

Clearinghouse REVIEW

July–August 2008
Volume 42, Numbers 3–4

Journal of
Poverty Law
and Policy



Use Contract Law to Enforce Third-Party Beneficiary Claims Against Vendors and Agencies

MORE:

Displaced Workers and
Trade Adjustment Assistance

Technological Barriers to
Public Benefits Administration

Buckhannon on When
a Party Prevails

Best Practices for Public
Housing Agencies

A Human Rights Strategy
to Eliminate Discrimination
Against Women

Massachusetts'
Health Care Reform

Race-Conscious
Community Lawyering

Ending Poverty and
Reducing Inequality

AND A NEW COLUMN:
Ethics and Legal Aid



Sargent Shriver National Center on Poverty Law



THIRD-PARTY BENEFICIARY CLAIMS

Recent Cases Against Private Parties and Local Agencies

By Rochelle Bobroff and Harper Jean Tobin

Rochelle Bobroff
Directing Attorney

Harper Jean Tobin
Staff Attorney

Herbert Semmel Federal Rights Project
National Senior Citizens Law Center
1444 I St. NW Suite 1100
Washington, DC 20005
202.289.6976 ext. 214
202.289.6976 ext. 210
rbobroff@nslc.org
htobin@nslc.org

Pprivate parties and local governments administer many of the benefits guaranteed by federal and state statutes that are funded by federal and state budgets. For instance, health care under Medicaid and Medicare is delivered by doctors, hospitals, and nursing homes. Federal housing services are administered by local housing authorities. These private and local entities administer public benefits under instructions contained in detailed contracts with a federal or state agency. Prisoners frequently receive services from private contractors who agree to conditions regarding the quality of those services in contracts with the government. Injured individuals may need to sue the private contractors or local governments to enforce their rights. Contract law provides a possible avenue for enforcement of individual rights since consumers may sue as third-party beneficiaries of a contract with the federal or state government.

Here we review cases over the past six years regarding third-party beneficiary claims against private contractors and local agencies.¹ While there have been several recent encouraging cases, claims generally fail when the contract includes a specific provision disavowing an intention to confer third-party rights.

¹For a detailed discussion of cases from 2001 and earlier, see Steve Hitov & Gill Deford, *The Impact of Privatization on Litigation*, 35 CLEARINGHOUSE REVIEW 590-97 (Jan.-Feb. 2002).

I. Basic Principles of Third-Party Beneficiary Claims

The federal courts as well as most state courts follow the Restatement (Second) of Contracts to determine third-party beneficiary status.² Yet approaches taken by different state courts vary.

A. Restatement Provisions

The Restatement Section 302 sets forth two conditions for contracts to confer third-party rights. The first condition is that “recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties.”³ The second condition is that either the contractual promise will satisfy a debt to the third party or “the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.”⁴ Section 302 contains the caveat that these conditions establish third-party beneficiary rights “unless otherwise agreed between promisor and promisee.”⁵ Numerous commentators contend that third-party claims for injunctive relief under government contracts should be analyzed solely under Section 302.⁶

However, many courts have applied Restatement Section 313 when denying third-party rights.⁷ Section 313(1) states that Section 302 applies to government contracts “except to the extent that ap-

plication would contravene the policy of the law authorizing the contract or prescribing remedies for its breach.”⁸ Section 313(2) further provides:

(2) In particular, a promisor who contracts with a government or governmental agency to do an act for or render a service to the public is not subject to contractual liability to a member of the public for consequential damages resulting from performance or failure to perform unless

(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.⁹

Section 313(2)(b) has been commonly interpreted to establish a presumption against third-party enforceability “unless the contract contains specific language providing [plaintiffs] with the right” to enforce its terms.¹⁰

Some courts hold that Section 313(2) does not apply to all government con-

²RESTATEMENT (SECOND) OF CONTRACTS § 302, Reporter’s Note (1981) (cases from forty states citing or adopting Section 302).

³*Id.* § 302(1).

⁴*Id.* § 302(1)(b).

⁵*Id.* § 302(1).

