

Case Study Workshop:

Rising Tides

Case Study



Notice to Workshop Participants

Loss prevention involves identifying and anticipating risks in the practice of architecture and engineering. Studying claims that have actually happened can help you more readily spot risks, identify opportunities to use loss prevention techniques and decrease exposure to claims in your own firm.

The case you are about to read is taken directly from an actual claim. It is not a composite case, nor has it been embellished—it is simply a real-life situation that involves design professionals. Fictitious names, firms and locations have been used to maintain confidentiality. Any similarity to names of actual persons, firms or locations is entirely coincidental.

This publication is intended for informational purposes only and does not constitute legal advice. For legal advice, seek the services of a competent attorney.

Any descriptions of insurance provisions are general overviews only. THE INSURANCE POLICIES, NOT THIS PRESENTATION, FORM THE CONTRACT BETWEEN THE INSURED AND THE INSURANCE COMPANY. Insurance coverage in any particular case will depend upon the type of policy in effect, the terms, conditions and exclusions in any such policy, and the facts of each unique situation. No representation is made that any specific insurance coverage would apply in the circumstances outlined herein. Please refer to the individual policy forms for specific coverage details. All coverages are subject to individual underwriting judgments and to state legal requirements.

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The Case Study Process

The case study process combines individual exercises and group discussions to examine an actual claim. Follow the steps below to determine loss prevention actions that could have been taken to avoid or reduce the problems that arose in this case and to identify new or revised loss prevention practices that may have value for your own firm.



Step 1: Individual Exercise—Review Case

- Read **The Facts** of the case (pages 4-7).
- As you read, note what you think is the primary problem or failure and identify factors that may have contributed to or exacerbated the situation. You can use page 8 to record your diagnosis. You'll also want to list actions that could have been taken to eliminate, reduce or mitigate contributing factors. (Think in terms of quality assurance procedures, communications/relationships, business practices, contract language and initial responses to the problem.)

Step 2: Small-Group Discussion

- Divide into small groups as instructed by the workshop leader.
- Select a spokesperson to facilitate and summarize your small group's discussion points and present a group consensus to the main body of participants.
- As a group, discuss the case in light of each individual's analysis of the case and develop a consensus to be reported to the main group. The spokesperson should tabulate and record the group's thinking.
- Wait for directions before you turn the page.

Step 3: Group Reports, Key Points and Conclusion

- Return to main group for discussion and conclusion to case.
- Each spokesperson reports the results of his or her small group discussion. The workshop leader develops a conclusion to the case based on feedback from all groups.
- **Key Points** (pages 9-14) of the case are summarized.
- Wait for directions before you turn the page
- Summary of the actual settlement or judgment, **The Bottom Line**, is presented (page 15).

Rising Tides

The Facts

Survey All, Inc., had a reputation for providing top-notch survey and civil engineering services to several small communities in the Florida Panhandle. The firm usually hovered around 5 to 8 employees and was led by two principals, Dan Alvarez (civil) and John Fitzgerald (survey). Dan and John had grown up together but were polar opposites. Dan was a savvy businessman, while John was considerably more laid back. John’s record keeping was casual, to put it kindly. Both worked hard and tended to their own projects, rarely checking in with the other.

Cast of Characters

Survey All, Inc.	Survey and Civil Engineering Firm
Dan Alvarez	Principal, Survey All
John Fitzgerald	Principal, Survey All
Jennifer Warren	Client

The Community of Margaritaville

In March of 1999, a friend of a friend put Dan and John in touch with a developer who had purchased some land that backed up against a brackish channel fed by Gulf waters. The terrain, while fairly flat, offered subtle variations in elevation. Due to the overall shape of the 100-acre parcel, lots were fairly long, sloping from high to low toward the water.

After a short meeting with the developer, Survey All was retained to perform a survey and to provide the plat for the community to be known as Margaritaville. Dan and John signed their proposal and sent it to the developer. The proposal contained their scope of services, fees, and solid terms and conditions. The developer called when he received it and said, “Looks great, let’s get started.”

Per local requirements, Survey All provided the FEMA flood zone lines on the plat. The flood zone lines were necessary to delineate the areas at high potential risk for flooding (Flood Zone A11) from those at lower risk (Flood Zone C). Among other things, John referenced his copy of the 1984 FEMA flood map he’d used thousands of times, in order to set the appropriate flood zone lines. To be honest, John always considered this requirement more of a formality for the City of Lowland, as the wind damage from hurricanes always seemed to be worse than flooding. Regardless, if the City had a problem with his work, he was sure that they’d let him know.

