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Contracts for the Benefit of Third Parties in the Construction Industry

COMMENT

CONTRACTS FOR THE BENEFIT OF THIRD PARTIES IN THE CONSTRUCTION INDUSTRY

I. INTRODUCTION

Perhaps no area of the law has been surrounded by as much confusion as the law governing third party beneficiary contracts. Indeed, one jurist, around the turn of the century, remarked: "There is as much confusion, probably, in the judicial holdings in respect to the matter, as on any question of law that can be mentioned. . . . There is confusion not only between different courts, but confusion in the decisions in many jurisdictions in the same court."[1] Almost three decades later, Professor Corbin, speaking of the tentative adoption by the American Law Institute of general rules recognizing that certain third persons can enforce promises made between others for their benefit, said that the rules represent existing American law arrived at only after more than a century of litigation, and added: "It may seem unfortunate that the law of a great industrial democracy must be built up by such a slow, uncertain, and costly process; but the limitations of the human mind and experience appear to make it inevitable."[2] Although these statements were made long ago, their validity remains undiminished today.

One result of this inconsistency and disparity in the judicial holdings is that the law of third party beneficiary contracts has developed too slowly to meet changing commerical and industrial needs.[3] For example, it was years before many jurisdictions permitted laborers and materialmen to recover the value of their services as beneficiaries of the surety bond given by the contractor to the owner of the proposed building.[4] Thus the private construction contract[5] proved to be a prolific source of controversy. It was initially held that laborers and

1. Tweeddale v. Tweeddale, 116 Wis. 517, 522-23, 93 N.W. 440, 442 (1903); see 17A C.J.S. Contracts § 519(1) (1963); Langmaid, Contracts for the Benefit of Third Persons in California, 27 Calif. L. Rev. 497 (1939).

2. Corbin, Third Parties as Beneficiaries of Contractors' Surety Bonds, 38 Yale L.J. 1 (1928).

3. Id.; see notes 12-16 infra and accompanying text.

4. E.g., New York. See Comment, Third Party Beneficiaries on a Contractor's Surety Bond, 27 Fordham L. Rev. 262, 263-65 (1958), which traces the development of New York law in this area. See generally Corbin, supra note 2, at 2.

5. A distinction was usually made between public and private construction contracts. While confusion prevailed in the latter situation, it was generally reasoned that when the surety's bond was given on a public construction project, the laborers and materialmen could recover on the bond as intended donee beneficiaries since they could not put a mechanic's lien on a public building. J. Calamari & J. Perillo, Contracts § 249 (1970) [hereinafter cited as Calamari & Perillo]. However, as some authorities have pointed out: "The trend today seems to be to abolish this distinction . . . and to hold that these third parties are protected beneficiaries of a payment bond." Id. at 393.

materialmen could not recover on the contractor's surety bond.[6] Subsequently, such persons were permitted to sue as beneficiaries on the surety's promise, which is regarded as one made to the owner to pay claims in discharge of the contractor's obligation.[7]

The liberalization of the law which has occurred in the cases involving the surety's contract has not taken place in situations involving any of the other contracts which frequently exist when a construction project is under way. Some examples are the contract between the prime contractor and the subcontractor; the contract between the subcontractor and the supplier; the contract between the owner and the prime contractor; and the contract between the owner and the future tenant of the premises. One or more participants in the construction project may, for various reasons, find it necessary to sue as a beneficiary on one of these contracts to which he is not a party.[8]

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6. E.g., Kentucky Rock Asphalt Co. v. Fidelity & Cas. Co. 37 F.2d 279 (6th Cir. 1930); National Sur. Co. v. Brown-Graves Co., 7 F.2d 91 (6th Cir. 1925); Maryland Cas. Co. v. Johnson, 15 F.2d 253 (W.D. Mich. 1926); 2 S. Williston, Contracts § 372 (3d ed. 1959) [hereinafter cited as Williston].

7. Fidelity & Deposit Co. v. Rainer, 220 Ala. 262, 125 So. 55 (1929); Byram Lumber & Supply Co. v. Page, 109 Conn. 256, 146 A. 293 (1929); Johnson Elec. Co. v. Columbia Cas. Co., 101 Fla. 186, 133 So. 850 (1931); Harris v. American Sur. Co., 372 Ill. 361, 24 N.E.2d 42 (1939); Daniel-Morris Co. v. Glens Falls Indem. Co., 308 N.Y. 464, 126 N.E.2d 750 (1955); Williston § 372; 30 N.Y.U.L. Rev. 1447, 1448 (1955). For a slight variation of the usual suit by a materialman on a bond, see Shepherd v. Miles & Sons, Inc., 10 Cal. App. 3d 7, 89 Cal. Rptr. 23 (Dist. Ct. App. 1970). Plaintiff supplier released a stop notice on a construction job upon the subcontractor's promise that he would pay the money owed him to the supplier if the supplier won its lawsuit then pending against the sub-subcontractor. Upon the advice of the sub-subcontractor's attorney (who was also the attorney for the sub-subcontractor's insurer) the subcontractor did not hold the money for the supplier as promised, but paid off other creditors of the sub-subcontractor. In exchange for this, the sub-subcontractor's insurer executed an agreement to " 'defend and save [the subcontractor] harmless from any and all claims of [the supplier].' " Id. at 11, 89 Cal. Rptr. at 25. Plaintiff supplier won its suit against the sub-subcontractor and sought to collect part of the judgement recovered from the subcontractor and the insurer. Plaintiff was permitted to recover against the insurer as a third party beneficiary of the "hold harmless" agreement between the subcontractor and the insurer. Contrary to the insurer's argument that there was no intent on the part of either party to benefit the supplier, the court believed that the agreement's primary purpose was to assure payment to the supplier if he obtained a judgement against the sub-subcontractor. "Accordingly, [the supplier] was the real beneficiary, for if he won his suit against [the sub-subcontractor] he was assured payment from either [the subcontractor or the insurer]." Id. at 15, 89 Cal. Rptr. at 28. For further discussion of beneficiary suits on surety bonds, see Corbin, supra note 2; Comment, Third Party Beneficiaries on a Contractor's Surety Bond, 27 Fordham L. Rev. 262 (1958); Note, Intent and Benefit in Third Party Beneficiary Contracts: A Justification for Public Policy, 26 Va. L. Rev. 778, 785-91 (1940).

8. For example, the prime contractor may find it necessary to sue the supplier of the subcontractor on the contract between the latter and his supplier; or the owner of the proposed project may feel compelled to sue the subcontractor on the contract between the prime contractor and subcontractor (or vice versa); or the tenant of the premises may feel

There are, however, strong arguments in favor of further expansion of the law in this area. The validity of these arguments will be established through an examination of the attitude of a majority of the courts which have considered these contractual relationships, and an analysis of several recent decisions which support this contention.

II. Intent to Benefit

A. *In General*

It is the prevailing rule in the United States that a third party may sue as a beneficiary on a contract made for his benefit.[9] To enable the third party to sue, however, an intent to benefit must be shown.[10] If this intention is demonstrated, the third party is known as an "intended" beneficiary; if the intention is lacking, the third party is an "incidental" beneficiary with no rights to enforce the particular contract.[11] Although this much is generally agreed upon by the authorities,

he has no choice but to sue the prime contractor on the contract between the owner and the prime contractor.

