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Barriers to Recovery in Pennsylvania Third Party Beneficiary Law

Larry L. Miller

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I. Introduction

Third party beneficiary law[1] in Pennsylvania abounds with confusion that results from inconsistent interpretations and restrictive judicial doctrines. In 1927 Professor Arthur Corbin noted this disorder when he described the law of Pennsylvania as being so inconsistent that no lawyer could safely advise his client without first taking his case to the supreme court.[2] This confusion originated in *Blymire v. Boistle*,[3] the state's leading beneficiary case, which flatly denounced the rights of creditor beneficiaries. Although the supreme court now explicitly acknowledges that creditor beneficiaries possess enforceable rights,[4] it will be shown that the law continues to adhere to *Blymire*'s archiac rule. Moreover, in recent years the supreme court has aggravated the confusion by adopting vague restrictive doctrines that in most instances have resulted in a broad denial of recovery to all third party beneficiaries. So today, fifty years later, Professor Corbin's description unfortunately continues to reflect the state of the law.

The purpose of this comment is to examine two general problem areas that exist in Pennsylvania third party beneficiary law. First, the courts' lack of clarity in analysis and failure to recognize the distinctions between donee and creditor beneficiaries will be considered. Second, the rationale and validity of recent judicial limitations will be analyzed. The objective of the comment is to suggest a means out of the confusing morass of case law.

II. Beneficiaries—General Rules

A. Creation of Contractual Rights in Beneficiaries

Third party beneficiary law encompasses the situation in which a third person seeks to enforce a contract to which he is not a party. The

1. For general background on third party beneficiaries, see 4 A. CORBIN, CONTRACTS §§ 772-855 (1961); J. MURRAY, CONTRACTS §§ 276-288 (Rev. ed. 1974); RESTATEMENT (SECOND) OF CONTRACTS §§ 133-147 (1973); RESTATEMENT OF CONTRACTS §§ 133-147 (1932); 2 S. WILLISTON, CONTRACTS §§ 347-403 (3d ed. 1959).

2. Corbin, *The Law of Third Party Beneficiaries in Pennsylvania*, 77 U. PA. L. REV. 1 (1928); *see* RESTATEMENT OF CONTRACTS—PENNSYLVANIA ANNOTATIONS (1933). The introduction to chapter six of the latter aptly begins, "The law of Pennsylvania is very much confused on this topic."

3. 6 Watts 182 (Pa. 1837); *see* Corbin, *The Law of Third Party Beneficiaries in Pennsylvania, supra* note 2 (Corbin in this article calls for the express overruling of *Blymire*).

4. *See* note 41 and accompanying text *infra*.

action by the third party is based on the general proposition that two contracting parties have the power to create rights in a third person.[5] Beneficiary rights are neither dependent on privity of contract[6] nor on furnishing any part of the consideration.[7] To be sure, however, no rights can arise in favor of any party unless a valid contract exists.[8]

The prevailing view generally follows the original *Restatement of Contracts* and grants donee and creditor beneficiaries enforceable rights.[9] The basic test of intended beneficiaries is whether the promisee desires that the third person receive something of value from performance of a contract.[10] This test can also be stated from the beneficiaries' perspective: Was the third person reasonable in believing that he was to derive a benefit or right from the contract?[11] All others who may in some way be benefitted indirectly or as a consequence of the performance have no rights and are called incidental beneficiaries.[12] Sometimes this distinction between intended and incidental beneficiaries is drawn on the basis of public policy.[13] The burden, of course, would be too onerous on the

5. Lawrence v. Fox, 20 N.Y. 268 (1859); *see* United States v. Thomas B. Bourne Assoc., 367 F. Supp. 919 (E.D. Pa. 1973); Commonwealth v. Great Am. Indem. Co., 312 Pa. 183, 167 A. 793 (1933).

6. Massengale v. Transitron Elec. Corp., 385 F.2d 83 (1st Cir. 1967); Anderson v. Rexroad, 175 Kan. 676, 266 P.2d 320 (1954); *accord*, Merriman v. Moore, 90 Pa. 78 (1879).

7. Beck v. Reynolds Metals Co., 163 F.2d 870 (7th Cir. 1947); LaMourea v. Rhude, 209 Minn. 53, 295 N.W. 304 (1940); Burns v. Washington Sav., 251 Miss. 789, 171 So. 2d 322 (1965).

8. RESTATEMENT OF CONTRACTS § 140 (1932). *See* Rose v. Rose, 385 Pa. 427, 123 A.2d 643 (1965); Williams v. Paxson Coal Co., 346 Pa. 468, 31 A.2d 69 (1943).

9. *See* Lawrence v. Fox, 20 N.Y. 268 (1859), the leading case in American law that set forth the broad general rules of law that have since spread throughout the country. *See also* 4 CORBIN, *supra* note 1, at § 774.

10. The terminology "intended beneficiary" includes all beneficiaries who have enforceable rights and explicitly encompasses the categories of donee and creditor beneficiaries as defined by the original *Restatement*. RESTATEMENT OF CONTRACTS §§ 133-136 (1932). It should be noted that the second *Restatement* has abandoned the specific terminology of creditor and donee beneficiary and has adopted the general inclusive term "intended beneficiary." Underlying this change was the belief that the terms carried "overtones of obsolete doctrinal difficulties." RESTATEMENT (SECOND) OF CONTRACTS, Introductory Note, Chapter Six (1973). Since the new *Restatement* retains the two now nameless classifications (§ 133(1)(a) states the creditor beneficiary rule and § 133(1)(b) states the donee rule), the terminology of the original *Restatement* is emloyed throughout this comment for the purpose of increased clarity. Also, American law generally classifies persons who have enforceable rights under contracts to which they are not parties as either creditor or donee beneficiaries. *See, e.g.*, Isbrandtsen Co. v. Longshoremen's Local 1291, 204 F.2d 495 (3d Cir. 1953); Martinex v. Socoma Cos., Inc., 133 Cal. Rptr. 585, 521 P.2d 841 (1974); RESTATEMENT (SECOND) OF CONTRACTS § 133, Comments b and c (1973).

11. This is the view taken by the RESTATEMENT (SECOND) OF CONTRACTS § 133, Comment d (1973). This perspective was adopted to gain more objectivity in analyzing cases.

12. Isbrandtsen Co. v. Longshoremen's Local 1291, 204 F.2d 495 (3d Cir. 1953); Willard v. Claborn, 220 Tenn. 501, 419 S.W.2d 168 (1967); McDonald Constr. Co. v. Murray, 5 Wash. App. 68, 485 P.2d 626 (1971); RESTATEMENT OF CONTRACTS § 133(c) (1932). *See also* 4 CORBIN, *supra* note 1, § 719c, at 40. Professor Corbin notes that this definition is not particularly helpful "for the problem of the courts is to determine what kinds of claimants asserting themselves to be beneficiaries have rights and what kinds have not."

13. *See* Isbrandtsen Co. v. Longshoremen's Local 1291, 204 F.2d 495, 498 (3d Cir. 1953), in which the court denied relief because the plaintiff was "too far away from this contract to be included either as a donee or a creditor beneficiary." *See also* Thompson v.

promisor if all individuals who received some indirect benefit from contractual performance were given enforceable rights.

B. *Kinds of Intended Beneficiaries*

1. The Donee Beneficiary.—A third person is a donee beneficiary when it appears that the purpose of the promisee in obtaining the promise of all or part of the performance is to make a gift to the beneficiary or to confer upon him a right against the promisor.[14] The relationship between the promisee and the beneficiary can be described as that of donor-donee and the performance received by the beneficiary is most often in the nature of a gift.[15] Donee beneficiaries are given enforceable rights against the promisor because the "party to the contract would have no action for its breach except for nominal damages since he was not the one who suffered by the promisor's default."[16] Also, the donee beneficiary does not have a right of action against the promisee because the latter owes no contractual obligation to the beneficiary. The courts for these reasons protect "the interest of the person for whose benefit the performance was intended to prevent a failure of justice."[17]

2. The Creditor Beneficiary.—A creditor-beneficiary relationship exists if the performance of the promisor's promise will satisfy an actual, supposed or asserted duty of the promisee to the beneficiary and is not intended as a gift.[18] When the promisee owes a prior obligation, the

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Harry C. Erb, Inc., 240 F.2d 452 (3d Cir. 1957) (noting that the policy against imposing large liability was not a consideration when liability was the result of voluntary business choice); Keefer v. Lombardi, 376 Pa. 367, 102 A.2d 695 (1954) (holding that, if sureties are liable to laborers and materialmen in the event of default, members of the public certainly do not stand on any lower level of suable rights); Falsetti v. UMW Local 2026, 400 Pa. 145, 161 A.2d 882 (1960) (stating that as a matter of policy, individual employees cannot enforce a union contract since it would create chaos). *Contra*, RESTATEMENT (SECOND) OF Contracts, Illustration 13 (1973); *see* Luzerne Anthracite, Inc. v. Borough of Kingston, 38 Luz. 229 (Pa. C.P. 1945).

14. The prevailing view generally follows the donee rule as set forth in the original *Restatement*. RESTATEMENT OF CONTRACTS § 133(1)(a) (1932). The rule reads:

> (1) Where performance of a promise in a contract will benefit a person other than the promisee, that person is, . . . (a) a donee beneficiary if it appears from the terms of the promise in view of the accompanying circumstances that the purpose of the promisee in obtaining the promise of all or part of the performance thereof is to make a gift to the beneficiary or to confer upon him a right against the promisor to some performance neither due nor supposed or asserted to be due from the promisee to the beneficiary.

In donee cases, intent of the promisee to benefit the third person is the primary test of enforceability. *See* McCulloch v. Canadian Pac. Ry., 53 F. Supp. 534 (D. Minn. 1943).