The Replat

A few months later, Survey All was contacted by Jennifer Warren, who had purchased two lots in Margaritaville. Jennifer had always dreamed of living on the water, and had finally saved up enough money for a down payment from her job working as a paralegal for a prominent personal injury lawyer in town. This, she thought, would be her dream home.

Jennifer told John that she wanted to combine the two lots and made at special point that it was very important to her that the home be located in the lowest risk flood zone. Not a problem, John told her. He reshot his survey, did the take offs for the flood zone lines, and replated the two parcels. As it turned out, a significant portion of her property was in the low-risk Flood Zone C.

The Dream Home

A few months later, Jennifer contacted John again and told him she wanted him to work with the builder to help site the home on the property and do the construction staking. John sent her a letter proposal that outlined the services and the cost. He did not include the standard terms and conditions that were so important to his partner. By this time, John felt he knew Jennifer well enough, and thought that as long as Survey All did what they were supposed to do in rendering professional services, they would continue to enjoy the claims free fortune they always had.

The Garage

Four years later in 2003, Jennifer asked John if Survey All could do the construction layout for the pilings for a new detached garage. Since he had done several prior projects without a contract, he really didn't think that a formal agreement was necessary. It always seemed like overkill, and it made him feel uncomfortable sending contracts to people he knew well.

The All Improvement Survey

In April of 2004, Jennifer asked John to provide an all improvements survey. He gladly obliged. John performed the survey and invoiced her for the work. While doing the survey, he relied on his trusty 1984 FEMA flood map. It was by now dog-eared and worn, but he had become rather fond of it over the years. He was wary of new technologies. Young engineers these days didn't use hard-copy maps anymore, they used the Internet, and who knows how reliable that thing is? One needed a *real* device, a map that you hold in your hand.

The Flood Elevation Survey

In September of 2011, Jennifer asked John to complete a flood elevation survey. She was switching flood insurance companies and the carrier would need the survey to confirm her home was in Flood Zone C. He resurveyed the property, checked his 1984 FEMA flood map, and confirmed that yes; her home was in fact in Flood Zone C.

Trouble in Paradise

About a week later, Jennifer called John in a panic. The carrier quoted her an insurance price at ten times the cost of her old policy with a third of the coverage, because her home was squarely within the high risk Flood Zone A11. The new carrier refused to accept John's flood elevation survey and was contending that the living space on the second floor was actually two feet under the Flood Zone C level and the garage was squarely within Zone A11. Impossible, thought John. He had checked the survey himself.

Dan, who couldn't help overhearing, asked John what had happened. John explained everything. Dan quickly checked the FEMA website, which showed that the FEMA flood map for Margaritaville hadn't been updated since 1992. There's no way there could be a mistake. At that moment, the blood drained from John's face. He admitted that he had been using a hard copy of the 1984 map all these years. For almost 20 years he'd failed to realize that the FEMA map had been updated. The 1992 map clearly showed Jennifer's home in Flood Zone A11. And what's worse, FEMA had paid Jennifer for flood damage from two previous hurricanes based on the assumption that the home was in a low risk flood zone.

Jennifer's dream home was now a nightmare. Her insurance was nearly cost prohibitive, and her limits were a fraction of what they used to be. The Flood Zone A11 revelation dramatically diminished the resale value of her home; as a result she was figuratively underwater on her mortgage. Additionally, what was to keep FEMA from reaching back and seeking reimbursement for the funds that it should never have paid? Terrified that her home and finances were being destroyed, Jennifer finally went to her boss. She needed advice. She needed to lawyer up.

Back at Survey All, it seemed like their years of good fortune had come to an end, and right when they were both looking to retire. But John had worse news: he had just been diagnosed with cancer. "Don't worry about this," Dan said. "I'll take care of the issue with Jennifer. You worry about getting well." And with that, Dan picked up the phone and called his insurance agent, and John was effectively out of pocket for 8 months battling for his life.

