Don't Bank On It!

(Case 1025)

The Case:

Two years ago your firm was retained by a banking institution (commercial bank) to be the geotechnical engineering consultant for the design of a multi-story building in an urban setting. The site for the proposed building was on a sloping hillside and the adjacent uphill property contained a decrepit two-story, wood-framed building in poor repair. It was understood that any new buyer for this adjacent property would demolish the existing structure and construct a new office building.

The design of the new bank/office building required a relatively deep basement excavation into the hillside immediately adjacent to the uphill property line. In order to construct the basement retaining wall, which was three stories in height at its maximum horizontal penetration into the sloping hillside, it was necessary to drill a number of temporary tieback supports into the soils on the adjacent property. This was done in order to avoid having to brace the retaining wall from inside the building footprint and having to deal with the disruption to construction operations that the presence of such inclined struts and kicker blocks would create. Once construction of the basement wall was completed and braced by interior floors, the tiebacks were scheduled to be de-stressed and abandoned.

Your firm told the bank's project manager that it would be necessary for the bank to obtain permission to install the temporary tiebacks in the soils below the neighboring uphill property, and made a written comment to that effect in the design report for the project. Copies of the report were sent to the bank for their use and for distribution to the architect and structural engineer for the project.

During construction the contractor installed the required tiebacks and anchors extending under the adjacent uphill property, but neither the contractor nor the bank contacted the adjacent property owner to obtain permission to do so. At the end of construction, the tiebacks were not abandoned, as originally planned.

After the new building was completed and occupied, the owner of the adjacent property filed a law suit against the bank, the building contractor, the architect, the structural design engineer and your firm, claiming total damages in the amount of $35,000 for unlawful encroachment (trespass) and use of his property.

In the process of the ensuing litigation, your lawyer has pointed out to the adjacent property owner that you had advised the bank and its project manager

verbally, and in writing in the design report, that it was their responsibility to obtain the necessary permission, and to negotiate a reasonable charge for the temporary use of the soils beneath the adjacent property for the installation of the tiebacks and anchors.

The plaintiff (adjacent property owner) has refused to let your firm out of the law suit, but a week before the case is scheduled to be tried in court, he has offered to settle with your firm individually for a lump sum payment of $15,000, even though you and your lawyer still have evidence that you were not responsible for any of the alleged damages.

What should you do?

(Note: In the process of deciding what to do, try to identify who among the various parties concerned with this action acted unethically, and why.)

Alternate Approaches and Survey Results for "Don't Bank On It!" (Case 1025)

1. This is ridiculous! Your firm is on record as advising the bank to obtain permission for the use of the subsurface portion of the plaintiff's property. This whole thing smells of extortion by the plaintiff. You should go to court to prove that your firm had nothing to do with these alleged damages, no matter what the legal defense costs to your firm may be.
   Percentage of votes agreeing: 7%

2. You should file for a Summary Judgment ruling by the court. The judge will then review the facts of the case and decide whether your firm has any responsibility for the claimed damages. If he finds your firm not responsibility for the damages claimed, the court will release you from the suit.
   Percentage of votes agreeing: 62%

3. Settle for the amount requested by the plaintiff. It is legal blackmail but settling out of court could be less expensive than the alternative of defending your firm in court.
   Percentage of votes agreeing: 3%

4. You should counter sue the plaintiff for bringing a frivolous lawsuit against your firm. As such, an impartial expert will be asked to judge whether or not your firm had any liability with regard to the alleged damages. You should be aware that all the plaintiff need do to keep your firm in the original suit is to find an "expert" who will say that you firm had some responsibility, no matter how small.
   Percentage of votes agreeing: 1%

5. You should make a counter-offer to the plaintiff to release your firm from the suit for a settlement of $5,000, since your legal fees for defense will likely be more than that amount.
   Percentage of votes agreeing: 11%

6. You should file a cross-complaint against the bank because their inaction on your firm's recommendation caused you to be brought into the lawsuit.
   Percentage of votes agreeing: 6%

7. You should make a deal with the plaintiff to testify for them as a friendly, rather than hostile, witness about the warning your firm gave to the bank in the design report. Offer to do this contingent on being released from the case.
   Percentage of votes agreeing: 10%

Forum Comments from Respondents

Student responses:

1. It could be extortion. Could there really be $35,000 in damages? Why did the [adjacent property] owner wait until the building was finished, before saying anything? [ed. note: a perceptive comment – see the Epilogue below]

2. The engineer should not have designed the system before there was written permission to use the soils below the existing [adjacent] structure… The engineer is as responsible for the suit as the owner and contractor for suggesting the tie back method.

3. The structural engineer and architect are also responsible for not making sure that the proper paper work was taken care of prior to proceeding with the work.

4. Learn your lesson here and follow up on such matters before beginning [of construction of] the project. If you [make] a recommendation, check back to see what the decision was prior to working on the 'assumption' that it was approved and handled correctly!

5. You should have checked that your verbal and written instructions concerning [protection of] the adjacent property were followed. This may only have required a phone call to the owner before construction began. The bank was negligent, but this could have been easily avoided with better management on your part.

