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THROW ME A MEDIATOR, MY LAW LEAKS

I give up. This is too scary. As you all know, lawyers live in a sea of paranoia, filled with ample opportunities to misunderstand law and end up giving advice as worthless as a Marlon Brando diet book. In the law biz', it's not what you know, but what you think you know that gets you into trouble. And every now and then, a new decision or two proves to me that I just don't get it, and never will. I am Conan the Confused; Zippy the Pinhead. I just don't get it. No excuses, I fully realize this is my problem.

Law School helps us develop these feelings of inadequacy early on. You remember law school? Perhaps it was in contracts class, when you were tipped off ahead of time that you would be called upon to explain something called the Statute of Frauds, so you studied and memorized, and when the professor called on you, you rose from your seat, confident and self-assured, and after clearing your throat, extolled your class and its wizened Yoda with the intricacies of the hallowed Statute of Frauds, and then continued to stand, awaiting applause. Instead, the blank stares turn into laughter, slowly at first, muffled by hands and handkerchiefs, until the rubato builds into full scale, wild gales of guffawing, finger-pointing, knee-slapping derision, until some of your fellow classmates, teary-eyed with glee, nearly pass out as puddles of

drool accumulate on their class notes, and the guy in the back from New Jersey (nobody liked him anyway) finally completely loses it and involuntarily breaks wind.

Clearly, you do not understand the Statute of Frauds.

Foolishly, I believed the years of practice and my pretended experience could conceal my obvious inadequacies, but once again, I find myself face to face with my hopeless inability to understand the law. It all came crashing down again while I was reading the advance sheets a couple of months ago. It was as if the Supreme Court said, "So you think you're hot stuff, huh? Well, bet you didn't know this!" I admit, I was hurt, because these are people I would consider *friends*! And how did they do this, you ask? It was their recent decision of *Amstadt v. US Brass Corp.* That's the case wherein the Court interpreted the rights of consumers to recover under the Deceptive Trade Practices Act (DTPA) against upstream manufacturers of defective products.

The manufacturers in that case were the makers of that faulty polybutylene water pipe, the vaunted flexibility of which was touted as the greatest advance in plumbing since the Water Wiggle. Builders were encouraged to incorporate the polybutylene pipe in new structures because its promised permanent flexibility made it easier to install.

Editor's note: Entre Nous is a regular department of the Austin Lawyer designed to take a light-hearted humorous look at the legal community and community-at-large.

This smashing achievement in water service had one insidious flaw: the resins in the pipe reacted to chlorine, causing the pipe to become hard as rock, and eventually crack, rupture and disintegrate. By the time the pipes began popping, the successful marketing of the product resulted in widespread usage by homeowners, water districts, and contractors. Certainly seemed to us law pretenders like a custom-fit DTPA action: a product which was represented to have characteristics (i.e., it *holds* water) which it does not have (i.e., it *leaks* water). So, why shouldn't consumers be allowed to sue the manufacturer? For two very important reasons: (follow me here, it gets tricky) first, because the DTPA is a *simple* statute, and secondly, because the chief defendant is a multi-billion dollar international oil company.

I had been so confused that I had been citing some of the cases in the court's opinion for the opposite premise, that is, to support consumers. My obvious confusion makes me nervous, because I'm not sure how I should advise clients anymore. How should a lawyer advise the irascible senior citizen who comes in with a plumbing problem? I can envision the following meeting:

Lawyer: Good morning Mr. Zipsky. What seems to be the problem?

Zipsky: My pipes leak.

Lawyer: Your pipes? Leaking? You mean your water pipes?

Zipsky: (sarcastically)
No, my cheese pipes...Yes my water pipes! All through the ceiling and into the bathroom we added. My wife is disabled and we added a bathroom to the master bedroom and put the plumbing across the attic. Some sort of new fangled plastic pipe.

Lawyer: Oh, you mean the polybutylene pipe that has failed all over the place?