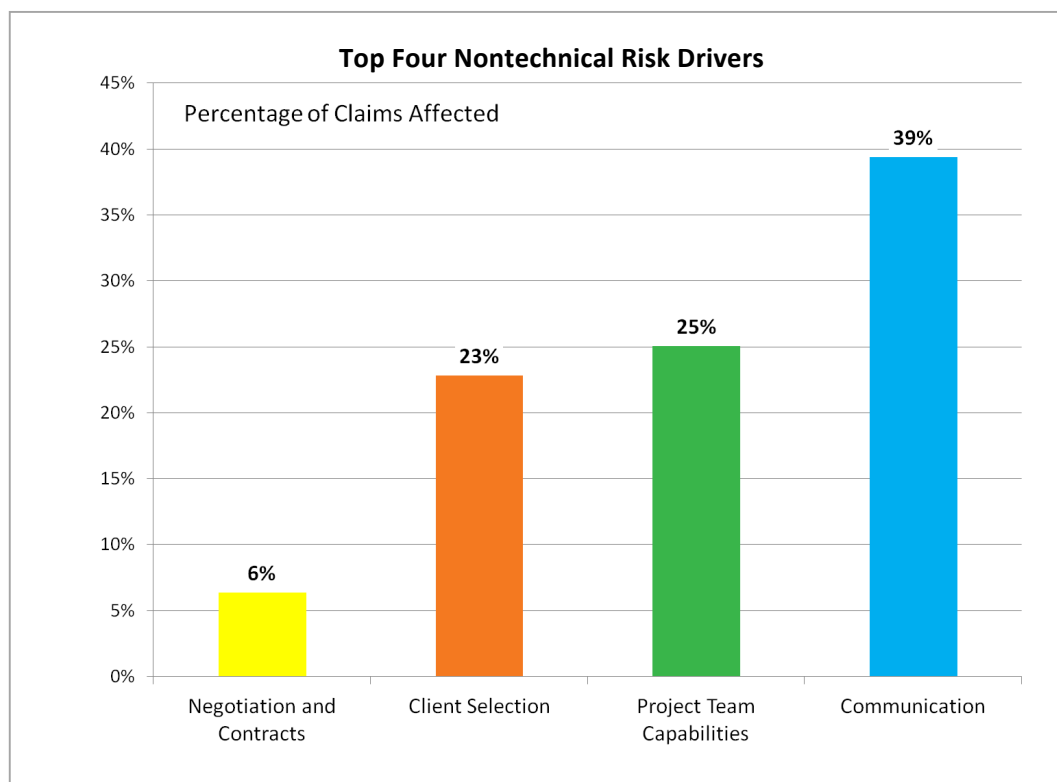


Notes

Use this page to record what you think is the primary problem or failure and identify factors that may have contributed to or exacerbated the situation. You'll also want to list actions that could have been taken to eliminate, reduce or mitigate contributing factors. (Think in terms of quality assurance procedures, communications/relationships, business practices, contract language and initial responses to the problem.)

Key Points

The Design Professional unit of XL Catlin has analyzed its large collection of claim files to identify the technical and nontechnical Risk Drivers behind the claims. While every claim has one or more technical causes, our research shows that in nine out of ten claims, a nontechnical “Risk Driver” leads to or exacerbates a claim.



In this claim, three out of four of these categories came into play:

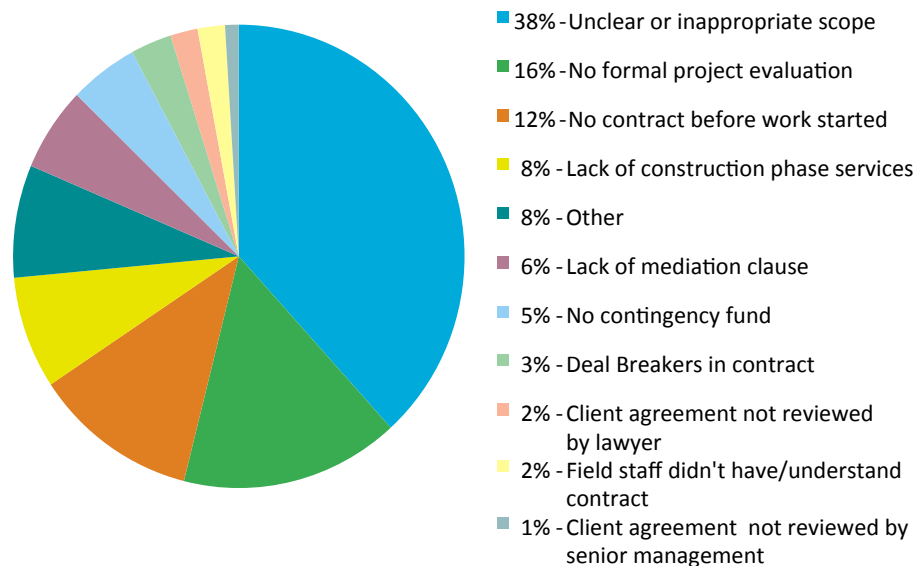
Negotiation and Contract Issues

According to data in our Risk Drivers study, negotiation and contract issues are contributing factors in 6% of claims (representing the frequency) and in 13% of claims dollars paid (representing severity).