9. 17A C.J.S. Contracts § 519(3) (1963). One jurisdiction which does not follow this rule is Massachusetts, the only state which does not allow a third party beneficiary to enforce a contract made for his benefit. Gustafson v. Doyle, 329 Mass. 473, 109 N.E.2d 465 (1952); Cain's Lobster House, Inc. v. Cain, 312 Mass. 512, 45 N.E.2d 397 (1942). Several exceptions to this have been made, however. E.g., Green v. Green, 298 Mass. 19, 9 N.E.2d 413 (1937). See also Note, The Third Party Beneficiary Concept: A Proposal, 57 Colum. L. Rev. 406, 407 (1957).

10. Jett v. Phillips & Assocs., 439 F.2d 987, 999 (10th Cir. 1971); Compagnie Nationale Air France v. Port of N.Y. Auth., 427 F.2d 951, 954 (2d Cir. 1970); State v. Wesley Constr. Co., 316 F. Supp. 490, 495 (S.D. Fla. 1970); Simson v. Brown, 68 N.Y. 355, 362 (1877); Snyder Plumbing & Heating Corp. v. Purcell, 9 App. Div. 2d 505, 508, 195 N.Y.S.2d 780, 783 (1st Dep't 1960); 17A C.J.S. Contracts § 519(4)(c) (1963). "The recognition of a right in a third person is often thought to depend upon the intention of the contracting parties, particularly that of the promisee who pays for the promise in question, to confer a benefit upon him." 4 A. Corbin, Contracts § 776, at 14 (1951) [hereinafter cited as Corbin].

11. These are the terms adopted by the American Law Institute and employed in Restatement (Second) of Contracts (Tent. Draft No. 4, 1968 & Tent. Draft No. 3, 1967). The decision to use them was made because the "terms 'donee' beneficiary and 'creditor' beneficiary carry overtones of obsolete doctrinal difficulties." Restatement (Second) of Contracts, Introductory Note at 3 (Tent. Draft No. 3, 1967). The general rule is tentatively restated by the American Law Institute to be as follows: "(1) Unless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either (a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary; or (b) the promise manifests an intention to give the beneficiary the benefit of the promised performance. (2) An incidental beneficiary is a beneficiary who is not an intended beneficiary." Restatement (Second) of Contracts § 133 (Tent. Draft No. 4, 1968). Professor Corbin defines an "incidental" beneficiary affirmatively as "a person who will be benefited by the performance of a contract in which he is not a promisee, but whose relation to the contracting parties is such that the courts will not recognize any legal right in him." Corbin § 779c, at 40; see Farmers' State Bank v. Anton, 51 N.D. 202, 199 N.W. 582 (1924); New Jersey Interstate Bridge & Tunnel Comm'n v. Jersey City, 93 N.J. Eq. 550, 118 A. 264 (Ch. 1922).

expressions of what indicates an intent to benefit vary greatly among the jurisdictions which recognize the third party beneficiary doctrine.[12] A further difference in opinion arises with respect to which party's intention shall govern in the application of the test of "intent to benefit." One view is that both the promisor and promisee must intend to confer a benefit upon the other party. Some courts have held that this intention must be found within the terms of the contract,[13] while others have held that it may be shown in light of the surrounding circumstances.[14] The most commonly accepted view is that the promisee must intend that the benefit run to the third party. This intent must be found in the contract, as read in light of all the surrounding circumstances.[15] It has even been held that it is the promisor's intent which is necessary to enable the third party to sue.[16]

Further complicating the matter is the fact that "intent" is sometimes confused with "motive." Accordingly, a court may improperly refuse to recognize a third party beneficiary relationship in a contract where the beneficiary is directly and intentionally benefited because the promisee was not motivated by a desire to please the beneficiary.[17] Considering this problem, one court pointed out that

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12. For example, some courts say that the contract must be " 'expressly made' for the 'benefit' of the third person with a 'clear intent' to so 'benefit';" other courts say that the contract must " 'largely and primarily though not exclusively' " benefit the third party; and still others, that it " 'must appear that the parties intended to recognize him as the primary party in interest' " or that " '[a]ll that is necessary is a beneficial interest in the enforcement of the contract.' " Note, Intent and Benefit in Third Party Beneficiary Contracts: A Justification for Public Policy, 26 Va. L. Rev. 778, 779-80 (1940) (footnotes omitted). More recently, one court has held that the intention to benefit the third party "must be indicated in the contract itself," and must be "intentional and direct." In addition, the third party must be "the real promisee. The promise must be made to him in fact although not in form . . . ." Basurto v. Utah Constr. & Mining Co., 485 P.2d 859, 863 (Ariz. Ct. App. 1971) (citations omitted) (emphasis deleted) (footnote omitted). This diversity of expression is further exemplified by the Restatement of Contracts which, since its original exposition of the law in this area, has been revised several times without, as yet, any new formulation being adopted by the American Law Institute. Restatement of Contracts § 133 (1932).

13. E.g., Spires v. Hanover Fire Ins. Co., 364 Pa. 52, 70 A.2d 828 (1950).

14. E.g., Marlboro Shirt Co. v. American Dist. Tel. Co., 196 Md. 565, 77 A.2d 776 (1951); Ridder v. Blethen, 24 Wash. 2d 552, 166 P.2d 834 (1946).

15. Corbin § 776; Williston § 356A; Restatement of Contracts § 133(1) (1932); see Johnson Farm Equip. Co. v. Cook, 230 F.2d 119 (8th Cir. 1956); Hamill v. Maryland Cas. Co., 209 F.2d 338 (10th Cir. 1954); 37 Fordham L. Rev. 291, 293 (1968).

16. In Fruitvale Canning Co. v. Cotton, 115 Cal. App. 2d 622, 252 P.2d 953 (Dist. Ct. App. 1953), overruled, Lucas v. Hamm, 56 Cal. 2d 583, 364 P.2d 685, 15 Cal. Rptr. 821 (1961), cert. denied, 368 U.S. 987 (1962), the court said: "Before a third party who may derive a benefit of a promise is entitled to bring an action thereon there must be an intent clearly manifested by the promisor to secure the benefit claimed to the third person." 115 Cal. App. 2d at 624, 252 P.2d at 955 (citations omitted). This language however, was disapproved in Lucas v. Hamm, supra at 591, 364 P.2d at 689, 15 Cal. Rptr. at 825.

17. See Corbin § 776 for a further discussion of this point.

"intent to benefit" is "almost a phrase of art."[18] Intent is distinct from motive and has been defined as a "purpose to use a particular means to effect a certain result."[19] Motive, on the other hand, is the "reason which leads the mind to desire that result."[20] Moreover, "intent" may refer either to the mental state of the parties to the contract or to the meaning of the words used therein; the latter, however, is generally said to be controlling.[21]

In determining whether the necessary intention to benefit is present, many courts have inquired: "To whom is performance to be rendered?"[22] Thus, "[i]f by the terms of the promise for which the promisee bargained the promisor is to render a performance directly to the third party, in nearly every case the third party who is to receive performance will be the person intended by the promisee to be benefited thereby."[23] Conversely, if the performance is to be rendered directly to the promisee, the third party, who may also be benefited thereby, is an incidental beneficiary having no right to sue.[24] The test, while easy to apply in cases where the intended beneficiary is of the donee variety,[25] is more difficult in the case of a creditor beneficiary[26] because there the promisee's purpose is to discharge his own obligation.[27]

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18. International Erectors, Inc. v. Wilhoit Steel Erectors & Rental Serv., 400 F.2d 465, 472 (5th Cir. 1968).

19. Hamill v. Maryland Cas. Co., 209 F.2d 338, 341 (10th Cir. 1954).

20. Id.

21. International Erectors, Inc. v. Wilhoit Steel Erectors & Rental Serv., 400 F.2d 465, 467-68 (5th Cir. 1968); Note, The Third Party Beneficiary Concept: A Proposal, 57 Colum. L. Rev. 406, 409 (1957). In contrast, in cases where there is a close relationship between the beneficiary and the promisee, the latter's subjective intention frequently appears to be controlling rather than the meaning of the terms used. Calamari & Perillo § 244.

