Martinez v. Socoma Companies: Problems in Determining Contract Beneficiaries' Rights

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MARTINEZ v. SOCOMA COMPANIES: PROBLEMS IN DETERMINING CONTRACT BENEFICIARIES’ RIGHTS

ANTONIO: Shylock, although I neither lend nor borrow, By taking nor by giving of excess, Yet to supply the ripe wants of my friend I’ll break a custom.

The Merchant of Venice, Act I, sc. iii

The initial action in Shakespeare’s play *The Merchant of Venice* could fairly be described as the formation of a third party beneficiary contract. Any question as to whether Antonio’s friend, the beneficiary, had the right to enforce the contract made between Shylock and Antonio was of course made unimportant by subsequent events in the well-known plot. Nonetheless, had Shakespeare chosen to deal with the difficulties posed by a third person’s assertion of such a right, the discussion would not have been untimely, for it was but a quarter of a century after the stage premiere of *The Merchant of Venice* that

1. “‘When seeking a subject for a play Shakespeare preferred one in which the initial action had some legal foundation.’” O. PHILLIPS, SHAKESPEARE AND THE LAWYERS 46 (1972). The initial action in *The Merchant of Venice* may be stated briefly as follows: Bassanio, a sixteenth century adventurer in need of money to finance a voyage, seeks help from his friend Antonio, an elderly merchant. With the purpose of assisting Bassanio, Antonio secures from Shylock, a userer, a sum of money. In return for the money, Antonio promises Shylock that if the sum is not repaid by a certain date, Antonio will forfeit a pound of flesh.

2. Williston defines a third party beneficiary contract as “[a] contract in which the promisor engages to the promisee to render some performance to a third person.” 2 S. WILListon, CONTRACTS § 347, at 792 (3d ed. 1959) [hereinafter cited as WILListon]. That the contractual action in *The Merchant of Venice* fits within this definition is evidenced by Bassanio’s lament:

[F]or, indeed,
I have engaged myself to a dear friend,
Engaged my friend to his mere enemy,
To feed my means.


the English courts first permitted a third party to enforce a contract made by others for his benefit.4

Ever since the acceptance of the third party action in seventeenth century England,5 the law of third party beneficiary contracts has been plagued by theoretical uncertainties,6 doctrinal difficulties,7 and confusion.8 Problems created by judicial grants of relief to persons not privies to the contract and strangers to the consideration9 proved too onerous for the English courts. In 1861 they repudiated the third party beneficiary doctrine and adopted the present English rule denying any contract action based on the third party beneficiary theory.10

In the United States the early historical path traveled by the third


6. The theoretical basis underlying the doctrine permitting recovery by a third person on a contract made by others for his benefit has been the subject of much debate and decisional conflict. Theories which courts and scholars have resorted to as bases for affording the beneficiary a remedy have included trust, blood relationship, subrogation, agency, novation, assignment, and avoidance of circuity of action or multiplicity of suits. Annot., 81 A.L.R. 1271, 1271-72, 1283-85. "But now that the doctrine is firmly established and its respectability is unquestionable, there is no occasion for giving it a fictitious basis or origin, or laying it, cuckoo fashion, in the nests of agency, subrogation, trusts, etc. . . . The doctrine has become a rule of law in its own right, and should be so treated." Id. at 1285.

7. See text accompanying notes 26-74 infra.

8. Corbin refers to the area as a "morass." 4 CORBIN, supra note 2, § 772, at 3. Williston calls the issues involved in third party beneficiary law "a source of trouble and confusion." 2 WILLISTON, supra note 2, § 347, at 795.

9. The concepts of privity and consideration are not the same. 4 CORBIN, supra note 2, § 779, at 31. But see Samuels, Contracts For the Benefit of Third Parties, 8 U.W. AUSTL. L. REV. 378, 381-83 (1968). Privity refers to the relationship between those who exchange promises or those to whom a promise is directed. J. CALAMARI & J. PERILLO, CONTRACTS § 243, at 378 (1970) [hereinafter cited as CALAMARI]. Consideration for a promise may come from the party to whom the promise was made, or from a third person. 4 CORBIN, supra note 2, § 779, at 31. Although both concepts were used in early cases to deny remedies to third party beneficiaries, today the general rule in the United States is that a third person may sue on a contract made for his benefit even though he is a stranger to the contract and to the consideration therefor. 17 AM. JUR. 2d Contracts §§ 302, 308 (1964).

party beneficiary concept was a more tortuous one. Nevertheless, today every jurisdiction save one recognizes the right of a third person to enforce a contract made for his benefit. Unfortunately, the demise of privity and consideration as doctrines for denying a third party's cause of action failed to likewise occasion the demise of doctrinal difficulties. Rather, the focus of judicial concern merely shifted from the question of whether any third party should be able to enforce a contract made by others for his benefit, to the question of whether a particular third party should be so entitled.

Recognition of the fact that not every sort of beneficiary deserved the right to sue on a contract entered into by others made it necessary for courts to find some basis for creating a reasonable dichotomy between beneficiaries with and beneficiaries without enforceable rights. In the search for workable decision-making criteria, both scholars and courts perused a variety of rules, tests, and standards.

Today, the search continues, and the fact that courts are still wrestling with a variety of tests is pointedly illustrated by the most recent California case concerned with the contractual rights of third party beneficiary claimants. In that case, Martinez v. Socoma Companies, the California Supreme Court rejected a claim that plaintiffs, representatives of a class of 2,017 hard-core unemployed residents of East Los Angeles, were third party beneficiaries of government contracts which required defendant companies to provide training and jobs to plaintiffs and their class. In a four to three decision, the court held that

12. Massachusetts is the only state which continues to deny recovery to third parties on the contract beneficiary theory. Simpson, supra note 10, at 853; see Note, The Third Party Beneficiary Rule in Massachusetts, 8 SUFFOLK U.L. REV. 130 (1973). However, statutes and judicial construction have engrafted a number of exceptions onto the general rule of nonrecovery. Id. at 131.
13. The right of enforcement is recognized in some jurisdictions by legislation, while in others by judicial decision. 2 WILLISTON, supra note 2, § 368, at 897; Ashe, supra note 11, at 233.
14. Beneficiaries determined to have enforceable rights under a contract have been given various names including donee, creditor, intended, and protected beneficiaries, depending on the test used to determine their existence. See text accompanying notes 19-74 infra.
15. Beneficiaries who may be benefited by the performance of a contract but who are denied standing to sue on the contract are generally called incidental beneficiaries. Corbin has called the term "a sort of omnium gatherum" which, being merely a negative definition encompassing all beneficiaries found not to have enforceable rights, "is not a particularly helpful definition." 4 CORBIN, supra note 2, § 779C, at 40-41.
any benefits accruing to plaintiffs’ class were intended only as a means of executing the public purposes stated in the government contracts and their authorizing statutes, and that therefore plaintiffs were mere incidental beneficiaries of the contracts and lacked standing to sue.18

Because both the majority and the dissent in Martinez purported to base their decisions on a number of third party beneficiary criteria, a profitable consideration of the case requires some knowledge of the various tests courts have used to determine which beneficiaries have enforceable rights, and some familiarity with the additional decisional factors courts have considered in dealing with government contracts which benefit third parties. Following a detailed examination of these tests, the focus of this note will shift to the California court’s application of such tests to the particular fact situation in Martinez. Finally, suggestions will be made for fashioning more workable criteria for deciding third party beneficiary cases such as Martinez.

Development of the Dichotomy: The Search for “The Test”

The Categorization Scheme

The Restatement of Contracts was the watershed in the judicial transformation from strict observance of the privity rule to a more universal recognition of third party beneficiary rights.19 The crux of the Restatement formula is its endorsement of mutually exclusive categories as the means for distinguishing protected from unprotected beneficiaries.20 Restatement section 133(1)(a) affixes the label “donee beneficiary” to a person who will benefit from performance of a promise in a contract “if it appears . . . that the purpose of the promisee in obtaining the promise . . . is to make a gift to the beneficiary or to confer upon him a right against the promisor to some performance . . . .”21 Similarly, the benefited person is labeled a “creditor beneficiary” by section 133(1)(b) if “performance of the promise will satisfy an actual or supposed or asserted duty of the promisee to the beneficiary, or a right of the beneficiary against the promisee which has been barred . . . .”22 Beneficiaries falling into either of the above categories assume protected status and are given enforceable rights under Restatement sections 135 and 136.23 On the other hand, “inci-

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18. Id. at 397-98, 521 P.2d at 843, 113 Cal. Rptr. at 587.
19. Ashe, supra note 11, at 236.
20. RESTATEMENT OF CONTRACTS § 133 (1932).
21. Id. § 133(1)(a).
22. Id. § 133(1)(b).
23. “[A] gift promise in a contract creates a duty of the promisor to the donee beneficiary to perform the promise; and the duty can be enforced by the donee benefi-
Dental beneficiaries" are negatively defined in section 133(1)(c) as all beneficiaries not described by the donee and creditor definitions. Under section 147 they are denied any enforceable rights.

Although the categorization scheme probably arose as an attempt to clarify existing "intent-to-benefit" tests, one reason for the plan's inadequacy today is that the division of beneficiaries into donee and creditor categories poses difficult intent problems. In most donee beneficiary cases, finding the requisite purpose or intent to make a gift or confer a right is not particularly difficult, since the promisee's motive, purpose, and intent are usually the same: to bestow a gift or other benefit upon the third person. In most creditor cases, however, finding this same intent to benefit is often problematic, for although the promisee wants the creditor to receive the benefit of the contractual performance, the motive or purpose of the promisee is more likely that of benefiting himself by procuring the discharge of his own debt or obligation.

Because of the difference in these two recurring third party beneficiary situations, an academic debate has arisen as to the proper method for analyzing each. One suggestion is that the promisee's intent should be controlling in the donee beneficiary case, but irrelevant in the creditor beneficiary case. The other proposal is that intent should be interpreted as denoting something wholly different from purpose or motive; the intent in both donee and creditor situations should be simply the promisee's intent that the third party receive the benefit.
of the contracted performance. Under this latter approach, intent assumes relevance in the creditor situation as well as the donee case. The promisee intends to confer a benefit on the creditor, not for the purpose of benefiting the creditor per se, but as a means to the discharge of the promisee's obligation to his creditor.

The Restatement adopted the proposal which suggests differing analyses of the donee and creditor situations. Thus, the Restatement requires that in the donee case "the purpose of the promisee [be] to make a gift to the beneficiary or to confer upon him a right . . . ." This requirement, along with the omission of any purpose or intent requirement in the creditor beneficiary case, leaves the categorization scheme vulnerable to judicial misinterpretation. Use of the terms "purpose" and "gift" in the donee definition provides grounds for restrictive interpretations, as courts may search for the one purpose of the contract or require a showing of traditional donative intent. On the other hand, terminology such as "to confer a right" affords the opportunity for expansive interpretations extending recovery beyond true donees to any person in fact benefited by a promisor's performance. Furthermore, the requirement of a purpose to benefit in the donee beneficiary case tends to foster what one commentator has called "creeping subjectivity." In essence, the promisee's motive becomes

30. "The purpose usually moving the promisee to exact the provision in [the creditor situation] is to relieve himself of a debt or duty, rather than to confer a benefit upon the third person. But it does not follow that such contracts are not 'intended' for the benefit of the creditor." Annot., 81 A.L.R. 1271, 1288 (1932).