15. RESTATEMENT OF CONTRACTS § 133(2) (1932). The comments to this section further explain, "By gift is meant primarily some performance or right which is not paid for by the recipient and which is apparently designed to benefit him." *Id.*, Comment c. See note 18 *infra*, which explains the scope of the new *Restatement*.

16. Isbrandtsen Co. v. Longshoremen's Local 1291, 204 F.2d 495, 497 (3d Cir. 1953), *accord*, United States v. Thomas B. Bowrve Assoc., 367 F. Supp. 919 (E.D. Pa. 1973).

17. Isbrandtsen Co. v. Longshoremen's Local 1291, 204 F.2d 495, 496 (3d Cir. 1953). It would be a failure of justice in the sense that the promisor could breach the contract and avoid providing a remedy to either the promisee or donee beneficiary. *See* Commonwealth v. Great Am. Indem. Co., 312 Pa. 183, 167 A. 793 (1933).

18. Visintine & Co. v. New York, Chi. & St. L. R.R., 169 Ohio St. 505, 160 N.E.2d

creditor beneficiary can bring action against either party for satisfaction of the duty owed.[19] Although creditor-beneficiary cases arise most frequently when one person contracts to pay the debt of another, the term "creditor" may also properly be used broadly to include any obligee to whom the promisee owes a duty.[20] In creditor beneficiary cases, the better reasoned opinions engage in a two-step inquiry by first examining whether the promisee owes an obligation to the third person and then by determining whether the promisor promised to discharge the obligation.[21]

C. *The Pennsylvania Variation*

Although the prevailing view follows the *Restatement of Contract* rules, Pennsylvania third party beneficiary law has developed along a unique route. The donee rule of Pennsylvania begins with the basic *Restatement* position, but then imposes limitations that limit recovery.[22] In creditor beneficiary cases no attempt is made to adhere to the *Restate-*

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311 (1959); *accord*, RESTATEMENT OF CONTRACTS § 133(1)(b) (1932). The full text of the creditor rule of the *Restatement* reads:

> (1) Where performance of a promise in a contract will benefit a person other than the promisee, that person is, . . . (b) a creditor beneficiary if no purpose to make a gift appears from the terms of the promise in view of the accompanying circumstances and 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 by the Statute of Limitations or by a discharge in bankruptcy, or which is unenforceable because of the Statute of Frauds.

The new *Restatement* narrows the scope of the creditor rule to circumstances in which "performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary." RESTATEMENT (SECOND) OF CONTRACTS § 133(1)(a) (1973). The official comment, however, states, "Promise of a performance other than the payment of money may be governed by the same principle if the promisee's obligation is regarded as easily convertible into money . . . ." *Id.* Comment b.

The reason for the change in scope was explained by the distinguished reporter Professor Robert Braucher as follows: "Where the promise is to pay a supposed or asserted debt, . . . it's very doubtful whether that is properly described as a creditor beneficiary. It's a noncreditor beneficiary." 44 ALI PROCEEDINGS 306 (1967). This group of "noncreditor beneficiaries" is now included within an expanded definition of the former donee rule, which grants the beneficiary enforceable rights when, "the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance." RESTATEMENT (SECOND) OF CONTRACTS § 133(1)(b) (1973). Since no change in substantive law was intended and none has resulted, the former terms and scope of the original *Restatement* are retained in this comment in accordance with their general use by the bench and bar.

19. 2 WILLISTON, *supra* note 1, § 361; *see* Sears, Roebuck & Co. v. Jardel Co., 421 F.2d 1048 (3d Cir. 1970); Hughes v. Gibbs, 55 Wash. 2d 791, 350 P.2d 475 (1960). The right to proceed against either party has created problems in some jurisdictions when it is feared that the promisor "would be subject to two separate actions at the same time, for the same debt, which would be inconvenient, and might lead to injustice." Blymire v. Boistle, 6 Watts 182, 184 (Pa. 1837); *see* Second Nat'l Bank v. Grand Lodge, 98 U.S. 123 (1878); Fry v. Ausman, 29 S.D. 30, 135 N.W. 708 (1912). Nevertheless, the majority of courts now recognizes the beneficiary's direct pecuniary interest in the performance of the contract and permits enforcement against the promisor. Also, this argument has now lost validity because of the liberal rules of interpleading in effect in most jurisdictions. *See, e.g.*, FED. R. CIV. P. 22.

20. Visintine & Co. v. New York, Chi. & St. L. R.R., 169 Ohio St. 505, 160 N.E.2d 311 (1959); 4 CORBIN, *supra* note 1, § 776.

21. Ar-Tik Systems, Inc. v. Dairy Queen, Inc., 302 F.2d 496 (3d Cir. 1962); Lawrence v. Fox, 20 N.Y. 268 (1859); Visintine & Co. v. New York, Chi. & St. L. R.R., 169 Ohio St. 505, 160 N.E.2d 311 (1959).

22. *See* text at notes 90-127 *infra*.

ment rules. Instead, the courts apply doctrines that should be applicable only in donee cases.[23] The remainder of this comment will analyze the Pennsylvania variations and their retarding effect on beneficiary rights.

III. Two Barriers to Recovery in Pennsylvania

Many deserving beneficiaries have been denied recovery in Pennsylvania on the basis of unfounded reasons that can be divided into two general areas. First, the rights of creditor beneficiaries are ignored because the courts apply donee rules to every third party beneficiary situation and thereby make it almost impossible for a true creditor beneficiary to recover. Second, the supreme court in *Spires v. Hanover Fire Insurance Co.*[24] formulated two additional roadblocks to recovery that perplex all beneficiaries. The two additional requirements, as presented in *Spires*, are that both parties to the contract, rather than only the promisee, must intend to benefit the beneficiary and that the obligation in favor of the beneficiary must affirmatively appear in the contract.

A. Failure to Distinguish Between Creditor and Donee Beneficiaries

1. Historical Considerations: Lack of Clarity.—The historical development of third party beneficiary law in Pennsylvania provides insight into the reason for the courts' failure to distinguish between creditor and donee beneficiaries. The most obvious feature in this historical development has been an absence of clarity. The resulting massive confusion has enabled the inequitable rules of the early cases[25] to retain their validity to this day, even though these early cases are never cited as precedent. Lack of clarity in the decisional law has, thus, disguised the true rule of the state, as interpreted by the supreme court, that creditor beneficiaries cannot recover.

In the leading Pennsylvania case on third party beneficiary law, *Blymire v. Boistle*,[26] it was suggested in dictum that a third person may enforce a contract made for his benefit.[27] Regrettably, however, the court's holding was that a creditor beneficiary has no right of action

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23. *See* text at notes 25-89 *infra*.

24. 364 Pa. 52, 70 A.2d 828 (1950).

25. *See* notes 26-27 and accompanying text *infra*. *See also* First Episcopal Church v. Isenberg, 246 Pa. 221, 92 A.141 (1914); Sweeney v. Houston, 243 Pa. 542, 90 A. 347 (1914); Adams v. Kuehn, 119 Pa. 76, 13 A. 184 (1888). The courts held in creditor beneficiary cases that the right of action was in the promisee alone. *See* Brill v. Brill, 282 Pa. 276, 127 A. 840 (1925). In *Brill*, the court held a creditor beneficiary to be a donee beneficiary. *See generally* 79 U. PA. L. REV. 350 (1928).

26. 6 Watts 182 (Pa. 1837) (land was conveyed by the promisee to the promisor in exchange for a promise to pay a judgment and by the promisee to the plaintiff).

27. *Id.* at 184. The *Blymire* court stated the donee rule as follows: "Where one person contracts with another to pay money to a third, or to deliver over some valuable thing, and such third person is thus the only party in interest, he ought to possess the right to release the demand or recover it by action." It is apparent that the rule of *Blymire* is very restrictive compared to the *Restatement* rule of § 133(1)(a). *See* note 18 and accompanying text *supra*.

against the promisor.[28] According to *Blymire*, when a promisor assumes an obligation owed by the promisee to a third person, the contract is deemed to be for the benefit of the promisee. Therefore, the third party has no right to recover on his contract.[29] It is this rationale that underlies the reasoning of the Pennsylvania Supreme Court in all cases in which creditor beneficiary rights are asserted.

The *Blymire* rule, with a few minor exceptions,[30] was followed consistently for nearly a century. In 1932, however, a breakthrough in the law of third party beneficiaries occurred with the apparent adoption of section 133 of the *Restatement of Contracts* in *Concrete Products v. United States Fidelity & Guaranty Co.*[31] The court, unwilling to classify the plaintiff as either a donee or creditor beneficiary,[32] tried to circumvent the *Blymire* rule by concluding that materialmen bringing suit on a surety bond have "the status not of mere creditor beneficiaries but of direct promisees."[33] Also, the court quoted approvingly from the *Restatement of Contracts* rules for donee and creditor beneficiaries. The importance of the decision rests on two points. First, the direct promisee reasoning underlies the "*Spires* Rule" that the identity of the third party must affirmatively appear in the contract.[34] Second, this was the only time the

28. *See* Lawrence v. Fox, 20 N.Y. 278 (1859), discussed at note 9 *supra*, in which the court permitted a creditor beneficiary to recover. The *Blymire* holding is thus in direct conflict with the leading case followed by the majority view.

29. *See* Greene County v. Southern Sur. Co., 292 Pa. 304, 141 A. 27 (1927) (donee case). The court articulated the rule as follows: "Under the general rule stated in [*Blymire*] and followed for almost a century, where the contract is for the benefit of the promisee, or, in other words where the third person is a creditor beneficiary, there can be no recovery." *Id.* at 316, 141 A. at 31-32 (citation omitted).