22. E.g., Fidelity & Deposit Co. v. Rainer, 220 Ala. 262, 265, 125 So. 55, 58 (1929); Carson Pirie Scott & Co. v. Parrett, 346 Ill. 252, 178 N.E. 498 (1931); Lenz v. Chicago & N.W. Ry., 111 Wis. 198, 86 N.W. 607 (1901); see G. Grismore, Contracts § 238, at 388 (J. Murray, Jr. rev. ed. 1965); L. Simpson, Contracts § 117 (2d ed. 1965). See also Calamari & Perillo § 244. In determining whether the requisite intent to benefit was present, the original Restatement of Contracts looked at the purpose of the promisee in contracting for the promise of the promisor. Restatement of Contracts § 133 (1932). See note 11 supra for the method by which the most recent draft of section 133 of the Restatement determines if the intent to benefit is present.

23. Simpson, Promises Without Consideration and Third Party Beneficiary Contracts in American and English Law, 15 Int'l. & Comp. L.Q. 835, 856 (1966). For a more thorough discussion of the intention to benefit test and the problems related thereto see Note, The Third Party Beneficiary Concept: A Proposal, 57 Colum. L. Rev. 406 (1957).

24. Simpson, supra note 23, at 856; see Calamari & Perillo § 244.

25. The third party is said to be a donee beneficiary if the promisee contracts to confer a gift upon him. Restatement of Contracts § 133(1)(a) (1932).

26. The third party is said to be a creditor beneficiary if the promisee contracts to discharge a duty he owes to the third party. Id. § 133(1)(b).

27. Simpson, supra note 23, at 855.

B. *In Construction Contracts*

Due to the great risks involved, the large amount of money at stake, and the extreme competitiveness of the industry itself, construction contracts often give rise to disputes between parties.[28] As one commentator has pointed out: "More than the usual amount of contract interpretation problems occur because of the complexity of a building operation."[29] Thus, the interpretational difficulties prevalent in third party beneficiary contracts are compounded as a result of the peculiar problems presented by the construction contract.

Further difficulty is encountered in applying the "intent to benefit" test[30] to construction contracts because multiple contractual relationships[31] invariably exist under such contracts, with the performance of each promisor ultimately, if indirectly, running to each party to the several contracts. Thus, in applying the "intent to benefit" test, the courts must, where the terms are unclear, interpret the promise to determine whether performance is to be rendered to the promisee or to the third party.[32] In doing so, they must give greater attention to the fine distinctions between motive, intent, and purpose. Since the performance is being rendered to the promisee and often, in effect, to the third party,[33] it might appear that such third parties would be beneficiaries. But in fact, it has usually been held that the typical construction contract[34] does not give third parties who have contracts with the promisee the right to enforce the latter's contract with another because such third parties are merely incidental beneficiaries.[35] Professor Corbin

28. Sweet, Owner-Architect-Contractor: Another Eternal Triangle, 47 Calif. L. Rev. 645 (1959).

29. Id.

30. See notes 9-27 supra and accompanying text.

31. E.g., the owner-prime contractor contract, the prime contractor-subcontractor contract, the subcontractor-supplier contract.

32. L. Simpson, Contracts § 117, at 248 (2d ed. 1965). For example, if a contractor and a city agree that the contractor shall be " 'responsible for all unlawful damages to persons or property from negligence' [then] it is not clear whether the contractor is to be responsible to a citizen thus injured, or whether the contractor is to be responsible to the city (promisee) by indemnifying the city against damage claims by citizens so injured." Id. Under the former interpretation the citizen is an intended beneficiary while under the latter he is only an incidental beneficiary. Id. For a recent case in which the court had to decide whether the contract was for the benefit of the town's inhabitants or a utility company, or both, see New York Tel. Co. v. Secord Bros., 62 Misc. 2d 866, 309 N.Y.S.2d 814 (Sup. Ct.), aff'd mem., 35 App. Div. 2d 779 (1970).

33. E.g., the installation of pipe lines in a building by a subcontractor benefits both the prime contractor and the owner.

34. As used in this comment the phrase "typical construction contract" means one which does not expressly state that it is the intention of the contracting parties to benefit a certain specified third party.

35. See, e.g., International Erectors, Inc. v. Wilhoit Steel Erectors & Rental Serv., 400 F.2d 465 (5th Cir. 1968); State v. Wesley Constr. Co., 316 F. Supp. 490 (S.D. Fla. 1970); Hamilton & Spiegel, Inc. v. Board of Educ., 233 Md. 196, 195 A.2d 710 (1963); Lake States Eng'r Corp. v. Lawrence Seaway Corp., 15 Mich. App. 637, 653, 167 N.W.2d 320, 330 (1969);

has explained why an owner may not maintain such an action against a subcontractor: "Such contracts are made to enable the principal contractor to perform; and their performance by the subcontractor does not in itself discharge the principal contractor's duty to the owner with whom he has contracted."[36] The language of one court,[37] in a case where a subcontractor sued the owner of the construction site on a beneficiary theory[38] for monies due for labor ordered by the prime contractor, is typical of such cases. Denying recovery on this theory, the court said:

> Indeed, performance by [the owner] did not, even by inference, benefit [the subcontractor] . . . .
>
> . . . [T]he record as to payments [of subcontractors] establishes no more than an indirect or incidental benefit accruing to plaintiff.
>
> *Ordinarily a subcontractor is not the third-party beneficiary of a contract between the owner and the [prime] contractor . . . .*[39]

Similarly, in assessing such contractual relationships, text writers have uniformly designated these third parties as incidental beneficiaries only, and have often posited the situation wherein the owner is suing the subcontractor on the latter's contract with the prime contractor, or where the subcontractor is suing the owner, as examples of actions by incidental beneficiaries.[40]

III. The Need for Permitting Direct Actions by Third Party Beneficiaries

The rationale of the rule permitting the third party beneficiary to bring suit directly on a contract made for his benefit is now recognized in this country because "[i]t is just and expedient to allow the person for whose benefit the contract is made to enforce it against the person whose duty it is to [perform]."[41] It has also been said that this right to sue directly is derived from the fact that the contract creates reasonable expectations on the beneficiary's part which in-

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Cerp Constr. Co. v. J.J. Cleary, Inc., 59 Misc. 2d 489, 299 N.Y.S.2d 560 (Sup. Ct. 1968), aff'd mem., 31 App. Div. 2d 784, 298 N.Y.S.2d 469 (2d Dep't 1969); Watson v. American Creosote Works, Inc., 184 Okla. 13, 84 P.2d 431 (1938). Professor Corbin indicates that the two contracting parties might couch their contract in such terms as to show that the promisee intended to make it for the benefit of a third party, but points out that "in fact such contracts are never so worded." Corbin § 779D, at 46 (footnote omitted).

36. Corbin § 779D, at 46.

37. Cerp Constr. Co. v. J.J. Cleary, Inc., 59 Misc. 2d 489, 299 N.Y.S.2d 560 (Sup. Ct. 1968), aff'd mem., 31 App. Div. 2d 784, 298 N.Y.S.2d 469 (2d Dep't 1969).

38. The plaintiff also sought to recover on a second theory, upon which recovery was granted, i.e., that the prime contractor was acting as an agent of the owner with respect to plaintiff's work. Id. at 490-91, 299 N.Y.S.2d at 561-62.