   [Ed. note for comments 2-5: unfortunately, as a consultant to the owner, or especially as a subconsultant to the structural engineer or architect for a project, you often are involved in the design recommendations, but rarely in the legal aspects of the project, such as obtaining permission from an adjacent land owner, nor do you have the authority to make obtaining such permission happen. The issue is even more perplexing if there is a considerable hiatus between the completion of your design recommendations and completion of the full project design, not to mention initiation of construction. The project

may be put on hold for some extended time pending financing arrangements or regulatory permitting, and you are often not notified of the project status until it is well under construction, if at all. While the criticisms above are justifiable in an ideal consulting environment, they are often not obtainable in the real world, especially if you are dealing with an obstinate client. That having been said, this situation is one that arises all too often and should be recognized and avoided whenever possible.]

6. The owner of [the adjacent] property could easily have taken care of this situation much earlier than the litigation stage following construction. This, as in many lawsuits, seems to be an attempt to extort money from a large corporation who is more likely to settle a case than take chances with a jury's judgement. To the bank and a large A/E firm the amount of damages in the lawsuit is minimal and most companies would take the loss rather than put their reputation on the line. In most of these types of lawsuits, when an innocent party with a strong case files a counterclaim for wrongful suit, legal fees, and other damages due to bad press, the case goes away quickly.

7. I would make no deals or cross-complaints as this would likely prevent me from ever getting work in this town again – regardless of guilt. Summary judgment would be the fastest, cheapest way to finish the case since I have proof I am in the clear.

8. I would seek a judge's ruling because any unbiased party could see my innocence and I would be OK. I would be hesitant to do any more work for the bank.

[Ed. note for comments 6-8: Filing for summary judgment is a possible remedy for this situation. Unfortunately, many judges are not conversant with technical issues, and are wary of making dismissal judgments that could be looked upon as erroneous by peers or a higher court. As a result, it is often more expedient for the judge to deny the summary judgment motion, which then tends to lock the defendant into a trial scenario. As a rule of thumb, it is not wise to assume that just because the right or wrong of a situation is obvious to you, the court will agree with you, for reasons you can't imagine or for motivations well beyond your comprehension or control. See the Epilogue, below.]

Comments from Board of Review members:

1. Cross claim against the bank because their inaction on the geotechnical firm's recommendation caused them (the geotechnical firm) to be damaged.

2. In my opinion, this is not an ethical issue, but rather a business issue. It is costly to go to court – attorneys' fees, design firm's staff time, etc. The decision should be based on a comparison of cost of settlement vs. cost of going to court. Also, settlement brings the matter to a close, unless the property owner and/or bank bring some type of action against the design professional. Also, going to trial has no assurance that the design professional will win. In this case it appears that settlement is the best action to take. The expense of a court case probably would exceed the cost of the settlement.

3. Give him $15,000 and run. The attorneys will spend way more of your money than that before the trial ends (probably already has). It would seem that your firm was involved in the construction process, too. You should also check your internal check policies. Someone did not follow through on determining whether your firm's recommendations to the bank about obtaining the abutter's permission were followed. That is a dangerous situation, and more than a little worrisome for future projects.

4. Where's the ethical dilemma? It appears instead to be a simple loss prevention case. We would have called in our professional society's loss prevention insurance advisor at the first hint of a suit by the adjacent land owner. They would have handled it from there, and would probably have accepted the $15,000 settlement offer as it would be less than the cost of defending the firm during the discovery process (let alone trial!). If the $15,000 gives the plaintiff land owner a monetary resource to go after the other defendants, that's simply too bad. The design professional had no obligation to the construction contractor, and the client was warned in writing (but ignored the warning).

5. Many of the schools in the country still do not teach (or know) much about loss prevention and limitation of liability. I agree that this case is not one in which the principal in the firm is faced with a large ethical issue (other than if it is ethical to pay off a shakedown when you are clearly in the right – or is it "a cost of doing business"?).

   The other ethical consideration centers on the "right" to sue for any perceived issue at all (even when an equitable offer for restitution may have been made), especially when the potential defendant has a "deep pocket" (i.e., the bank, as well as the designer team members); whether it is ethical for lawyers to pull the trigger on a shotgun and name anyone who walked on or by a site in the complaint and suit (what is the principal canon of ethics in the legal profession?); and perhaps what motivates the plaintiff in these cases.

Epilogue

You did, in fact, reluctantly pay the $15,000 settlement to be removed from the case with the proviso that there was no additional recourse against your firm. This was advised by your attorney (appointed by your professional liability insurance carrier) as "a cost of doing business." The transaction occurred only a few days before the trial was scheduled to begin.

The trial was held and an engineering geologist appearing in court as an expert for the plaintiff told the jury that the entire design of the building and retaining system was faulty, since it is well know that "Nature reduces all hills until they are essentially flat."

Additionally, the plaintiff's attorneys made it know to the jury that the plaintiff was an old man with only a few grandchildren left in his family. It was alleged that he was terminally ill with cancer and did not have a lot longer to live. As a result, he wanted to be able to pass on the monetary court award (if he won) to his grandchildren as his legacy, having little else of value to give.

Having heard all of the testimony, the jury considered the plaintiff's demand for $35,000 plus court fees in damages, deliberated for a short period of time and returned with an award in favor of the plaintiff in the amount of $105,000 plus court costs!

Moral of the story: Despite the ethical implications of such a situation, going to court is in reality a crap shoot. Consideration of right and wrong take a back seat to the ability of each attorney to make convincing, emotional appeals to the judge and jury on behalf of their individual clients. Unfortunately, this reality fosters the type of "legal" extortion the geotechnical firm experienced in this case (but were wise enough to be removed for the $15,000, considerably less than the firm would have had to pay the plaintiff, let alone their attorneys, had they stayed in the suit and gone to court to defend themselves).