31. "In the creditor beneficiary situation . . . [e]ven though the promisee's motive or purpose in buying the promise was not to benefit his creditor but rather himself, yet it was clearly his expressed intent that the third person shall receive the benefit of performance. So intention to benefit in the creditor beneficiary case means an intention to create in the third party an enforceable right to the performance for which the promisee bargained and furnished the consideration. The promisee's purpose is to secure from the promisor a performance to the third party which will discharge his debt. It can best be effectuated by permitting suit directly by the third party." Simpson, supra note 10, at 854.

32. 26 CALIF. L. REV. 627, 628-29 (1938); Annot., 81 A.L.R. 1271, 1287 (1932); see 4 CORBIN, supra note 2, § 776, at 16-17.

33. RESTATEMENT OF CONTRACTS § 133(1)(a) (1932) (emphasis added).

34. Simpson, supra note 10, at 856; 2 WILLISTON, supra note 2, § 356A, at 839 n.19.

35. See text accompanying notes 71-73 infra.


37. The Third Party Beneficiary Concept, supra note 36, at 423-25.

38. The Intention Standard, supra note 36, at 1188.
a determinative factor in cases involving family or friends, while the court must still resort to more objective tests to deal with cases in commercial settings.39

Confusion regarding the definitional sections of the Restatement,40 and dissatisfaction with the inadequacy of the strict categorization scheme in complex fact situations,41 were undoubtedly among the "obsolete doctrinal difficulties"42 the American Law Institute was seeking to avoid when, in the Restatement Second, it abandoned the donee-creditor terminology and switched to an intent standard broad enough to encompass both categories.43 Although the donee-creditor method of analysis is still advocated in some academic circles44 and used by a number of courts,45 it has been the subject of growing criticism46 even

39. CALAMARI, supra note 9, § 244, at 382-83.
40. See text accompanying notes 33-39 supra.
41. Corbin states, "The classification also causes some difficulty for the reason that contracts are often complex; there may be several beneficiaries of different kinds in the case of a single contract, and sometimes a single beneficiary may have the aspect of both a donee and a creditor or the aspect of neither one." 4 CORBIN, supra note 2, § 795, at 140. Williston notes that "it [is] difficult to classify a number of the cases in one or the other of the aforementioned categories." 2 WILLISTON, supra note 2, § 356, at 830. Indeed, many courts and scholars have conceded the necessity for granting certain third party beneficiaries a remedy even though they cannot be forced into either of the protected categories. See The Third Party Beneficiary Concept, supra note 36, at 421-23; Note, Contracts: The Third Party Beneficiary Theory is Available as a Theory of Recovery in Pollution Cases, 3 TEXAS TECH. L. REV. 385, 386 (1972). For examples of beneficiaries difficult to classify as either donees or creditors see 4 CORBIN, supra note 2, §§ 356-56A, 364A, 379A; The Third Party Beneficiary Concept, supra note 36, at 421-23 & n.87.
42. Tentative Draft No. 3, supra note 2, Introductory Note at 3.
43. "The definition of 'intended beneficiary' . . . comprehends all those included as 'donee' and 'creditor' beneficiaries in the original Restatement." RESTATEMENT (SECOND) OF CONTRACTS § 133, Reporter's Note at 18 (Tent. Draft No. 4, 1968) [hereinafter cited as Tentative Draft No. 4]. The Restatement Second claims to avoid use of the terms "donee" and "creditor" beneficiary because of the doctrinal difficulties associated with those terms. Id. The Restatement Second, however, fails to rid itself completely of the categorization influence. See, e.g., id. § 133, comments b & c; The Intention Standard, supra note 36, at 1169 n.26.
44. See, e.g., 4 CORBIN, supra note 2, §§ 774, 795; 2 WILLISTON, supra note 2, §§ 356-56A. Corbin attributes his adherence to the Restatement classifications to the differences in legal relations of the two classes of beneficiaries. 4 CORBIN, supra note 2, §§ 774, 795. Contra, The Third Party Beneficiary Concept, supra note 36, at 416-21 (disputing the reasons advanced by Corbin on both theoretical and practical grounds); 45 VA. L. REV. 1226, 1227 n.8 (1959) (contending that beneficiaries differ only with respect to their factual situations).
46. The Third Party Beneficiary Concept, supra note 36, at 407, 415-25 (misleading; unsound); The Intention Standard, supra note 36, at 1169 (weak); 26 CALIF. L.
among those who originally endorsed its efficacy.\textsuperscript{47}

The Intent Standard

Although heralded by the American Law Institute as “new,”\textsuperscript{48} the intent standard is anything but novel.\textsuperscript{49} Rather, the institute’s switch to an intent test appears to have brought it into conformity with prevailing judicial practice.\textsuperscript{50}

Under the \textit{Restatement Second} test, the terms “intended” and “incidental” are used to distinguish beneficiaries with enforceable rights from those who lack them.\textsuperscript{51} 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 . . . will satisfy an obligation of the promisee to pay money to the beneficiary or; (b) the promise [sic] manifests an intention to give the beneficiary the benefit of the promised performance.”\textsuperscript{52} As in the \textit{Restatement}, an incidental beneficiary is negatively defined; any beneficiary who is not intended is incidental.\textsuperscript{53}

Despite the remedial functions the intent test was designed to serve, the \textit{Restatement Second}’s new test has been as beset with difficulties as the original \textit{Restatement}’s old test. For purposes of brevity these difficulties will be called the \textit{who}, \textit{what}, and \textit{how} problems of any intent standard.

The \textit{who} problem involves determining which party must intend that a third party be benefited. A few courts have said that for a third party to be an intended beneficiary, both parties to the contract must

\textsuperscript{47} Corbin expresses his doubts about the categorization scheme when he states, “The distinction between donee beneficiaries and creditor beneficiaries may turn out to be a quite unnecessary classification.” 4 \textsc{Corbin}, supra note 2, § 795, at 139. “Classifications are necessary and are useful (if well-made); but they generally have imperfections and it is always dangerous to apply them mechanically as absolute tests of justice and the law.” \textit{Id.} at 56 (Supp. 1971). Indeed, the American Law Institute itself has admitted the inherent deficiencies of its categorization plan. Tentative Draft No. 3, \textit{supra} note 2, Introductory Note at 3.

\textsuperscript{48} Tentative Draft No. 4, \textit{supra} note 43, § 133, Reporter’s Note at 18.

\textsuperscript{49} The \textit{Intention Standard}, \textit{supra} note 36, at 1169-70.

\textsuperscript{50} \textsc{Calamari}, \textit{supra} note 9, § 244, at 380 n.13.

\textsuperscript{51} Tentative Draft No. 3, \textit{supra} note 2, Introductory Note at 3.

\textsuperscript{52} Tentative Draft No. 4, \textit{supra} note 43, § 133(1). Again section 135 makes the rights of an intended beneficiary enforceable. Tentative Draft No. 3, \textit{supra} note 2, § 135.

\textsuperscript{53} Tentative Draft No. 4, \textit{supra} note 43, § 133(2). An incidental beneficiary is again denied any enforceable right by section 147. Tentative Draft No. 3, \textit{supra} note 2, § 147.
intend that he receive the benefit of the promised performance. Occasionally, a court has held that it is the promisor rendering the promised performance who must intend to confer a benefit on the third party. The weight of authority today, however, is that it is the intent of the promisee, who pays for the promise in question, which must govern.

The law is not nearly so well settled as to what the promisee must intend. One view is that the promisee's express intent must be to give the third party the right to sue on the contract. This position has been roundly criticized, however, on the ground that a beneficiary's right to sue should not be extinguished merely because the parties failed to grant the right to sue in the contract. On the other hand, courts and critics agree that if the parties expressly grant or deny to the third party the right to sue, such contractual provision should be binding.

In light of the fact that Restatement Second sections 135 and 147 respectively give and deny to beneficiaries the right to enforce the promisor's duty to perform, the Restatement Second view seems to be that the promisee need only intend to give the third party the benefit of the promisor's performance, rather than an express right to sue, in order for the beneficiary to be able to enforce the contract. Nevertheless, the Restatement Second is less than clear on this point, and thus fails to provide any definitive guidance.

54. See CALAMARI, supra note 9, § 244, at 380; The Third Party Beneficiary Concept, supra note 36, at 409; 45 VA. L. REV. 1226, 1228 (1959).
55. See notes 80-81 & accompanying text infra.
56. Tentative Draft No. 4, supra note 43, § 133(1)(b); CALAMARI, supra note 9, § 244, at 380; 4 CORBIN, supra note 2, § 776, at 14; 2 WILLISTON, supra note 2, § 356A, at 836.
57. "There does not seem to be any basis for holding that, although a performance of the contract will necessarily and directly benefit the third person, his remedy depends upon an intention on the part of the parties to the contract that he shall have the right to sue thereon." Annot., 81 A.L.R. 1271, 1287 (1932).
58. "[T]he existence of legal relations is not dependent upon an intent to create them." 4 CORBIN, supra note 2, § 777, at 25. "[A] requirement of an intention that the third party beneficiary should be granted the legal right to enforce the promise... seems... unrealistic because, as a general rule, contracting parties do not contemplate either a breach or the resultant litigation." The Third Party Beneficiary Concept, supra note 36, at 411; see Annot., 81 A.L.R. 1271, 1287 (1932). Another problem with the "right to sue" theory is that it tends to make the Restatement's enabling sections, 135 and 147, mere surplusage. It also contradicts the reasoning behind section 145 which allows for recovery by a member of the public on a government contract in only two circumstances, one of which is when the terms of the contract specifically provide for such recovery. See notes 121-135 & accompanying text infra.
59. CALAMARI, supra note 9, § 244, at 381; 4 CORBIN, supra note 2, § 777, at 25 & n.39.
60. See notes 52-53 supra.
61. Simpson, supra note 10, at 855-56.
62. Compare Tentative Draft No. 4, supra note 43, § 133(1)(b) with Tentative
As stated earlier, although the Restatement Second claims to give a new definition to the intent test, variations of the intent-to-benefit test have long been employed by most courts. These decisional tests were the result of problems courts faced in deciding how to apply an intent standard practically.

Two varieties of the intent test rely on the use of presumptions. One test sets forth the rule that when a contract appears to create a beneficial right in a third party, there is a presumption that the contracting parties intended to confer a benefit on him, even though their primary concern was their own benefit. On the other hand, a few courts reverse the presumption and assume that the parties contract only for their own benefit unless an intent to benefit a third party is clearly proved.

Two other decisional tests turn on the concept of directness. One of these tests focuses on the person to whom the performance will be rendered. If performance runs directly to the promisee, the contract is presumed to be solely for the benefit of the parties. On the other hand, a promisor's obligation to render a performance directly to a third party will usually be determinative of the third party's status as an intended beneficiary. The second "direct" test differentiates between direct and remote beneficiaries. Third parties who are benefited only as a necessary result of the promisor's performance are termed remote beneficiaries and are denied recovery. On the other hand, those who receive a benefit which is intended to be one of the

Draft No. 3, supra note 2, § 135, comment e. Section 135, comment e confuses the issue by reverting to a donee, creditor, and "other intended" beneficiary categorization. Comment e implies that those beneficiaries within the "other" category must be intended by the promisee to have the right to sue. The Restatement Second professes to avoid categories because of the doctrinal difficulties they foster. Why it treats "other intended" beneficiaries differently is not explained. See also Tentative Draft No. 4, supra note 43, § 133, comment d.