39. Id. at 490, 299 N.Y.S.2d at 561-62 (citations omitted) (emphasis added).

40. E.g., Corbin § 779D; Restatement of Contracts § 147, illustration 1 (1932); Restatement (Second) of Contracts § 133, illustration 18 (Tent. Draft No. 4, 1968 & Tent. Draft No. 3, 1967); Simpson, supra note 23, at 856; see Williston § 402.

41. Kelly v. Richards, 95 Utah 560, 570, 83 P.2d 731, 736 (1938).

duce him to change his position in reliance thereon.[42] While there is still some disagreement[43] as to the theoretical basis for allowing such a recovery by a third person, the view which is perhaps most often stated is that "the law, operating on the act of the parties, creates the duty, establishes the privity, and implies the promise and obligation, on which the action is founded."[44] This is simply another way of saying that the law does not require *independent* privity to be established before the third party beneficiary may recover.[45]

Thus, the rule is based on equitable concepts and convenience. These same reasons, however, are equally present when one party to the overall construction contract scheme attempts, as a beneficiary, to bring an action against another party with whom he personally has not contracted. Yet in this situation it has traditionally been held that the plaintiff may not sue directly because the requisite intent to benefit is lacking.[46]

Although not every person who stands to benefit from a contract to which he is not a party should be able to sue to enforce that contract, it is clear that the interrelationships, interdependency and reliance upon the promises and performances of others which pervade the construction field necessitate rules which are

42. Corbin § 775.

43. Some of the theories that have been offered in support of the rule allowing the third party to enforce the contract are those of agency (Lawrence v. Fox, 20 N.Y. 268 (1859) (concurring opinion)), subrogation (Green v. McDonald, 75 Vt. 93, 53 A. 332 (1902)), and that the beneficiary is an implied party to the contract. De Cicco v. Schweizer, 221 N.Y. 431, 117 N.E. 807 (1917); see 17 Am. Jur. 2d Contracts § 303 (1964).

44. Brewer v. Dyer, 61 Mass. 337, 340 (1851); accord, Calder v. Richardson, 11 F. Supp. 948 (S.D. Fla. 1935); Meyerson v. New Idea Hosiery Co., 217 Ala. 153, 115 So. 94 (1927); Chung Kee v. Davidson, 102 Cal. 188, 36 P. 519 (1894). See also 17 Am. Jur. 2d Contracts § 303 (1964). Initially, judges felt that, in light of accepted principles, they had to justify the rule permitting the third party beneficiary to sue. But now that the rule is well "established and its respectability is unquestionable, there is no occasion for giving it a fictitious basis or origin . . . ." Annot., 81 A.L.R. 1271, 1285 (1932).

45. See Annot., 81 A.L.R. 1271, 1284 (1932).

46. For cases where subcontractors were unable to maintain an action against the owner of the premises because of the lack of intent to benefit see, e.g., Nickel v. Pollia, 179 F.2d 160 (10th Cir. 1950); Vanderlaan v. Berry Constr. Co., 119 Ill. App. 2d 142, 255 N.E.2d 615 (1970); Commonwealth v. L.G. Wasson Coal Mining Corp., 358 S.W.2d 347 (Ky. Ct. App. 1962) (as modified on denial of rehearing); Hamilton & Spiegel, Inc. v. Board of Educ., 233 Md. 196, 195 A.2d 710 (1963). "In such a case it is clear, in the absence of evidence of a different intention, that the subcontractor is not a beneficiary of the [owner's] promise to the contractor to pay the cost, even though the amount payable to the subcontractor is reckoned as a part of the cost." Corbin § 779D, at 47.

For cases holding that the owner could not maintain an action as a beneficiary against a subcontractor for lack of intent to benefit see, e.g., Weimar v. Yacht Club Point Estates, Inc., 223 So. 2d 100 (Fla. Dist. Ct. App. 1969); Majestic Mfg. Corp. v. L. Riso & Sons Bldg. Co., 27 N.Y.S.2d 845 (Sup. Ct. 1940), aff'd mem., 261 App. Div. 1099, 27 N.Y.S.2d 846 (2d Dep't 1941); Vogel v. Reed Supply Co., 277 N.C. 119, 177 S.E.2d 273 (1970); Corbin § 779D. See also Cox v. Curnutt, 271 P.2d 342 (Okla. 1954); N. Walker & T. Rohdenburg, Legal Pitfalls in Architecture, Engineering and Building Construction 98-99 (1968).

more responsive to the needs of the industry. Recognizing this need, one writer has described the tremendous importance played by the contract in this field thusly:

> Contractual relationships are the mortar . . . with which industry is put together. Upon the effectiveness of contractual obligations, express or implied, depends the soundness of a business venture. Nowhere does this truism need to be emphasized more than in the construction industry.[47]

A. *The Argument*

The reasons why an injured third party should be permitted to maintain a direct action against a breaching party in the contractual setting of a construction project are numerous. To begin with, it is manifestly just to allow the party who has the greatest interest in the litigation to attempt to influence its outcome.[48] A situation may arise, for example, in which the prime contractor and subcontractor agree that neither shall be liable for delay caused by the owner. Since the subcontractor cannot sue the owner for damages as a result of delay because there is no contract between them, he is without a practical remedy. Recovery would only be possible if the prime contractor were allowed to sue and recover on behalf of the subcontractor.[49] However, this is not a very satisfactory solution, since any benefits realized in such an action would not accrue to the party who had commenced the suit. Since the prime contractor's interest is only nominal, the subcontractor's chances of recovery may thus be seriously reduced. For example, the prime contractor may either choose not to sue at all or to drop the action soon after its commencement,[50] or to be less than a highly effective advocate. One court, while reluctantly holding that, for want of privity, a subcontractor could not sue an owner, noted that

> the ends of justice might be better served if a subcontractor were given a right to

47. C. Levitt, Law of the Construction Industry in New York State 164 (1943).

48. See generally Lehow v. Simonton, 3 Colo. 346, 348-49 (1887).

49. This fact pattern is suggested by Continental Ill. Nat'l Bank & Trust Co. v. United States, 81 F. Supp. 596 (Ct. Cl. 1949). There it was held that the prime contractor could not sue on behalf of the subcontractor because the prime contractor was "not damaged regardless of any hardship suffered by the subcontractor . . . ." Id. at 597.

50. This is one of the reasons the court in County of Giles v. First U.S. Corp., 445 S.W.2d 157 (Tenn. 1969), allowed the plaintiff to recover directly from the breaching promisor on a contract to which he was not a party. See text accompanying notes 81-90 infra. But cf. Cutler v. Hartford Life Ins. Co., 22 N.Y.2d 245, 239 N.E.2d 361, 292 N.Y.S.2d 430 (1968), where the court concluded that, despite the "nominal designations" in an insurance certificate of a mutual fund as the recipient of the proceeds, the true beneficiary of the insurance was the wife of the deceased purchaser of the mutual fund share plan who had been named as beneficiary in the share purchase plan. The court pointed out: "It was the wife who would reap economic benefit from the insurance rather than [the mutual funds] . . . . It is she who chooses to sue rather than [the mutual fund], which has little interest in the outcome of the action . . . . In truth . . . the wife is the intended beneficiary, or, at least, the ultimate intended beneficiary . . . ." Id. at 253, 239 N.E.2d at 366, 292 N.Y.S.2d at 438 (citation omitted).

sue, either in his own name or through the contractor for his benefit, for damages sustained by him on account of wrongful acts of the [owner] in cases where the letting of subcontracts is approved by the [owner].[51]