As you can see from the following chart, the third biggest category, or 12% of the claims, can be linked to not having a contract before work started. In this case, Survey All was very lax in its contracting practices. It had originally approached the developer with a written agreement that included a good standard of care provision and a limitation of liability that limited Survey All's exposure to \$250,000. However, Survey All commenced services after

receiving verbal authority to do so from the developer, and it **never got a signed contract**. While this had little impact on Jennifer's claim, it certainly set the stage for a firm culture that did not see the value in dotting the "i's" and crossing the "t's", and at least one of the principals was never really on board with concept of having a signed contract with safeguards in the event of a mistake.

Negotiation and Contract Issues

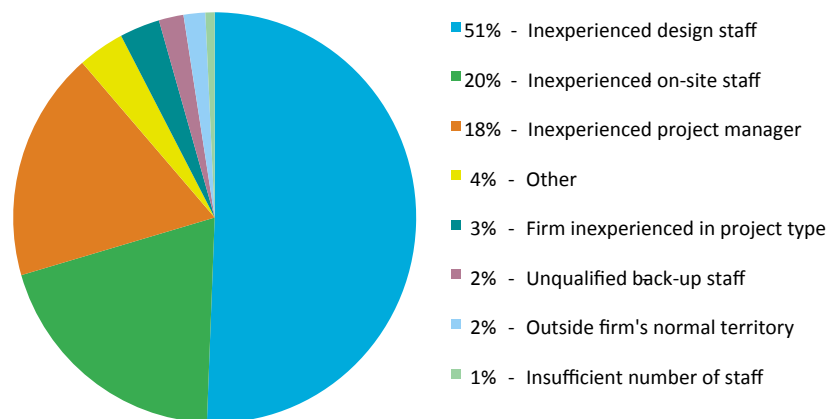


Moreover, all of the services offered to Jennifer were done merely by invoice or letter proposal, and many of the records were gone or never properly filed. This became a problem when John was unavailable due to his medical condition, and Dan was left trying to reconstruct what happened. (In fact, Dan believed for some time that the error was shared by another survey firm who came after Survey All and sited Jennifer's home on her lot. This was actually part of Survey All's initial defense of the claim. This turned out to be false as Survey All was the subsequent firm, and kept replicating the mistake.) What's worse is that the standard contract terms and conditions that Dan worked so hard on with their local counsel in the summer of 1999, the one that John felt was overkill or embarrassed to forward to Jennifer, contained a much more favorable limitation of liability clause limiting Survey All's liability to \$50,000. Since this **contract was never signed** by Jennifer—or even sent to her—it was not part of agreement for services. The claim ultimately resolved for significantly more than the limitation amount.

Project Team Capabilities

Our Risk Drivers Research shows that the second leading risk driver is project team capabilities. Its involvement in the claims we see has stayed at roughly 25% since we did the first Risk Drivers analysis in 2001. In the “Project Team Capabilities” chart below, note how often the words “inexperienced,” “unqualified” and “insufficient” appear.

Project Team Capabilities



Often, practitioners assume that these words correspond to young firm members. While it is always a good idea to focus on training and education for younger members of the profession, it is equally important to realize that **seasoned professionals can and do make mistakes**. John was slow to learn new technologies. When the FEMA map was updated in 1992, he failed to appreciate this key fact and what it meant. However, although younger practitioners came to rely on FEMA updates via the Internet, John never bothered to even look. Had he looked, he would have had instant access to the most recent FEMA flood map, including all revisions, amendments and revalidations. He could have quickly referenced the property by address, place or coordinates and caught his mistake. Dan was flabbergasted when he learned that this was how John had been conducting his surveys. He never thought to vet his own partner. After all, John was the survey guy in the firm—he knew what he was doing, right?