63. See text accompanying notes 48, 49 and note 26 supra.
64. The Third Party Beneficiary Concept, supra note 36, at 408.
65. Id.
66. CALAMARI, supra note 9, § 244, at 381-82.
67. Id.; Simpson, supra note 10, at 856.
68. "A contract for the benefit of a third person usually provides that performance shall be rendered directly to the beneficiary, but this is not necessarily the case." Restatement of Contracts § 133, comment d (1932). See, e.g., Lucas v. Hamm, 56 Cal. 2d 583, 364 P.2d 685, 15 Cal. Rptr. 821 (1961), cert. denied, 368 U.S. 987 (1962). For a discussion of Hamm and other cases in which the "direct" test was found not determinative, see CALAMARI, supra note 9, § 244, at 381-82; 1 B. WITKIN, SUMMARY OF CALIFORNIA LAW, Contracts § 505, at 433-34 (8th ed. 1973) [hereinafter cited as WITKIN].
69. CALAMARI, supra note 9, § 244, at 381-82; Simpson, supra note 10, at 856.
70. 2 WILLISTON, supra note 2, § 356A, at 841-42.
direct and immediate consequences of the promisor's performance are
direct beneficiaries and are entitled to recovery.

Finally, of the numerous other tests based on the concept of int-
ent, the "degree of benefit" or "primary purpose" test deserves men-
tion in that it is the basis for much of the majority's reasoning in the
Martinez case to be discussed below. This test requires that bestowing
a benefit upon a third party must be the primary purpose and object
of the promisee.\(^7\) Because the primary purpose of the promisee, es-
pecially in the creditor beneficiary case, is usually to benefit himself,\(^7\)
this test has met with little critical approval.\(^7\)

In summary, because of difficulties such as the who, what and how
problems mentioned above, the intent standard has failed to be the per-
fected decision-making test.\(^7\) If one basic problem could be gleaned
from the many encountered in this area, it would have to be a semantic
one: what is the meaning of "intent"?

California's Statutory Test

The transition from rejection to recognition of the contract bene-
iciary's right of action was accomplished in some states by judicial de-
cision, in others by legislation.\(^7\) In 1872, California enacted Civil
Code section 1559, which reads: "A contract, made expressly for the
benefit of a third person, may be enforced by him at any time before
the parties thereto rescind it."\(^7\)

Although section 1559 makes no reference to a categorization
scheme or an intent standard, California decisions have generally
adopted the donee-creditor classifications\(^7\) and the courts have ver-
balized in terms of an intent to benefit test of recovery.\(^8\) Accordingly,

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71. 4 Corbin, supra note 2, § 776, at 19-20.
73. See 4 Corbin, supra note 2, § 776, at 19-23; The Third Party Beneficiary
74. For some typical criticisms of the intent standard see The Third Party Bene-
ficiary Concept, supra note 36, at 408-10; The Intention Standard, supra note 36.
75. See note 13 supra.
76. Cal. Civ. Code § 1559 (West 1954). For general source material on Cal-
ifornia's third party beneficiary law see 14 Cal. Jur. 3d Contracts §§ 208-17 (1974);
1 Witkin, supra note 68, §§ 499-512.
Cal. Rptr. 540, 544 (1962).
78. E.g., Walters v. Calderon, 25 Cal. App. 3d 863, 102 Cal. Rptr. 89 (1972);
R.J. Cardinal Co. v. Ritchie, 218 Cal. App. 2d 124, 32 Cal. Rptr. 545 (1963); Southern
Cal. Gas Co. v. ABC Constr. Co., 204 Cal. App. 2d 747, 22 Cal. Rptr. 540 (1962);
is intended for the benefit of a third person is a question of construction. Walters v.
Calderon, 25 Cal. App. 3d 863, 102 Cal. Rptr. 89 (1972); Woodhead Lumber Co. v.

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most of the difficulties the California courts have experienced are the same as those discussed in conjunction with the Restatement and Restatement Second tests. Nevertheless, a few particular aspects of California third party beneficiary law merit brief discussion here.

For a time, California courts exhibited some uncertainty as to whose intent, regarding a third party, should be controlling. Initially the courts took the position that it was the promisor who must manifest the intent to secure a benefit to a third party. Recently, however, the California Supreme Court called such language "unfortunate" and stated that so long as the promisor understands that the promisee has an intent to benefit a third party, the promisor himself need not manifest any such intent.

Although the cases are indefinite as to what kind of intent the promisee is required to demonstrate, California appears to adhere to a view similar to that of the Restatement Second. California courts have stated that the promisee must intend that the performance inure to the benefit of the third party, and that a finding of such intent is important in determining the beneficiary's right to bring legal action under the contract.

Problems regarding the application of California's tests of beneficiary enforceability have centered around the interpretation of the phrase "expressly for the benefit of the third party" in section 1559. The term "expressly" has been construed to mean "in an express manner; in direct or unmistakable terms; explicitly; definitely; directly." On the other hand, the phrase has been held not to mean "exclusively," "solely," or "primarily" for the benefit of a third person. 

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79. See text accompanying notes 26-47, 54-74 supra.
82. See cases cited notes 83-84 infra.
84. Lucas v. Hamm, 56 Cal. 2d 583, 364 P.2d 685, 15 Cal. Rptr. 821 (1961), cert. denied, 368 U.S. 987 (1962); R.J. Cardinal Co. v. Ritchie, 218 Cal. App. 2d 124, 32 Cal. Rptr. 545 (1963). See note 181 infra. Of course, if it is provided in the terms of the contract that the contract is, or is not, made expressly for the benefit of a third party, such provision will govern. See 26 CAL. L. REV. 627 n.1 (1938).
86. Hartman Ranch Co. v. Associated Oil Co., 10 Cal. 2d 232, 247, 73 P.2d 1163,
Similarly, the term has been construed not to require that performance be rendered "directly" to the beneficiary. Moreover, the statutory test has not limited recovery on the contract to those specifically named or identified in the contract. Consequently, its connotative meaning having been destroyed by judicial interpretation, the term "expressly" has now come to mean merely the negative of "incidentally."

Government Contracts and Federal Statutes: Purposes, Remedies, and Public Beneficiaries

Many third party beneficiary cases in which a federal statute is involved or in which a governmental unit is a party have been ultimately decided on traditional third party grounds. Nonetheless, most courts deciding these cases have deemed it necessary or at least useful to take into account a number of additional factors.

Among the factors considered have been purposes of the statute, remedies expressed or implied in the statute, benefits accruing

91. The Third Party Beneficiary Concept, supra note 36, at 414 n.45.
93. For example, in Martinez v. Socoma Cos., 11 Cal. 3d 394, 521 P.2d 841, 113 Cal. Rptr. 585 (1974), the court held that plaintiffs were mere incidental beneficiaries of contracts entered into pursuant to the Economic Opportunity Act since they did not qualify as donee beneficiaries under basic third party beneficiary principles. In Bailey v. Iowa Beef Processors, Inc., 213 N.W.2d 642 (Iowa 1973), cert. denied, 419 U.S. 830 (1974), the court held that plaintiffs were not intended beneficiaries of a consent decree entered into pursuant to the Clayton Act since under fundamental contract law both parties must intend for the third party to recover on the contract and must confer an actionable right upon the third party in the contract.
94. See notes 99-103 & accompanying text infra.
95. See text accompanying notes 104-05, 111-12 infra.
to the public in general,96 and contractual assumption by the promisor of a duty to compensate third parties.97 Often such factors have proved not only helpful but determinative of the case at hand. Nevertheless, courts have selected, applied, and weighted these factors without a great deal of precision or symmetry, and the cases demonstrate no consensus as to which of the additional factors should be considered, let alone which should be controlling. Consequently, the law in this area has lacked both order and predictability, and "[i]n some States the complex cases [have been] so poorly analyzed and there has been so much direct conflict in decision that no litigant could be safely advised by his attorney without first taking his case to the court of last resort."98

It is suggested that at least some of the resultant unpredictability in this area is due to judicial failure to differentiate among certain types of government contracts. It is further suggested that for purposes of analysis, such differentiation is perhaps the only method of discerning even the faintest outlines of some trends in this area.

Government Contracts Made Pursuant to Federal Statutes

If a government contract is made pursuant to a federal statute, the government presumably enters into the contract in order to effectuate an object of the statute, and the contract's purpose is usually identical with that of the statute.99 A judicial determination that the pur-

96. See text accompanying notes 121-35 infra.
97. See text accompanying notes 127, 182-85 infra.
98. 4 Corbin, supra note 2, § 772, at 3. Although in this statement Corbin was speaking about third party beneficiary cases in general, his observation seems particularly apropos with regard to the case law in the area of government contracts.
99. A few examples may help to illustrate this point. Two purposes of the Immigration Act of 1917 were to exclude from admission into the United States an alien "likely to become a public charge," and to vest in a commissioner the "authority to enter into contract[s] for the support and relief of such aliens as may fall into distress or need public aid." Immigration Act of 1917, ch. 27, §§ 3, 29, 39 Stat. 874. Thus a court held that a relative's contractual promise to the Department of Immigration that he would execute his will in favor of two proposed immigrants, was made to satisfy these statutory purposes. In re Wenninger's Estate, 239 Wisc. 432, 1 N.W.2d 880 (1942). A purpose of having national securities exchanges register with the Securities Exchange Commission is to protect investors. Securities Exchange Act, 15 U.S.C. §§ 78f(a)(3), (d), (f). Therefore, an agreement required as a condition of registration, in which the New York Stock Exchange promised that it would comply with the provisions of the Act, had as one of its purposes the protection of investors. Weinberger v. New York Stock Exch., 335 F. Supp. 139, 144 (S.D.N.Y. 1971) (such agreement gives a contractual right to investors and breach may create a cause of action.) Other cases illustrative of this point include Lemon v. Bossier Parish School Bd., 240 F. Supp. 709 (W.D. La. 1965), aff'd 370 F.2d 847 (5th Cir.), cert. denied, 388 U.S. 911 (1967) (school board assurances in return for federal grants made pursuant to 20 U.S.C. section 236); Blair v. Anderson, 325 A.2d 94 (Del. 1974) (state contract with federal govern-
poses pronounced by Congress as enactor of a statute are the same as the purposes espoused by the government as promisee in a contract can be an important determination regarding a court's interpretation of an agreement.¹⁰⁰

Occasionally, a statement of purposes in a federal statute evinces a congressional recognition that certain persons, or classes of persons, will and should receive a benefit in order to effectuate a statutory scheme.¹⁰¹ If such persons should later bring an action on a contract entered into pursuant to the federal statute, courts reading the government contract in conjunction with the statutory purposes will have less difficulty concluding that the third party claimants are intended beneficiaries.¹⁰² On the other hand, if a statute makes no reference to third persons and demonstrates no contemplation that those persons should be benefited by the statutory scheme or any contracts made pursuant thereto, courts will be less hesitant to find that such third persons are but incidentally benefited.¹⁰³


¹⁰¹. See cases cited at note 99 supra. Each of the statutes involved in these cases was held to evince a recognition that certain third parties should receive benefits through its effectuation.