Furthermore, in the construction contract context, there is little danger of exposing a defaulting party to beneficiary suits by parties not originally within his contemplation since he knows that his performance is being relied upon by a particular group of persons.[52] Thus it does not seem inequitable to hold him accountable to those parties who are injured by his default. So, for example, where in computing his price and deciding to enter into a contract with the prime contractor, the subcontractor relied upon certain promises made by the owner in the latter's contract with the prime contractor, the subcontractor should be able to enforce those promises directly.[53] One court has permitted several subcontractors to recover on a contractor's surety bond given to the owner of the proposed building,[54] not on the theory that the subcontractors were third party beneficiaries thereof,[55] but on the theory that there existed a direct contractual relationship between the subcontractors and the surety as the result of reliance on the part of the subcontractors. Noting that the latter knew and relied upon the provisions of the surety bond at the time they submitted their bids and contracted to do the work, the court held: "The bond constituted a standing offer of security to all who, in reliance upon it, should accept the offer by bringing themselves within its terms [by performing the work]."[56] Because the jurisdiction in which this case was decided does not recognize suits by a third party on a contract to which he is not a party,[57] the court felt constrained to find an acceptable theory on which the plaintiffs could recover. Although this reliance theory has been criticized as unusual and far-reaching,[58] it is justifiable simply

51. Continental Ill. Nat'l Bank & Trust Co. v. United States, 81 F. Supp. 596, 598 (Ct. Cl. 1949).

52. Although there is little danger of exposing a party to suits by persons not originally within his contemplation, there is the danger of holding him liable for an amount far beyond that which either party could have contemplated when making the contract. The rule of Hadley v. Baxendale, 156 Eng. Rep. 145 (Ex. 1854), would seem to prohibit, for example, a prime contractor from recovering damages in the amount of $500,000 caused by a supplier's default where the supplier's contract with the subcontractor on the job called for delivery of material worth only $20,000.

53. In Thomas G. Snavely Co. v. Brown Constr. Co., 16 Ohio Misc. 50, 239 N.E.2d 759 (C.P. 1968), the court based its decision that plaintiff subcontractor was a third party beneficiary of the owner-prime contractor contract partially on the fact that plaintiff relied on certain provisions in that contract. See text accompanying notes 91-100 infra.

54. Johnson-Foster Co. v. D'Amore Constr. Co., 314 Mass. 416, 50 N.E.2d 89 (1943).

55. Although the terms of the bond clearly expressed an intention to benefit third parties, Massachusetts does not recognize such suits (see note 9 supra) and it appeared that the court was simply trying to find a way around that rule. Id. at 422, 50 N.E.2d 92.

56. Id. at 420, 50 N.E.2d at 92.

57. See note 9 supra.

58. Annot., 148 A.L.R. 359 (1944).

because of the equitable result achieved with respect to those who had relied on the bond.[59]

The fact that, in private[60] construction projects, a third party such as a subcontractor or supplier can usually place a mechanic's lien on the property for materials furnished or labor performed[61] seems to be a further reason for allowing such persons to recover directly on a third party beneficiary theory. In the situation where the subcontractor or supplier sues the owner of the property for payment because it could not be obtained from the prime contractor, he should be able to proceed on a third party beneficiary theory since he will recover against the owner in any event if he has placed a lien against his property. It certainly seems preferable for all parties concerned that recovery be sought in this manner rather than by resort to foreclosure upon the lien on the owner's newly erected building.

The procedural considerations militating in favor of allowing direct actions are most persuasive. In *Nomellini Construction Co. v. Harris*[62] the prime contractor sued the subcontractor for failure to perform, and the subcontractor cross-complained against his supplier, whose breach had caused the subcontractor's inability to perform. Although the prime contractor was not a party to the cross-complaint and did not sue the supplier, the court entered a judgment for the prime contractor against the supplier. The court reasoned that since the supplier's breach was the sole cause of the subcontractor's default, it was equitable to "telescope" the claims and permit entry of a direct judgment in favor of the prime contractor against the supplier.[63] Thus, in permitting the injured third person to recover directly from the promisor, duplexity of effort, circuity of action[64] and a multiplicity of lawsuits are avoided.[65] In view of the congested court calendars,[66] the latter reason is increasingly significant. Otherwise, the

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59. Cf. Restatement (Second) of Contracts § 133, comment d (Tent. Draft No. 4, 1968), which in certain cases would allow a third party to sue on a promise if he acted reasonably in relying on it as manifesting an intention to confer a right on him. See Hamill v. Maryland Cas. Co., 209 F.2d 338 (10th Cir. 1954).

60. In cases of public projects, liens may not be put on the property but may sometimes attach to the fund appropriated by the governmental body. N. Walker & T. Rohdenburg, Legal Pitfalls in Architecture, Engineering, and Building Construction 160 (1968).

61. See id. at 159-91 for a survey of several state statutes pertaining to mechanic's liens.

62. 272 Cal. App. 2d 352, 77 Cal. Rptr. 361 (Dist. Ct. App. 1969).

63. Id. at 359, 77 Cal. Rptr. at 364.

64. "[I]t is settled that where one makes a promise to another for the benefit of a third person, such third person may maintain an action upon the promise . . . . The purpose of the . . . rule seems to have been largely to avoid circuity of action." Barnett v. Pratt, 37 Neb. 349, 351, 55 N.W. 1050, 1051 (1893), overruled on other grounds, Security Sav. Bank v. Rhodes, 107 Neb. 223, 185 N.W. 421 (1921) (the issue upon which this case overruled Barnett related to the parol evidence rule. The holding of Rhodes on this point was in turn disapproved by Abbott v. Abbott, 185 Neb. 177, 174 N.W.2d 335 (1970)).

65. Wood v. Moriarty, 15 R.I. 518, 9 A. 427 (1887).

66. See Annual Report of the Director of the Administrative Office of the United States

injured party would be compelled to bring suit against his own promisor rather than the party who actually caused the damage. This in turn would lead to either the impleading of another party or an unnecessary additional suit, since the defendant would certainly want to be indemnified by one who may be liable to him—his promisor.[67]

B. *Recent Supporting Cases*

Several recent cases provide support for the proposition advanced here. Specifically, the Third Circuit Court of Appeals, the Supreme Court of Tennessee, and lower courts in Florida and Ohio have all permitted a party to maintain an action as a third party beneficiary against one with whom he had no contract but whose breach caused him direct injury.

Proceeding primarily on general concepts of equity and justice rather than applying the more rigid "intent to benefit" test, the courts in each case reached the fairest and the most expeditious result.[68] In the Florida[69] and Tennessee[70] cases the courts departed from the traditional judicial reasoning found in third party beneficiary lawsuits by conspicuously ignoring the "intent to benefit" test in deciding whether the plaintiff could sue as a beneficiary.[71] Had they applied this test, the result would have been inescapable that it was not the intent of the contracting parties in either case that the plaintiff should benefit.[72]

In contrast, the Ohio court,[73] relying on a previous decision[74] of that state's highest court, attempted to stay within the limits of the third party beneficiary doctrine by "finding" an intent to benefit. Significantly, however, the court expanded the "intent to benefit" test by finding such an intent even though the benefit to the plaintiff was probably not in the contemplation of either of the contracting parties.[75]

Courts, Reports of the Judicial Conference of the United States 169-314 (1968); Tamm, Are Courts Going the Way of the Dinosaur?, 57 A.B.A.J. 228 (1971).

67. See generally County of Giles v. First U.S. Corp., 445 S.W.2d 157, 160-61 (Tenn. 1969).

68. However, in one of the cases, after holding that plaintiff was a third party beneficiary and could sue directly, the court concluded that the action was barred for other reasons. See note 106 infra.

