MUDDY BREWING
MEDIATION

Confidential Information for

M.C. Rogers, Esq. of Kraft, Kuhl & Rogers, LLC.

Counsel for Plaintiff Brewery Owner-Developer

You are a partner in Kraft, Kuhl & Rogers, LLC, a seven-person law firm, created three years ago by the merger of two smaller practices. You are proud to have built a general practice servicing small business clients, both in transactional work and litigation. You have a bit of a specialty in construction related litigation. The firm is doing well, but as is true for most firms of its size, the profit margin is never enormous. Still, you represent clients for the long run. You have learned that it is never wise (not to mention ethical) to "milk" a case for a high fee before suggesting settlement. Your firm will prosper in the long run if its clients are satisfied with the value of your services and the ability of your legal advice to help resolve business problems.

Your client in this case is B.Z. Boone, principal and owner of a local development company – Boone Properties - that has done various commercial and residential projects in the area for many years. Boone's most recent project is Boone's Brewery; they seem to have invested heart and soul and a lot of capital into this one.

Boone confided in you that, in retrospect, it would have been wise to consider George Groban's inexperience when assembling architect/general contractor team for this project. Because Boone trusted Groban's father; they didn't investigate the company's reputation or performance in recent projects. Boone seems to recognize they could have been more involved at the early stages, or at least have initially inspected the property's location abutting the hill by the river. At the time, Boone Development was running several other projects. This does not excuse Rorie's or Groban's negligence, but it might have avoided the expensive consequences.

Even if Boone would like to ignore the disclaimers in the structural engineer's report, they present a problem for this case. Boone maintains he told the structural engineer that his drawings and calculations should assume a restaurant with patio openings. Boone recognized that these openings – involving removal of part of the brick exterior walls – could impact the overall structure and weight capacity. That's why Boone hired a structural engineer in the first place.

Frankly, it's clear Boone should have gone back to the structural engineer when they decided to locate full brewing equipment, storage, and cellaring in the building. Given Boone's involvement in Outskirts Brewing, they have some familiarity with the brewing process, and the extra weight of equipment and beer production. Of all people, Boone should have known to ask the structural engineer to re-run his calculations and drawings.

Or, at the very least, Boone should have informed Rorie and Groban that the engineer's work was done without considering a brewery operation.

Theoretically, you could argue that Rorie shares some of the blame because Boone gave them the engineer's full report, with all its plans, drawings, and calculations. The report does not mention brewing operations. Rorie could easily have seen that along with the engineer's disclaimer regarding soil conditions. Rorie is the design professional and had an obligation to alert Boone to any need for additional structural engineering analysis. No doubt, Boone would have obtained that analysis if Rorie had alerted them to a potential problem. Boone is adamant that Rorie never raised the soil issue; it's a self-serving lie or a fabricated memory.

You explained to Boone that Groban's bankruptcy means you won't be able to collect much of anything for their mistakes. Under the law of joint and several liability, if a jury allocates any fault to Rorie, they are responsible for paying the full amount. Rorie and Rorie Space Design and their insurer are the only realistic sources of compensation for what this building debacle has cost.

- Regarding 20 bathrooms with leaky wall fan flashing and mis-chosen faucets:

Boone can now see and the expert confirms ambiguities in Rorie's flashing detail plans for installing bathroom wall fan units. An experienced general contractor should have known what to do or should have checked. However, that is the purpose of an architect's supervision responsibility. And, if an architect is going to provide sloppy, unclear plans, they had better show up at the site more often.

What really angers Boone is that they asked Rorie to check on wall fan flashing leaks early on. Rorie failed to do anything. As a result, mildew has no doubt built up behind the exterior wall in up to 20 bathrooms, increasing the cost of repairs.

Boone told you there's no excuse for the faucets in those fancy above-counter sinks. The faucet product information page suggests a certain sink depth and height. All Rorie had to do was read the product sheet and test one and the problem would have been clear before all 20 were installed.

Boone gave you an estimated cost of $4,500 per bathroom - $90,000 for 20 bathrooms - including replacement faucets, new flashing, and wall repairs by the wall fan units. You didn't press Boone on it but you suspect there's some padding in those numbers.

Of course, the mudslides and sinking foundation are what caused the major damages in raw costs and business disruption. As Boone explained, they bought the building with a rough business plan that included projected rental income within a month or so after completion of construction. If Boone had known then that additional structural work would be required, they might have paid less for the building or walked away from the deal. Truth is, at the time of the purchase, Boone seemed not to have had so clear an idea of the desirability of the two extended patio areas. They hadn't really explored the full range of

brewing equipment. Only after the building purchase did Boone come up with the double patio idea and decide to go with premium larger and heavier brewing equipment for larger brew volumes.