¹⁰². See cases cited at note 99 supra. In each of the cases cited the third party beneficiary claimant was held entitled to sue on the contract made pursuant to the federal statute.

A complication may arise when a federal statute includes specific remedies for the violation of its own terms.\textsuperscript{104} A court faced with an action for breach of a contract made pursuant to the statute must decide whether the statutory remedies should be deemed exclusive or whether they should be viewed merely as supplements to existing common law remedies for breach of contract. In general, courts have held that when an action is based on contract, and the contract is one made pursuant to a statute, the statute establishes the standards against which the promisor's conduct is to be measured, but the statutory remedies do not deprive a plaintiff of his common law contractual remedies.\textsuperscript{105}


\textsuperscript{105} See, e.g., Weinberger v. New York Stock Exch., 335 F. Supp. 139 (S.D.N.Y. 1971); Shell v. Schmidt, 126 Cal. App. 2d 279, 272 P.2d 82 (1954), cert. denied, 348 U.S. 916 (1955); Fryns v. Fair Lawn Fur Dressing Co., 114 N.J. Eq. 462, 168 A. 862 (1933). Where, however, a contract is not made pursuant to a federal statute, but rather merely incorporates a term or terms of a federal statute, the purpose of the contract and that of the statute will usually differ, and a court's inquiry into statutory remedies will be much more thorough. Typical of this type of contract are construction contracts which embody statutory wage, hour, or safety provisions solely because of statutory mandate. See, e.g., Martinez v. Phillips Petroleum Co., 283 F. Supp. 514 (E.D. Idaho 1968) (hours); Hensley v. United States, 279 F. Supp. 548 (D. Mont. 1968) (safety); Willis v. E.I. DuPont de Nemours & Co., 76 F. Supp. 1010 (E.D. Okla.), rev'd on other grounds, 171 F.2d 51 (10th Cir. 1948) (wages and hours). Although a purpose of a statute may be to benefit certain persons, if the contract itself is not made to effectuate the purposes of the statute, courts will not assume that the contract was made to benefit those persons. Rather the cases demonstrate a feeling on the part of courts that only when Congress has provided the third party with a statutory remedy for the violation of a statutory provision, will the courts be warranted in granting a coextensive contractual remedy for breach of the statutory provision embodied in the contract. Consequently, although courts sometimes speak about statutory purpose in such cases, the focus of judicial inquiry is on whether the statute itself affords a third party an express or implied right to sue. See, e.g., Martinez v. Phillips Petroleum Co., 283 F. Supp. 514 (E.D. Idaho 1968) (neither); Willis v. E.I. DuPont de Nemours & Co., 76 F. Supp. 1010 (E.D. Okla.), rev'd on other grounds, 171 F.2d 51 (10th Cir. 1948) (neither); Filardo v. Foley Bros., Inc., 297 N.Y. 217, 78 N.E.2d 480 (1948), rev'd on other grounds, 336 U.S. 281 (1949) (implied); Fata v. S.A. Healy Co., 289 N.Y. 401, 46 N.E.2d 339 (1943) (express). Nevertheless, narrowing the focus of judicial inquiry in this type of case has not resulted in uniformity of decision. Indeed, cases involving the same statute and similar fact situations have emerged from judicial analysis with diametrically opposite results. Compare Martinez v. Phillips Petroleum Co., 283 F. Supp. 514 (E.D. Idaho 1968) and Willis v. E.I. DuPont de Nemours & Co., 76 F. Supp. 1010 (E.D. Okla.), rev'd on other grounds, 171 F.2d 51 (10th Cir. 1948) with Filardo v. Foley Bros., Inc., 297 N.Y. 217, 78 N.E.2d 480 (1948), rev'd on other grounds, 336 U.S. 281 (1949). Each of these cases involved contracts embodying provisions of the Eight Hour Laws, Act of Aug. 1, 1892, ch. 352, §§ 1-3, 27 Stat. 340; Act
Two California cases are illustrative of the above concepts and are important to an understanding of the *Martinez* case which will be discussed below.

*Shell v. Schmidt*

In *Shell v. Schmidt* the Federal Housing Authority, pursuant to the Veterans’ Emergency Housing Act of 1946, granted a contractor certain priorities on building materials. In return for these priorities, the contractor promised to build a number of dwellings for veterans in conformity with certain plans and specifications. The contractor failed to comply with the designated plans, however, and veterans who purchased the homes brought suit as third party beneficiaries of the contract between the contractor and the United States. In concluding that the veterans were intended beneficiaries with a right to damages for the contractor’s failure to build the houses as specified, the appellate court relied heavily on the statutory purposes of the Veterans’ Emergency Housing Act of 1946. The court first determined that the statute was passed for the purpose of benefiting veterans by looking to the name of the statute and the fact that other courts had previously recognized such a purpose. The court then used its finding of statutory purpose to determine that the veterans were intended beneficiaries of the contract. The court noted that since the statute and the regulations which resulted in the contract were passed to aid and benefit veterans, the contract must also be for their benefit. Finally, the court once more looked to statutory purpose to reject the contractor’s argument that the statute itself contained the veterans’ exclusive remedy. In holding that the enumeration of remedies in the statute merely created new remedies, without displacing others, the court stated:


107. Ch. 268, §§ 1-12, 60 Stat. 207. The purpose of this act was “to accelerate the production of houses with preferences for veterans of World War II and at sales prices or rentals within their means.” *Id.* § 1, at 208.
109. *Id.* at 286, 272 P.2d at 87.
110. *Id.* at 290, 272 P.2d at 89.
111. *Id.* at 285-86, 272 P.2d at 86. The contractor argued that the exclusive remedies for violations of the contract were those specified in sections 7(a) and 7(d) of the statute. Section 7(a) gave the government the authority to obtain monetary compensation for purchasers from contractors on account of deficiencies in construction resulting from the contractor’s failure to comply with building specifications. Section 7 (d) gave the individual purchaser the statutory right to sue the contractor for violation of the maximum selling price fixed by the FHA and to recover the amount by which the price paid exceeded the fixed price. Veterans’ Emergency Housing Act of 1946, ch 762 §§ 7(d) (A) 60 Stat 207 711.
We agree with respondents that the federal statute should not be interpreted as containing the exclusive remedies of purchasers so as to deprive them of their common law remedies . . . . This would be in subversion of the very purpose and intent of the statute. 112

City & County of San Francisco v. Western Air Lines, Inc.

In another recent California case, City & County of San Francisco v. Western Air Lines, Inc., 113 the court of appeal likewise relied upon statutory purpose, but determined that the third party claimant was merely an incidental beneficiary. That case involved receipt by the City and County of San Francisco of federal funds for the development of its airport under authority of the Federal Airport Act of 1946. 114 In return for the federal aid, the city made various assurances to the federal government, one of which was that it would “operate the Airport for the use and benefit of the public, on fair and reasonable terms and without unjust discrimination.” 115 Western Air Lines, claiming that it had been unjustly charged higher rates than other carriers for its use of the airport, sued as a third party beneficiary of the city’s assurances given pursuant to the Federal Airport Act. One of the reasons 116 given by the court of appeal for rejecting this contention was that “[a]n examination of the act as a whole disclose[d] that its purpose [was] to promote a nationwide system of public airports . . . and not to regulate airport operations.” 117 The court then emphasized that the various agreements and assurances which the city was required to provide were simply promotive of the act’s general purpose. 118

Furthermore, the court noted that the statute itself made no mention of plaintiff or its class, and that it neither expressly nor impliedly provided users of an airport with a private legal remedy. 119 Rather, the court observed that the language of the granting agreement disclosed that it was simply a financial arrangement between two parties, and that such language “echo[ed] the language of the statute.” 120

Government Contracts Benefiting the Public

In a case such as Western Air Lines in which a contract demon-
strates government intent that a particular performance should inure to the benefit of the entire public, or a segment thereof, additional problems may arise concerning the right of an individual member of the public to enforce the contract.

Because every contract made by a governmental unit is to some extent made for the benefit of those the unit governs, and because courts have feared that imposing upon a promisor an obligation to each member of the governmental unit would result in too crushing a burden, both Restatements have special provisions dealing with such government contracts. Sections 145 of both the Restatement and the Restatement Second set forth a general rule that promisors contracting with governmental units will not be liable to members of the public for breach of contract. The Restatement provides that “a promisor bound to the United States or to a State or municipality by contract to do an act or render a service to some or all of the members of the public, is subject to no duty under the contract to such members to give compensation for the injurious consequences of performing or attempting to perform it, or failing to do so,” unless the contract falls within certain enumerated exceptions.

In line with its donee-creditor analysis of third party beneficiary cases, the Restatement allows for two exceptions to the general rule of non-liability in section 145. The first exception, a special application of the donee beneficiary definition in section 133(1)(a), allows for recovery by a member of the public if “an intention is manifested in the contract... that the promisor shall compensate members of the public for such injurious consequences... .” The other exception to section 145 is a similar special application of the creditor beneficiary definition in section 133(1)(b), and allows for beneficiary recovery if “the promisor's contract is with a municipality to render services the non-performance of which would subject the municipality to a duty to pay damages to those injured thereby.” The Restatement Second follows the lead of the Restatement in its drafts of section 145

121. Calamari, supra note 9, § 247, at 387.
122. See id. at 388-89 & n.63.
123. Here the Restatement Second speaks in terms of “a government or governmental agency.” The Restatement is narrower in that it limits governmental promisees to the United States, a state, or a municipality.
124. The Restatement Second refers only to “the public” whereas the Restatement speaks in terms of “some or all of the members of the public.”
125. Restatement of Contracts § 145 (1932).
126. Id. § 145, comment a.
127. Id. § 145(a).
128. Id. § 145, comment a.
129. Id. § 145(b).
and the two exceptions, although it contains minor changes\textsuperscript{130} and is phrased in more general terms.\textsuperscript{131}

Recognizing, however, that \textit{Restatement} section 145 was in some respects too restrictive\textsuperscript{132} and had often denied rights to third parties simply because of doctrinal difficulties,\textsuperscript{133} the \textit{Restatement Second} added a new subsection to section 145.\textsuperscript{134} This new subsection provides that the general rules applicable to non-governmental third party beneficiary contracts should likewise apply “to contracts with a government or governmental agency except to the extent that application would contravene the policy of the law authorizing the contract or prescribing remedies for its breach.”\textsuperscript{135} Thus, according to the \textit{Restatement Second}, government contracts should be treated the same as other contracts unless the performance of the promisor would inure to the benefit of the public, in which event the contract must fall within one of the two exceptions to the general rule of nonrecoverability by a member of the public, or unless such treatment would contravene the law authorizing the contract. Nevertheless, there remains the major and unresolved problem as to when a person within a certain group or class should be considered a “member of the public” and thus be required to come within a section 145 exception in order to qualify for relief.