69. Flintkote Co. v. Brewer Co., 221 So. 2d 784 (Fla. Ct. App.) (per curiam), cert. denied, 225 So. 2d 920 (Fla. 1969).

70. County of Giles v. First U.S. Corp., 445 S.W.2d 157 (Tenn. 1969).

71. For a further discussion of these two cases, see text accompanying notes 78-90 infra.

72. The dissenting opinion in one of the cases pointed out that the county-owner "initiated the series of contracts here under scrutiny with a single purpose: the attraction of industry to the County." 445 S.W.2d at 163-64.

73. Thomas G. Snavely Co. v. Brown Constr. Co., 16 Ohio Misc. 50, 239 N.E.2d 759 (C.P. 1968).

74. Visintine & Co. v. New York, C. & St. L.R.R., 169 Ohio St. 505, 160 N.E.2d 311 (1959) (per curiam).

75. See further discussion of this case at text accompanying notes 91-100 infra.

A different rationale was employed by the Third Circuit Court of Appeals[76] in holding a plaintiff to be a third party beneficiary. Although the plaintiff's action was ultimately barred for other reasons,[77] the court based its decision that plaintiff could sue directly as a beneficiary on the fact that the contract sued on contemplated the rendition of services by the defendant to the plaintiff.

In *Flintkote Co. v. Brewer Co.*[78] the plaintiff was a prime contractor who had contracted with the Air Force to repair an air strip. Plaintiff then contracted with a subcontractor for the installation of binding material on the air strip, and the subcontractor in turn contracted with defendant who agreed to supply the necessary material. When defendant, unable to comply with one of the required specifications, defaulted, plaintiff purchased the needed materials elsewhere and sued the supplier.[79] The Florida Court of Appeals held that, due to the nature and purpose of the contract between the subcontractor and the supplier, the plaintiff was entitled to sue and recover as a third party beneficiary. The court reasoned:

> The failure of [the supplier] to perform did not relieve [the subcontractor] of its obligation under its subcontract with [plaintiff] to supply the material, and if [the subcontractor] had purchased the material elsewhere at added cost it would have had a cause of action for the excess cost. . . .
>
> If [plaintiff] had passed on the extra expense to [the subcontractor], then [the subcontractor] could recover and [plaintiff] could not. However, . . . upon purchasing the material elsewhere [plaintiff] made it available to [the subcontractor], which then proceeded to process and apply it on the project as provided for in its subcontract.[80]

A similar result was reached by the Supreme Court of Tennessee in *County of Giles v. First U.S. Corp.*[81] Plaintiff, a county in Tennessee, decided to construct a building which was to be leased to private industry.[82] To raise the necessary funds, the county authorized the issuance and sale of bonds. The tenant, also a plaintiff in the action, agreed to lease the building, the rent therefor to be determined by the amount "necessary to retire the bonds and interest

76. Sears, Roebuck & Co. v. Jardel Co., 421 F.2d 1048 (3d Cir. 1970).

77. See note 106 infra.

78. 221 So. 2d 784 (Fla. Ct. App.) (per curiam), cert. denied, 225 So. 2d 920 (Fla. 1969).

79. Id. at 785.

80. Id.

81. 445 S.W.2d 157 (Tenn. 1969). See Brown v. Bowers Constr. Co., 236 N.C. 462, 73 S.E.2d 147 (1952), where the tenant was permitted to recover against the prime contractor on a third party beneficiary theory because the contract between the owner and prime contractor was clearly intended to benefit the tenant. In McDonald Constr. Co. v. Murray, 485 P.2d 626 (Wash. Ct. App. 1971), a prospective tenant was held to have no right of action to recover as a third party beneficiary for damages sustained by it as a result of the prime contractor's delay in constructing a building, since the prospective tenant derived no direct benefit from the construction contract between the owner and the prime contractor. Id. at 628.

82. The reason for such construction was to decrease unemployment in the county. Thus if anyone was intended to be benefited it was the unemployed inhabitants of the county. See note 72 supra.

thereon."[83] Defendant contracted with the county to act as its fiscal agent in the sale of the bonds. In a suit by the county against the defendant for breach of its fiduciary duty and for wrongfully withholding funds, the tenant was held to be a third party beneficiary of the contract between the county and the defendant[84] and was allowed to bring suit as such since its rental payments were affected thereby and any recovery by the county would, as a result, accrue to the tenant's benefit.[85]

The court's decision to allow plaintiff-tenant to bring suit was further based upon the pragmatic recognition of what might result if the tenant were not allowed to continue as a party to the action. The county could recover, the court surmised, and then decline to give the tenant the benefit of the recovery, thereby necessitating another lawsuit "whose issues could be disposed of in the present action."[86] Alternatively, the county might decide not to pursue the suit any further since the tenant, and not the county, was the one who would receive the benefit of any recovery.[87]

As in *Flintkote,* discussion of the "intent to benefit" test was conspicuously absent.[88] In both cases the plaintiffs would certainly have benefited by the defendants' performance of their contractual obligations. However, the benefits appeared to be rather indirect ones which have traditionally been held to qualify the plaintiffs as mere incidental beneficiaries with no right to enforce the contracts.[89]

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83. 445 S.W.2d at 158-59.

84. Had defendant been a prime contractor in this situation, rather than a broker, and had he affected the tenant's rental payments by "padding" bills, for example, in a cost plus fixed fee contract, the result would seem to be the same (A cost plus fixed fee contract is one which provides that the prime contractor or subcontractor "shall receive as compensation the cost of materials furnished and labor performed plus a percentage of such costs." C. Levitt, Law of the Construction Industry in New York State 211 (1943)).

85. "Under the facts as alleged we think [the tenant] would be a third party beneficiary to the contract between [defendant] and Giles County. By virtue of the statute under which the bonds were issued if there be any recovery by appellants it will accrue to the benefit of [the tenant], since such [recovery] will reduce [the tenant's] statutory obligation to pay all the cost of the bonds." 445 S.W.2d at 160. Plaintiff had also advanced two other theories on which he could recover: (1) that the circumstances of the case gave rise to an implied contract with the defendant; and (2) that defendant held, under a constructive trust for plaintiff tenant, the amount of money in excess of the agreed fee. Id.

86. Id. at 161.

87. "[W]ould anyone say under such circumstances that although [the tenant] has the statutory right to have its rent determined on the basis of actual and not fraudulent cost, still it has no such interest as would enable it to maintain a suit against both Giles County and the present defendants? Of course not. Then, why cannot [the tenant's] interest in the subject matter be settled now, once and for all? We think it can and accordingly reverse the chancellor and remand the case for further proceedings." Id.

88. However, the court in County of Giles did say that it was "manifest that this [was] to be a nonprofit enterprise with the industrial building to be acquired at the least possible cost to both the county and the industry." Id. at 159.

89. This was the position taken by the dissenting opinion in County of Giles, which

In disregarding the "intent to benefit" doctrine, both decisions appear to be based on the premise that for every wrong there should be a remedy and that the most practical, expeditious and equitable manner of attaining this result is by permitting the plaintiffs to sue the defendants directly. Consequently, a multiplicity of suits, further delay and increased expenses were avoided, and, more important, the plaintiffs were not left without any remedy as other plaintiffs similarly situated have been, simply because the court deciding their case refused to give practical effect to the rules governing third party beneficiary law.[90]

In *Thomas G. Snavely Co. v. Brown Construction Co.*[91] the contract between the owner and the prime contractor, both defendants in the action, was for the construction of a factory. This contract stated that time was of the essence, provided time schedules for the completion of various portions of the work,[92] and further specified that the schedules applied to " 'all of the various subtrades.' "[93] Plaintiffs subcontracted with the prime contractor to do work which was to be completed by certain dates. Due to delay caused by the nonobservance of the schedules contained in the general contract between the owner and the prime contractor, which were relied on by plaintiffs when contracting with the prime contractor, plaintiffs were unable to complete their work as planned. Plaintiffs thus incurred additional expenses, for the recovery of which they brought suit.