Zipsky: Poly-schmolly-whatever. My pipes leak.

Lawyer: Well how bad it is?

Zipsky: The water came through the ceiling, ruined the mattress, ruined the carpet. It's a mess. Can't we sue the people who made that pipe?

Lawyer: Hold on there, you are going too fast for me. Do you know what plumber put in the pipe?

Zipsky: Sure. Morty Ingels. He's been our plumber for 35 years.

Lawyer: Well, you gotta sue Morty.

Zipsky: Why? Morty didn't make the pipe. He just bought and installed it.

Lawyer: Do you know where Morty bought the pipe?

Zipsky: Sure, from Crimp's Plumbing Supply.

Lawyer: Well then Morty can sue Crimp's Plumbing Supply.

Zipsky: But Crimp didn't make the pipe either. He bought it from the manufacturer, Aqua-Leak.

Lawyer: Well then Crimp can sue Aqua-Leak.

Zipsky: Why can't I sue Aqua-Leak? Didn't they tell everyone that this poly-whatever pipe would hold water?

Lawyer: Well, I'm sure they did.

Zipsky: Well why can't I sue them?

Lawyer: Because they didn't tell *you*.

Zipsky: What? They gotta tell me, and not just everyone else?

Lawyer: Yup. You gotta have them in *your* transaction.

Zipski: What, having their rotten pipe in *my* attic's not enough? I bought their exploding pipe!

Lawyer: Uh-Uh-Uh... *you* didn't, *Crimp* did!

Zipsky: Who makes this rule that I gotta be told personally by the Aqua-Leak people that their pipes hold water?

Lawyer: Supreme Court, that's who.

Zipsky: So I'm impressed. I'll bet that rule lasts until *their* pipes leak.

Lawyer: So, do you know them?

Zipsky: Know who?

Lawyer: The people who made the Aqua-Leak pipe.

Zipsky: How close do I have to know them? Do I have to have them over for dinner or something?

Lawyer: You almost, but not quite, have to have privity with them.

Zipsky: That's just it, I can't quite use the privy now.

Lawyer: No, not privy, privity. That means that you had to buy the pipes directly from them. Well, that's not right, either, but, . . . you get the general idea.

Zipsky: This may come as a shock to you, but I'm not on a first name basis with the schlemiels at Aqua-Leak. I just got the shaft with their pipe. Besides, why do I have to know these guys anyway?

Lawyer: Because the Supreme Court says this is a "simple statute" designed to give the consumers relief.

Zipsky: Then I simply want to sue Aqua-Leak.

Lawyer: It's not *that* simple.

Zipsky: Why not?

Lawyer: Well, you can't be just going off just willy-nilly suing anybody who puts a product into the stream of commerce.

Zipsky: I'm not just suing anybody, I'm suing the guys who put a stream of water in my bedroom. What do I do now?

Lawyer: Simple. Sue the plumber.

Zipsky: But Morty is my friend. Besides he and his wife are retiring and moving to Florida. Why should I have to sue Morty? He didn't do anything wrong.

Lawyer: You gotta sue Morty. That's what makes the deceptive trade practices act simple.

Zipsky: Let me get this straight. If I want my pipes fixed, I gotta sue Morty.

Lawyer: Right.

Zipsky: Morty has to use his life savings to hire an attorney and then sue Crimp.

Lawyer: Right.

Zipsky: Crimp, who bought the pipe from Aqua-Leak, has then gotta hire a lawyer and turn around and sue Aqua-Leak.

Lawyer: Right. It's that simple.

Zipsky: Tell me why I have to do this again?

Lawyer: Because Aqua-Leak wasn't involved in your transaction.

Zipsky: So if Crimp gets money out of Aqua-Leak, he gives the money to Morty and Morty gives the money to me, and all of us have to pay our lawyer's fees all the way up and down the ladder.

Lawyer: Right! Is this a great country or what? I'll just need a small retainer to get started.