⁶See, e.g., Deborah Zalesne, *Enforcing the Contract at All (Social) Costs: The Boundary Between Private Contract Law and the Public Interest*, 11 TEXAS WESLEYAN LAW REVIEW 579, 603–4 (2005) (criticizing contrary cases); Michele Estrin Gilman, *Legal Accountability in an Era of Privatized Welfare*, 89 CALIFORNIA LAW REVIEW 569, 636 (2001); Robert S. Adelson, *Third Party Beneficiary and Implied Rights of Action Analysis: The Fiction of One Governmental Intent*, 94 YALE LAW JOURNAL 875, 879 nn. 21, 24 (1985). See also RESTATEMENT (SECOND) OF CONTRACTS § 313 cmt. A (1981). (“excessive financial burden” is a chief reason for limiting claims under third-party contracts).

⁷See, e.g., *Kremen v. Cohen*, 337 F.3d 1024 (9th Cir. 2003) (Section 313 applies to all claims under government contracts, and no third-party claim lies under a government contract unless the contract shows an intention to grant the third party enforceable rights); *Briggs v. Department of Human Services*, 472 F. Supp. 2d 1288, 1293 (W.D. Okla. 2007) (invoking Section 313 to reject a parent’s claim against a nonprofit that contracted to provide court advocates in family court cases); *Fort Lincoln Civic Association Incorporated v. Fort Lincoln New Town Corporation*, No. 05-03740, 2008 WL 731562, at *6 (D.C. App. March 20, 2008) (invoking Section 313 to reject residents’ claims under urban redevelopment contract).

⁸RESTATEMENT (SECOND) OF CONTRACTS § 313(1) (1981).

⁹*Id.* § 313(2).

¹⁰*Jama v. U.S. Immigration and Naturalization Service*, 334 F. Supp. 2d 662, 687 (N.J. 2004) (Clearinghouse No. 53,346) (following *Nguyen v. U.S. Catholic Conference*, 719 F.2d 52 (3d Cir. 1983)).

tracts. A line of decisions from the federal circuit holds that this subsection applies only to suits “against promisors who had contracted with the government to render services to the general public and, therefore, [is] not relevant to third-party beneficiary analysis.”¹¹ Numerous commentators explain that Section 313(2) is intended to apply to commercial contracts with the government, not to public benefit programs such as subsidized housing, Medicaid, and Medicare.¹² This view is supported both by Section 313(1), which focuses on “the policy of the law authorizing the contract,” and by the Section 313 illustrations, which include contracts with mail carriers, utility companies, railway companies, and construction firms.¹³ While the prospect of money judgments against commercial contractors might become an impediment to public works projects, injunctive enforcement of public benefit contracts

by individual beneficiaries furthers the goals of those programs.¹⁴

B. State Court Variations

Courts usually apply state law to third-party contract claims against private parties and local agencies.¹⁵ This is true even where the contract is with a federal agency under a federal-state program so long as no federal agency is a party to the suit.¹⁶

State courts vary in their receptivity to third-party claims, with many falling into a few identifiable categories. In some states, the courts apply a “strong presumption” against finding third-party rights.¹⁷ A second group of state courts refers to a presumption against third-party rights but does not appear to employ a strict standard.¹⁸ Courts in a third group of states recognize such a presumption but hold that it is overcome whenever the contract requires rendering

¹¹*Flexfab Limited Liability Company v. United States*, 62 Fed. Cl. 139, 147 (2004), *aff'd*, 424 F.3d 1254 (Fed. Cir. 2005) (following *Schuerman v. United States*, 30 Fed. Cl. 420 (1994), and *Montana v. United States*, 124 F.3d 1269, 1273 (Fed. Cir. 1997)). But see *Fort Lincoln*, No. 05-03740, 2008 WL 731562, at *9 (acknowledging Montana’s repudiation of “intent to give a right” test but nevertheless construing it to require “reasonable reliance” on an “intention to confer a right”).

¹²See, e.g., Zalesne, *supra* note 6, at 603–4; Justin Massey, *Applying the Third Party Beneficiary Theory of Contracts to Enforce Clean Water Act § 404 Permits: A California Case Study*, 18 JOURNAL OF ENVIRONMENTAL LAW AND LITIGATION 129, 142–43 (2003); Adelson, *supra* note 6, at 879 n.21.

¹³RESTATEMENT (SECOND) § 313 illus. 1-6.