**Martinez v. Socoma Companies:**

\textbf{Juggling Criteria and a Four-three Decision}

The availability of such a variety of tests of third party enforceability, each with its own strengths and weaknesses, has contributed

\begin{itemize}
\item \textsuperscript{130} The exceptions in the \textit{Restatement Second} provide for promisor liability if “(a) the terms of the promise provide for such liability; or (b) the promisee is subject to liability to the member of the public for the damages and a direct action against the promisor is consistent with the terms of the contract and with the policy of the law authorizing the contract and prescribing remedies for its breach.” Tentative Draft No. 3, \textit{supra} note 2, § 145(2) (a)-(b).
\item \textsuperscript{131} \textit{Id.} § 145, Reporter’s Note.
\item \textsuperscript{132} \textit{CALAMARI, supra} note 9, § 247 at 388 n.57.
\item \textsuperscript{133} Tentative Draft No. 3, \textit{supra} note 2, § 145, comment a.
\item \textsuperscript{134} \textit{Id.} § 145(1).
\item \textsuperscript{135} \textit{Id.} The new subsection was added to reflect the disappearance of doctrinal difficulties while still allowing for the consideration of relevant factors in particular situations and “to avoid any implication that the liability of a government contractor to beneficiaries is broader than that of other contractors.” \textit{Id.} § 145, Reporter’s Note. Professor Calamari feels that the new subsection provides for those cases in which individual public beneficiaries of government contracts were allowed enforceable rights although not fitting strictly within either of the exceptions to section 145 of the \textit{Restatement}. \textit{CALAMARI, supra} note 9, § 247, at 389. In addition, the new subsection recognizes the judicial practice of looking to statutory purposes and remedies as relevant factors in government contract cases. See text accompanying notes 93-105 \textit{supra}.\
\end{itemize}
little toward achieving overall clarity and predictability in the area of third party beneficiary recovery. Although this variety could perhaps be defended on the ground of providing for judicial flexibility, it seems a more accurate observation that "the application of vague tests capable of almost unlimited expansion to reach a supposedly desirable result [has] contributed to uncertainty of policy and difficulty of analysis." Indeed, too many cases demonstrate the propensity of courts to jump from test to test, stressing either the language which makes the test more inclusive or that which makes it more restrictive, depending on what result the particular court deigns most desirable. It is this very brand of judicial manipulation which is so pointedly illustrated in Martinez v. Socoma Companies.

The Facts

In 1967 Congress amended the Economic Opportunity Act of 1964 to provide for the development of special impact programs. The programs were to be directed toward the solution of chronic unemployment and dependency existing in particular communities or neighborhoods within urban areas having especially high concentrations of low-income persons.

On October 2, 1967, the President of the United States issued a directive calling on private industry to join with the federal government in implementing the special impact programs by helping to find jobs

136. The Third Party Beneficiary Concept, supra note 36, at 406-07. Another commentator has observed that the rule of third party beneficiary recovery "is still somewhat confused because courts—with no firm conviction, and without consistency of adaptation—continue to insist upon the presence of certain elements to sustain the rights asserted by the parties to be benefited. These elements have degenerated from things of substance to mere figments of form, yet their persistence results in an anomaly of contract law which has become all the more pointed because of the dynamic expansion of third party relations and of third party rights under modern social legislation and social relations." Richardson, Third Parties and the Contract Relationship, 17 Brooklyn L. Rev. 29 (1950).

137. The Third Party Beneficiary Concept, supra note 36, at 416.


140. Id. § 150, 81 Stat. 688. The amendments authorized financial assistance for "programs which provide financial and other incentives to business to locate in or near the areas served so as to provide employment opportunities for residents of those areas" for "activities which create new training and employment opportunities" and for "manpower training programs for unemployed or low-income persons which support and complement economic, business, and community development programs." Id. § 151, at 689. To receive financial assistance, a program was, among other things, to "promote the development of entrepreneurial and management skills and the ownership or participation in ownership of assisted businesses by residents of the area served." Id. § 152(a)(2), at 689.
and provide training for thousands of the nation's hard-core unemployed.\textsuperscript{141} Funds for the administration of the special impact programs were appropriated to the Department of Labor, and following the designation of the East Los Angeles neighborhood as a special impact area, the department made available sums for contracts with local private industry.\textsuperscript{142}

On January 17, 1969, the secretary of labor, acting on behalf of the Manpower Administration of the United States Department of Labor, entered into contracts with three corporations: Socoma Companies, Lady Fair Kitchens, and Monarch Electronics International. Each of the contracting corporations agreed to lease space in a vacant Los Angeles jail building, to invest in the building's renovation, and to establish a plant for the manufacture of certain articles.\textsuperscript{143} The corporations further agreed to train and employ stated numbers\textsuperscript{144} of certified hard-core unemployed residents of East Los Angeles for a period of at least one year at a statutory minimum wage rate.\textsuperscript{145} In addition, the contractors promised to arrange for the orderly promotion of such employees into available supervisory, managerial, and other positions, and to enable them to obtain an ownership interest in the employer corporation through a stock purchase plan. As consideration, the government agreed to pay each corporation a stated amount in installments.\textsuperscript{146} By January, 1970 the government had paid substantial amounts to the corporations.\textsuperscript{147} Each corporation, however, failed to perform under its contract.\textsuperscript{148}

On April 9, 1970, nine members of a class of 2,017 East Los Angeles residents, who had been certified by the government as disadvantaged, hard-core unemployed and were therefore qualified for employment under the contracts, brought a class action against the three corporations. Plaintiffs sought to recover damages for the loss


\textsuperscript{143} Id.

\textsuperscript{144} Socoma agreed to hire 650 persons, Lady Fair 550 persons, and Monarch 400 persons. Id.

\textsuperscript{145} The starting minimum wage was to be $2.00 per hour for the first 90 days and thereafter a minimum of $2.25 per hour, or the prevailing wage for the area if higher. Id. at 410, 521 P.2d at 851-52, 113 Cal. Rptr. at 595-96.

\textsuperscript{146} Socoma was to receive $950,000, Lady Fair $999,000, and Monarch $800,000. Id. at 398, 521 P.2d at 843, 113 Cal. Rptr. at 587.

\textsuperscript{147} Socoma had received $712,500, Lady Fair $299,700, and Monarch $240,000. Id. at 399, 521 P.2d at 844, 113 Cal. Rptr. at 588.

\textsuperscript{148} Socoma did provide 186 jobs but wrongfully terminated 139 of them. Lady Fair provided 90 jobs but wrongfully terminated all of them. Id.
of wages and job training which would have accrued to 1,600 members of the class had the defendant corporations fully performed under the contracts. The trial court sustained general demurrers to the complaint on the ground that plaintiffs lacked standing to sue as third party beneficiaries. The appellate court affirmed, holding that although plaintiffs appeared to be donee beneficiaries of the contracts within Restatement section 133(1)(a), they could not recover on the contracts since they were also members of the public within Restatement section 145. The court held that plaintiffs failed to come within an exception to the rule in section 145 because the contracts conferred upon them the right to receive only training and employment, not monetary damages in lieu thereof.

In a four to three decision the Supreme Court affirmed the dismissal on demurrer. The majority held that not only did the contracts fail to provide that either the government or the defendants were to be liable to members of the public such as plaintiffs, but furthermore that plaintiffs failed even to qualify as donee beneficiaries of the government contracts.

The Majority Opinion

Chief Justice Wright, writing for the majority of four, laid the foundations for his analysis of the Martinez case by noting that the statutory test in California Civil Code section 1559, which limits third party actions to those on contracts made expressly for the third person's benefit, has in effect merely prevented recovery by incidental beneficiaries. The Chief Justice then emphasized that California courts have generally used the donee and creditor categories of the Restatement in determining which types of contract beneficiaries may recover. Thus, although Chief Justice Wright initially acknowledged that "[u]nquestionably plaintiffs were among those whom the Government intended to benefit through defendants' performance of the

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149. See note 144 supra.
151. Id. at 772-73. The appellate court distinguished Shell v. Schmidt, 126 Cal. App. 2d 279, 272 P.2d 82 (1954), cert. denied, 348 U.S. 916 (1955), on the basis that the third party beneficiaries in Shell acted in reliance on the contract, whereas there was no showing of any such reliance by the plaintiffs in Martinez. Id. at 770. See 4 CORBIN, supra note 2, § 782 (Supp. 1971). But see note 217 infra. The appellate court also demonstrated a reluctance to award damages to plaintiffs on a policy basis saying that "such benefits, if awarded . . . could be detrimental to the participants and society as a whole." Id. at 773.
152. 11 Cal. 3d 394, 521 P.2d 841, 113 Cal. Rptr. 585 (1974).
153. Id. at 397-98, 521 P.2d at 843, 113 Cal. Rptr. at 587.
154. See text accompanying notes 85-92 supra.
155. 11 Cal. 3d at 400, 521 P.2d at 844-45, 113 Cal. Rptr. at 588-89.
contracts," he nevertheless maintained that those intended beneficiaries would not be allowed to recover on the contracts unless they could be brought within one of the Restatement definitions of donee or creditor beneficiary.

**Plaintiffs As Donee Beneficiaries**

Since plaintiffs never claimed to be creditor beneficiaries of the government contracts, the majority narrowed the issue to whether plaintiffs could be classified as donee beneficiaries within the definition of that term in Restatement section 133(1)(a). In other words, the majority took the position that in order for plaintiffs to have standing to sue on the contracts, it was necessary for the court to find that the purpose of the government was to confer upon plaintiffs either a "gift" or "a right against the promisor to some performance."

The majority first ruled out the possibility that the benefits to plaintiffs were intended as gifts, stressing that the government received good consideration for its procurement of jobs for the plaintiffs. In support of this finding of consideration the majority cited two California cases which involved state grants of aid to the indigent aged and to veterans. Both cases held that such grants were for public purposes and therefore were not violative of California's constitutional provision prohibiting the legislature from making gifts of public money to individuals. The majority concluded that in Martinez the benefits of such [special impact] programs are provided not simply as gifts to the recipients but as a means of accomplishing a larger public purpose. The furtherance of the public purpose is in the nature of consideration to the Government, displacing any governmental intent to furnish the benefits as gifts.

Essentially, then, the majority reasoned that although plaintiffs were unquestionably intended to benefit from performance of the contracts, they were not intended to benefit by receiving that which has been traditionally defined as a gift, and therefore they did not come within the gift definition of donee beneficiary in Restatement section 133(1)(a). Such reasoning, of course, ignored the fact that the Restatement itself provides a definition of gift as "some performance or right which is not paid for by the recipient and which is apparently

156. Id. at 401, 521 P.2d at 845, 113 Cal. Rptr. at 589.
157. Id. at 400, 521 P.2d at 845, 113 Cal. Rptr. at 589.
158. Id. at 401, 521 P.2d at 845, 113 Cal. Rptr. at 589.
159. Id. at 401, 521 P.2d at 845, 113 Cal. Rptr. at 589, citing County of Alameda v. Janssen, 16 Cal. 2d 276, 106 P.2d 11 (1940); Allied Architects' Ass'n v. Payne, 192 Cal. 431, 221 P. 209 (1923).
160. CAL. CONST. art. IV, § 31 (1879).
designed to benefit him.”