30. A thorough treatment of the early exceptions to the creditor beneficiary rule is provided by Corbin, *The Law of Third Party Beneficiaries in Pennsylvania, supra* note 2. *See also* 4 CORBIN, *supra* note 1, § 828, in which the law of Pennsylvania is discussed. The exceptions are based on a "transfer of assets" theory. Howes v. Scott, 224 Pa. 7, 73 A. 186 (1909). *But see* 2 WILLISTON, *supra* note 1, § 349, stating that the transfer of property exception is unwarranted because there is no connection between the assets handed over to the promisor and the payment actually made to the third person. Under the "transfer of assets" theory, whenever the assets pass into the hands of the promisor in exchange for a promise to pay an obligation of the promisee, the third person is permitted to enforce the contract.

Another exception, which first developed under the above rule and is now covered by statute, is the express assumption of a mortgage debt by a grantee. *See* PA. STAT. ANN. tit. 21, § 655 (Purdon 1955). The mortgagee is permitted to sue as a creditor beneficiary in this instance. *See, e.g.*, Steinert v. Galasso, 363 Pa. 393, 69A.2d 841 (1949); Fair Oaks Bldg. & Loan Ass'n v. Kahler, 320 Pa. 245, 181 A. 779 (1935); Frey v. United Traction Co. v. Pittsburgh, 320 Pa. 196, 181 A. 775 (1935). The cases recognizing this exception are not based on the *Restatement* rule, but on case law and statutory interpretation. Although these exceptions exist, they are relatively minor and are rarely, if ever, applied today.

31. 310 Pa. 158, 165 A. 492 (1932) (suit by materialmen on a public construction surety bond). Actions on public construction bonds are now covered by statute. PA. STAT. ANN. tit. 53, §§ 1291-97 (Purdon Supp. 1976).

32. For examples of similar unwillingness, see Demharter v. First Fed. Sav. & Loan Ass'n, 412 Pa. 142, 194 A.2d 214 (1963); Kreimer v. Second Fed. Sav. & Loan Ass'n, 196 Pa. Super. Ct. 644, 176 A.2d 132 (1961).

33. 310 Pa. 158, 163, 165 A. 492, 497 (1933).

34. This rule was the natural extension of the direct promisee analysis. *See* note 109 and accompanying text *infra*.

Supreme Court of Pennsylvania has ever quoted the creditor beneficiary rule of the *Restatement*.[35] The donee rule of the *Restatement* quoted in *Concrete Products* was soon to be applied by the courts as the ruling law. The creditor rule, however, was doomed to obscurity.

The court quickly began to avoid the creditor beneficiary rule of the *Restatement* as *Commonwealth v. Great American Indemnity Co.*[36] typifies. The court in *Great American Indenmnity Co.* incorporated section 133 of the *Restatement of Contracts* into its decision. Despite the adoption of this section, which includes both the creditor and donee rule, the court quoted only the donee rule; the court did not formally recognize the creditor rule.[37] While the applicability of section 133 has not been expressly limited to any particular class of contracts,[38] a definitive ruling on whether the creditor rule of the *Restatement* is the law remains uncertain.

The Supreme Court of Pennsylvania has never found a beneficiary whom the justices consider worthy of recovery as a creditor beneficiary under the *Restatement* rules. This is true despite the interpretation by some courts that the *Great American Indemnity Co.* case adopted as law both donee and creditor rules.[39] Yet, the supreme court in *Burke v. North Huntingdon Township Municipal Authority*[40] stated, "That a third party not in privity to the original contract, may sue as a creditor beneficiary is now the rule in Pennsylvania."[41] The irony of this assertion is evidenced

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35. In the most recent case dealing with beneficiary rights in Pennsylvania, the superior court quoted both the donee and creditor rules of the original *Restatement*. Hillbrook Apts., Inc. v. Nyce Crete Co., 237 Pa. Super. Ct. 565, 352 A.2d 148 (1975). While the supreme court has not followed the creditor rule of § 133(1)(b) of the *Restatement*, it has been quick to quote the rule of incidental beneficiaries contained in § 133(1)(c). *See, e.g.*, Burke v. North Huntington Tp. Mun. Auth., 390 Pa. 588, 136 A.2d 310 (1957).

36. 312 Pa. 183, 167 A. 793 (1933). The court also adopted sections 135, 139, and 345 of the *Restatement* and noted that it was willingly joining the sister states.

37. *See* Frumkin v. Mayer, 139 Pa. Super. Ct. 139, 11 A.2d 767 (1939), which construed a reference in *Great American Indemnity Co.* to creditor beneficiaries as an adoption of the rule.

38. McClelland v. New Amsterdam Cas. Co., 322 Pa. 439, 185 A. 198 (1936); Philipsborn v. 17th & Chestnut Holding Corp., 111 Pa. Super. Ct. 9, 169 A. 473 (1933); *see* Williams v. Paxson Coal Co., 346 Pa. 468, 31 A.2d 69 (1943).

39. *See, e.g.*, Ar-Tik Sys. Inc. v. Dairy Queen, Inc., 302 F.2d 496 (3d Cir. 1962); Mowrer v. Poirier & McLane Corp., 382 Pa. 2, 114 A.2d 88 (1955); Keefer v. Lombardi, 376 Pa. 367, 102 A.2d 695 (1954). In *Keefer*, Justice Musmanno wrote for a unanimous court as follows:

> Happily, Pennsylvania no longer stands outside the almost completely-sweeping circle of states which permit third party intervention in certain contracts. The turning point in our law on this subject came in the case of Commonwealth v. Great Am. Indemnity Co., where we . . . adopted the applicable rules in Restatement, Contracts, (cf. Sections 133, 135, 139, 345) (citation omitted).

Id. at 372-73, 102 A.2d at 698. *See also* Williams v. Paxson Coal Co., 346 Pa. 468, 31 A.2d 69 (1943); Frumkin v. Mayer, 139 Pa. Super. Ct. 139, 11 A.2d 767 (1940); Dana Perfumes Corp. v. Greater Wilkes-Barre Indus. Fund, Inc., 65 Luz. 141 (Pa. C.P. 1975); Frank v. Corace, Inc. v. West Pa. Disposal Corp., 118 P.L.J. 246 (Pa. C.P. 1970); Marietta Gravity Water Co. v. John H. Swanger, Inc., 57 Lanc. 303 (Pa. C.P. 1961); Weiner v. Hospital Service Plan, 13 Pa. D. & C.2d 689 (C.P. Lehigh 1958); 12 U. PITT. L. REV. 295 (1951).

40. 390 Pa. 588, 136 A.2d 310 (1957).

41. *Id.* at 595, 136 A.2d at 314 (citations omitted). The opinion reads on, "The application of this Rule . . . depends on the intention of the parties to the contract . . . ."

by the authority the *Burke* court cited in support of its statement. All of the cases cited by the court as precedent were suits brought by either donee or incidental beneficiaries, not creditor beneficiaries.[42] In essence, the supreme court rule that creditor beneficiaries have enforceable rights exists in name only.

The evolution of the creditor beneficiary case law has thus offered little guidance to anyone concerned with its workings.[43] The creditor rule in Pennsylvania may in fact be the *Restatement* rule or it may still be *Blymire* doctrine, since the supreme court has only permitted recovery in very limited instances. The lack of clarity results from the courts' failure to expressly overrule decisions no longer valid[44] and to clearly set forth the rules on which they base their decisions.[45] This assumes, of course, that some kind of legal principle rather than a purely ad hoc determination underlies the decisional law. Moreover, because of this confusion, the supreme court has filed to make fundamental analytical distinctions between creditor and donee beneficiaries and has thereby done great harm to the rights of creditor beneficiaries as will be seen in the following section.

2. Misapplication of the "Intent to Benefit" Rule.—One of the effects of the lack of clarity in the case law is a failure by the supreme court to recognize the fundamental differences between donee and creditor beneficiaries. The court in analyzing cases that litigate beneficiaries' rights has applied the donee test of "intent to benefit" to all be-

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Id. at 596, 136 A.2d at 314. The court thus indicated that this mere conclusion of law is the only framework on which it based its decisions.

42. The *Burke* court cited the following cases as authority for the intent rule discussed at note 41 *supra*: Mowrer v. Poirier & McLane Corp., 382 Pa. 2, 114 A.2d 88 (1955) (in which the beneficiary was found to be incidental); Spires v. Hanover Fire Ins. Co., 364 Pa. 52, 70 A.2d 828 (1950) (incidental beneficiary case); Commonwealth v. Great Am. Indem. Co., 312 Pa. 183, 167 A. 793 (1933) (donee was permitted to recover), and Concrete Prod. Co. v. United States Fidelity & Guar. Co., 310 Pa. 158, 165 A. 492 (1932) (donee beneficiary case). The court also cited 4 CORBIN, *supra* note 1, § 828 as authority, but this very section of the treatise criticizes the Pennsylvania courts for not giving creditor beneficiaries the right to recover.

43. *See* Dana Perfumes Corp. v. Greater Wilkes-Barre Indus. Fund, Inc., 65 Luz. 141 (Pa. C.P. 1975) (illustrating the result of the lack of clarity in the law that probably led to plaintiff's failure to plead his status as a third party beneficiary).

44. *See* Commonwealth v. Great Am. Indemn. Co., 312 Pa. 183, 167 A. 793 (1933) (concurring opinion). This is the only time in the history of third party beneficiary law in Pennsylvania that a prior case was forthrightly overruled. The reversal marked a departure from the law that had evolved in surety bond cases since Greene County v. Southern Sur. Co., 292 Pa. 304, 141 A. 27 (1927), in which recovery had been denied.

