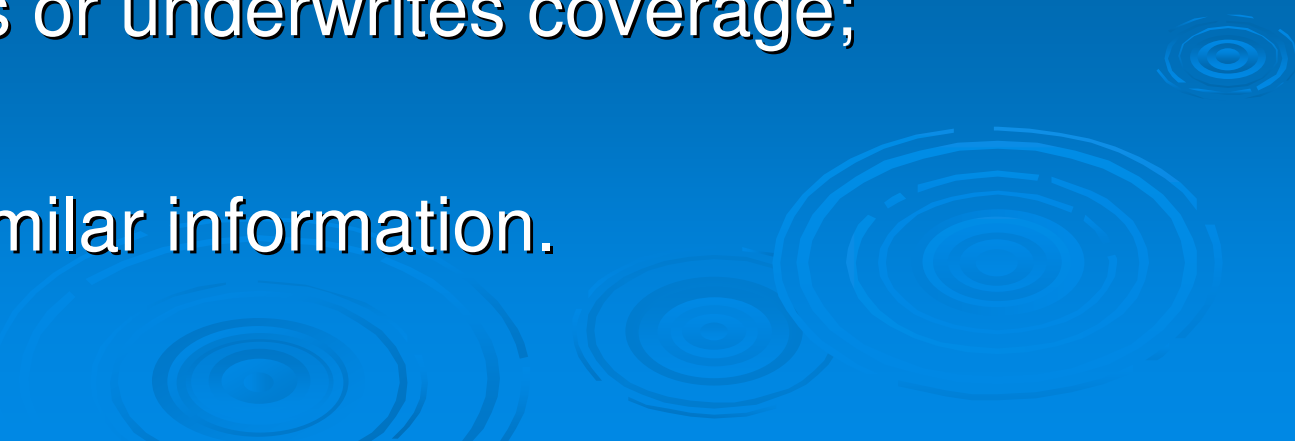
- Main issue was that Sanchez's counsel sought "shared discovery."
- In other words, his counsel sought to use the information obtained in their case in other cases.

# Sanchez...

- A party resisting discovery “must first establish that the information sought is a trade secret or other confidential information and then demonstrate that its disclosure would cause an identifiable, significant harm.” *Stone Connection, Inc. v. Simpson*, 2008 U.S. Dist. LEXIS 34489, 2008 WL 1927033, at \*1 (E.D. Tex. Apr. 28, 2008) (citing *Occidental Chemical Corp. v. Louisiana Public Service Commission*, 2008 U.S. Dist. LEXIS15688, 2008 WL 566833, at \*2 (M.D. La. Feb. 29, 2008)).



# If...

- The documents had contained information on how Hartford does business generally;
  - How it trains or guides its employees or adjusters to adjust claims;
  - How it prices or underwrites coverage;
  - And other similar information.
- 

## SPOLIATION OF EVIDENCE

*Trevino v. Ortega*, 969 S.W.2d 950 (Tex.1998)

- In this case the petitioners who were the doctor and the maternity clinic sought a review of a decision by the court of appeals, which recognized an independent tort action for spoliation of evidence brought by Ortega.
- When he discovered that medical records had been destroyed, he sued separately for intentionally, negligently and recklessly destroying medical records.

# However...

- The Texas Supreme Court reversed the decision of the Court of Appeals and determined that spoliation does not give rise to independent damages, and because it is better remedied within the lawsuit affected by spoliation, the Texas Supreme Court declined to recognize spoliation as a tort cause of action.

Therefore, to avoid the impression of having engaged in spoliation of evidence...

- Preservation of all e-mails, correspondence, and any and all other documents related to the handling of the specific claim is of utmost importance.

# EXTRA-CONTRACTUAL CLAIMS

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# EXTRA-CONTRACTUAL

- THEORIES COMMONLY UTILIZED
  - 1)COMMON LAW BAD FAITH
  - 2)STATUTORY BAD FAITH
  - 3)542.051

# EXTRA-CONTRACTUAL

- COMMON LAW BAD FAITH-
- “FAILING TO ATTEMPT IN GOOD FAITH TO EFFECTUATE A PROMPT, FAIR, AND EQUITABLE SETTLEMENT OF A CLAIM WITH RESPECT TO WHICH THE INSURER’S LIABILITY HAS BECOME REASONABLY CLEAR . . .” *Universe Life Ins. Co. v. Giles*, 950 S.W.2d 48 (Tex. 1997).