Not only did John fail to catch this mistake when the original work was done in 1999, when the Internet was not as widely accepted as it is now, but he had **multiple opportunities to catch his error**. At the time the claim was made, he was still using the 1984 FEMA flood map that was almost 20 years out of date. What’s worse is that he was well aware of the propensity for hurricanes in this part of the world, and was no stranger to the flood damage that can result from storm surges and the inability of the relatively flat landscape to accommodate surface water runoff during periods of heavy storm activity. While he was

unaware of the change in the FEMA map, he was certainly aware of what seemed like an increase in storm activity over the years—something climate scientists have been warning of for some time. While some still debate the impacts of climate change, savvy plaintiff attorneys will use the frequent climate change discourse in the news and media to argue that design professionals are on notice of issues like flooding in hurricane prone areas. If a jury believes this argument, the standard of care has changed. Don't think this could happen? It can and it does.

Moreover, Jennifer had specifically told him how important it was to make sure that her home and garage were located squarely within the portion of the lot that was at the lowest risk for flooding. Again, several missed opportunities.

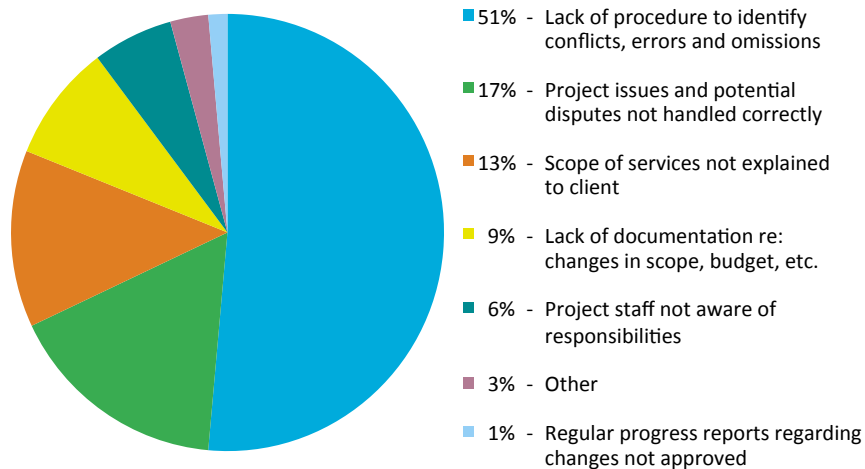
Compounding his error was the mistaken belief that if a hurricane was going to hit the area the flood zone lines would be meaningless. In fact, the flood zone lines were very important. John failed to appreciate the distinction between flood and wind insurance. Also, having the City rubber stamp your design documents is no defense to a claim. City officials are not there to catch your mistake.

Finally, Survey All had ***no quality assurance or quality control procedure***. Both Dan and John felt awkward checking each other's work. They relied on their close friendship to cement their belief that neither one of them could make a mistake.

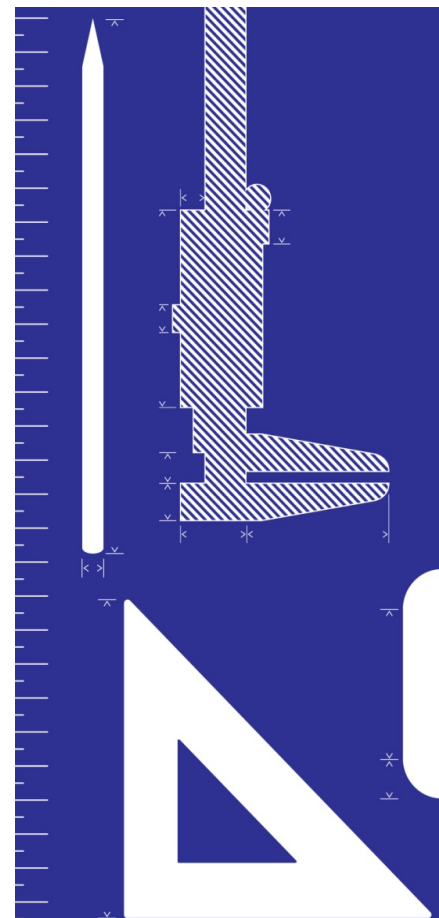
Communication Issues

XL Catlin's Risk Driver research shows that in all project types, nearly 40% of the claims count (representing the frequency) and almost 30% of claims dollars paid (representing the severity) have their roots in poor project team and client communication.