¹⁴See, e.g., *Ayala v. Boston Housing Authority*, 536 N.E.2d 1082, 1090 n.16 (Mass. 1989). But see *County of Santa Clara v. Astra USA Incorporated*, No. 05-03740, 2006 WL 1344572, at *9 (N.D. Cal. 2006) (invoking Section 313 in rejecting county’s third-party claim under Medicaid Pharmaceutical Pricing Agreement because policy of statute creating drug discount program “is to remedy breaches via government action or the dispute-resolution process”).

¹⁵See, e.g., *Richards v. City of New York*, 433 F. Supp. 2d 404, 430 (S.D.N.Y. 2006) (city contract with foster care agency); *5th Bedford Pines Apartments Limited v. Brandon*, 262 F. Supp. 2d 1369, 1377–78 (N.D. Ga. 2003); *Murns v. City of New York*, No. 00-9590, 2001 WL 515201, at *5 (S.D.N.Y. 2001) (city contract with private hospital for treatment of prisoners). Courts apply state law to claims against state actors but apply federal law if the federal government is named in the suit.

¹⁶See, e.g., *Brown v. Sun Healthcare Group Incorporated*, 476 F. Supp. 2d 848, 853 (E.D. Tenn. 2007) (Medicare and Medicaid provider agreements); *Johnson v. City of Detroit*, 319 F. Supp. 2d 756, 780–81 (E.D. Mich. 2004) (U.S. Department of Housing and Urban Development (HUD) contract); *Wallace v. Chicago Housing Authority*, 298 F. Supp. 2d 710, 723–24 (N.D. Ill. 2003) (Clearinghouse No. 55,072) (HUD contract). An exception to this general rule applies, however, where “substantial rights or duties of the United States hinge on [the case’s] outcome.” *Miree v. Dekalb County*, 433 U.S. 25, 31 (1977). Compare, e.g., *Owens v. Haas*, 601 F.2d 1242, 1249–50 (2d Cir. 1979) (third-party claim by federal prisoner against county officers, for injuries he suffered after a transfer to county custody under federal contract, implicates federal duty to protect prisoners), with *Smith v. Correctional Corporation of America*, 19 Fed. App. 318, 320 (6th Cir. 2001) (no federal jurisdiction over contract claim by District of Columbia prisoner against private operator based on contract with District).

¹⁷See, e.g., *Seeck v. Geico General Insurance Company*, 212 S.W.3d 129 (Mo. 2007); *Shank v. H.C. Fields*, 869 N.E.2d 261 (Ill. App. Ct. 2007); *Ortega v. City National Bank*, 97 S.W.3d 765 (Tex. App. 2003). See also *Eastern Steel Constructors Incorporated v. City of Salem*, 549 S.E.2d 266 (W. Va. 2001) (stating that “in order to overcome [the] presumption [against third-party rights] the implication from the contract as a whole and the surrounding circumstances must be so strong as to be tantamount to an express declaration”).

¹⁸See, e.g., *Elsner v. Farmers Insurance Group Incorporated*, 220 S.W.3d 633 (Ark. 2005); *State ex rel. Stovall v. Reliance Insurance Company*, 107 P.3d 1219 (Kan. 2005); *Smith v. Chattanooga Medical Investors*, 62 S.W.3d 178 (Tenn. Ct. App. 2001). See also *Meyer v. Tufaro*, 934 So. 2d 861 (La. Ct. App. 2006) (third-party rights are “never presumed” and “must be made manifestly clear”).

performance directly to a third party.¹⁹ A fourth group of state courts holds that, when performance is rendered directly to a third party, there is a presumption *in favor* of third-party rights.²⁰ State courts also vary widely in their description of third-party beneficiary status as a question of fact, a question of law, or a mixed question of law and fact.²¹