45. *E.g.*, Frey v. United Traction Co., 320 Pa. 196, 181 A. 775 (1935). The promisor assumed the obligation for bonds for which the plaintiff was the obligee. Although it permitted suit on the contract, the court avoided citing the *Restatement* and did not designate the plaintiff as either a donee or creditor beneficiary, nor did it provide any indication of the basis of its decision. *See also* 82 U. PA. L. REV. 537 (1934) (noting that treatment by the courts leaves something to be desired in the way of clarity and completeness); Note, *The Rights of Third Party Beneficiaries in Pennsylvania*, 13 TEMPLE L. REV. 118 (1938-39) (calling for the courts to take the final step and forthrightly adopt the *Restatement* rules).

neficiaries.[46] It has failed to look beyond the donee rule to the operative facts that should be determinative in creditor beneficiary cases. Thus, the supreme court has overlooked the proper analysis for creditor cases: Did the promisee owe an obligation to the third person and was the obligation assumed by the promisor?[47] The flaw that has resulted in Pennsylvania law is aptly described by Professor Williston as follows: "Any attempt to reduce to a single governing principle the case of the donee beneficiary and of the creditor beneficiary is not only doomed to failure but is an inevitable source of confusion."[48]

If it were properly utilized, the "intent to benefit" test would be an operative consideration only in donee beneficiary cases.[49] By applying the test to both donee and creditor beneficiaries the supreme court disregards the crucial distinctions enunciated by the treatise writers and the *Restatement*.[50] The "intent to benefit" test is applicable in donee cases since the desire to benefit the third person is the promisee's main purpose in entering the contract. In creditor beneficiary contracts, however, the promisee's guiding purpose is not to confer a benefit on the third person, but to obtain a discharge of his obligation owed to the third person.[51] The promisee seeks to attain this end to benefit himself, not his creditors or obligees.[52] Thus, the "intent to benefit" test has no viability in creditor beneficiary cases and should play no role in the analysis.

Some explanation of the "intent to benefit" test is necessary to fully understand its use in Pennsylvania. If the "intent to benefit" standard is used in the sense of requiring that the promisee intends the promisor to assume a direct obligation to the third person, it is not objectionable.[53] Certainly a beneficiary must be within the contemplation of the promisee

46. *See* A. CORBIN, CORBIN ON CONTRACTS 733 (1952). Professor Corbin notes that the rules of donee and creditor beneficiaries should be distinguished and should not both be based upon the indefinite phrase "intent to benefit."

47. *See* note 18 and accompanying text *supra*.

48. 2 WILLISTON, *supra* note 1, § 356A, at 839.

49. "In third party cases, the right of such party does not depend upon the purpose, motive, or intent of the promisor." CORBIN, *supra* note 46, at 732. *See* Isbrandtsen Co. v. Longshoremen's Local 1291, 204 F.2d 495 (3d Cir. 1953).

50. *See* 4 CORBIN, *supra* note 1, § 776; 2 WILLISTON, *supra* note 1, § 356A; RESTATEMENT OF CONTRACTS § 133 (1932). "[I]t's the intention of the promisee that you are searching for in the case where you are trying to see who intended that this benefit should go to the beneficiary. The trouble is that it is not the intention of the promisor." 44 ALI PROCEEDINGS 311 (1967) (Professor Robert Braucher, reporter).

51. Sears, Roebuck & Co. v. Jardel Co., 421 F.2d 1048, 1054 (3d Cir. 1970) (the court noted the promisee's objective in creditor beneficiary cases is always to benefit himself). *See* 4 CORBIN, *supra* note 1, § 776, at 10. Corbin illustrates the problems of the "intent to benefit" test as follows: "[Suppose] B conveys Blackacre to A in return for A's promise to pay $1,000 to A's dearly hated creditor C. . . . It is certain that intention to benefit cannot be identified with love and affection. It is now a desire to escape from C's clutches that motivates B and causes him to convey his land to A."

52. Visintine & Co. v. New York, Chi. & St. L. R.R., 169 Ohio St. 505, 160 N.E.2d 311 (1959); McCulloch v. Canadian Pac. Ry., 53 F. Supp. 534 (D. Minn. 1943).

53. *See* McDonald Constr. Co. v. Murray, 5 Wash. App. 68, 485 P.2d 626 (1971). The court distinguished between intent to confer a benefit and intent that the promisor shall assume a direct obligation.

before enforceable rights arise. When, however, the test is used in a manner synonymous with the promisee's purpose or motive, and this becomes the determinative factor, difficult analytical problems develop.[54]

Unfortunately the Pennsylvania courts, since the days of *Blymire*,[55] have used the test in the latter manner.[56] Recovery is allowed only if the promisee's motive or donative intent is to confer a gift or benefit upon the third person. But, in creditor beneficiary cases the promisee's dominant motive is to have the promisor discharge his obligation to the third party. His intent is not to benefit anyone except himself. Consequently, the courts of this state systematically find that the parties to a contract only intended to benefit themselves;[57] creditor beneficiaries are rarely recognized by the lower judicial tribunals and never by the supreme court. Although this is a simple way to resolve a controversy, it conflicts with a common sense interpretation.

The Supreme Court of Pennsylvania applies this incomplete method of analysis to creditor beneficiary cases by looking solely for an intention of the parties to confer a benefit and no further. A case which illustrates this point is *Burke v. North Huntingdon Township Municipal Authority*.[58] Under the terms of the contract in issue, the obligation owed to the plaintiff-third party was expressly set forth, and provisions were made for its payment. The court, however, reasoned that,

> When the County Authority exacted from the Township and the Township Authority a promise to pay reasonable fees and expense of the consulting engineers [the plaintiff] up to $20,000.00

54. *See* Hamill v. Maryland Cas. Co., 209 F.2d 338 (10th Cir. 1954) (discussion of difference between motive and intent).

55. Blymire v. Boistle, 6 Watts 182 (1837 Pa.).

56. *See, e.g.*, Burke v. North Huntington Tp. Mun. Auth., 390 Pa. 588, 597, 136 A.2d 310, 315 (1957). The court stated "Taking into consideration the circumstances under which this contract was made and its terms it is obvious that the parties had no intent to confer a benefit upon [the plaintiff]." Silverman v. Food Fair Stores, Inc., 407 Pa. 507, 180 A.2d 894 (1962) (court found no motive to benefit a third person in a lease containing a promise by the tenant to procure insurance); Farmers Nat'l Bank v. Employers Liab. Assur. Corp., 414 Pa. 91, 199 A.2d 272 (1964); Supan v. Oriole Motor Coach Lines, Inc., 37 Pa. D. & C.2d 638 (C.P. Alleg. 1965); Barnes v. Craft, 25 Pa. D. & C.2d 731 (C.P. York 1961). In fact, the Pennsylvania rule is even more restrictive as both the promisee and the promisor are required to have an "intent to benefit" the third person. *See* footnotes 92-107 *infra*.

57. Van Cor, Inc. v. American Cas. Co., 417 Pa. 408, 208 A.2d 267 (1965); Steets v. Sovereign Constr. Co., 413 Pa. 458, 198 A.2d 590 (1964); Mowrer v. Poirier & McLane Corp., 382 Pa. 2, 114 A.2d 88 (1955); Holly Constructions Co. Inc. v. Pottsgrove School Auth., 91 Montg. 199 (Pa. C.P. 1969); International Bhd. of Elec. Workers v. Warfel Assoc., Inc., 5 Pa. D. & C.2d 695 (C.P. Lanc. 1955).

This point is illustrated by the situation in which a plaintiff sustained personal injuries in a fall on land leased by the defendant. The lease contained a provision obligating the tenant to indemnify the landlord for all liability arising from injury upon the premises. Also, the tenant agreed to maintain and pay the costs of general liability insurance for both parties. The decision of the court was that the parties only intended to benefit themselves by these provisions and had no intent to benefit injured third parties. Silverman v. Food Fair Stores, Inc., 407 Pa. 507, 180 A.2d 894 (1962). *See* Brief for Appellee, arguing only that the landlord was intended to be benefited and that it would be patently absurd to hold the defendant liable for thousands of patrons. *Accord*, George v. Brehm. 246 F. Supp. 242 (W.D. Pa. 1965). *But see* RESTATEMENT (SECOND) OF CONTRACTS § 133, Illustration 9 (1973).

58. 390 Pa. 588, 136 A.2d 310 (1957).

> and when the Township exacted from the County Authority the promise to pay engineering fees in excess of $20,000.00, did the parties intend thereby to confer a benefit upon Burke [the plaintiff]?[59]

On the basis of this inquiry the court found the parties had "no intent to confer a benefit upon Burke."[60] The only semblance of a test or principle adduced by the court reads, "on whether the third party is in fact a creditor beneficiary, . . . depends on the intention of the parties to the contract as expressed therein."[61] But conspicuously absent from this conclusive statement are any guideposts on how the promisee's intention must be manifested or what kind or degree of intention is required. Avoiding these pertinent inquiries, the court concluded the plaintiff was only an incidental beneficiary and not a protected creditor beneficiary.[62]

If the *Burke* court would have recognized the fundamental distinctions between donee and creditor beneficiaries, its analytical perspective would have been entirely different.[63] The creditor rule requires only a showing that the performance of the promise will satisfy an actual, asserted, or supposed duty of the promisee to the beneficiary.[64] The court in *Burke* found an obligation that was owed by the seller-promisee and a promise to pay the obligation by the County Authority-promisor.[65] The court, however, did not appreciate the importance of these crucial factors as the analysis ended when it found no "intent to benefit." By applying the donee "intent to benefit" analysis, the court failed to adopt the simple creditor test of whether the promisee owed a duty to the third party that was assumed by the promisor. In essence, the Supreme Court of Pennsylvania has never found a creditor beneficiary because it has never applied the proper creditor beneficiary test and the donee rule has constituted an insurmountable barrier.

