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## Private Law: Obligations

Katherine Shaw Spaht

H. Alston Johnson III

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## OBLIGATIONS

*Katherine Shaw Spaht\* and H. Alston Johnson III\*\**

## NATURAL OBLIGATIONS

When determining whether a particular promise is enforceable and has legal effect, the classifications of obligations—moral, natural and civil<sup>1</sup>—is significant.<sup>2</sup> If the obligation which induces the promisor to promise is natural, the resulting promise and acceptance form an enforceable contract—a perfect civil obligation; and anything paid in fulfillment of a natural obligation cannot be recovered.<sup>3</sup> The effect of a natural obligation is thus to “characterize as onerous a certain contract that would otherwise be considered gratuitous and therefore subject to requirements of form.”<sup>4</sup>

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\* Associate Professor of Law, Louisiana State University.

\*\* Associate Professor of Law, Louisiana State University.

1. LA. CIV. CODE art. 1757: “Obligations are of three kinds: imperfect obligations, natural obligations, and civil or perfect obligations. 1. If the duty created by the obligation operates only on the moral sense, without being enforced by any positive law, it is called an imperfect obligation, and creates no right of action, nor has it any legal operation. The duty of exercising gratitude, charity and the other merely moral duties, is an example of this kind of obligation. 2. A natural obligation is one which can not be enforced by action, but which is binding on the party who makes it, in conscience and according to natural justice. 3. A civil obligation is a legal tie, which gives the party, with whom it is contracted, the right of enforcing its performance by law.”

A suggested source of this tripartite division of obligations is Pothier. See 1 POTHIER, A TREATISE ON THE LAW OF OBLIGATIONS OR CONTRACT 191-98 (Evans transl. 1806). See also 1 LITVINOFF, OBLIGATIONS § 339 in 6 LOUISIANA CIVIL LAW TREATISE 590 (1969) [hereinafter cited as LITVINOFF].

2. See the text at note 4, *infra*. Professor J. Denson Smith in *A Refresher Course in Cause*, 12 LA. L. REV. 1, 17-18 (1951): wrote: “To find therefore that an obligation is based on a natural obligation is to find that it is not a donation. At the same time if based on a merely moral obligation and a depletion of patrimony is involved it becomes a donation and its character as purely gratuitous, onerous, or remunerative has to be determined. *The concept of natural obligations thus serves as a means for classifying or characterizing the resulting contract.*” (Emphasis added). See also 2 COLIN ET CAPITANT, COURS ELEMENTAIRE DE DROIT CIVIL FRANCAIS no. 278 (10th ed. 1953); 1 LITVINOFF at § 305.

3. LA. CIV. CODE art. 1759: “Although natural obligations can not be enforced by action, they have the following effect: 1. No suit will lie to recover what has been paid, or given in compliance with a natural obligation. 2. A natural obligation is a sufficient consideration for a new contract.” For a detailed discussion of the effect of natural obligations, see 1 LITVINOFF at §§ 355-57.

4. 1 LITVINOFF at § 305. For an exhaustive historical treatment of natural obligations at Roman, French and German law see *id.* at §§ 306-32.

Unlike the French Civil Code,<sup>5</sup> Louisiana Civil Code article 1758 enumerates the obligations which are to be considered natural.<sup>6</sup> Because of the effects of a natural obligation under Civil Code article 1759,<sup>7</sup> the legal problem arises—is the listing merely illustrative or is it exclusive? In the context of a legal malpractice suit, the Louisiana Court of Appeal held in *Muse v. St. Paul Fire and Marine Insurance Co.*<sup>8</sup> that the listing is illustrative, not exclusive. Recognizing that its decision was in conflict with the 1903 Louisiana Supreme Court case of *Succession of Miller v. Manhattan Life Insurance Co.*,<sup>9</sup> the court cited “numerous” subsequent decisions

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5. The French Civil Code does not contain a corresponding article to Louisiana Civil Code article 1758. According to Professor Litvinoff, “[t]he Code [French] neither defines nor lists natural obligations. The brevity of the legal text imposed upon doctrine the task of clarifying and explaining its underlying theory. The subject, however, is still controversial, and at least three different currents of opinion are significant: the classic doctrine, the jurisprudential approach, and a modern doctrine that attempts to identify natural obligation and moral duty.” 1 LITVINOFF at § 309.

The classic doctrine attempted to draw a line between natural and moral obligations, and considered natural obligations as one of two types: (a) either the remnant of a civil obligation or (b) instances in which a legal obstacle prevented a civil obligation from coming into existence. *Id.* at §§ 310-12. The French jurisprudence, on the other hand, refused to follow the classical approach and instead adopted a much more liberal view: “Taking the decisions on this matter as a whole, the conclusion might very well be reached that the courts see a natural obligation whenever they deem that a consideration of a moral order, not consecrated by the positive law, should be recognized. When an act of promising or giving does not create or result in a civil obligation, but cannot be considered as a pure liberality inspired by the idea of beneficence or gratification, the courts admit the existence of a natural obligation.” *Id.* at § 314. Modern doctrine espouses that the common thread in identifying a natural obligation is a “duty of conscience.” The supporters of this view are careful not to assimilate completely natural obligations with moral ones. For a moral duty to give rise to a natural obligation, certain requirements must be met: (1) “The moral duty must be one of justice and not of simple charity.” (2) “The moral duty must be recognized and assumed by the obligor through voluntary payment or the promise to pay, as he is not legally compelled to fulfill it.” (3) “Recognition of the moral duty must not impair the public order.” *Id.* at § 320.