The court stated that the work of the plaintiffs was necessary to the construction and that this was known to both the owner and the prime contractor from the outset. Furthermore, it was the duty of the owner to afford plaintiffs the opportunity to perform their work in compliance with the time schedules agreed to

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advanced the argument, inter alia, that the tenant was in "no legal or equitable sense a third party beneficiary of the contractual obligation between [defendant] and Giles County. . . . [I]t is clear that its so-called rights could arise from the contract in no other way than as a coincidence of the breach thereof." Id. at 164.

90. E.g., Continental Ill. Nat'l Bank & Trust Co. v. United States, 81 F. Supp. 596 (Ct. Cl. 1949); see note 49 supra and accompanying text.

91. 16 Ohio Misc. 50, 239 N.E.2d 759 (C.P. 1968).

92. Id. at 52, 239 N.E.2d at 760. In addition to the owner and prime contractor, a second contractor who entered into a separate contract with the owner was also a defendant. For the sake of clarity, reference to this defendant has been omitted.

93. Id. In a case involving a similar obligation to follow time schedules, the Fifth Circuit Court of Appeals reversed the district court, holding that where the owner had let several different contracts for the construction of his building, each of which contained an obligation on the part of each contractor to coordinate his work and cooperate with the others, one contractor injured by another's delay was a direct beneficiary of the contract between the owner and that other contractor. This decision was based on the fact that each contractor had further agreed that any costs caused by defective or ill-timed work would be borne by the party responsible therefor. Moreover, there was a clause providing that if one contractor caused damage to another contractor, the party causing the injury should settle with the other contractor. M.T. Reed Constr. Co. v. Virginia Metal Prods. Corp., 213 F.2d 337 (5th Cir. 1954).

by the owner and the prime contractor and "upon which plaintiffs were entitled to rely, because they, too were bound by [them], in performing for [the prime contractor]."[94] Had the plaintiffs been the cause of the delay, the court pointed out, it could not be said that the owner and prime contractor were only incidental beneficiaries of the subcontracts. "In fact situations as here, *practical realities should not be ignored.*"[95] Citing the case of *Visintine & Co. v. New York, Chicago & St. Louis R.R.*[96] as controlling authority, the court in *Snavely* stated that it was made clear in all the contracts that the subcontractors' work was dependent upon the prime contractor's performance of its obligation. By each party completing his duties in the sequence set forth " ' "a *benefit* was incurred upon the other by permitting them to complete their work in accordance with the terms of their various contracts." ' "[97] Thus, plaintiffs were not merely incidental beneficiaries.[98]

The court in *Snavely* looked at two factors: the necessity of having all the parties to the various contracts cooperate with each other in order to attain the end result of a completed construction project, and the fact that the plaintiffs had relied on the time schedules contained in the contract. By examining the agreement in light of the overall performance intended, the court was able to sustain a third party beneficiary action, notwithstanding the fact that the per-

94. 16 Ohio Misc. at 55, 239 N.E.2d at 762.

95. Id. (emphasis added).

96. 169 Ohio St. 505, 160 N.E.2d 311 (1959) (per curiam). In that case the owner of a railroad contracted with the state and a city to perform certain work. Since these contracts did not cover all the necessary work, a separate contract was entered into between plaintiff contractor and the state. Each contract provided that work was to be performed in accordance with the plans and in the sequence designated, for none of the parties could perform its portion in a single operation. Plaintiff sued the railroad, claiming damage as a result of the railroad's failure to perform its work as obligated by the railroad's contract with the state. The plaintiff's action, instituted upon the theory that it was a third party beneficiary of this contract, was upheld by the court against the defendant's demurrer.

97. 16 Ohio Misc. at 57-58, 239 N.E.2d at 763 (emphasis added), quoting from Visintine & Co. v. New York, C. & St. L.R.R., 169 Ohio St. 505, 509, 160 N.E.2d 311, 314 (1959) (per curiam), which in turn quoted from the opinion of the Court of Appeals of Ohio in the same case, 79 Ohio L. Abs. 353, 357, 155 N.E.2d 682, 685 (Ct. App. Franklyn County 1958).

98. 16 Ohio Misc. at 56, 239 N.E.2d at 762. A contrary result was reached in C.H. Leavell & Co. v. Glantz Contracting Corp., Inc., 322 F. Supp. 779 (E.D. La. 1971), a case factually similar to Snavely and Visintine. In Glantz the owner of certain property had contracted with an architect and a prime contractor for them to render services in connection with the construction of an exhibition facility. There was no contract between the architect and the prime contractor. Distinguishing Snavely and Visintine, the court held that the prime contractor could not hold the architect liable on a third party beneficiary theory for damages sustained by it as a result of unreasonable delays occasioned by, inter alia, improperly prepared plans and late delivery of plans and working drawings: "The contract for architectural services and the construction contract were closely interrelated, and the performance by the Architects of their duties was necessary in order for [the prime contractor] to be able to perform the work for which it was employed. But this does not make [the prime contractor] a beneficiary of the Architects' contract with the [owner]." Id. at 783.

formance probably could not be viewed as running to the subcontractor.[99] Furthermore, the court's statement that "practical realities should not be ignored"[100] embodies one of the more persuasive reasons for allowing third parties to sue directly in such cases, and is characteristic of the decisions in *Flintkote* and *County of Giles* as well.

In *Sears, Roebuck & Co. v. Jardel Co.*[101] a property owner contracted with a prime contractor for the construction of a shopping center and the latter subcontracted certain work to the defendant. Upon the collapse of the owner's building, the owner sued the subcontractor, alleging that the subcontractor had breached his contract with the prime contractor in that he had failed to comply with the specifications which had been incorporated into the subcontract.[102] The court stated that "[b]ecause the contract explicitly contemplated the provision of services by [the subcontractor] to [the owner, the owner] has rights under the contract as a third-party creditor beneficiary."[103] The court reasoned that the prime contractor, in order to fulfill part of his duty to the owner, chose to subcontract with the subcontractor, who promised to do the designated work. Continuing, the court held: "Because courts have 'instinctively recogniz[ed] the creditor's [the owner's] interest in such a promise,' . . . the third-party creditor beneficiary can sue the promisor (in this case, [the subcontractor]) directly."[104] At this point the court noted that the subcontractor had agreed to "indemnify and save harmless" the owner from any claim for damage which could be asserted against the prime contractor as a result of the subcontractor's work,[105] adding that there were other provisions in the contract which also indicated that both parties expressly intended that the owner be a beneficiary.[106]

Although the subcontract apparently expressed an intention to benefit the owner, thus giving him a right to sue directly, *Jardel* is significant because the court seemingly based its decision on the fact that the "contract explicitly contemplated the provision of services by [the subcontractor] to [the owner]. . . ."[107]

99. See 45 Va. L. Rev. 1226, 1229 (1959), noting Visintine.

100. See text accompanying note 95 supra.

101. 421 F.2d 1048 (3d Cir. 1970).

102. Id. at 1050. In fact, the owner was sued by his tenant for damages allegedly caused by the owner's breach of the construction provisions of the contract under which the tenant had agreed to lease the building. Thereupon, the owner sued the subcontractor in a third-party action. For the sake of clarity, reference to the actual procedural posture of the action has been omitted from the text.