Once the court acknowledges the distinction between donee and creditor beneficiaries, a crucial element in applying the creditor test will be whether the promisee owed an obligation. The scope of inquiry necessary to determine whether the promisee owed an obligation to a third party includes analysis of both duties and liabilities.[66] Accordingly, the

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59. *Id.* at 597, 136 A.2d at 315.

60. *Id.*

61. *Id.* at 596, 136 A.2d at 314.

62. The court did refer to the incidental beneficiary rule of the *Restatement*, but made no reference to the creditor rule, even though this was the issue of the case.

63. The court was aware of the *Restatement* rule, as both the appellee and appellant raised it in their briefs. See Brief for Appellant at 12-18; Brief for Appellee at 2-16.

64. Ar-Tik Sys., Inc. v. Dairy Queen Inc., 302 F.2d 496 (3d Cir. 1962); RESTATEMENT OF CONTRACTS § 133(1)(b)(1932). *See also* 4 CORBIN, *supra* note 1, § 776, at 8 (Supp. 1971). He observes that "a creditor beneficiary does not have to prove that the contracting parties 'intended' to confer a 'benefit' on him as if they regarded him as a donee."

65. *See* 4 CORBIN, *supra* note 1, § 828, at 116 (Supp. 1971). In discussing *Burke*, Professor Corbin says, "But even the very terms of the express contract itself show that all the parties expressly contemplated Burke's claim and made express promises that it should be discharged. That is the only "intent to benefit" that is required to be shown by a creditor beneficiary."

66. *See* W.N. HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS 5 (Cook ed. 1923).

scope has not been restricted to situations in which the promisee owed a liquidated debt.[67] A duty barred by a statute of limitations or rendered unenforceable by the Statute of Frauds also should be within the inquiry.[68] The term obligation thus should be construed to encompass duties and liabilities arising both under contract and law. Furthermore, Professor Corbin's suggested guideline is that the term "may properly be used broadly to include any obligee to whom the promisee owes a duty."[69]

A good illustration of the principle's application can be found in *Van Cor, Inc. v. American Casualty Co.*,[70] in which the supreme court was faced with the question whether a "cooperation clause" in a construction contract created a creditor beneficiary relationship. The "cooperation clause" required each contractor to be responsible for any actions that interfered with the progress of the other contractors' work. The plaintiff-contractor argued that the owner-promisee owed an obligation to provide a site at which the work could be performed without hindrance or delay and that by the "cooperation clause" the subcontractor promised to fulfill this obligation.[71]

The court demonstrated its reluctance to tackle the beneficiary question by affirming per curiam and quoting exerpts from the opinion of the lower court. Again the inquiry ended after the court applied the donee test of "intent to benefit" without reaching the appropriate creditor inquiries. Also, the opinion ignored the leading case on this point, *Visintine & Co. v. New York, Chicago & St. Louis Railroad*,[72] which held that a "cooperation clause" results in the promisor's assumption of a duty owed by the promisee to another, a duty created by contract. The duty to provide a suitable work site in *Van Cor* should thus have been sufficient to give the plaintiff the status of a creditor beneficiary. This example illustrates that the obligation inquiry should be interpreted broadly to

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Hohfeld defines a duty as the correlative of a right and a liability as the correlative of a power in the Hohfeldian system of legal relations; *e.g.*, a duty owed by law or a liability owed under a contract. *See* Commonwealth *ex rel.* Milk Marketing Bd. v. Ohio Cas. Ins. Co., 25 Pa. Commw. Ct. 371, 360 A.2d 788 (1976).

67. *See, e.g.*, RESTATEMENT OF CONTRACTS § 136, Illustration 3 (1932).

68. RESTATEMENT OF CONTRACTS § 133(1)(b) (1932).

69. 4 CORBIN, *supra* note 1, § 787, at 97.

70. 417 Pa. 408, 208 A.2d 267 (1965) (suit against surety who assumed the obligation for loss and damage caused by subcontractor's failure to comply with the contract, the subcontractor defaulted). *See also* Mechanical Insulation Co. v. J. Marcellus & Co., 36 Pa. D. & C.2d 163 (C.P. Bucks 1964); Holly Constr. Co. v. Pottsgrove School Auth., 91 Montg. 199 (Pa. C.P. 1969).

71. *See* Brief for Appellant at 5-11. The issues and rules regarding creditor beneficiaries were clearly raised and *Restatement* § 133(1)(g) was cited as authority.

72. 169 Ohio St. 505, 160 N.E.2d 311 (1959). *Visintine* dealt with a contract between the state of Ohio and two contractors. The court found the state owed the contractor a duty to provide a site for him to work without hinderance or delay. *See* Brief for Appellant at 8, Van Cor, Inc. v. American Cas. Co., 417 Pa. 408, 208 A.2d 267 (1965) (citing *Visintine*); United Pacific Ins. Co. v. Meyer, 305 F.2d 107 (9th Cir. 1962); *see* Thomas G. Snavely Co. v. Brown Constr. Co., 16 Ohio Misc. 50, 239 N.E.2d 759 (1968).

account for wide varieties of factual situations and diverse kinds of obligations.

3. Reluctance of Pennsylvania Appellate Courts to Reconsider Their Position.—The failure to distinguish between creditor and donee beneficiaries has led not only to improper interpretations, but also to a general reluctance on the part of the supreme court to raise the issue of creditor beneficiaries. As noted in the previous section, the court avoided expounding on the legal concepts raised in *Van Cor* by affirming per curiam.[73] An even more explicit example of the court's reluctance to decide creditor beneficiary cases is *Brunswick Corp. v. Ciaffoni*.[74] In *Brunswick* two landlords promised to waive the privilege of distraint so that the tenant could secure equipment necessary to run the leased bowling alley. The tenant defaulted and the supplier brought action to regain the equipment because of the landlord's waiver.

The lower court held that the plaintiff was a creditor beneficiary under section 133(1)(b) of the *Restatement*.[75] It found that the promisee tenant owed a duty to the plaintiff and that the performance of the release by the landlords gave effect to the obligation. Also, both appellant[76] and appellee[77] based the arguments in their briefs on the *Restatement* rules. The supreme court, however, responded, "We find it unnecessary to consider this third party creditor beneficiary theory by which the court *en banc* resolved the case. Nor need we consider whether appellee's recovery can be justified on a donee beneficiary theory . . . ."[78] In a one line conclusive remark two concurring justices stated that the plaintiff "may properly enforce [the waiver] as a third party donee beneficiary."[79]

The *Brunswick* opinion explicitly shows the reluctance of the supreme court to forthrightly resolve cases involving creditor beneficiaries.[80] Also the case illustrates the confused state of the law, since the lower court and counsel directed their arguments to creditor beneficiary issues, and the two prominent concurring justices believed that the

73. *See also* Steets v. Sovereign Constr. Co., 413 Pa. 458, 198 A.2d 590 (1964), in which the court affirmed per curiam the lower court's opinion denying recovery. *But see* Steinert v. Galasso, 363 Pa. 393, 69 A.2d 841 (1949).

74. 432 Pa. 442, 248 A.2d 39 (1968).

75. 48 Wash. 40 (Pa. C.P. 1967).

76. *See* Brief for Appellee at 14-21, in which appellee argued the promisee owed a duty to assure security.

77. *See* Brief for Appellant at 9-22, in which it was argued that no actual or supposed duty was owed by the promisee to the third person. *But see*, Supplemental Brief for Appellants, filed after the case had been argued, in response to the concern of Mr. Justice Cohen on the authority of a referee in bankruptcy.

78. 432 Pa. 442, 446, 248 A.2d 39, 40 (1968) (the two judges writing for the majority held that the bankruptcy proceedings were determinative of the issue).

79. *Id.* at 448, 248 A.2d at 41 (present Chief Justice Egan, joined by former Chief Justice Jones).

80. *See* Demharter v. First Fed. Sav. & Loan Ass'n, 412 Pa. 142, 194 A.2d 214 (1963) (illustrating a similar reluctance to tackle the issue of creditor beneficiaries). *See* Brief for Appellant Intervenors at 23-33, in which it is argued the promisor assured a duty of the promisee to pay the various contractors.

beneficiary was a donee. Although *Brunswick* afforded the opportunity to clarify the law of creditor beneficiaries, the court cleverly avoided the opportune moment.

Even though the supreme court has provided little leadership in this area, the Pennsylvania Superior Court and the lower courts occasionally allow creditor beneficiaries to recover.[81] While the superior court has recognized that a creditor beneficiary can recover, unfortunately it too has not articulated the distinction between donee and creditor beneficiaries. Actually, the superior court in beneficiary cases rules by conclusion rather than by reason. For example, in *Clardy v. Barco Construction Co.*,[82] the court opined that the "[d]etermination of whether the third party is in fact a creditor beneficiary depends on the intention of the parties to the contract as expressed therein. We find that intention clearly expressed in the agreements and by the conduct of the parties in executing them."[83] This curt conclusion was the court's only explanation for its decision. Absent from this conclusion is any reference to a duty owed by the promisee and assumed by the promisor.[84] Nothing is said of the type of intention that is needed nor is any definition of a creditor beneficiary set forth. While conciseness in judicial opinion writing has its virtue, the

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81. *See, e.g.*, Clardy v. Barco Constr. Co., 205 Pa. Super. Ct. 218, 208 A.2d 793 (1965); Hempt v. South Orange Trust Co., 63 Pa. D. & C. 559 (C.P. Dauph. 1948) (materialman's suit against promisor, who orally agreed with the owners to pay all creditors of the construction company. The court cited as authority Liebman v. Fox, 96 Montg. 9 (Pa. C.P. 1972) (attorney sued for fees due him under separations agreement); Jackson Marine Sales, Inc. v. Maurer, 59 Lanc. 503 (Pa. C.P. 1965) (promisor agreed to pay promisee's debt to third party assignor; assignee sued as creditor beneficiary); Datesman v. Upper Darby Nat'l Bank, 37 Del. 10 (Pa. C.P. 1948) (agreement between depositor and depository bank to apply deposits solely to pay checks of a third party); RESTATEMENT OF CONTRACTS § 133, Illustration 9 (1932); *see* Peters v. Burke, 19 Bucks 572 (Pa. C.P. 1970); Youth Center v. Ward & Ward, Inc., 52 Luz. 7 (Pa. C.P. 1961) (plaintiff lessee was beneficiary to an agreement between lessor shopping center and other lessee, which was designed to regulate competition; lessor also owed a contractual duty to the plaintiff); Samuels v. California Ins. Co., 20 Beaver 169 (Pa. C.P. 1958); Bostetter v. Hill, 11 Cumb. 88 (Pa. C.P. 1966); Bell v. Williams, 41 Pa. D. & C. 253 (C.P. Phila. 1941).