II. Medicaid and Medicare Cases

In *Smallwood v. Central Peninsula General Hospital* the hospital admitted that it automatically billed Medicaid recipients for charges rejected by the state, a practice known as “balance billing.”²² Yet federal and state Medicaid law, encapsulated in the hospital’s agreement with the state, prohibits providers from billing Medicaid patients for amounts beyond authorized copayments that are not reimbursed by Medicaid. The Alaska Su-

preme Court held that Smallwood could pursue injunctive and declaratory relief as a third-party beneficiary of the contract between the hospital and the state. The court found Section 313(2) “inapplicable” because the plaintiff was not seeking consequential damages, and Section 313(2) by its terms applies only to claims for consequential damages.²³ Following Restatement Section 302, the court focused on the intent of the promisee, (the State), rather than the promisor (the hospital).²⁴ The court concluded that “the state intended that Medicaid recipients like Smallwood benefit from providers’ promises not to balance bill.”²⁵ The court noted the specific prohibitions in both the provider agreement and the applicable federal and state law against such charges.²⁶ The court assumed, without deciding, that since the state manifested an intention to benefit Medicaid recipients, “it also manifested an intention that

¹⁹See, e.g., MICH. COMP. LAWS § 600.1405 (1996) (“A promise shall be construed to have been made for the benefit of a person whenever the promisor of said promise had undertaken to give or to do or refrain from doing something directly to or for said person”); *Wolverton v. Young*, 131 Wash. Ct. App. 1020 (2006) (“There is a rebuttable presumption that parties enter a contract for their own benefit and not for the benefit of a third party”); *Ramos v. Arnold* 169 P.3d 482, 487 (Wash. Ct. App. 2007) (“The key is whether performance of the contract would necessarily and directly benefit the party claiming to be a third party beneficiary”); *Dickerson v. Pinkerton Security Company*, No. 257124, 2005 WL 3481437, at *1 (Mich. Ct. App. 2005) (“A contract is presumed to have been made for the benefit of the parties to it,” and “[a] person is a third-party beneficiary of a contract only when that contract establishes that a promisor has undertaken a promise ‘directly’ to or for that person”). See also *Eischen Cabinet Company v. New Tradition Homes Incorporated*, No. A06-220, 2006 WL 3593051 (Minn. Ct. App. 2006) (“If, by the terms of the contract, performance is to be directly rendered to a third party, the third party is an intended beneficiary”); *Gay v. Georgia Department of Corrections*, 606 S.E.2d 53 (Ga. Ct. App. 2004) (“A contract is intended to benefit a third party when the promisor engages to the promisee to render some performance to a third person”).

²⁰See, e.g., *Caprer v. Nussbaum*, 825 N.Y.S.2d 55 (N.Y. App. Div. 2006) (“Where performance is to be made directly to a third party, that party is generally deemed an intended beneficiary of the contract and is entitled to enforce it or there is, at least, a presumption that the contract was for the benefit of the third party”); *Prouty v. Gores Technology Group*, 121 Cal. App. 4th 1225, 1232 (2004) (“If the terms of the contract necessarily require the promisor to confer a benefit on a third person, then the contract, and hence the parties thereto, contemplate a benefit to the third person. The parties are presumed to intend the consequences of a performance of the contract”); *Countywide Federal Credit Union v. Safe Auto Insurance*, No. 04CA0006, 2004 WL 1490124, at *2 (Ohio. Ct. App. 2004) (“In order for [the plaintiff] to prevail on its claim, there must be evidence that the promisee intended to directly benefit [the plaintiff] on a duty that [the promisee] owed [the plaintiff]... Then, the promisor ... is presumed to have agreed to be bound by a promise implicit in its agreement with the promisee to provide that benefit to the third party”).

²¹Compare, e.g., *In re Telluride Global Development Limited Liability Company*, 380 B.R. 585, 594 (10th Cir. 2007) (question of fact under Colorado law), and *Souza v. Westlands Water District*, 135 Cal. App. 4th 879, 891 (2006) (same under California law), with *Basic Capital Management v. Dynex Commercial Incorporated*, No. 05-04-10358, 2008 WL 509385, at *6 (Tex. Ct. App. 2008) (question of law), and *AgGrow Oils, Limited Liability Company v. National Union Fire Insurance Company*, 420 F.3d 751, 755 (8th Cir. 2005) (same under North Dakota law), and *Flexfab Limited Liability Company v. United States*, 424 F.3d 1254, 1259 (Fed. Cir. 2005) (mixed question). See also RESTATEMENT (SECOND) OF CONTRACTS § 212(2) (1981) (interpretation of contracts is a question of law except where “it depends on the credibility of extrinsic evidence or on a choice among reasonable inferences to be drawn from extrinsic evidence”).

