



MUDDY BREWING MEDIATION

Confidential Information for Defense Client Ryan Rorie, Architect

You are outraged and sickened by Boone's \$10,000,000 lawsuit on a job on which your fee was \$250,000. How dare they sue you personally, when all of your work was done through Rorie Space Design? This was not a personal project; you don't have personal liability. Boone knows better. How would Boone like to have home and family threatened for every on-the-job company mistake? Boone did not sue Groban personally even though Groban Construction is in bankruptcy, no doubt because Gary Groban is a buddy.

You carry insurance through the insurer Design Insurance Corporation, Inc. ("DIC") to cover this type of claim but the deductible is \$100,000. The insurance policy limits are \$5,000,000. Under the insurance contract, you must split the cost of attorneys' fees 50/50 with DIC until the deductible is reached. Also, you end up paying in higher premiums for any amount the insurer pays on your behalf. (That is why you have ultimate settlement authority, even if DIC would approve a settlement figure greater than your deductible.) Though provided by DIC, the attorney must represent your interests, not just DIC's.

With respect to the window fan unit leakage, you reread the plan documents. You have designed window fans units in this way many times before, without any problem, when working with a competent general contractor. However, you can see that the flashing detail is a little bit vague and could be misinterpreted by a general contractor without much experience. You were supervising the job, of course, but were not present when the flashing detail was done. You had never had trouble in this area before, so you did not think it important to be there for that piece of the bathroom work.) With respect to the wall by the fan units, your plans said: "board to code." You wonder if the contractor used suitable board material that would resist moisture. In any event, it would have been fine if the flashing had been done correctly. You put the blame for that on the general contractor.

As for the bathroom faucets, in retrospect, you can see that the faucets you specified were intended for use with a deeper sink unit. You had chosen them from a catalog for their elegant lines. Because of the angle of the picture, you hadn't realized how far they would extend. Also, you recall that earlier versions of the bathroom plans had more space between the sink and the opposite wall, so you had spec'd a slightly deeper sink. Later, it was decided to allocate less square footage to the bathrooms to allow for a small closet on the other side of the wall. Unfortunately, you didn't go back to check the faucet dimensions when choosing a smaller sink.

Nevertheless, the faucet problem should have been obvious to the contractor as soon as they took the first one out of its box. At that moment, they could have alerted you to the problem; you would have sent the faucets back immediately and replaced them with a



different model. Instead, the contractor just stuck them all into the sinks; they didn't care about splashing water. Now, all the faucets have been used and can't be returned.

Frankly, you don't think it's fair for you to foot the bill for the faucets and the fan window unit repairs. Moreover, you believe Boone's so called "expert architect's" repair estimates are grossly inflated at approximately \$4,000 per bathroom for redoing the wall fan unit flashing and fixing any wall damage, plus \$500 for replacing the faucets. For 20 bathrooms, that's a total of \$80,000 for the wall fan unit and \$10,000 for the faucets – a total of \$90,000. The entire bathroom installation did not cost that much. You work frequently with a friend who is a general contractor who has told you that he could do the repair at \$2,000 - \$2,500 per unit, or \$40,000 - \$50,000, and source and install faucets at \$2,500 - \$5,000 – a total of \$45,000 - \$55,000.

On the far more costly issue of damage to windows, doors, walls, floors, and subfloors, not to mention lost revenue caused by mudslides and sagging foundations, you don't think that burden should be on you. You are neither structural engineer nor an expert in of brewing equipment weights. You handle the aesthetics of space and design. In fact, when you first saw the way the building abutted the side of a hill by the river, you were concerned about instability from heavy rains or rising rivers. You noticed the structural engineer's disclaimer about current soil conditions and mentioned the concern to Boone and Groban. One of them was going to check with the city's engineering department. At a minimum, you suggested they find out if there had been any recent mudslides or flooding in the area or more current soil sampling. Both deny these conversations took place and you have no notes or other written evidence.

At the time, you did take the trouble to review the structural engineer's original drawings and calculations, provided to you by Boone. The structural engineer's sketches had included restaurant space and opening the building to the two side patios. That allayed your concerns to some degree. You weren't aware that Boone had obtained the structural engineer's report before deciding to locate full brewery equipment, storage, and cellaring in the building.

Boone is taking the position that you, as the design professional, should have known and investigated fully. He alleges it was your duty to him not only to raise the issue, but, in essence, to refuse to follow his request to design the building that way if there were any concerns. You strongly disagree, particularly because Boone is a savvy developer. This was an old building on a sloped site by the river. It was his idea to expand the exterior footprint with two patio extensions, and later, to install heavy equipment the building had never supported before. Moreover, Boone's involvement in Outskirts Brewing meant he was familiar with the brewing process and weight of the equipment, especially as the tanks filled with beer batches.