# EXTRA-CONTRACTUAL

- SEC 541.060
- (a) IT IS AN UNFAIR METHOD OF COMPETITION OR AN UNFAIR ACT OR DECEPTIVE ACT OR PRACTICE IN THE BUSINESS OF INSURANCE TO ENGAGE IN THE FOLLOWING UNFAIR SETTLEMENT PRACTICES WITH RESPECT TO A CLAIM BY AN INSURED OR BENEFICIARY:



# EXTRA-CONTRACTUAL

- (2) FAILING TO ATTEMPT IN GOOD FAITH TO EFFECTUATE A PROMPT, FAIR, AND EQUITABLE SETTLEMENT OF:
  - (A) A CLAIM WITH RESPECT TO WHICH THE INSURER'S LIABILITY HAS BECOME REASONABLY CLEAR . . .

# EXTRA-CONTRACTUAL

- BULLETIN NO. B-0071-08
- REMINDS INSURERS:
  - That they may not misrepresent terms and provisions of a policy
  - That homeowners are entitled to have their home repaired by the person of their choice
  - That they may not engage in unfair settlement practices

# EXTRA-CONTRACTUAL

- NOTICE OF SUIT
  - No notice of suit is required for common law bad faith. However, sec 541.154 does require notice if a statutory bad faith suit is being pursued.

# EXTRA-CONTRACTUAL

- Sec. 541.154. PRIOR NOTICE OF ACTION.
  - (a) A person seeking damages in an action against another person under this subchapter must provide written notice to the other person not later than the 61st day before the date the action is filed.

# EXTRA-CONTRACTUAL

- (b) The notice must advise the other person of:
  - (1) the specific complaint; and
  - (2) the amount of actual damages and expenses, including attorney's fees reasonably incurred in asserting the claim against the other person.

*Nichols v Nationwide Prop. & Cas. Ins. Co.*, 2010 U.S. Dist. LEXIS 38914 (S.D. Tex. 2010);

# EXTRA-CONTRACTUAL

- Appraisal
  - Is liability reasonably clear if appraisal has been demanded?
  - before a proof of loss?
  - before an EUO?
- *In re Slavonic Mutual Fire Ins. Ass.*, 308 SW3d 556 (Tex. App.-Houston [14<sup>th</sup> Dist] 2010); *Amine v Liberty Lloyds*, 2007 Tex.App.LEXIS 6280 (Tex.App-Houston [1<sup>st</sup> Dist.] 2007)

# EXTRA-CONTRACTUAL

- SHARED DISCOVERY
  - *Sanchez v. Property and Casualty Insurance Company of Hartford*, 2010 U.S. Dist. LEXIS 1006 (S.D. Tex. 2010)

# EXTRA-CONTRACTUAL

- REASONABLE BASIS

- “[A]n insurer's reliance on an expert report, standing alone, will not necessarily shield the carrier if there is evidence that the report was not objectively prepared or the insurer's reliance on the report was unreasonable.”

- *State Farm Lloyds v. Nicolau, 951 S.W.2d 444, 448 (Tex. 1997).*



# EXTRA-CONTRACTUAL

- *Hamilton v State Farm Lloyds*, 265 SW3d 725 (Tex. App.-Dallas 2008, pet. dism'd.)
  - Perdue was on the list of State Farm's approved engineers;
  - more than fifty percent of Perdue's business came from State Farm;
  - Perdue had investigated 1440 claims for State Farm;

# EXTRA-CONTRACTUAL

- State Farm had paid Perdue's company more than \$ 3 million between January 1999 and December 2003;
- Ogle had been using Perdue for ten years; and Perdue had never testified against State Farm's interests.
- The numbers were also significant for Perdue's employee, Bommarito

# EXTRA-CONTRACTUAL

- he had done "seven or eight hundred" cases for State Farm over several years.
- Sixty or seventy of those had been during his time with Perdue's company.
- The jury could have perceived conflict within the Perdue Report. We have already discussed the difference between the moisture of the soil samples and the moisture of the soil as Perdue described it in his conclusions.

# EXTRA-CONTRACTUAL

- The jury could also have perceived an incomplete basis for some of the report's conclusions. The report set forth a number of possible causes of foundation movement, including construction issues, erosion issues, and moisture-related issues.

# EXTRA-CONTRACTUAL

- Indeed, the jury may have believed that State Farm failed to address the major leak under the foundation in any satisfactory manner. No flow test was ever performed on the leak after it was supposedly repaired. But mere days after the leak was supposed to have been repaired, and after all the standing water was removed from the excavation, the parties observed the excavation fill up with water again

# EXTRA-CONTRACTUAL

- Separate trial or severance
  - *Divine Restoration Apostolic Church v Nationwide Mutual Ins. Co.*, 2010 U.S. Dist. LEXIS 26124 (S.D. Tex. 2010)
    - “Following Akin’s reasoning, the court need not order separate trials where payment has been made on an undisputed portion of the contract claim, but none has been made on the disputed claims.”