²²*Smallwood v. Central Peninsula General Hospital*, 151 P.3d 319 (Alaska 2006).

²³*Id.* at 325.

²⁴*Id.* at 324.

²⁵*Id.* at 325.

²⁶*Id.*; cf. *Wogan v. Kunze*, 623 S.E.2d 107, 119 (S.C. Ct. App. 2005) (third-party claim rejected regarding failure of provider to submit claim when provider agreement did not require the submission of the claim).

Medicaid recipients, as third-party beneficiaries, be able to enforce the provider agreement.”²⁷ The court also held that the possibility of enforcement by the government did not foreclose Smallwood’s claim because he had no assurance of enforcement in *his* case, and he was not entitled to a state administrative hearing regarding the hospital’s improper billing.²⁸

In *Brown v. Sun Healthcare Group Incorporated* a widow of a Tennessee nursing home resident asserted a third-party contract claim under Medicare and Medicaid provider agreements because she believed that her husband’s death was caused by the home’s neglect and misconduct.²⁹ The Tennessee federal district court denied the nursing home’s motion to dismiss her claim. The court held that the lack of an implied private right of action in the Medicaid and Medicare statutes against nursing homes did not preclude a third-party beneficiary action.³⁰ The court found that in those laws Congress did not intend to displace or preempt state contract law.³¹ The court concluded that Brown could pursue a third-party beneficiary claim governed by Tennessee law.³²

A decision by a Pennsylvania trial court is the only reported decision rejecting a third-party claim under a Medicaid or

Medicare provider agreement. In *Zaborowski v. Hospitality Care Center of Hermitage Incorporated* the plaintiff claimed that his mother died as a result of neglect and misconduct by a nursing home in violation of its Medicaid and Medicare provider agreements.³³ In holding that the plaintiff’s mother was not an intended beneficiary the court engaged in little substantive analysis, rejecting contrary cases as “inconsistent with Pennsylvania case law” that set forth a more stringent test for government contracts based on Restatement Section 313(2).³⁴

III. Prisoner Cases

Shortly after its favorable decision in *Smallwood*, the Alaska Supreme Court also permitted a state prisoner to enforce procedural rights through the state’s contract with a private prison operator in *Rathke v. Corrections Corporation of America*.³⁵ The prisoner alleged that he was held in administrative segregation for a false positive drug test and was denied his request to see the evidence against him. The court again focused on the intent of the promisee.³⁶ Quoting a leading treatise, the court stated that as “a general rule, if the promised performance is rendered directly to the beneficiary, ‘the intent to benefit the third party will be

²⁷*Smallwood*, 151 P.3d at 324–25; accord *Christian v. First Capital Bank*, 147 P.3d 908, 913 (Okla. Civ. App. 2006) (Oklahoma law “does not require that the contract expressly give the beneficiary the power to enforce it, but only that the beneficial promise be express”).

²⁸*Smallwood*, 151 P.3d at 326–27.

²⁹*Brown*, 476 F. Supp. 2d at 853.

³⁰*Id.* at 853 (quoting *Brogdon v. National Healthcare Corporation*, 103 F. Supp. 2d 1322, 1334 (N.D. Ga. 2000)).

³¹*Id.*; accord *Palmer v. Joseph Healthcare P.S.O. Incorporated*, 77 P.3d 560, 562, 573–74 (N.M. Ct. App. 2003) (permitting third-party claim under Medicare Plus Choice provider contract and rejecting preemption under the Medicare Act), cert. dismissed, 101 P.3d 808 (N.M. 2004).

³²*Brown*, 476 F. Supp. 2d at 853 (contract claim, however, must satisfy state medical malpractice statute); accord *Solter v. Health Partners of Philadelphia Incorporated*, 215 F. Supp. 2d 533, 539 n.8 (E.D. Pa. 2002) (no private right of action under Medicaid Act but third-party beneficiary claim under state law available to enforce contract between managed care organization and state regarding provision of medically necessary care).

³³*Zaborowski v. Hospitality Care Center of Hermitage Incorporated*, No. 2002-1188, 2002 WL 32129508, at 474 (60 Pa. D. & C.4th 2002). The plaintiff did not submit a copy of the provider agreement, and this may have contributed to the court’s conclusion that the complaint did not adequately allege that the state intended the resident to be a beneficiary of the provider agreement (*id.* at 499 n.19).