82. 205 Pa. Super. Ct. 218, 208 A.2d 793 (1965) (general contractor held to be a creditor beneficiary of a construction loan agreement, which the plaintiff had attached). *But see* Demharter v. First Fed. Sav. & Loan Ass'n, 412 Pa. 142, 194 A.2d 214 (1963) (the facts of these two cases were nearly identical). *See* Brief for Appellant at 7-8 in the *Clardy* case arguing that *Demharter* was directly on point.

Another case illustrating the superior court's reluctance to explain its decisionmaking is Kreimer v. Second Fed. Sav. & Loan Ass'n, 196 Pa. Super. Ct. 644, 176 A.2d 132 (1961), in which a materialman sought to recover as a beneficiary under a contract executed between the owner and a savings and loan association. A provision of the contract obligated the association to directly pay those furnishing labor and materials. The court held the plaintiff could recover as a third party beneficiary. It, however, avoided any attempt to label the beneficiary as either a donee or creditor to explain its reasoning. While this factual situation fits the classic definition of a creditor beneficiary (*i.e.*, the owner owed a duty to pay, the association assumed the duty), it was not so labeled. Oddly, in *Kreimer* the appellant argued the materialman was a creditor beneficiary at the lower court proceeding and then in his brief to the superior court argued on the donee theory instead. *See* Brief for Appellant at 6-11. *See also* Brief for Appellee at 8-12.

83. *Id.* at 223, 208 A.2d at 795-97 (citation omitted).

84. *See* Brief for Appellee at 8-10, in which appellee quotes from *Restatement* rule of § 133(1)(b) for creditor beneficiaries. The court, however, did not refer to this section in its decision.

failure to provide more than mere conclusions has impeded the search for clarity in the law of beneficiaries.

4. Federal Courts Recognize the Correct Application.—Even though the Pennsylvania courts have not made the necessary inquiry in creditor beneficiary cases, the federal courts, when interpreting the Pennsylvania law, have applied the *Restatement* rules and have done so correctly. In *Ar-Tik Systems, Inc. v. Dairy Queen, Inc.*,[85] the test used by the Third Circuit Court of Appeals was whether the performance of the contract would satisfy an actual, supposed, or asserted duty of the promisee to the beneficiary and whether the promisor assumed the obligation.[86] The litigation entailed a contract between a licensee and assignee that required the assignee to pay a royalty owed by the licensee to the patent owner. The court found the duty inquiry was satisfied by the licensee's obligation to make royalty payments to the owner. The assumption of this obligation by the assignee was then held to fulfill the second leg of the inquiry. *Ar-Tik* exemplifies the proper application of the test advocated in this comment and the merits of distinguishing between donee and creditor beneficiaries.[87]

Similarly, the court in *Sears, Roebuck & Co. v. Jardel Co.*[88] ascertained first whether the promisee owed a duty to the beneficiary and whether the promisor assumed the obligation. In *Sears* the court found the owner of a shopping center to be the creditor beneficiary of a contract between the general contractor-promisee and the subcontractor-promisor.[89] The federal courts, as evidence by *Ar-Tik* and *Sears*, show an ability to both understand the general principles and apply them with adroitness and accuracy worthy of attention. Unlike the decisions mentioned earlier, they do not cloak their rulings with the indefinite "intent to benefit" phraseology. Instead, by boldly stating and unequivocally applying the *Restatement* rules, they serve as a model the state courts should emulate.

B. Spires Rule Limitations

The Pennsylvania Supreme Court has also made recovery more difficult for all third party beneficiaries with two unusual rules first set

85. 302 F.2d 496 (3d Cir. 1962). *See* Isbrandtsen Co. v. Longshoremen's Local 1291, 204 F.2d 495 (3d Cir. 1953).

86. 302 F.2d at 504.

87. The court noted "it seems clear that Ar-Tik was a creditor beneficiary under the law of Pennsylvania." *Id.* As explained under section 2 above, however, the *Burke* holding was the exact opposite. *See* notes 58-62 and accompanying text *supra*.

88. 421 F.2d 1048 (3d Cir. 1970).

89. The contract between the parties explicitly contemplated the duty assumed by the subcontractor to the owner. The creditor beneficiary did not prevail, however, as a general release between the contracting parties was held to be binding on the owner. *Id.* at 1055-56. For vesting of beneficiary rights, *see* Logan v. Glass, 136 Pa. Super. Ct. 221, 7 A.2d 116 (1939); Clardy v. Barco Constr. Co., 205 Pa. Super. Ct. 218, 208 A.2d 793 (1965); RESTATEMENT OF CONTRACTS §§ 142, 143 (1932).

forth in *Spires v. Hanover Fire Insurance Co.*[90] The "*Spires* Rule," which has been cited as the ruling law in both creditor and donee cases, declares that,

> To be a third party beneficiary entitled to recover on a contract it is not enough that it be intended by one of the parties of the contract and the third person that the latter should be a beneficiary, but both parties to the contract must so intend and must indicate that intention in the contract; . . . The obligation to the third party must be created, and must affirmatively appear in the contract itself.[91]

The two elements of the rule that act as barriers are the "intent of both" test and the "affirmatively appear" requirement. In the following discussion, each of these elements will be considered separately.

1. Intent of Both Rule.—This barrier to recovery requires that both the promisee and promisor intend to confer a benefit upon the third party. While the "intent to benefit" discussion showed the problems that resulted from misapplying the standards for the promisee's intention, this barrier focusses on the promisor's intention. The Pennsylvania courts thus demand that the promisor intend to confer a benefit on the third party. Again, this restrictive interpretation is unique to Pennsylvania. In contrast, it is only the intent of the promisee who pays for the promise that governs under the prevailing view.[92] The concept of mutual intent generally plays no role in the analysis. In most instances the promisor's motivation for entering into a contract is the consideration offered by the promisee. Therefore, his intention should play no role in the determination of beneficiary rights.[93] Properly, the intention of the promisor should be, and is, irrelevant to the question of whether beneficiary rights have been created by contract.

Compounding the "intent to benefit" test, the "intent of both" requirement regrettably attenuates the rights of beneficiaries even further.[94] Not only do the courts scrutinize the contract for an "intent to benefit" on the part of the promisee, but they require it of the promisor as well.[95] As noted previously, the "intention" standard is not used to

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90. 364 Pa. 52, 70 A.2d 828 (1950). *But see* 24 TEMPLE L. REV. 89 (1950-51), in which the author states that the *Spires* rules are typical and in accordance with the *Restatement*.

91. *Id.* at 56-57, 70 A.2d at 830-31 (citations and footnotes omitted).

92. *See* Hamill v. Maryland Cas. Co., 209 F.2d 338 (10th Cir. 1954); McCulloch v. Canadian Pac. Ry., 53 F. Supp. 534 (D. Minn. 1943); 4 CORBIN, *supra* note 1, § 776; RESTATEMENT OF CONTRACTS § 133 (1932); 2 S. WILLISTON, CONTRACTS § 356A (3d ed. 1959); *accord*, 17 U. PITT. L. REV. 483 (1956). 17 U. PITT. L. REV. 483 (1956).

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

94. By using the intent of the promisor in the determination, the way is open for outright denials of such intention when any ambiguity exists. *See, e.g.*, Brief for Appellee at 18-23, Hillbrook Apts., Inc. v. Nyce Crete Co., 237 Pa. Super. Ct. 565, 352 A.2d 148 (1975) (appellee denied any intention to benefit a third party whose names was captioned on the contract).

95. *See* notes 56-57 *supra*. The cases there cited were also based on the "intent of both" standard. *But see* Fidelity-Philadelphia Trust Co. v. Bankers Life Ins. Co., 370 Pa. 513, 88 A.2d 719 (1952).

denote merely that both parties contemplated the existence of a beneficiary as the *Spires* language might imply. If used in this manner it would be consistent with the objective theory of contracts. Instead, the Pennsylvania courts construe intention to mean that the motive of both parties was to confer a benefit with donative intent upon the third person.[96] The consequences of such an interpretation are considerable, because in the creditor beneficiary relationship it is not the motive of either party to confer a benefit on the third party, and in the donee beneficiary situation it is only the promisee who desires to confer such a benefit.