103. Id. at 1054 (footnote omitted).

104. Id., quoting in part from Williston § 361, at 864-65 (citation omitted) (footnote omitted).

105. 421 F.2d at 1054-55 n.20.

106. Id. While the court held that the owner could sue the subcontractor directly, his action was barred because, as the court noted, a third party beneficiary's rights are not unlimited and a release given by the prime contractor to the subcontractor satisfied the latter's obligation to both the owner (the beneficiary) and the prime contractor (the promisee). Id. at 1055-57.

107. Id. at 1054 (footnote omitted). Because of the juxtaposition of the points in its

Because of this, the court said, the owner was a third party beneficiary. This "explicit" contemplation of services was found in a provision[108] of the subcontract. The Standard Form of Subcontract of the American Institute of Architects[109] contains similar "explicit" provisions incorporating therein the terms and specifications of the prime contract.[110] Thus it can safely be concluded that many construction contracts contain such provisions.

Moreover, the fact that such a provision is contained in the subcontract does not discharge the prime contractor's obligation to the owner which, according to Professor Corbin, is the reason why these contracts do not make the owner an intended beneficiary.[111] Thus if, as it appears, the court in *Jardel* did in fact base its finding that the owner was a third party beneficiary primarily on this "incorporation" provision,[112] there can be little doubt that the court has expanded the third party beneficiary concept to a greater degree than any of the courts in the other cases discussed.[113] It is possible that the court recognized that the subcontractor, in performing his work, is benefiting not only the prime contractor but the owner as well[114] —a fact which a majority of the courts do not consider to be indicative of any direct intention to benefit.[115]

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opinion, it appears that the court based its decision primarily on this fact. The court's initial statement with regard to the third party beneficiary claim was: "Because the contract explicitly contemplated the provision of services by [the subcontractor] to [the owner, the owner] has rights under the contract as a third-party creditor beneficiary." Id. (footnote omitted). Following the phrase: "to [the owner,]" in the above quoted sentence, the court placed a footnote which referred to a provision of the subcontract which stated that the subcontractor's work formed a part of the owner's building. Thus, prior to any discussion of an intention to benefit the owner, the court held that the owner was a third party beneficiary because of the explicit contemplation of services running to him. Following this statement and a lengthy quotation from Williston defining a creditor beneficiary, the court said that the "beneficiary can sue the promisor . . . directly." Id. (footnote omitted). At the word "directly," was placed another footnote in which the court discussed certain language of the subcontract, interpreting it as intending to benefit the owner. In other words, by the time the court said that the owner could sue "directly," it had already decided that the owner was a beneficiary as a result of the explicit contemplation of services running to him.

108. The provision defined the term owner as meaning the owner of the building "of which the Sub-Contractor's . . . work forms a part." Id. at 1054 n.18.

109. These forms enjoy great prestige and are widely used in the construction industry. See B. Tomson, Recognizing and Handling the Legal Problems of Private and Public Construction: It's The Law 373 (1960). All of the contracts involved in Thomas G. Snavely Co. v. Brown Constr. Co., discussed at text accompanying notes 91-100 supra, were A.I.A. standard form contracts.

110. See A.I.A. Standard Form of Agreement Between Contractor and Subcontractor, Arts. 1 & 11.1 (AIA Doc. No. A401, Sept. 1967 ed.).

111. See text accompanying note 36 supra.

112. The provision is quoted in part at note 108 supra.

113. See discussion at text accompanying notes 78-100 supra.

114. See text accompanying note 33 supra.

115. E.g., G & P Electric Co. v. Dumont Constr. Co., 194 Cal. App. 2d 868, 879, 15 Cal. Rptr. 757, 763 (Dist. Ct. App. 1961) ("While the [owners] would receive the benefit of

IV. A Proposal

Construction projects have evolved from rather simple operations to highly complex ones wherein subcontractors and suppliers have become essential to the completion of the entire project.[116] As a result, some flexible means of providing recourse for those parties who do not have a contract with the defaulting party must be devised.[117] The beneficial consequences to the industry are obvious.[118] Third party beneficiary law seems to be the most appropriate "device" to meet this need since, liberally applied, the concept need have no limit as to the types of situations in which it can be employed. Moreover, it seems particularly suited to the construction industry, since all the parties in the total construction picture are interrelated through their own contracts, and the performance by each benefits several of the others in some manner.[119]

Therefore, at least in this area of the law, the courts should aid a party not only in enforcing his own contracts, but also in enforcing a contract to which he is not a party but upon which he depends and relies in fulfilling his own contractual obligations to another. Instead of concerning themselves primarily with finding an "intent to benefit" or with asking: "To whom is performance rendered?", the courts would better serve the needs of the industry by viewing the various contracts that are entered into to complete the construction project as one,[120] and asking the question: "Were the third party's expectations, rights

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having the electrical work performed by virtue of [the subcontractor] performing its subcontract with [the prime contractor], this factor alone would not make the . . . subcontract a contract for the express benefit of [the owner]."); Vogel v. Reed Supply Co., 277 N.C. 119, 129, 177 S.E.2d 273, 279 (1970) ("[The owner] benefits only incidentally or indirectly because performance of the subcontract was rendered in fulfillment of [the subcontractor's] obligation to the general contractor. Hence, any benefit derived from the subcontract by the landowner would necessarily accrue indirectly . . . through the general contractor."). See text accompanying note 35 supra.

116. Sweet, supra note 28, at 671.

117. The mechanic's lien originally provided a means of recourse against the owner and today surety bonds do likewise. But these two devices are not sufficient since, as illustrated herein, they do not provide a means of recourse for all concerned.

118. See Note, Intent and Benefit in Third Party Beneficiary Contracts: A Justification for Public Policy, 26 Va. L. Rev. 778, 787 (1940), wherein the author points out some of the advantages of giving subcontractors and suppliers assurances that they will be paid for work done and materials supplied. See also Corbin, supra note 2, at 16.

119. See text accompanying note 97 supra. In C.H. Leavell & Co. v. Glantz Contracting Corp., Inc., 322 F. Supp. 779 (E.D. La. 1971), the court rejected the prime contractor's argument that its contract with the owner, together with the separate contract between the architect and the owner and the working relationship between the architect and the owner, combined to create a sort of "tripartite contractual interrelationship." Id. at 782. See note 98 supra for an explanation of the facts of this case.

120. Of course, such contracts should only be considered as one for the purpose of determining whether plaintiff should be able to sue as a beneficiary. It is not suggested here that provisions such as the amount payable for the work done should be extended to all the parties involved in the construction project.

or obligations thereunder *directly affected* adversely by another party's breach of his contract?" If so, this third party should be permitted to directly enforce the terms of the breaching party's contract. Proceeding in this manner will not open the door to frivilous complainants nor expose a defendant to inequitable suits because of the obvious limitation that any plaintiff must first have a contract with one of the parties on the construction site before he may bring an action.

Third party beneficiary law is a concept which was recognized relatively late in American jurisprudence. It is a concept whose development has been slow and whose application has been almost chaotic. Yet it is a concept whose potential as a tool to arrive at more equitable decisions in certain areas of the law is great if the courts "expand the scope of inquiry and thereby bring decisions in line with both the commercial needs and policies of the market in which the parties are functioning and more general concepts of equity and justice."[121]

121. Note, Third Party Beneficiaries and the Intention Standard: A Search for Rational Contract Decision-Making, 54 Va. L. Rev. 1166, 1172 (1968) (footnote omitted).