Florida Law Review

Volume 7 | Issue 1 Article 11

March 1954

Contracts: Intent to Benefit a Third Party

Dana Bullen

This decision makes the serving of notice upon the defendant a mandatory procedure preceding prosecution for libel and places upon the state prosecutor the burden for such notice and the allegation that the notice has been served. The Court in so doing has filled the gap in Florida libel law, thereby enabling the defendant to reduce or mitigate by a proper retraction[34] the penalties evolving from inadvertent libel. This step was fairly to be anticipated in view of the ever-growing need of modern society for the rapid dissemination of news[35] and the psychological value of retraction,[36] but particularly in light of the limited liability guaranteed the press by Section 836.08 of Florida Statutes 1953:[37] ". . . and if, in a criminal proceeding, a verdict of 'guilty' is rendered on such a state of facts, the defendant shall be fined one dollar and the costs, and no more."

LEWIS H. HILL, III

CONTRACTS: INTENT TO BENEFIT A THIRD PARTY

United States v. Carpenter, 113 F. Supp. 327 (E.D.N.Y. 1949)[1]

Defendant importer and a Canadian exporter executed a contract for the importation of potatoes into the United States. One clause of the contract limited the resale of the potatoes to seed purposes. The Canadian Government required insertion of the clause in pursuance of an executive agreement between the United States,

statutes illustrative of the trend, see Beauharnais v. Illinois, 343 U.S. 250, 254 (1951); Note, *Constitutionality of the Law of Criminal Libel,* 52 COL. L. REV. 521, 525 (1952); Tanenhaus, *Group Libel,* 35 CORNELL L. Q. 261, 273 and n.67 (1950); 2 WHARTON, CRIMINAL LAW §§1930, 1934 (12th ed., Ruppenthal, 1932).

[34]FLA. STAT. §770.02 (1953).

[35]Layne v. Tribune Co., 108 Fla. 177, 146 So. 234 (1933).

[36]See ROTHENBERG, THE NEWSPAPER 70 (1948).

[37]In order to be eligible, however, the defendant must meet the following requirements: "If it appears upon the trial that said article was published in good faith, that its falsity was due to an honest mistake of the facts, and that there were reasonable grounds for believing that the statements in said article were true, and that within ten days after the service of said notice a full and fair correction, apology and retraction was published in the same editions or corresponding issues of the newspaper or periodical in which said article appeared, and in as conspicuous place and type as was said original article . . . ."

which supports the price of table potatoes, and Canada. Plaintiff, the United States, alleging that the imported potatoes were resold for table use, sued for an injunction prohibiting future resales and for damages. Defendant moved for an order dismissing the complaint on the ground that it failed to state a cause of action. HELD, the complaint alleged sufficient facts to enable the jury to find a contract made for the benefit of the United States, which can maintain an action as a third party beneficiary. Motion denied.

It is settled law that, when one person makes a promise to another for the benefit of a third person, that third person may maintain an action upon the promise.[2] The right of action of the third person, who need not be privy to the contract or to the consideration, has traditionally been limited to cases in which the third person was the party intended to be benefited by such a contract.[3] If the promisor expressly agrees to render a performance to a third person, courts experience no difficulty in finding a right of action in that third person for breach of the promise. The courts, however, encounter difficulty in the absence of express words showing the intention of the parties. The existence of the requisite intent is a matter of construction of the contract,[4] and it is sometimes said that the language will be construed strictly against the one suing as a third party beneficiary.[5] Nevertheless, courts have struggled valiantly in many cases to discover language in the contract supporting the claim of the alleged third party beneficiary when the factual situation seemed to demand it. This intent has been described in the cases variously as an intention to confer a direct benefit;[6] an intention to confer a benefit largely and primarily, even though not exclusively, for the plaintiff;[7] or an intention to recognize the third person as a primary

---

[1]Case reported in October of 1953.

[2]Lawrence v. Fox, 20 N.Y. 268 (1859). This leading case established the right of a third party beneficiary to maintain an action and has been followed in all jurisdictions in the United States. English courts do not allow the action.

[3]Simpson v. Brown, 68 N.Y. 355 (1877).

[4]*See* Woodhead Lumber Co. v. E. G. Niemann Investments, Inc., 99 Cal. App. 456, 298 Pac. 913, 914 (1929).

[5]*See* Commissioner v. Keller, 59 F.2d 499, 502 (7th Cir. 1932); Cannon Ball Motor Freight Lines v. Grasso, 59 S.W.2d 337, 343 (Tex. Civ. App. 1935).

[6]Robins Dry Dock & Repair Co. v. Flint, 275 U.S. 303 (1927); *In re* A. C. Becken Co., 75 F.2d 681 (7th Cir. 1935); Carson Pirie Scott & Co. v. Parrett, 346 Ill. 252, 178 N.E. 498 (1931).