Furthermore, by insisting that even unquestionably intended beneficiaries must fit within a strict donee beneficiary definition in order to sue on the contracts, the majority stumbled into two of the pitfalls, mentioned earlier, which inhere in the categorization scheme and have led to its decline. First, not all beneficiaries deserving of enforceable rights can be forced into strictly defined and labeled categories. Second, the very terminology of the donee and creditor definitions leaves them susceptible to just such overly restrictive interpretations.

Moreover, even if the government did not intend to confer a gift upon the plaintiffs, Restatement section 133(1)(a) provides an alternative definition of donee beneficiary to cover those cases “where, though the promisee receives consideration from the beneficiary, there is manifested an intent that the beneficiary shall acquire a right against the promisor to some performance . . . .” The most unsatisfactory aspect of the Martinez opinion was the reasoning which allowed the majority to conclude that plaintiffs likewise were not donee beneficiaries within this definition.

The majority first asserted that under this definition it was necessary for the right acquired by the plaintiffs to be “a direct right to benefits or damages in lieu of benefits.” Next, without explaining why the contractual provisions requiring defendants to provide plaintiffs with jobs and training did not give plaintiffs a direct right to benefits, the majority stated that plaintiffs were not donees within section 133 (1) (a) because the “contracts [manifested] no intent that the defendants pay damages to compensate plaintiffs or other members of the public for their nonperformance,” and thus failed to meet the requirements of Restatement section 145. To meet plaintiffs’ argument that section 145 was inapplicable to the case, however, the court merely stated that even if section 145 did not apply, plaintiffs still would not be donee beneficiaries because the promisee did not intend “to confer upon them a legal right against the defendants.”

162. Restatement of Contracts § 133, comment c (1932). The dissent notes the applicability of this definition. 11 Cal. 3d 394, 412 n.3, 521 P.2d 841, 853, 113 Cal. Rptr. 585, 597 (1974).
163. See note 41 & text accompanying notes 35-36 supra.
165. 11 Cal. 3d at 401, 521 P.2d at 845, 113 Cal. Rptr. at 589.
166. The most the majority says is that “a governmental intent to confer such a direct right cannot be inferred simply from the fact that the third persons were intended to enjoy the benefits.” Id.
167. Id. at 402, 521 P.2d at 846, 113 Cal. Rptr. at 590.
168. Id. at 404, 521 P.2d at 848, 113 Cal. Rptr. at 592 (emphasis added).
The majority's reasoning is obviously circular, with the court in effect using *Restatement* section 145 as authority for requiring that plaintiffs be given damages or a right to sue on the contract in order to be donee beneficiaries within section 133(1)(a). Moreover, this reasoning ignores the fact that section 145 does not govern section 133, but rather is a special application of section 133,169 to be used in cases involving government contracts which benefit the public. Indeed, Justice Burke, writing for the dissent, convincingly refuted the majority's use of section 145 when he discussed in his dissenting opinion the reasons underlying the special rules applicable to that section:

The language of section 133, standing alone, could reasonably suggest that members of the general public are "donee beneficiaries" under any contract whose purpose is to confer a "gift" upon them. Section 145 qualifies this broad language and treats the general public merely as incidental, not direct, beneficiaries under contracts made for the general public benefit, unless the contract manifests a clear intent to compensate such members of the public in the event of a breach. Section 145 does not, however, entirely preclude application of the "donee beneficiary" concept to every government contract. Whenever, as in the instant case, such a contract expresses an intent to benefit directly a particular person or ascertainable class of persons, section 145 is, by its terms, inapplicable and the contract may be enforced by the beneficiaries pursuant to the general provisions of section 133.170

Thus, the majority's assertion that even if *Restatement* section 145 were inapplicable plaintiffs still would not be donee beneficiaries, since they were given no legal right to sue, ignores the difference between section 133 and section 145 and the reasons for requiring compensation provisions in those government contracts which benefit the general public and thus fall within section 145.171 Furthermore, by reading the requirements of section 145 into section 133(1)(a), the majority in essence adopted the right to sue theory, which requires that the parties to a contract expressly give the third party a right to sue rather than merely the right to receive a beneficial performance. As was pointed out earlier,172 however, this test has been convincingly discredited by Corbin and other scholars, as well as by a number of courts.

As further justification for its holding that plaintiffs could not be classified as donee beneficiaries under either definition of the term in


170. 11 Cal. 3d at 412-13, 521 P.2d at 853, 113 Cal. Rptr. at 597. This is in accord with the position of the *Restatement Second* on government contracts. See text accompanying notes 132-35 supra.

171. See text accompanying notes 121-22 supra.

172. See notes 57-58 supra. A possible justification for the majority's position may be found in comment e to section 135 of the *Restatement Second*. See note 62 supra. Nevertheless, this does not explain why the plaintiffs are not donee beneficiaries within section 133(1)(a) of the original *Restatement*. 
Restatement section 133(1)(a), the court advanced an interesting "means to an end" argument. The gist of this argument was that since the purpose of the contracts and their underlying legislation was to improve certain neighborhoods and the nation as a whole, the training and jobs to be provided plaintiffs were intended not to be benefits as such, but merely to be the means of implementing such public purposes. In relying on this argument, the majority overlooked the fact that a contract may have several purposes, and several beneficiaries of different types, and that section 133 requires only that "all or part" of the promisor's performance be for the purpose of making a gift or conferring a right upon the beneficiary. Indeed, although the majority used the "means to an end" terminology to characterize its theory for denying plaintiffs relief, a closer look at the court's action makes it clear that the majority's rejection of plaintiffs' claim rested on the ground that the contracts were not made for the primary purpose of benefiting the plaintiffs. As noted earlier, however, the primary purpose test, which allows third party recovery on a contract only if the promisee's primary purpose for making the contract was to benefit the third party, has met with great criticism and has been previously rejected in California.

Furthermore, the majority's use of a means to an end theory for denying relief to intended third party beneficiaries contradicts the very basis for allowing relief in creditor beneficiary situations. As one commentator explains,

In the case of most creditor beneficiaries, it is the purpose and intent of the promisee to procure the discharge of his obligation. The attainment of this end involves benefit both to himself and to his creditor. This 'benefit' he intends to bring about as an entirety . . . including not only the ultimate end in view but also the means used to bring it about.

Although "means to an end" terminology has not often been used in donee situations, the recognition that in most such cases the promisee's purpose and intent are the same, i.e. to make a gift to the third party, suggests that the means to an end theory is similarly applicable to

173. 11 Cal. 3d at 405-06, 521 P.2d at 848-49, 113 Cal. Rptr. at 592-93.
174. See text accompanying notes 71-73 supra & note 179 infra.
175. See Restatement of Contracts § 133, comment a (1932). See note 41 supra.
176. Restatement of Contracts § 133(1)(a) (1932) (emphasis added).
177. See note 73 & accompanying text supra.
179. 4 CORBIN, supra note 2, § 776, at 20. In the creditor case "the motive is not to make a gift but to confer the benefit as a means to an end, namely, the discharge of B's debt to C." 26 Calif. L. Rev. 627, 629 (1938). See notes 30-32 & accompanying text supra.
donee beneficiary cases. In both donee and creditor cases, it is precisely because the benefit to the third person will be a means of effectuating the promisee's purposes for making the contract, that the third party has been afforded an action on the contract in his own right. Therefore, as will be suggested later in this note, "means to an end" terminology can be used to advantage in analyzing contract beneficiary cases. Little will be gained, however, if the terminology serves only as a masquerade for such disfavored tests as the primary purpose test used by the majority in Martinez.

**Plaintiffs As Members of the Public**

Having concluded that plaintiffs did not qualify as donee beneficiaries and therefore lacked standing to bring suit against defendants, the majority attempted to bolster its conclusion by asserting that in any event plaintiffs, as members of the public, were also subject to the exclusionary provision of Restatement section 145 because no "intention [was] manifested in the contract . . . that the promisor [was to] compensate members of the public . . . ." The majority opinion never really explained why the plaintiffs were members of the public or came

180. In an Illinois case adopting the means to an end analysis to allow recovery by a donee beneficiary, the officers of a hotel contracted with the underwriters of a bond issue for the building of the hotel. The officers promised the underwriters that the hotel company would furnish the hotel promptly and free of lien by buying certain goods from Carson Pirie Scott, and that if the hotel company did not pay for the goods, the officers would. Carson installed the goods promptly and lien free, but the hotel company did not pay for them. The court held that Carson was a beneficiary of the contract and could sue the officers for payment. Counsel for the officers argued that the only purpose of the contract was that the installation of the goods be done promptly and free of lien. The court agreed that this was probably the primary concern of the underwriters, but added that it was quite reasonable for the underwriters to require as the method of installation lien free that they be paid for by the officers if the hotel company failed to do so. The court explained its holding by saying, "This contract is not merely one for prompt installation of the furnishings in any manner that would insure their installation lien free, but is for the prompt payment of the goods 'so that the installation of same promptly and free of lien is assured.' In other words, the contract specifies the means by which the installation of the goods lien free is to be assured. This the promisee had a right to exact." Carson Pirie Scott & Co. v. Parrett, 346 Ill. 252, 262-63, 178 N.E. 498, 503 (1931). Corbin discusses the case at length in 4 CORBIN, supra note 2, § 776, at 22 & n.34.

181. Witkin hints at this in his analysis of Lucas v. Hamm, 56 Cal. 2d 583, 364 P.2d 685, 15 Cal. Rptr. 821 (1961), cert. denied, 368 U.S. 987 (1962). "The main purpose of the testator client in making the agreement with the attorney draftsman is to benefit the persons named in his will. Since this intent can be effectuated in the event of breach, only by giving the beneficiaries a right of action, 'we should recognize, as a matter of policy, that they are entitled to recover as third-party beneficiaries.'" 1 WITKIN, supra note 68, § 505, at 434. See note 31 supra.

182. 11 Cal. 3d at 402, 521 P.2d at 846, 113 Cal. Rptr. at 590.
CONTRACT BENEFICIARIES' RIGHTS

within section 145 in the first place,\textsuperscript{183} as it merely concluded that the lack of intent to compensate plaintiffs was evidenced by the presence in the contracts of governmental provisions for control of disputes and for liquidated damages.\textsuperscript{184} The majority then asserted that it was this absence of a manifestation of an intent to compensate plaintiffs that distinguished \textit{Martinez} from \textit{Shell v. Schmidt} and likened it to \textit{City & County of San Francisco v. Western Air Lines, Inc.}\textsuperscript{185}

The majority distinguished \textit{Shell} because of the fact that the legislation underlying the contract in \textit{Shell} gave the government the right to sue contractors who had failed to comply with building specifications in order to obtain from these contractors compensation for veterans who had purchased deficient dwellings.\textsuperscript{186} It is suggested, however, that this legislative remedy was not a basis for the decision in \textit{Shell}.\textsuperscript{187} In fact, the court in \textit{Shell} stressed that the remedies in the statute could not be held to supplant those common law third party beneficiary remedies already available to the plaintiffs.\textsuperscript{188}

Furthermore, in \textit{Shell} the court found it unnecessary to look at \textit{Restatement} section 145 at all, since the contract was for the benefit

\begin{footnotes}

\textsuperscript{183} The majority again simply relied on its means to an end argument. The majority stated that since the purpose of the Economic Opportunity Act of 1964 was public in nature, therefore “the services which the contracts required the defendants to perform were to be rendered to ‘members of the public’ within the meaning of [section 145].” 11 Cal. 3d at 404, 521 P.2d at 848, 113 Cal. Rptr. at 592. In 88 HAV. L. REV. 646, 650-51 (1975), the author discusses the policy objective underlying section 145 and notes that the section was designed by the American Law Institute to insulate government contractors from liability for unforeseeable damages to members of the public. The author argues that in \textit{Martinez} the majority’s reliance on section 145 was improper since the plaintiffs were suing for foreseeable damages for promised performance. Another interesting point with regard to the majority’s position is that by refusing to distinguish the hard-core unemployed residents of East Los Angeles from members of the public in general, the court overlooked language in one of the cases it relied on to determine that plaintiffs were not gift beneficiaries. In that case, County of Alameda v. Janssen, 16 Cal. 2d 276, 106 P.2d 11 (1940), grants of aid to the indigent aged were held not violative of constitutional provisions since “the classification of the indigent aged as a group is based upon a clear distinction between them and other individuals in the state.” County of Alameda v. Janssen, 16 Cal. 2d 276, 284-85, 106 P.2d 11, 16 (1940).