³⁴*Id.* at 499 n.19 (citing *Drummond v. University of Pennsylvania*, 651 A.2d 572 (Pa. Commw. 1994), appeal denied, 651 A.2d 572 (Pa. 1995)).

³⁵*Rathke v. Corrections Corporation of America*, 153 P.3d 303 (Alaska 2007).

³⁶*Id.* at 310. The court refers to “the motives of the parties in executing a contract—especially the promisee” but in a footnote quotes authorities indicating that the promisee’s intent is virtually the exclusive focus.

clearly manifested.”³⁷ The court noted that the contract incorporated procedural guarantees from a class action settlement agreement with the state, including prisoners’ right to access evidence against them in disciplinary hearings.³⁸ This language constituted a promise to render performance directly to third parties and an intention to benefit prisoners. Therefore the court held that “the prisoners are intended third-party beneficiaries of the portions of the contract which are taken directly” from the settlement agreement.³⁹ The Ninth Circuit, applying Alaska law, followed the *Rathke* decision regarding third-party rights in a case concerning medical services to prisoners under the same contract.⁴⁰

In *Ogunde v. Prison Health Services Incorporated* the Supreme Court of Virginia allowed a prisoner, who alleged that he was injured by inadequate medical care, to enforce a contract between the state and a private provider of medical services for prisoners.⁴¹ The contract aimed to “provide cost effective, quality inmate health care services for up to ... inmates” and defined the scope of services to be provided to the prisoners.⁴² The court found that the contract rendered a direct benefit to the inmates, and this was clearly the intention of the contracting parties.⁴³ The defendant argued that Ogunde was not an intended beneficiary

because he could cease to be a prisoner. The court held that a third-party contract right “does not depend upon permanent membership in the class of persons entitled to receive the benefit of the contract” but instead exists so long as the person is a part of that class.⁴⁴

However, third-party claims brought by detained asylum-seekers were rejected in *Jama v. U.S. Immigration and Naturalization Service*.⁴⁵ The plaintiffs claimed that they had been tortured and abused at a privately operated detention facility under contract with the federal government. The district court relied on earlier case law that it characterized as establishing “a recognized presumption against third party beneficiary rights under government contracts.”⁴⁶ Under this rule, third-party beneficiaries must point to “specific language providing them with the right to [sue].”⁴⁷ Although the contract between the agency and the contractors contained promises that detainees would not be abused, it contained “no provisions ... that express specifically any intent to confer a right to performance on any of the detainees.”⁴⁸

Moreover, in *Moore v. Gaither* a prisoner’s third-party claim was denied on the basis of explicit language excluding third-party rights.⁴⁹ The prisoner challenged disciplinary actions by a private

³⁷*Id.* (quoting Richard A. Lord, *WILLISTON ON CONTRACTS* § 37:8 at 70 (4th ed. 2000)).

³⁸*Id.* at 311.

³⁹*Id.*

⁴⁰*Miller v. Corrections Corporation of America*, 239 Fed. App’x. 396 (9th Cir. 2007). The *Rathke* court specifically disapproved the lower court decision in *Miller*, which relied on a broad application of RESTATEMENT § 313(2).

⁴¹*Ogunde v. Prison Health Services Incorporated*, 645 S.E.2d 520 (Va. 2007).

⁴²*Id.* at 526.

⁴³*Id.* (quoting *Professional Realty Corporation v. Bender*, 222 S.E.2d 810, 812 (Va. 1976)).

⁴⁴*Id.*; accord *Murns v. City of New York*, No. 00-9590, 2001 WL 515201, at *5 (S.D.N.Y. 2001) (prisoners were intended beneficiaries where hospital “agreed to provide medical services to the inmates of City correctional facilities, and ... performed the contract by providing medical services directly to the inmates”).

⁴⁵*Jama*, 334 F. Supp. 2d at 662, 687. The court did not specify whether New Jersey or federal law applied and said that either would lead to the same result. *Id.* at 686.

⁴⁶*Id.* at 688 (citing *Nguyen*, 548 F. Supp. 1333 (W.D. Pa. 1982), *aff’d*, 719 F.2d 52 (3d Cir. 1983)).