[7]Maumee Valley Elec. Co. v. Toledo, 13 F.2d 98 (6th Cir. 1926).

party in interest.[8] In an extreme expression of the doctrinally vital intent, one court said that the cause of action depended "merely upon the question of whether the third party has a beneficial interest in the enforcement of the contract."[9]

The reasoning in the instant case reflects factors which give rise to the aura of flexibility of the third party beneficiary doctrine. First the court poses the question of whether the contract was intended to benefit the plaintiff as being a question of fact for the jury. Next it assumes that a trier of the facts made a finding that the export contracts were for the benefit of the United States. Finally, after assuming the vital intent to benefit the plaintiff, the court states that a beneficiary of such agreements is entitled to maintain suit, citing five cases to bolster this line of reasoning. Of these, three[10] held against the alleged third party beneficiary after the court failed to find the necessary intent in the contract. The remaining two[11] involved express contract clauses guaranteeing payment for property damage resulting from construction activity. Thus the court in the instant case side-stepped the knotty intent question.

A review of the third party beneficiary cases reveals that, unless the intent is not proved,[12] there is no objection to an action by the United States as a third party beneficiary, in a proper case,[13] merely because the plaintiff is the Government.[14] Nor does the fact that the clause relied upon was included in the contract pursuant to the command of a statute,[15] an executive order,[16] or a state athletic commission,[17] mean that the plaintiff will be denied a remedy. In such cases, courts have inferred the requisite intent. The obvious fact that the parties to such a contract had no desire or motive to

---

[8] *In re* Gubelman, 13 F.2d 730 (2d Cir. 1926).

[9] Merchants Loan & Trust Co. v. Ummach, 228 Ill. App. 67, 81 (1923).

[10] German Alliance Ins. Co. v. Home Water Supply Co., 226 U.S. 220 (1912); Constable v. National S.S. Co., 154 U.S. 51 (1894); *In re* United Cigar Stores Co., 70 F.2d 313 (2d Cir. 1934).

[11] Coley v. Cohen, 289 N.Y. 365, 45 N.E.2d 913 (1942); Rigney v. New York Cent. & H. R.R., 217 N.Y. 31, 111 N.E. 226 (1916).

[12] Standard Fruit and S.S. Co. v. United States, 103 Ct. Cl. 659 (1945).

[13] United States v. Inorganics, 109 F. Supp. 576 (E.D. Tenn. 1952).

[14] United States v. Insurance Co. of North America, 65 F. Supp. 401 (W.D.S.C. 1946).

[15] Fata v. S. A. Healy Co., 289 N.Y. 401, 46 N.E.2d 339 (1943).

[16] United States *ex rel.* Johnson v. Morley Constr. Co., 98 F.2d 781 (2d Cir. 1938).

[17] McClare v. Massachusetts Bonding & Ins. Co., 266 N.Y. 371, 195 N.E. 15 (1935).

benefit the third party has apparently caused little if any judicial concern. Using similar reasoning, a sizable group of cases indicate increasing use of a construction of the intent to afford a remedy to a person who is not a contracting party. The benefit to the third party which necessarily results from the performance of the contract is said to be within the contemplation of the parties, and provides the constructive intent to benefit upon which the third party may base his action.[18] This circular reasoning is perhaps a manifestation of a judicial desire to increase the availability of the remedy for reasons founded upon financial equities[19] or promotion of industry[20] or public policy.[21]

Despite facile manipulation of the intent-to-benefit doctrine as demonstrated in many of the above cases, this test of the plaintiff's right of action has not proved adequate. It is logically inconsistent to argue that *A* is motivated by an intent to benefit his creditor *C*, when *A* secures a promise from *B* that *B* will assume the duties of *A* to *C*. *A*'s motive is to be relieved of his obligation to *C*, and yet courts have consistently construed from this situation an intent on the part of *A* to benefit *C*. *C* may then sue on the contract between *A* and *B*. Despite contrary motives of *A*, the granting of an additional right to *C* by permitting him to sue *B* always results in a benefit to *C*. Faced with the contradiction between terminology and facts, courts sometimes have denied relief merely because of an inability to handle the facts in terms of the language of the intent doctrine.[22]

To resolve this logical and verbal hurdle and facilitate use of the third party beneficiary remedy, a new method of analyzing the plaintiff's claim was formalized in the *Restatement of Contracts*.[23] This method involves categorization of third party beneficiaries into three types: donee, creditor, and incidental. A person is a donee beneficiary if the purpose of the promisee in obtaining the promise

---

[18]Calder v. Richardson, 11 F. Supp. 948 (S.D.Fla. 1935); Chesapeake & Ohio Ry. v. Wadsworth Elec. Mfg. Co., 234 Ky. 645, 29 S.W.2d 650 (1930); Durnherr v. Rau, 135 N.Y. 219, 32 N.E. 49 (1892); Lenz v. Chicago & N.W. Ry., 111 Wis. 198, 86 N.W. 607 (1901).