# EXTRA-CONTRACTUAL

- “Nationwide has not specifically identified any other prejudice it will suffer as a result of all claims being tried together. as the Texas Supreme Court has held, ‘In the absence of a settlement offer on the entire contract claim, or other compelling circumstances, severance is not required’”

# EXTRA-CONTRACTUAL

- CH 542.051 PROMPT PAYMENT OF CLAIMS
- Sec. 542.055. RECEIPT OF NOTICE OF CLAIM.
  - (a) Not later than the 15th day or, if the insurer is an eligible surplus lines insurer, the 30th business day after the date an insurer receives notice of a claim, the insurer shall:



# EXTRA-CONTRACTUAL

- (1) acknowledge receipt of the claim;
- (2) commence any investigation of the claim; and
- (3) request from the claimant all items, statements, and forms that the insurer reasonably believes, at that time, will be required from the claimant.

# EXTRA-CONTRACTUAL

- Sec. 542.056. NOTICE OF ACCEPTANCE OR REJECTION OF CLAIM.
  - (a) Except as provided by Subsection (b) or (d), an insurer shall notify a claimant in writing of the acceptance or rejection of a claim not later than the 15th business day after the date the insurer receives all items, statements, and forms required by the insurer to secure final proof of loss.

# EXTRA-CONTRACTUAL

- IMPACT OF APPRAISAL
  - *Amine v Liberty Lloyds*, 2007 Tex.App.LEXIS 6280 (Tex.App.-Houston [1<sup>st</sup> Dist] 2007)
  - To prevail under *Article 21.55*, the insured must establish: (1) a claim under an insurance policy; (2) that the insurer is liable for the claim, and, (3) the insurer has not followed one or more sections of *Article 21.55* with respect to the claim.

# EXTRA-CONTRACTUAL

- *Allstate Inc. Co. v. Bonner*, 51 S.W.3d 289, 291 (Tex. 2001); *Wellisch v. United Servs. Auto. Ass'n.*, 75 S.W.3d 53, 57 n.2 (Tex. App.-San Antonio 2002, pet. denied).

# EXTRA-CONTRACTUAL

- The first element was satisfied when the Amines filed their claim. The Amines argue that the second element is "met through [Liberty's] partial payment of the claim and full payment of the umpire's award, and the third should have been resolved through presentation of evidence."

# EXTRA-CONTRACTUAL

- Texas courts that have considered the issue have concluded that full and timely payment of an appraisal award under the policy precludes an award of *Article 21.55* penalties as a matter of law.

# EXTRA-CONTRACTUAL

- *See Breshears, 155 S.W.3d at 344*  
(holding that insurer did not breach contract and insureds were not entitled to payment of penalty fees, even though final payment was delayed until completion of appraisal process );

# EXTRA-CONTRACTUAL

- *Waterhill Cos. Ltd. v. Great American Assurance Co., No. 05-4080 CV, 2006 U.S. Dist. LEXIS 15302, 2006 WL 696577 at (S.D. Tex. March 16, 2006)* (holding that, when the appraisal clause is invoked, a delay in payment pursuant to the appraisal process does not constitute an *Article 21.55* violation).



# EXTRA-CONTRACTUAL

- CONSTITUTIONALITY-Art. I sec 15
  - Right to a trial by jury

# EXTRA-CONTRACTUAL

- ACTUAL DAMAGES
  - Provident American Ins. Co. v Castaneda, 988 SW2d 189 (Tex 1998)
  - With regard to the damages that might be recoverable if an insurer failed to adequately investigate a claim, we indicated in *Stoker*<sup>46</sup> that failure to properly investigate a claim is not a basis for obtaining policy benefits.

# EXTRA-CONTRACTUAL

- We did recognize, though, that there might be liability for damage to the insured other than policy benefits or damages flowing from the denial of the claim if the insured mishandled a claim. We said: "We do not exclude, however, the possibility that in denying the claim, the insurer may . . . cause injury independent of the policy claim."

# EXTRA-CONTRACTUAL

- PUNITIVE DAMAGES
  - *Transportation Ins. Co. v Moriel*, 879 SW2d 10 (Tex. 1994)
  - In addition to conscious indifference, an insured who alleges gross negligence must prove that the insurer committed an act that was likely to cause serious injury.

# EXTRA-CONTRACTUAL

- In essence, the issue in determining whether bad faith involved an independent likelihood of "serious injury" is whether the insurer engaged in the sort of outrageous behavior that the law seeks to punish. *Ware, 359 S.W.2d at 899* ("The fact that an act is [tortious] is not of itself ground for an award of exemplary or punitive damages.").

# EXTRA-CONTRACTUAL

- In general, though, an insurance carrier's refusal to pay a claim cannot justify punishment unless the insurer was actually aware that its action would probably result in extraordinary harm not ordinarily associated with breach of contract or bad faith denial of a claim -- such as death, grievous physical injury, or financial ruin.