⁴⁷*Id.* at 688.

⁴⁸*Id.*

⁴⁹*Moore v. Gaither*, 767 A.2d 278 (D.C. 2001).

corrections company, which had promised to follow District of Columbia regulations with regard to prisoners' rights. However, the contract with the district contained boilerplate language that "the provisions of this Agreement are for the sole benefit of the Parties hereto and shall not be construed as conferring any rights on any other person."⁵⁰ Although the right to counsel allegedly violated by the company was clearly incorporated in the agreement, the D.C. Court of Appeals ruled that "Gaither cannot reasonably claim the right she now seeks to assert in light of this explicit and, in our view, dispositive provision."⁵¹

IV. Housing Cases

Exclusionary clauses have also been a bar to third-party claims in housing cases. In *Anderson v. District of Columbia Housing Authority* the D.C. Court of Appeals did not consider the merits of a public housing tenant's third-party beneficiary claim because the local housing authority's contract with the U.S. Department of Housing and Urban Development (HUD) stated that a family in public housing "is not a party to or a third party beneficiary of" the contract.⁵² The court held that the third-party claim "must be rejected on its face because of the plain language in the [HUD] contract limiting her ability to claim such status."⁵³ Nearly iden-

tical language appears in HUD regulations and in its contracts with other local authorities.⁵⁴

Even without an exclusionary clause, public housing residents were unsuccessful in *Wallace v. Chicago Housing Authority*, which concerned relocation rights when homes were demolished to make way for mixed-income housing.⁵⁵ Residents claimed that the city housing authority breached its agreement with HUD by failing to provide adequate relocation services. Since HUD was not a party, the district court applied Illinois law, which has a "strong presumption" against third-party rights.⁵⁶ Although the contract provided that one of its purposes was to "design and test innovative methods of providing housing and delivering services to low-income families," the court concluded that the language of the agreement generally focused on the obligations of the federal and state agencies.⁵⁷ The court further stated that, although the contract incorporated the housing authority's contracts with residents, "the very fact that the ... Agreement envisions" separate contracts for residents "undercut[]" the plaintiff's claims.⁵⁸ Noting that Illinois third-party law is "much more stringent" than federal law, the court concluded that the agreement did not show that the parties "unequivocally intended to confer a benefit enforceable by Plaintiffs."⁵⁹

⁵⁰*Id.* at 282.

⁵¹*Id.* at 288; accord *Walters v. Kautsy*, 680 N.W.2d 1 (Iowa 2004) (prisoners not third-party beneficiaries of contract between Department of Corrections and state public defender due to exclusionary clause).

⁵²*Anderson v. District of Columbia Housing Authority*, 923 A.2d 853, 863 n.20 (D.C. 2007).

⁵³*Id.* at 863. See also *Fort Lincoln*, 2008 WL 731562, at *8-9 (invoking "no other person than a party" language to reject residents' third-party claim under urban redevelopment contract).

⁵⁴See 24 C.F.R. § 982.456(b)(1) (2007); *Kirby v. Richmond Redevelopment and Housing Authority*, No. 3:04-791, 2005 WL 5864797, at *6 (E.D. Va. 2005) (rejecting tenants' third-party claim based on this language); *Dewakuku v. Martinez*, 271 F.3d 1031 (Fed.Cir. 2001) (rejecting claim against HUD based on exclusionary clause); *Garreaux v. United States*, No. 07-3021, 2008 WL 895825, at *9 (D. S.D. March 31, 2008) (same). See also *Johnson v. Housing Authority of Jefferson Parish*, No. 04-1128, 2004 WL 2414095, at *2 n.2 (E.D. La. 2004) (plaintiffs abandoned third-party contract claim in light of exclusionary clause). But see *Maglies v. Estate of Guy*, 936 A.2d 414, 433-34 (N.J. 2007) (Hoens, J., dissenting) (HUD contracts and regulations, including exclusionary clause, draw "a sharp distinction" between tenants and other family members).

⁵⁵*Wallace*, 298 F. Supp. 2d at 724-25.

⁵⁶*Id.* at 724.