\textsuperscript{184} 11 Cal. 3d at 402-03, 521 P.2d at 846, 113 Cal. Rptr. at 590. But see note 225 infra.

\textsuperscript{185} 11 Cal. 3d at 403, 403-04 n.4, 406-07, 521 P.2d at 847 & n.4, 849, 113 Cal. Rptr. at 591 & n.4, 593.

\textsuperscript{186} Id. at 403, 521 P.2d at 847, 113 Cal. Rptr. at 591.


\textsuperscript{188} See text accompanying notes 111-12 supra.

\end{footnotes}
of a class consisting of purchasing veterans, and thus any member of that intended class could enforce it. Finally, the court in Shell observed, "It is no objection to an action by the third party that the contracting party (here the government) could also sue upon the contract for the same breach." The majority's comparison of Martinez with Western Air Lines seems similarly inapt, since in the latter case the plaintiff was suing on contractual assurances which required nondiscrimination toward "the public," and which thus brought the contract directly within the scope of section 145.

In summary, the majority opinion reveals the lingering semantic and doctrinal difficulties inherent in a strict donee-creditor analysis of third party beneficiary contracts; the inconsistencies arising from an intent test requiring that a third party be granted the right to sue rather than the right to receive a beneficial performance; the undesirability of a standard which denies recovery to all beneficiaries except those whose benefit is the primary purpose of the contract; and the susceptibility of Restatement section 145 to unjustified use as a catch-all device for denying rights to beneficiaries of government contracts.

An Alternative Approach: Renovating the Intent Standard

"A sort of mystery accompanies many of our words, both legal and otherwise; and, indeed, many are content to rest in a comfortable fog of mysticism and to make little effort to attain a more realistic clarity." Such a fog surrounds many of the terms encountered in the area of third party beneficiary contracts. Perhaps none is so obscured as the term intent. A few commentators have suggested the total rejection of any criterion incorporating the term intent, on the ground that the term's ambiguity leaves all such criteria "fatally flawed." Others have recognized the need for increased definitional precision, but have hesitated to supply it, arguing that the adoption of particularized definitions could lead to undesirable restrictiveness or conflicts.
with relevant policy considerations. It is suggested, however, that to allow the continuation of existing uncertainty and confusion and to permit the type of judicial manipulation exemplified in the Martinez case is far more undesirable than to attempt a clarification of relevant criteria in order to provide needed decisional guidelines.

A Proposal

Perhaps the biggest problem with the intent standard is its failure to differentiate between the concepts of motive, purpose, and intent. It is suggested that much clarity could be added to the area of third party beneficiary law by simply recognizing that motive is the "moving power which impels to action for a definite result;" purpose is that "intended or desired result;" and intent is the "[determination] to use a particular means to effect such result."

It is submitted that under a proper intent test the concept of motive should be ignored. The reasons which lead the mind to desire or act for a certain result are usually beyond a court's determination, and are often unknown to the actor himself. Therefore, a court's inquiry should focus first on determining the promisee's purposes as expressed in the contract. In other words, the court should seek to determine the ends, aims, objects, or results sought by the promisee through his exacting of a particular performance from the promisor. Second, a court should ask whether it appears from the contract that the promisee "intends" that the third party should receive the benefit of the promisor's performance. In particular, the question should be whether the fact that a third person will benefit from the promisor's performance is the promisee's chosen means of effectuating a purpose of the contract.

196. The Intention Standard, supra note 36, at 1171.
197. Corbin begins his analysis of the intent concept with the observation that "the ideas that lie behind such terms as 'purpose,' 'motive,' and 'intention' are obscure and elusive . . . ." 4 CORBIN, supra note 2, § 776, at 14-15.
201. "[T]he motive, purpose, or desire of the parties is a quite different thing from their intention. The former is immaterial . . . ." Annot., 81 A.L.R. 1271, 1287 (1932). See also The Third Party Beneficiary Concept, supra note 36, at 425.
202. See 4 CORBIN, supra note 2, § 776, at 15.
203. This approach is not novel. One commentator has noted that "[b]ecause the parties' only real intent usually is to benefit themselves . . . . a more realistic solution than the nebulous 'intent to benefit' test seems to lie in determining first, the basic purposes of the contract, and second, whether recovery by the beneficiary would accomplish or tend to accomplish those purposes." 31 TEXAS L. REV. 210, 211 (1952); see
Although this two-step approach does not solve all the problems of third party beneficiary contracts,²⁰⁴ it does help to eliminate some of the more prevalent difficulties examined earlier in this note.²⁰⁵ As to the three main areas of difficulty inherent in an intent standard, it is important to note that the above proposal looks to the purposes and intent of the promisee, not the promisor.²⁰⁶ The showing required under the above approach is only that the beneficiary is intended to receive a beneficial performance, not that he is given the legal right to sue.²⁰⁷ Furthermore, the proposed means to an end analysis requires neither that the benefit be direct, nor that it be the primary purpose of the contract, or even a purpose at all.²⁰⁸ Since the benefit need not be a purpose of the contract, a distinction between donee and creditor categories of beneficiaries becomes unnecessary: the intent concept, when defined as the determination to benefit the third party in order to effectuate the purposes of the contract and when distinguished from purpose or motive, is broad enough to encompass both categories.²⁰⁹ Finally, the proposed test continues to deny recovery in cases in which the third party may incidentally receive a benefit from performance of a contract, but the benefit itself is not a means of accomplishing the promisee’s purposes.²¹⁰

²⁰⁴ See The Third Party Beneficiary Concept, supra note 36 at 410, emphasizing that despite the advantages of an objective approach, “a finding that the terms of the contract were ambiguous would provide a possible escape, through the process of construction, to the realm of ‘purpose,’ surrounding circumstances, and other extrinsic evidence.”


²⁰⁶ See text accompanying notes 54-56 supra.

²⁰⁷ Once the beneficiary is determined to be “intended,” the right to enforce the promisor’s duty should then attach automatically. See Tentative Draft No. 3, supra note 2, §§ 135, 147. Of course, if the contract expressly provides that the third party shall or shall not have the legal right to sue, such provision would be controlling. See note 84 and text accompanying note 59 supra.

²⁰⁸ Williston makes it clear that the purpose of the contract need not be to benefit the third party: “[A] contract for the benefit of a third person [is] with little regard to whether the purpose of the promisee in entering into the contract was his own benefit or the benefit of the person to whom performance was to be rendered.” 2 Williston, supra note 2, § 347, at 792-93; see 45 Va. L. Rev. 1226, 1229-30 (1959); Annot., 81 A.L.R. 1271, 1287 (1932).

²⁰⁹ The Restatement Second attempted to abolish the donee and creditor categories. See note 43 supra.

²¹⁰ A few examples may help to illustrate the working of the proposal. In a typical donee beneficiary case the promisee’s purpose for making the contract is to benefit the third party. In order to achieve this purpose the promisee contracts to have a gift, service, or other beneficial performance go to the third party. Giving the specific benefit to the third party is the means the promisee has chosen to effectuate his purpose of benefiting the third party. In the typical creditor situation the promisee’s purpose
The area of government contracts remains a particularly problematic one. It is nevertheless suggested that a more particularized intent test, such as the one proposed, can also help to eliminate difficulties arising solely because the promisee in a contract is a governmental unit, or because the contract in some way involves a statute. It is therefore submitted that government contracts should be analyzed along the same lines as private contracts, subject only to the following few exceptions. First, if a contract is made pursuant to a statutory scheme, the purposes of the contract should be determined by reading the statute and the contract together. When such a reading discloses an intent that a third party receive a benefit as the means of effectuating the statutory and contractual purposes, the third party's contractual remedies should not be abridged or denied simply because of the inclusion or noninclusion of specific remedies within the statutory scheme.

In addition, because every government contract is to some degree made for the benefit of the public or some segment thereof, a promisor should be held liable to members of the public only if such members qualify as intended beneficiaries under the two-step approach outlined above and come within either of the Restatement Second's section 145 exceptions. The first requirement, that the member of the public be an intended beneficiary, should often be determinative of public beneficiary cases, since benefiting the public will often be a purpose or end sought by the government promisee, but not also the means of effectuating such purpose.

Finally, courts too often assume that any beneficiary of a government contract is a member of the public and so is subject to the special

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is the discharge of his own debt. The means of accomplishing such purpose is the giving of a benefit to his creditor. See also note 179 supra and the text accompanying notes 32, 179 supra. In government contracts other factors such as statutory purposes, statutory remedies, and public beneficiaries, must be taken into account. It is important to note, however, that not all beneficiaries who benefit from the effectuation of a contractual purpose are to be considered "intended" beneficiaries. Only where the benefit received by the plaintiff is the means of accomplishing the ends sought will the beneficiary be allowed to recover. Thus in Martinez that the plaintiffs were to benefit (i.e. were to become trained and employed individuals) was to be the means of accomplishing the government's goals of neighborhood and national improvement.

211. This approach is basically consistent with that of Tentative Draft No. 3, supra note 2, § 143(1). See text accompanying notes 134-35 supra.

212. Where a contract incorporates a statutory term, but is not made pursuant to a statute, the general two-step approach should apply. Where a beneficiary is determined to be only incidentally benefited by the contract, however, he should be permitted recovery for the promisor's breach of a statutory provision included in the contract by mandate of law, only to the extent that such recovery is expressly or impliedly granted by the statute. See note 105 supra.

213. See note 130 supra.
provisions of section 145. Therefore, in determining whether or not a particular person or class of persons falls under the rubric “member of the public”, a court should consider 1) the specificity with which the person or group is designated, 2) whether or not performance will go directly to the beneficiary, and 3) whether or not such beneficiary’s reliance would be reasonable.

Application of the Proposal and the Dissenting Opinion

Although the dissent in Martinez generally spoke in terms of the same tests as the majority, the reasoning in the dissenting opinion comports more closely with the mode of analysis set out in the above proposal.

Because the contracts in Martinez were made to execute a statutory scheme, the dissent based its determination of the promisee’s pur-

214. This is a primary argument in the dissenting opinion in Martinez. 11 Cal. 3d at 412-13, 521 P.2d at 853, 113 Cal. Rptr. at 597. See text accompanying note 170 supra.