[19]Rodgers v. United States, 332 U.S. 371 (1947).

[20]Fidelity & Deposit Co. of Baltimore v. Rainer, 220 Ala. 262, 125 So. 55 (1929).

[21]See Note, *Intent and Benefit in Third Party Beneficiary Contracts: A Justification for Public Policy*, 26 VA. L. REV. 778 (1940).

[22]Constable v. National S.S. Co., 154 U.S. 51 (1894); Vrooman v. Turner, 69 N.Y. 280 (1877).

[23]RESTATEMENT, CONTRACTS §133 (1932).

is to make a gift to or to confer a right upon the beneficiary.[24] A person is a creditor beneficiary if the performance of the promise will satisfy an actual, supposed, or asserted duty of the promisee to the beneficiary.[25] A person is an incidental beneficiary if the benefits to him are merely incidental to the performance of the promise and he is neither of the other two types.[26] A donee beneficiary or a creditor beneficiary is afforded a remedy. An incidental beneficiary, however, cannot recover under any circumstances.[27] This new classification has been tried in the courts and has proved acceptable.[28]

Application of the *Restatement* test of a third party's right of action to the facts of the instant case provides a new tool with which to evaluate the court's judgment. First, which type of beneficiary is the United States? Since the performance of the promise will not satisfy a duty of the promisee Canadian exporter to the beneficiary United States, plaintiff is not a creditor beneficiary. In addition, the creditor beneficiary remedy is usually reserved for cases in which the promisee owes a debt of money to the beneficiary that is paid by the promisor in performance of the contract.[29] This, also, is not the situation in the instant case. The United States, however, was not considered an incidental beneficiary, since the motion to dismiss was denied and the plaintiff was acknowledged to possess a cause of action. Therefore, by process of elimination, the United States would have been held a donee beneficiary had the court employed the *Restatement* language.

The above analysis of the facts of the instant case in terms of the *Restatement* test is a realistic appraisal of the way in which that test has been applied to third party beneficiary cases. Some writers, including judges, speak of the incidental beneficiary class as having been intended as a catch-all classification;[30] others speak of the donee beneficiary class as having been intended as a catch-all classification.[31]

---

[24]See 22 TENN. L. REV. 1060 (1953).

[25]12 U. OF PITT. L. REV. 295 (1951).

[26]*Id.* at 296.

[27]RESTATEMENT, CONTRACTS §147 (1932); 4 CORBIN, CONTRACTS §779C (1951).

[28]Ohio Casualty Ins. Co. v. Beckwith, 74 F.2d 75 (5th Cir. 1934); Byram Lumber & Supply Co. v. Page, 109 Conn. 256, 146 Atl. 293 (1929); Hendrix Mill & Lumber Co. v. Meador, 228 Ky. 844, 16 S.W.2d 482 (1929); Marlboro Shirt Co., Inc. v. American Dist. Tel. Co., 196 Md. 565, 77 A.2d 776 (1951).

[29]4 CORBIN, CONTRACTS §787 (1951).

[30]*Id.* §779C.

[31]FULLER, BASIC CONTRACT LAW 551 (1947).

Thus a rationale appears. If the remedy is to be afforded, the donee beneficiary class becomes catch-all; the remedy is afforded; and the incidental beneficiary class is considered exclusive. But, if the remedy is not to be afforded, the incidental beneficiary class is considered as the catch-all; the remedy is not afforded; and the donee class is considered exclusive. Since the court must rely upon manifestations in the contract, and the situation of the parties at the time the contract was concluded, to resolve the question of whether the parties had intended to make a gift or to confer a right upon a third party, the line between these two classes is hazy indeed. The real test of the *Restatement* rationale is: Which of the two classes will be considered as the catch-all class by the court in view of the circumstances surrounding the contract? The vagueness which surrounded the law under the intent-to-benefit reasoning can but continue in only slightly abated form under the *Restatement* dichotomy. Both the intent-to-benefit test and the *Restatement* test are indefinite in application and are in reality equally prone to judicial manipulation. The *Restatement* has clarified the air only to the extent that it has recognized creditor beneficiaries as a separate class and has permitted courts to analyze in terms of rights rather than benefits.

DANA BULLEN

The following case comments, written by freshmen students in this College in fulfillment of a portion of the requirements in the course known as Introduction to Legal Research and Writing, are considered of sufficient quality to merit publication.

CRIMINAL LAW: FLORIDA REQUIREMENTS FOR FURNISHING A LIST OF STATE'S WITNESSES TO A DEFENDANT

Shields v. State, 64 So.2d 271 (Fla. 1953)

Defendant was indicted on a charge of first degree murder. The trial judge, on request of defendant, ordered the State to furnish defendant a full and complete list of witnesses and keep the list up to date. The State complied in advance of trial, but called a witness