Communication Issues



The failure to communicate internally played a big role in this claim. When John was unavailable as the claim developed, Dan was tasked with assisting the insurance company and his defense counsel with recreating the project file. John was not only lax in his contracting discipline, but he was extremely **careless in his document management**. Dan and John basically handled their own projects, and seldom overlapped. They had a conversation when the firm first started about how they would categorize and store documents. However, John never took the system very seriously. Instead of adhering to their agreed-upon protocol of making hard-copy files that were indexed by project name and client name, John would frequently label files by client name only (first name or last name, whichever was easiest for him to remember), address, sometimes city, and sometimes parcel number. Moreover, he did not have a method of cross-referencing projects; i.e., there was no way to reference the work for the developer with the work for Jennifer Warren. Survey All **did not have a clearly defined document retention policy**, which meant that Dan was saving all documents and John was throwing out documents, like invoices and proposals, when he figured he did not need them anymore.

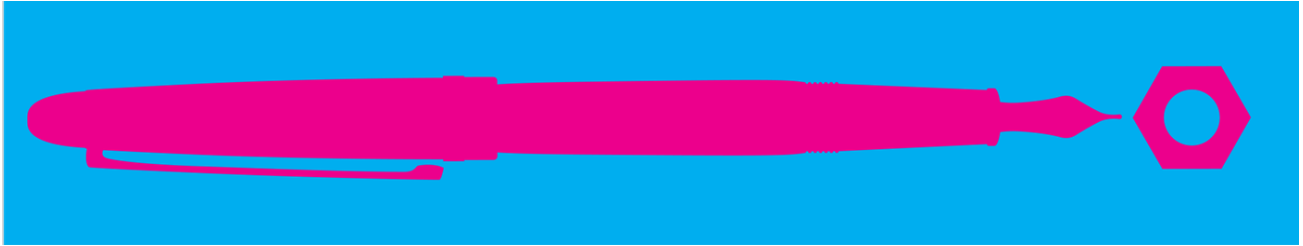


Tasked with piecing together the paper trail, Dan had an extremely difficult time. (When he mistakenly believed that Survey All preceded another survey firm who made the same mistake and shared liability, he made sure that his attorney told the other side. What was thought to be a defense turned about to be an embarrassment when Jennifer's attorney completely discredited Survey All at the initial mediation in front of the mediator and Jennifer.) The failure to properly locate documents was perceived by Jennifer as disingenuous and deceitful behavior, and John was accused in his absence of throwing evidence away. Several of the documents used to recreate the project file came from Jennifer.

Finally, many of the key facts and dates of service were never written down in a log or journal. Often, Dan had no idea what John had been thinking, when he did something, or how he'd arrived at a certain conclusion. So much was merely "in his head" and when John was taken out of production to undergo extensive medical treatment, Dan was left grasping at straws.

Documentation is all about proof. The ability to produce complete, accurate records is critical to a design firm's defense of any claim or lawsuit. The lack of documentation is the single greatest challenge XL Catlin's claims staff face when trying to extricate our clients from a claim or dispute. ***The lack of documentation and record retention can lead to claims of dishonesty and spoliation of evidence***—the intentional destruction of documents—that can give rise to a variety of sanctions, and change the landscape of the litigation in favor of the other side.

Wait for directions before proceeding beyond this page.



The Bottom Line

Jennifer, who was receiving excellent representation from the best trial attorney in the county, filed a lawsuit seeking well in excess of \$1,000,000 to compensate her for the loss in value of the home, the cost to move the home to higher ground, the cost of additional insurance premiums, and the amounts of money that FEMA paid based on the wrong flood zone (her concern being that FEMA could recoup the money if it ever found out about the mistake).

Dan tried his best to fill in the gaps and recreate the paper trail. John was available at times between his chemotherapy treatments, but he wasn't very present throughout the entire ordeal. He remembered little, but he did confirm that Jennifer was adamant about locating the home and the garage in the lowest risk flood zone possible, and he did remember using his hard copy of the 1984 FEMA flood map. He also admitted that he never thought to check the FEMA website for any updates.

Feeling emboldened, Jennifer demanded more than she was entitled to under the law. The fact that her case was assigned to a judge with a reputation for being a "wild card", and someone who was fond of Jennifer's attorney also bolstered her confidence. The judge had already issued some pretrial rulings that didn't really follow the law and favored Jennifer's case.

The case needed to settle. Dan had to save his firm and his reputation, as Jennifer was sure to spread the word of Survey All's poor quality of services in their small community. Dan knew that he would never be able to sell the firm and retire in the next two years. That shipped had sailed with the rising tide.

The case ultimately settled at the second mediation for \$425,000. Survey All's carrier spent an additional \$100,000 defending the firm. John eventually made a full recovery, but not until after the claim was settled. Both Dan and John have delayed their retirement until their late 60s or early 70s.



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