Fortunately, Boone explained that their original business plan had been somewhat conservative on rental projections for the office spaces. Based on the market at the time, Boone estimated monthly rental for each space at $12,000. Later, as local rents were rising and the building space design and interior were obviously spectacular, they were listed at $20,000 per month. At this point, given the mudslide fiasco, Boone is concerned about whether any business would rent these spaces in the near term. Boone would be willing to let them go at $12,000 per month, or even $10,000 if a renter would come in immediately.

Rental business aside, Boone is adamant that Rorie and their insurer must pay for what was professional malpractice. Yes, Boone asked Rorie to come up with a design to extend outdoor patios from the restaurant and lower level serving areas. Rorie did that. However, Rorie was also required to consider the older building structure and the hill into which it was built. As the design professional, Rorie was obligated to design so as not to create risk of a sagging foundation or hillside mudslides. If that wasn't possible, it was Rorie's obligation to tell Boone so. You've heard Rorie may claim to have raised "water concerns" with Boone and Groban, but your client has absolutely no memory of that. If Rorie had been clear and direct about the possible consequences, Boone would remember it.

Boone anticipates Rorie may blame Groban and argue that Groban also had a professional obligation to recognize the site risks. It would have been nice if Groban had been smart enough to see the risks or suggest bringing in the structural engineer. Groban would no doubt say he had a right to rely on the architect's plans, as written. As you explained to Boone, now that Groban Construction is bankrupt, Groban can say whatever he wants. Still, you recognize Rorie and Rorie's insurance company may balk at covering the full damages.

Boone now faces enormous unanticipated costs and their insurer has already committed to large sums that they seek to recover from Rorie or Rorie's insurer. These include:

- The $90,000 in bathroom repairs referenced earlier;
- $100,0000 to repair water damage to interior restaurant walls and furnishings;
- $80,0000 for replacement sliding wall window units;
- $40,000 for sliding glass doors and frames on bottom and ground floor levels;
- $60,000 for installation and finishing work;
- $1,000,000 for foundation and structural improvements; and
- $800,000 ($200,000 per month in lost business revenues for at least 4 months)

You recognize that these numbers don't add up to the $10,000,000 claim stated in the complaint. Boone was insistent that you "shoot high" and insisted there was diminished value in the building, revenues would be slower to ramp up, and the timing caused them to miss higher rent markets plus the inevitable time, aggravation, mental distress, and all of that.

You didn't press Boone on the point, but it's not lost on you that these are Boone's estimated revenue figures, not lost profits. You can't really estimate Boone's profit margins. However, based on your general experience, if profits are higher than 20-25%, more people would be in that business.

Boone has pressed you to say their case is strong: that they are likely to succeed against the architect even though Groban appears to be judgment proof. Boone suspects Groban's insurance had lapsed, so you won't be able to bring in another insurer. You did advise Boone to sue Rorie personally along with Rorie Space and Design to protect against the possibility that the company might eventually be judgment proof too.

You have not yet fully discussed with Boone how much of these damages would likely be recovered. Boone has always seemed resistant to any suggestion of compromise, or the idea that Rorie's failures may not have caused all the costs and business troubles. You anticipate opposing counsel will raise the argument that the structural improvements – adding a retaining wall, reinforcing the foundation, blocking, bridging, and helical pile underpinnings – were required by conditions of the property. If Rorie had spotted the problem while drawing up the design before any construction, Boone would have had to incur those costs then. Maybe a jury will accept this argument, or maybe they won't. Because Rorie failed to see and inform Boone about the problem, the windows, walls, sliding doors and floors suffered damage and had to be replaced or fixed. Rorie and his insurers should own those costs.

According to Boone, the opening of the brewery and the restaurant will have been delayed for a full four months by the time the work is done. You can argue about the degree to which the project would have been delayed by discovering these issues earlier.

Still, at some point, Rorie and his insurer are unlikely to pay for necessary improvements to the property. Your client may not be eager to accept that.

You did explain to Boone that a trial would be lengthy, bad for Boone's reputation as an owner/developer, and costly -- up to $50,000 in experts and $100,000 in legal fees.

On the settlement front: because there hasn't been formal discovery, you don't know what Rorie's insurance deductible or coverage limits are. As a practical matter, you will need to find that out!