⁵⁷*Id.*

⁵⁸*Id.*

⁵⁹*Id.* The court noted, however, that this conclusion did not preclude the plaintiffs from pursuing claims under their own contracts with the Chicago Housing Authority in state court. *Id.*

In *Campbell v. Boston Housing Authority* the high court of Massachusetts affirmed that public housing tenants generally had enforceable third-party rights absent an exclusionary clause.⁶⁰ The court permitted a suit by a tenant harmed by lead poisoning in accord with court precedent but stated that an exclusionary clause would render that precedent “irrelevant.”⁶¹

V. A Developing Area of Law

Contract law is an important avenue for enforcing the rights of individuals who receive services from private contractors and local agencies under federal and state contracts. Advocates need to familiarize themselves with applicable state laws to ascertain whether to bring such claims. Equally important in deciding whether to bring such claims is a careful review of the contract language, particularly looking into whether a clause excludes enforcement by third-party beneficiaries.

There are good legal arguments why exclusionary clauses should not bar claims by the beneficiaries of government contracts. One district court judge, whose opinion was later overruled, said that a contract simultaneously ensuring decent housing for low-income people and removing any contract law remedy that residents would have to cure defective housing made a mockery of the federal housing program.⁶² Whether the ordi-

nary discretion that the Restatement confers upon contracting parties applies to federal agencies in the face of a clear legislative intent is unclear since programs such as Medicaid and Section 8 have no conceivable purpose other than to benefit their recipients.⁶³ Nevertheless, in the past six years there have been no reported cases in which exclusionary clauses in government contracts have been overcome.

Administrative advocacy may be more effective than litigation in the area of third-party beneficiary claims especially if a future administration is sympathetic to the needs of the poor. For example, since HUD has drafted regulations and contracts that exclude third-party claims, a new HUD administration could change both the regulations and contract language to be receptive to enforcement by residents. Advocacy with state administrative agencies could strengthen language in state contracts with Medicaid and prison service providers to specify the intent to permit beneficiary enforcement.

In sum, numerous recent cases hold that, in the absence of an exclusionary clause, a government contract can be enforced by those who benefit from its terms. Advocates for the poor should seek out strong cases that can contribute to this developing area of law.

⁶⁰*Campbell v. Boston Housing Authority*, 823 N.E.2d 363 (Mass. 2005).

⁶¹*Id.* at 370–71.

⁶²*Dewakuku v. Cuomo*, 107 F. Supp. 2d 1117, 1134 (D. Ariz. 2000), rev'd, 271 F.3d 1031 (Fed. Cir. 2001).

⁶³See Hitov & Deford, *supra* note 1, at 593–94 (outlining arguments and citing cases); RESTATEMENT (SECOND) OF CONTRACTS § 313(1) (general contract rules apply to public contracts “except to the extent that application would contravene the policy of the law authorizing the contract”). See also *Prouty*, 121 Cal. App. 4th (in a commercial contract case, specific promise of employer to provide severance pay to laid-off employees trumped general exclusion of third-party claims).

Subscribe to CLEARINGHOUSE REVIEW

Annual subscription price covers

- six issues (hard copy) of CLEARINGHOUSE REVIEW and
- www.povertylaw.org access to current issues of CLEARINGHOUSE REVIEW and all issues from 1990

Annual prices (effective January 1, 2006):

- \$250—Nonprofit entities (including small foundations and law school clinics)
- \$400—Individual private subscriber
- \$500—Law school libraries, law firm libraries, other law libraries, and foundations (price covers a site license)

Subscription Order Form

Name _____

Fill in applicable institution below

Nonprofit entity _____

Library or foundation* _____

Street address _____ Floor, suite, or unit _____

City _____ State _____ Zip _____

E-mail _____

Telephone _____ Fax _____

*For Internet Provider-based access, give your IP address range _____

Order

Number of subscriptions ordered _____

Total cost (see prices above) \$ _____

Payment

- My payment is enclosed.
*Make your check payable to **Sargent Shriver National Center on Poverty Law.***

- Charge my credit card: Visa or Mastercard.

Card No. _____ Expiration Date _____

Signature _____

We will mail you a receipt.

- Bill me.

Please mail or fax this form to:
Sargent Shriver National Center on Poverty Law
50 E. Washington St. Suite 500
Chicago, IL 60602
Fax 312.263.3846

CUT HERE