Although the requirement that both parties must intend to benefit another is applied in creditor beneficiary cases, its impact as a denial of rights is purely secondary.[97] That is, the creditor beneficiaries' rights have already been completely denied by the improper use of the "intent to benefit" test, and, thus, the "intent of both" rule is simply another means to deny rights already lost by misapplication. The "intent to benefit" test, even if applied only to the promisor, results in a denial of third party creditor rights, since the promisor's sole intent is to benefit himself with the promisee's consideration, not to benefit the beneficiary. By requiring that the motive of both parties be to benefit the third person, the supreme court has completely closed the door to creditor beneficiary recovery. Actually, the *Blymire* doctrine, which denied recovery to creditor beneficiaries, still rules, although now by implication through the intention standards rather than by its direct language.[98]

The requirement of the "intent of both" rule has a more profound and direct effect in donee cases. A case that clearly delineates the divergent rulings that result depending on whether the intent of the promisee or the intent of both parties is used is *Mowrer v. Poirier & McLane Corp.*[99] Plaintiff sued on a construction contract with the Commonwealth that required the general contractor to procure insurance for himself and any subcontractor for property damage resulting from the performance of the contract. The plaintiff's property was damaged during the performance of the contract, and he sought damages for breach of the

96. *See, e.g.*, Farmers Nat'l Bank v. Employers Liab. Assur. Corp., 414 Pa. 91, 199 A.2d 272 (1964); Silverman v. Food Fair Stores, Inc., 407 Pa. 507, 180 A.2d 894 (1962); Barnes v. Craft, 25 Pa. D. & C.2d 731 (C.P. York 1961) (plaintiff-employee sued for wages specified in contract between a school authority and the general contractor. The court held that the plaintiff was not intended to be benefited by both parties). *But see* Youth Center v. Ward & Ward, Inc., 52 Luz. 7 (Pa. C.P. 1961) (analysis based on purpose and intent of the promisee).

97. *See, e.g.*, Burke v. North Huntington Tp. Mun. Auth., 390 Pa. 588, 136 A.2d 310 (1957); Commonwealth, Pa. Liquor Control Bd. v. Rapistan, Inc., 14 Pa. Commw. Ct. 501, 323 A.2d 410 (1974); *see* Josal, Inc. v. Rolling Park Homes, Inc., 195 Pa. Super. Ct. 646, 171 A.2d 830 (1961); Baush v. Francum, 25 Bucks 283 (Pa. C.P. 1974); Samuels v. California Ins. Co., 20 Beaver 169 (Pa. C.P. 1958).

98. *See* notes 28-29 and accompanying text *supra*.

99. 382 Pa. 2, 114 A.2d 88 (1955) (the case was argued twice before the supreme court. The court finally split four to three). *See also* Farmers Nat'l Bank v. Employers Liab. Assur. Corp., 414 Pa. 91, 199 A.2d 272 (1964); *see* United Pacific Ins. Co. v. Meyer, 305 F.2d 107 (9th Cir. 1962); Mowrer v. Poirier & McLand Corp., 46 Berks 269 (Pa. C.P. 1954) (the lower court held the plaintiff was a donee beneficiary).

contractual provisions. In strictly applying the "*Spires* Rule," the court held that the parties merely intended to benefit themselves and found no desire to provide a benefit to injured third parties. The majority concluded, "It is, of course, true that the insurance provision in the agreement accrued to the benefit of the plaintiff, not, however, as a donee beneficiary, . . . but merely as an *incidental* beneficiary . . . ."[100]

But the application of the "*Spires* Rule" in *Mowrer* was not achieved without a strong dissent that pointed to the injustice of the rule. The well reasoned dissenting opinion by Mr. Justice Jones, former Chief Justice of the supreme court, questions the validity of the "intent of both" rule. The dissent states that the question should be resolved by application of the general principles of law set forth in chapter six of the *Restatement of Contracts*.[101]

> And, while it has been said that it is the intention of *the parties* to the contract which must be sought [citing Spires], in reality, it is *the purpose of the promisee* who extracts the promise for the benefit of the third party that is controlling. The promisor assents to the promisee's requirement in such regard only because it desires to secure the benefits accruing to it under the contract.[102]

If one regards the case from the perspective of only the promisee, the dissent's conclusion is, of course, at odds with the majority. The purpose of the promisee "was to make sure that no one should suffer any damage through the execution of the public work by a private contractor and not be compenstated therefore. . . . To say now that the plaintiff is not within the protected class . . . is bluntly to disregard the plain intendment of the Commonwealth. . . ."[103] It is evident from the comparison of the two positions that beneficiary rights will not be properly recognized as long as the courts require that both parties intend to confer a benefit to the beneficiary.[104]

Fortunately, the barrier raised by the "intent of both" requirement has not always been strictly applied in all the areas of third party beneficiary law.[105] One situation in which the supreme court has awarded the donee recovery is governmental contracts with contractors who expressly assume an obligation to pay for damages caused during perform-

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100. *Id.* at 7, 114 A.2d at 90; *see* RESTATEMENT (SECOND) OF CONTRACTS § 135, Illustration 9 (1973).

101. 382 Pa. 2, 10, 114 A.2d 88, 91.

102. *Id.* at 10-11, 114 A.2d at 91.

103. *Id.* at 11-12, 114 A.2d at 92.

104. *See* 17 U. PITT. L. REV. 483 (1956).

105. *See, e.g.*, Lieberman v. Howard Johnson's Inc., 68 Pa. D. & C.2d 129 (C.P. Phila. 1973) (members of the public held to be donee beneficiaries of a minimum price provision even though the contract did not specify an intent by both contracting parties to benefit the public). *But see* Potato City, Inc. v. Bartlett, 43 Pa. D. & C.2d 725 (C.P. Dauph. 1968); Manor Shopping Center Merchants Ass'n v. Everfast Fabrics, Inc., 36 Pa. D. & C.2d 401 (C.P. Lanc. 1964).

ance.[106] Certainly in this situation the contractor-promisor has no desire to benefit the private citizens, but recovery is allowed despite the "intent of both" rule. The importance of this tendency to overlook the "intent of both" requirement rests in the possible reluctance of the court to extend the rule into new areas and the desire to follow the *Restatement* instead.

In summary, as noted in the dissenting opinion in *Mowrer*, the "intent of both" requirement conflicts with the basic principle that the intent of the promisee controls. The "*Spires* Rule" is unjust in that a beneficiary should be permitted to recover when the promisee alone intends the third person to have the status of a beneficiary. The "*Spires* Rule" states, "it is not enough that it be intended by *one* of the parties . . . and the *third person* that the latter should be a beneficiary."[107] But it should be sufficient when the third person reasonably believes the contract was made for his benefit. This is all that is required for the third party to recovery under the prevailing view and the *Restatement*.

2. Affirmatively Appear Requirement.

(*a*) *Unfairness of the rule.*—The second element of the "*Spires* Rule" requires that the obligation to the third person "affirmatively appear" in the contract itself.[108] This is in reality a unique, judicially created parole evidence rule. In the parol evidence rule, however, some fault rests with the party who neglected to secure his rights. But, under the "affirmatively appear" requirement the third parties' rights are made to depend on the promisee's ability to contract. The fairness of the rule is questionable, because beneficiary rights are dependent on the wording of a contract that the beneficiary did not formulate. Instead, the third person should be permitted to show by extrinsic evidence alone[109] that the contract created a right to performance.

The unfairness of the rule is especially apparent when the promisee specifically alleges that the contract was made for the benefit of a third person. In *Pennsylvania Liquor Control Board v. Rapistan, Inc.*[110] the promisee argued that the agreement into which it entered with a general contractor was clearly intended to benefit the operator of a finished

106. Keefer v. Lombardi, 376 Pa. 367, 102 A.2d 695 (1957). This factual situation is not recognized as an exception to the rule, rather the "intent of both" requirement was just overlooked. In *Keefer* this may have been because of the appellant's failure to argue the issue. *See* Brief for Appellant. The court did follow RESTATEMENT OF CONTRACTS § 145 (1932) argued by appellee. *See* Brief for Appellee at 5. *Accord*, Thompson v. Harry C. Erb, Inc., 240 F.2d 452 (3d Cir. 1957). *See also* Townsend v. Pittsburgh, 383 Pa. 453, 119 A.2d 227 (1956); Del Pizzo v. Middle W. Constr. Co., 146 Pa. Super. Ct. 345, 22 A.2d 79 (1941); Given v. Township of Marple, 51 Del. 159 (Pa. C.P. 1963).

107. Spires v. Hanover Fire Ins. Co., 364 Pa. 52, 56, 70 A.2d 828, 830 (1950).

108. *See* note 91 and accompanying text *supra*; *accord*, Silverman v. Food Fair Stores, Inc., 407 Pa. 507, 180 A.2d 894 (1962) (holding that a beneficiary cannot enforce a contract unless both indicate that intention in the contract); Farmers Nat'l. Bank v. Employers Liab. Assur. Corp., 414 Pa. 91, 199 A.2d 272 (1964).

109. *See* 4 CORBIN, *supra* note 1, § 776 (Supp. 1971).

110. 14 Pa. Commw. Ct. 501, 323 A.2d 410 (1974).

warehouse. The beneficiary brought action to enforce the contract, which was then breached by the general contractor. Looking solely at the express terms of the contract, the court concluded that "while it certainly contemplates that [the] equipment would be operated by a third party, we can find no clear indication that such third party was intended to have the status of a creditor beneficiary."[111] The court, in total disregard of the intention of the promisee, decided the case by going no further than the express terms of the contract and thus strictly adhered to the "*Spires* Rule."

The "*Spires* Rule" was originally a very narrow principle designed for a specific set of facts and based on public policy considerations. In *Spires*, the lease agreement between the parties required the lessee to insure the building for the benefit of the lessor. The lessee in accordance with the agreement insured the building and its contents. A fire occurred and the lessee settled for the damages to the contents, but not for the lessor's building which was explicitly described in the insurance policy. When the lessee refused to file a claim for damages to the building, an action was brought by the lessor on the insurance agreement made pursuant to the lease. The court held that the lessor could not recover "because, whatever incidental interest they may have had therein, and even if, *as between them and the lessee*, they were meant to be a beneficiary thereof, they are not referred to in the *policy itself* as an intended beneficiary."[112] The rationale of the decision was that it would deprive the insurance company of two fundamental rights—the privilege to choose the person whom it was willing to insure and the right to deal exclusively with the named insured for settlement purposes. Although the decision was based on these policy elements it has not been so limited.