215. See text accompanying notes 229-234 infra.

216. The Martinez dissent does make note of the fact that “one of the usual characteristics of a third party beneficiary contract is that performance is to be rendered directly to the beneficiary.” 11 Cal. 3d at 410, 521 P.2d at 852, 113 Cal. Rptr. at 596. See note 68 supra. Although the dissent looks to the direct nature of the benefits to determine that plaintiffs were intended beneficiaries, this inquiry could serve as well to distinguish plaintiffs from mere incidentally benefited “members of the public.”

217. The Restatement Second makes reliance an important consideration in determining whether beneficiaries, other than strict “gift” or “creditor” beneficiaries are “intended” beneficiaries. The Restatement Second states that “if the beneficiary would be reasonable in relying on the promise as manifesting an intention to confer a right on him, he is an intended beneficiary.” Tentative Draft No. 4, supra note 43, § 133, comment d. Although this test concerns the initial determination of whether a beneficiary should be afforded enforceable rights, the test seems even more appropriate for distinguishing between “public” beneficiaries who fall within section 145, and “non-public” beneficiaries who do not. It must be noted that actual reliance is not required. The key word is would. If the beneficiary would be reasonable in relying, he is most likely not an unprotected member of the public. This distinction becomes more apparent when applied to the Martinez case. Assuming that the contracts in that case were for the purposes of benefiting both the nation and the plaintiffs, the question arises as to who, if anyone, should be able to sue under the contracts. If a person living somewhere in the United States should decide to sue for damages for non-performance of the contracts, because the East Los Angeles neighborhood and the nation as a whole had not been improved (as was the purpose of the contracts), it would be difficult to find that this person’s reliance on the contracts would be reasonable. A citizen of the nation would thus fall within the category of “member of the public” and would be denied the right to damages on the contract under section 145. On the other hand, the 1,600 certified hard-core unemployed residents of East Los Angeles who were to receive training, wages, promotions, and ownership interests would hardly be unreasonable in relying on the contracts. It would not be unreasonable for one of the 1,600 to decline another job opportunity for the time he expected to be employed and trained by the defendants. See also The Intention Standard, supra note 36, at 1190-91.
poses for making the contracts on statements of congressional purpose in the Economic Opportunity Act of 1964,\textsuperscript{218} purposes indicated in the subsequent amendments creating the special impact programs,\textsuperscript{219} and stated governmental purposes for executing the contracts with defendants pursuant to the act.\textsuperscript{219} Having read and compared these statutory and contractual declarations of purpose, the dissent concluded that the "benefits to members of plaintiffs' class were not merely the 'means of executing the public purposes' . . . but were the ends in themselves and one of the public purposes to which the legislation and subsequent contracts were addressed."\textsuperscript{221}

Thus, the thrust of the dissent's argument was that the congressional purpose was to benefit both the neighborhoods in which the special programs were established and the individual unemployed persons in those neighborhoods.\textsuperscript{222} Although this interpretation seems the more reasonable reading of the statutory and contractual statements of purpose, it must be noted that under the test proposed in this note, plaintiffs and their class would be intended beneficiaries according to the reasoning of both the dissent and the majority. Even if the only purpose of the legislation and the pursuant contracts was to improve particular neighborhoods and the nation as a whole, the government intended that training and jobs be bestowed upon plaintiffs and their class as the means for effectuating that purpose.\textsuperscript{223}

If benefits received by third persons are intended by a promisee as the means of effectuating one or more purposes of both a contract and its authorizing statute, any remedies given to the promisee or the

\textsuperscript{218} 11 Cal. 3d at 409 n.1, 521 P.2d at 851 n.1, 113 Cal. Rptr. at 595 n.1.

\textsuperscript{219} Id.

\textsuperscript{220} Id. at 409-10, 521 P.2d at 851, 113 Cal. Rptr. at 595 (quoting portions of the contracts' preambles).

\textsuperscript{221} Id. at 409, 521 P.2d at 851, 113 Cal. Rptr. at 595.

\textsuperscript{222} Id. Another possibility, not followed up by either the majority or the dissent, would have been specific inquiry into the intent of the promisee, the Secretary of Labor, acting on behalf of the Manpower Administration of the United States Department of Labor. Such an inquiry was the basis of a decision in a Texas case involving laborers suing on contractual provisions for wage rates in a contract between a construction company and the government. The court concluded that "such provisions were included for the benefit and protection of the laborers employed in constructing the building. This construction is further fortified by the fact that the United States Department of Labor was a party to the agreement. 'The purpose of the Department of Labor shall be to foster, promote and develop the welfare of the wage earners of the United States, to improve their working conditions, and to advance their opportunities for profitable employment.'" Hearn v. Ralph Sollitt & Sons Constr. Co., 93 S.W.2d 551, 556 (Tex. Civ. App. 1936) quoting Act of March 4, 1913, ch. 141, § 1, 37 Stat. 736 (codified at 29 U.S.C. § 551 (1970)). \textit{But see} 88 HARv. L. REV. 646, 651-52 (1975). \textit{See note} 194 supra.

\textsuperscript{223} 11 Cal. 3d at 401, 521 P.2d at 845, 113 Cal. Rptr. at 589.
third party in the statute should not be deemed exclusive.\textsuperscript{224} Thus, as the dissent in \textit{Martinez} argued, the facts that the government as promisee could have brought an action for the same breach and that each contract included a liquidated damages clause running in favor of the government should not have defeated plaintiffs' right to recovery, since "[n]othing in the contracts [limited] the right of the government or, more importantly, plaintiffs' class, to seek additional relief."\textsuperscript{225} This reasoning is consistent with \textit{Shell}\textsuperscript{226} and analogous cases in other jurisdictions.\textsuperscript{227}

Having determined that plaintiffs and their class were intended beneficiaries under general third party beneficiary principles, the dissenters turned their attention to the question of whether plaintiffs were classifiable as members of the public and would therefore be denied relief under \textit{Restatement} section 145 unless they were afforded compensation by the terms of the contract.\textsuperscript{228} In arriving at the conclusion that the beneficiaries in \textit{Martinez} were distinguishable from those public beneficiaries to which section 145 applies,\textsuperscript{229} the dissent looked primarily to the particularity with which the plaintiffs' class was defined.\textsuperscript{230} The dissent noted that the beneficiaries in \textit{Martinez} were to receive the promised performance because of their membership in a specifically defined and limited class and not simply because they were members of the general public.\textsuperscript{231} In making the contracts, the dissent reasoned, the government required that the defendants agree
to provide training and jobs to a specified class of persons, whom plaintiffs represent[ed]. The government's express intent, therefore, was to confer a benefit, namely training and jobs, upon an ascertainable identifiable class and not simply the general public itself.\textsuperscript{232}

\textsuperscript{224} See text accompanying notes 104-05 \textit{supra}.
\textsuperscript{225} 11 Cal. 3d at 414, 521 P.2d at 855, 113 Cal. Rptr. at 599. "When a contract describes a remedy for breach without an express or implied limitation making that remedy exclusive, the injured party may seek any other remedy provided by law." \textit{McDonald v. Stockton Metropolitan Transit Dist.}, 36 Cal. App. 3d 436, 442, 111 Cal. Rptr. 637, 642 (1973).
\textsuperscript{226} According to \textit{Shell} the fact that the government is a party to a contract and can sue for its breach does not affect the third party beneficiary's right to enforce the contract. 126 Cal. App. 2d at 290-91, 272 P.2d at 89. See text accompanying note 190 \textit{supra}.
\textsuperscript{227} See cases cited at note 99 \textit{supra}.
\textsuperscript{228} See text accompanying notes 121-31 \textit{supra}.
\textsuperscript{229} 11 Cal. 3d at 411-12, 521 P.2d at 853, 113 Cal. Rptr. at 597.
\textsuperscript{230} \textit{Id.} at 409 n.2, 411-14 & n.5, 521 P.2d at 851 n.2, 853-54 & n.5, 113 Cal. Rptr. at 595 n.2, 597-98 & n.5. The dissent also noted that performance was to be rendered directly to the plaintiffs. See note 216 \textit{supra}.
\textsuperscript{231} 11 Cal. 3d at 412, 521 P.2d at 853, 113 Cal. Rptr. at 597.
\textsuperscript{232} \textit{Id.} at 409 n.2, 521 P.2d at 851 n.2, 113 Cal. Rptr. at 595 n.2.
Thus, the dissent concluded, one purpose of the government contracts was that plaintiffs benefit therefrom. Moreover, since plaintiffs' class was sufficiently defined and ascertainable the special provisions of Restatement section 145 were inapplicable. The dissent stressed that this conclusion was consistent with the holding in Shell, in which specific benefits went to a particular class consisting of "purchasing veterans," and with the holding in Western Air Lines in which the contract required nondiscriminatory operation of airports for the use and benefit of "the public."

Summary

The lower court in Martinez entered judgments of dismissal after defendants' general demurrers to the complaint were sustained without leave to amend. By affirming the judgments of dismissal, the majority of the supreme court in effect held that plaintiffs could not recover under any reasonable interpretation of the contracts which was pleaded in the complaint or under any which could be pleaded by amendment. In light of the majority's strained interpretation of several basic principles of third party beneficiary enforceability, such a holding is questionable at least. By applying a test designed to increase predictability and uniformity while still allowing for flexibility, a court would be more likely to conclude that plaintiffs had standing to sue on the contracts, since the government clearly intended that plaintiffs' class should receive definite benefits as a means of executing the public purposes of the contracts and their authorizing statutes. Moreover, even a more straightforward analysis of the case according to the Restatement's categorization scheme would seem to lead a court to conclude, as did the dissent, that

an interpretation to which the contracts in the instant case "are reasonably susceptible and which is pleaded in the complaint or could be pleaded by proper amendment" . . . is that they were made expressly for the benefit of a particular class of persons, namely the class consisting of the certified hard-core unemployed of East Los Angeles.

Conclusion

Since the time of Shakespeare, the development of third party beneficiary law has been inhibited by theoretical, doctrinal, and practical hindrances. In the case of Martinez v. Socoma Companies the California Supreme Court did little to clarify or resolve the myriad dif-

233. See note 189 & accompanying text supra.
234. See notes 115, 191 & accompanying text supra.
235. See 11 Cal. 3d at 399-400, 521 P.2d at 844, 113 Cal. Rptr. at 588.
236. Id. at 414, 521 P.2d at 854, 113 Cal. Rptr. at 598.
ficulties which continue to plague the judiciary in its encounters with third party beneficiary contracts. In arriving at its holding that plaintiffs and their class were mere incidental beneficiaries of the government contracts providing for their employment and training, the majority of the court engaged in the manipulation of general principles of third party beneficiary law and special criteria applicable to government contract cases.

California's present adherence to an outmoded scheme of beneficiary categorization and a restrictively interpreted intent standard of recovery, is in marked contrast to its overall posture in the days when the California Supreme Court led the nation in enunciating modern principles of contract law. The time is ripe for California to take the initiative again in shaping and promulgating new and effective decision-making criteria in the field of third party beneficiary contracts. No small area of contract law is more deserving of innovation.

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