You suspect that Boone overpaid for the building. To function as Boone intended, costly structural improvements to the property were necessary all along. It's not your fault and



not your problem that Boone didn't factor this into his business plan or that his plan changed to include a full brewery rather than just a restaurant, offices, and retail.

In other words, your fair share should only be what your "negligence" caused or allowed to happen. Boone's lawyer argues you should have seen and alerted them to the structural problems, risk of landslides and sagging foundation, etc. Okay. If you had done so, and if they had listened, major foundation work and structural reinforcement would still have been required. That would have cost the same \$1,000,000 and caused substantial project delay. You are not responsible for any of that. (You anticipate the other side will argue the costs would have been lower and delay shorter if this work were done at the beginning. You wouldn't necessarily concede the point to them, at least not right away. But even with that, the cost of the work wouldn't have been more than 25% lower - \$250,000 –and the delay less than two months. You would want to see legit delay costs - lost profits, not lost gross revenues, and not fantasy.)

Thus, the real consequences of anyone's failure to see and warn about the risks were the \$100,000 in repairs to the interior restaurant walls and furnishings plus \$80,000 for replacement sliding window wall units, \$40,000 for sliding glass doors and frames, plus \$60,000 for reinstallation and finishing work – a total of \$280,000. Because you DID raise the issue, and Boone and Groban Construction were equally able to see a potential problem, you are not eager to pay even for these repairs. At this point, you can (grudgingly) see that it would be reasonable to compromise on 50% or \$140,000ish on this aspect of the claim.

You also understand that Rorie Space Design (through its insurer) will also likely be on the hook for much of the bathroom-related expenses.

Even though any amount over your \$100,000 deductible will come from DIC, you don't think you or DIC should authorize paying more than about \$190,000 or \$200,000 (based on a share of repair costs and bathroom costs described above). You could change your mind here if convinced the actual costs were higher or that you missed some compelling argument relating to allocation of fault (between you and Groban) or the cost of this mess. You reject the idea of covering inflated "project delay damages" because even if the need for structural work had been known earlier, the project would have been delayed. And any developer should know better than to count on a short time frame for project opening.

Even payment of figures in this range presents practical problems for you. Rorie Space Design does not have \$100,000 in the bank to cover the deductible. You would be willing to pay a small portion in cash - \$30,000 to \$40,000 is about all you could handle right now - and the remainder either over time (perhaps \$20,000 per year) or as future design services. It is also in your interest to think of ways to "use up the deductible" within the language of any settlement agreement, so that the insurance company's cash can be used (within reason) to satisfy Boone.

There are other possible options, one of which is to lease one of the office areas in Boone's building for your design business. Rorie Space Design currently pays \$11,000 per month



rent on a lease set to expire in two months. You have never liked the location and the space is larger than necessary. If efficiently laid out, you could do will much less square footage. One of the Boone building's office areas would be fine, especially because you could design the layout. If you could rent it at \$8,000 per month – the price point at which Boone is advertising – that would represent cash flow savings for Rorie Space Design. Or you would be willing to keep paying \$11,000 per month on a long-term lease.

Another possible area for working with Boone would be in future design services. Rorie Space Design is not a one-person shop; it includes a team of architects and designers. Instead of cash, you might be willing to contribute design services for other projects Boone has in the works, if there are any. But you would only go down that road if Boone's general contractor was experienced and solvent.

As soon as you learned of the Boone building disaster, you had contacted DIC. After receiving the written complaint, you met with the attorney DIC provided. While that attorney seemed perfectly nice and knowledgeable about construction litigation, you were somewhat concerned about their possible motivation to drag this out. After all, billing is by the hour. You also worried whether any attorney on DIC's list might prioritize the insurer's interests over yours.

To date, the attorney's fees have only been \$10,000, and you have paid half - \$5,000 – which count against your \$100,000 deductible. Really, all the attorney has done is review the documents, talked to you, and filed an answer to the complaint. You understand the fees would be as high as \$100,000 if the case were to go to into full-blown discovery and adjudication in court or before an arbitrator.

You were delighted by the attorney's recent call to suggest mediation as a process that might lead to a business solution, saving time and money. While you had reviewed all the liability issues and defenses in the initial meeting with the attorney, your business interests were not raised or discussed.