Zipsky: Ah, forget it. I think I'll just pay Morty to put in some new pipe. I don't have enough energy to sue anybody. It just sounds too difficult.

Lawyer: Well, you're right. Come back next week, and I'll explain something even simpler to grasp, like the usury statute.

Pass the Bongos

Now I know that ADR is great and all that, but I think we have reached the saturation point for mediators. First of all, everyone wants to be (or claims to be) a mediator. Why? Because for many, it's a convenient escape from the sea of paranoia described above. Now, it's true that a skilled mediator can resolve difficult matters, but I firmly believe that legal skills and negotiation skills come from two different lobes of the brain. You can be a great mediator and not know diddly about the law. In fact, a good mediator can encourage the useful discussion of the law within the process and not have to know anything himself (very much like a law professor). People are also lured to the mediation profession by attractive pay. Once

again, this is incomprehensible. What risk is the mediator taking for his or her services that requires such handsome pay? Is there caucus malpractice? Now, I know that there will be raised blood pressures from "professional" mediators reading these words who would respond with, "Well, (hrumph) you get what you pay for," and "The skill involved in conflict resolution is a delicate art involving the science of psychology, inter-personal communication, a catharsis of [blah, blah, blah...fade...snore]. It all reminds me of my days playing in piano bars in Los Angeles. I once ran into a man who played the bongo drums in a coffee house. (Yes, the bongo drums.) He was arguing how he was the most valuable member of the band because, unlike the musicians who had music for what they were playing, he "had to know everything by heart." Mediators: the bongo players of the legal profession.

Well, for whatever reason, everyone and their sister has decided to become a "certified" (whatever that means) mediator and everyone is expecting the current ADR craze to solve all of our problems. And now, of course, we are approaching the saturation point. You can't even conduct an ordinary day's business without running into 10 or 12 mediators wanting to help you through the day.

For example, I brought an unmarked can of tuna fish up to the counter in the grocery store and asked the checker how much it was. The man in front of me in line stopped, held up his hands, and calmly asked me, "How much would you like it to be?" When I responded, he turned to the checker and said, "Will that be acceptable to you?"

I went to file a new lawsuit at the clerk's office the other day, and the clerk asked me, "Are you sure you want to do this without a mediator's approval?" I told her that I was sure. My client really wanted the name change.

On the way home I stopped for gas, there was a mediator there to assist me

with the octane selection (for a very reasonable fee, I might add). I was helping my son with his homework and I noticed that he had multiplied three and 22 and got the answer of 62. When I suggested to him that the answer was 66, he hired a mediator. We settled on 65.

Luby's Cafeteria has two mediators: one for the vegetable selection, and the other specifically for the "Lou Ann" plate. Not surprisingly, it now takes more than three hours to make your flavor selection at Baskin Robbins (and the cones are now \$63). Soon we will have personal mediators whose job it will be to compromise every decision we make during the day, from what tie or shoes to wear, what comic strip to read first, and the all important "paper or plastic?" Fortunately or unfortunately, however, given our historical ability to overuse any good idea, it won't be too long until we will turn "mediation" into a dirty word. Who knows, eventually maybe important legal questions won't drown in caucus sessions and our courts will once again be forced to define the law openly and critically.

In the meantime, pass me the bongos, because I'm pretty good at this.

Way Cool

We attended the Patti LuPone benefit at the Paramount Theatre last May with a bunch of our friends including Burnie and Janet Burner, John and Jeannene Miller, and Walker and Claire Arenson. Walker came in classic Texas black tie: tuxedo coat, blue jeans, and cowboy boots. He also wore his "way-cool" Rayban sunglasses throughout the evening. I was complementing him on his impeccable style, and how only he could pull off something like wearing evening shades and not feel the least bit uncomfortable. After accepting my compliments, Claire turned to me and revealed the secret: Walker had actually forgotten his real glasses and was blind as a bat unless he wore his prescription sunglasses. Whatever. It was still way cool, Walker. ↖