The "affirmative appear" requirement is even more restrictive in application than it appears at first reading. It requires that the identity of the beneficiary be disclosed specifically in the contract. Although the "*Spires* Rule" language only requires that the obligation "affirmatively appear" in the contract,[113] the building in the *Spires* case was expressly insured. Thus, the obligation assumed by the promisor was present; what was missing was the expressed identity of the beneficiary owner.[114] Arguably the history of the law in this state does not follow this view. In

111. *Id.* at 507, 323 A.2d at 414.

112. 364 Pa. 52, 56, 70 A.2d 828, 830 (1950) (emphasis in original). *Contra*, RESTATEMENT (SECOND) OF CONTRACTS, § 135, illustration 9 (1973); 2 WILLISTON, *supra* note 1, § 364A.

113. *See* note 91 and accompanying text *supra*.

114. *See* American Elec. Power Co. v. Westinghouse Elec. Power Corp., 418 F. Supp. 435 (S.D.N.Y. 1976) (interpreting *Spires* as requiring the identity of the beneficiary to expressly appear in the contract); Falsetti v. Local 2026, UMW, 400 Pa. 145, 161 A.2d 882 (1960) (requiring specific language in an agreement before giving the beneficiary a right to enforce it); Bausch v. Francum, 25 Bucks 283 (Pa. C.P. 1974) (holding that the promisor's unawareness of the beneficiary's identity gave the plaintiff only the status of an incidental beneficiary); Supan v. Oriole Motor Coach Lines, Inc., 37 Pa. D. & C.2d 638 (C.P. Alleg. 1965).

Commonwealth v. Great American Indemnity Co.[115] the court adopted *Restatement* section 139, which provides, "It is not essential to the creation of a right in a donee beneficiary or in a creditor beneficiary that he be identified when a contract containing the promise is made."[116] Simply stated, this identity burden, if placed on a beneficiary, would render recovery nearly impossible.

(*b*) *A move away from the requirement.*—The federal courts have not followed the "*Spires* Rule" that requires the identity to "affirmatively appear" in the contract when they have interpreted Pennsylvania law. In *Ohio Casualty Insurance Co. v. Bank Building and Equipment Corp. of America*[117] the court found that a reference to an adjacent building in a construction contract was sufficient to show a "clear intention to benefit [the owner when his building] is the only adjacent building that could possibly benefit . . . ."[118] "This principle is even extended to a third party not specifically in contemplation of the parties, where a contract creates a duty to inspect."[119] As in the "intent to benefit" area, the federal courts proficiently apply the *Restatement* rules and grant recovery more liberally.

Recently, the supreme court circumvented the "affirmatively appear" requirement in *Line Lexington Lumber & Millwork Co. v. Penn Publishing Corp.*[120] On facts nearly indistinguishable from *Spires*, the court permitted reformation of an insurance contract.[121] The court at-

115. 312 Pa. 183, 167 A. 793 (1933); *accord*, Frank v. Corace, Inc. v. West Pa. Disposal Corp., 118 Pitts L.J. 246 (Pa. C.P. 1970); Manor Shopping Center Merchants Ass'n v. Everfast Fabrics, Inc., 36 Pa. D. & C.2d 398 (C.P. Lanc. 1965); Hempt v. South Orange Trust Co., 63 Pa. D. & C. 559 (C.P. Dauph. 1948).

116. RESTATEMENT OF CONTRACTS § 139 (1932); *see* Herre v. Davies, 51 West. 91 (Pa. C.P. 1968).

117. 300 F. Supp. 632 (W.D. Pa. 1968). *But see* American Elec. Power Corp. v. Westinghouse Elec. Corp., 418 F. Supp. 435 (S.D.N.Y. 1976), in which the court, interpreting Pennsylvania law, held that *Spires* required that the intent to confer a benefit affirmatively appear within the four corners of the contract. Even though the defendant admitted on its answer that it knew the generator it furnished was intended for the plaintiff's use, the court followed *Spires* and concluded that an explicit intention to confer a benefit must be present. It also noted the more liberal and generally followed view that a beneficiary not named in an insurance contract can be an intended beneficiary under New York law. *Id.* at 448.

118. 300 F. Supp. at 637. The building contract between the owner and general contractor contained the following provision: "Contractor . . . shall take precaution to guard against movement or settlement of adjacent building . . . [and] be liable for any movement or settlement and any damage or injury caused thereby . . . ." *Id.* at 634. On the basis of this language, the court held that the owner of the adjacent building was entitled to be indemnified by the contractor because of the death of an employee. *Contra* Steets v. Sovereign Const. Co., 413 Pa. 458, 198 A.2d 590 (1964) (per curiam).

119. 300 F. Supp. at 637. The Court cited Evans v. Otis Elevator Co., 403 Pa. 13, 168 A.2d 573 (1961) as authority. In *Evans* a contract to service an elevator gave rise to a tort claim.

120. 451 Pa. 154, 301 A.2d 684 (1973). *See* Hillbrook Apts., Inc. v. Nyce Crete Co., 237 Pa. Super. Ct. 565, 352 A.2d 148 (1973) (interpreting the ramifications of the *Line* decision).

121. *See* notes 70-71 and accompanying text *supra*. In *Line*, the lessee of a building procured fire insurance for the benefit of the owner of the structure. The insurance broker designated the lessee as the insured party as was the case in *Spires*. Similarly, the insurers

tempted to distinguish the cases on the rationale that the insurance agent had knowledge of the lessor's identity. Nevertheless, this assumption could have also been inferred in *Spires*. Furthermore, the supreme court apparently weakened the "affirmatively appear" requirement quoted in *Van Cor*,[122] upon which the lower court relied in stating, "This case merely affirms the rule that, in order for one to be a third party beneficiary, to a contract, the contracting party must have so intended."[123] Thus, the court appears to be retreating from the rigid requirements of the "*Spires* Rule" and moving closer to the better reasoned approach of the *Restatement*.

Not only has the rule been circumvented recently, but it has also been denounced in Judge Cercone's dissenting opinion in *Hillbrook Apartments, Inc. v. Nyce Crete Co.*[124] The dissent referred to the *Spires* "affirmatively appear" requirement and stated "strictly applied, that rule seems not so much a statement of the law of third party beneficiaries, as an exposition of an archaic view of the parole evidence rule. . . . If by this is meant that the precise relationship of the third party beneficiary must be literally prescribed by the contract, it is wholly out of tune with the clear weight of authority."[125] The majority opinion implied agreement with the dissent, but reluctantly noted, "Sympathetic as we may be to the dissent's position, we are not free, as an intermediate appellate court, to overrule the decisional law enunciated by the Supreme Court of Pennsylvania."[126]

The "*Spires* Rule" is a product of the early third party beneficiary law, which searched for a new rationale to avoid *Blymire* by constructing exceptions to the denial of third party rights. The direct promisee rationale constituted one means to accomplish this objective.[127] Today this direct promisee rationale is embodied in the "affirmatively appear" requirement of *Spires*, which requires that the identity of the parties be expressed in the contract. Sadly, the reasoning that was designed to

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settled with the lessee after the occurrence of a fire. Also, as in *Spires*, the duty to secure insurance was embodied in the lease.

122. Van Cor, Inc. v. American Cas. Co., 417 Pa. 408, 208 A.2d 267 (1965).

123. 451 Pa. 154, 161, 301 A.2d 684, 688 (1973).

124. 237 Pa. Super. Ct. 565, 352 A.2d 148 (1975) (a four to two decision, Judge Jacobs joining in the dissent). Hollbrook, Inc. brought suit as assignee of a contract for the installation of a concrete floor system that was allegedly improperly installed. The underlying contract was between the president of Hillbrook, Inc. and defendant and was captioned, "Re: Hillbrook Inc." The majority held that the plaintiff was not a beneficiary, as the intent to benefit did not affirmatively appear in the contract.

The dissent notes persuasively, "If under these circumstances, the intent to benefit Hillbrook, Inc. did not affirmatively appear, it is difficult to conceive of an agreement in which it would appear, except when the parties have chosen some talismanic form of words creating the relationship." *Id.* at 581, 352 A.2d at 157. *See* Brief for Appellee at 18-23, arguing that under *Spires* the right of a third party to enforce the contract must be clearly intended by the promisor and that he had no such intent.

125. *Id.* at 579-80, 352 A.2d at 155-56.

126. *Id.* at 573, 352 A.2d at 152.

127. *See* note 34 and accompanying text *supra*.

promote beneficiary rights is now used to destroy them. Such restrictive reasoning has no justification in third party beneficiary law.

IV. Conclusion

Third party beneficiary law in Pennsylvania is presently confusing and complex, but the task to make the law clear and less complex is not insurmountable. Most importantly, the courts must be forthright in their opinions so that one need no longer wonder what the law of beneficiaries is in Pennsylvania. A decision must be clearly made whether the *Restatement of Contracts* or *Blymire* is the ruling law. If *Blymire* is not the law, then it should finally be expressly overruled and the *Restatement* rules adopted.

In applying the *Restatement* rule the courts must begin to recognize the fundamental differences between the two protected kinds of beneficiaries. The "intent to benefit" test should be limited to donee cases in which it is justified. In creditor beneficiary cases, the courts should implement the two-step inquiry of the *Restatement*. The "*Spires* Rule," which was first based on public policy considerations and characteristics peculiar to insurance law, should be strictly limited to that purpose. Since the two elements of the "*Spires* Rule" serve no legitimate purpose, the courts should follow the general rules as expressed by the dissents in *Mowrer* and *Hillbrook* and overrule these restrictive doctrines. If these simple steps are followed the courts will bring Pennsylvania in line with the prevailing view and clear the law of the confusing doctrines that have existed since *Blymire* was decided.

LARRY L. MILLER