6. LA. CIV. CODE art. 1758: “Natural obligations are of four kinds: 1. Such obligations as the law has rendered invalid for the want of certain forms or for some reason of general policy, but which are not in themselves immoral or unjust. 2. Such as are made by persons having the discretion necessary to enable them to contract, but who are yet rendered incapable of doing so by some provision of law. 3. When the action is barred by prescription, a natural obligation still subsists, although the civil obligation is extinguished. 4. There is also a natural obligation on those who inherit an estate, either under a will or by legal inheritance, to execute the donations or other dispositions which the former owner had made, but which are defective for want of form only.”

7. See note 3, *supra*.

8. 328 So. 2d 698 (La. App. 1st Cir. 1976).

9. 110 La. 652, 34 So. 723 (1903). In *Succession of Miller* the deceased husband

in which other obligations were found "to be natural obligations although they do not fit within either of the four categories in said article."<sup>10</sup> In *Muse* the plaintiff sued his attorney and the attorney's insurer to recover the sum of \$1,873.33 as damages for allegedly erroneous legal advice given to him by defendant attorney. The advice given was that the plaintiff should pay this sum, collected from plaintiff's health and accident insurer, to Charity Hospital for medical services rendered to the plaintiff. According to the attorney, the sum was subject to a lien in favor of the Louisiana Health and Human Resources Administration (LHHRA).<sup>11</sup> Plaintiff complied with the advice given by the defendant attorney<sup>12</sup> and only subsequently concluded that Charity did not have a lien on the proceeds. The object of the suit was reimbursement from the attorney for the sum paid Charity as a result of the attorney's advice. The lower court's judgment that the attorney had negligently breached his duty to plaintiff was affirmed on appeal.

The defendants made LHHRA a third party defendant seeking recov-

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purchased a life insurance policy and named his administrators, executors and assigns as the beneficiaries. Subsequently, the deceased assigned the ownership of the policy to his wife. The administrators of his succession claimed that the assignment was a donation and as such void for want of proper form (*see* LA. CIV. CODE art. 1536). The wife asserted the defense that the assignment was an onerous contract in that it was made "in satisfaction and discharge of his [husband's] obligation to make provision for his wife against the time when he should no longer be there to support her . . . ." *Id.* at 656, 34 So. at 724. Although the court recognized that the deceased was not moved by a pure spirit of liberality to make the assignment but by a stern sense of duty, the court relied upon the distinction between moral and natural obligations in Civil Code article 1757 and found that, "it [Civil Code] proceeds to classify natural obligations into four distinct categories, in none of which could we place this moral obligation of the husband." *Id.* at 657, 34 So. at 725. The result in *Succession of Miller* has now been changed by statute, *see* LA. R.S. 22:1521 (1950). *Succession of Miller* was cited and followed in *Succession of Burns*, 199 La. 1081, 7 So. 2d 359 (1942), *noted* in 17 TUL. L. REV. 310 (1942).

10. 328 So. 2d at 705 (La. App. 1st Cir. 1976). *See, e.g.*, *Mortgage Investment v. Natal*, 181 La. 651, 160 So. 128 (1935) (an endorser held liable despite a release of his obligation resulting from an extension granted the principal obligor); *Foster & Glassell Co. v. Harrison*, 168 La. 500, 122 So. 595 (1929) (a son being held to pay an unenforceable debt against parent's estate); *Interstate Trust & Banking Co. v. Irwin*, 138 La. 325, 70 So. 313 (1915) (a bank director held liable on a note given to prevent impairment of bank stock). *See also* Martin, *Natural Obligations*, 15 TUL. L. REV. 497 (1941); Comment, *Natural Obligations*, 12 LA. L. REV. 79 (1951); Note, 17 TUL. L. REV. 310 (1942).

11. *See* LA. R.S. 46:8 (Supp. 1972); 9:4752-53 (Supp. 1970); 22:646 (Supp. 1958).

12. Two checks—one dated March 14, 1973, for \$800 and the other dated August 16, 1973, for \$1,073.33—made payable to plaintiff client and defendant attorney were presented to them by plaintiff's health and accident insurer. Upon the advice of defendant attorney after endorsement by both plaintiff and defendant, the checks were sent to counsel for Charity Hospital in payment on the hospital bill.

ery of the same amount, claiming that the sum was erroneously paid to LHHRA and that it would be "unjust enrichment"<sup>13</sup> to allow it to retain the said sum. In defense to the third party demand LHHRA contended that plaintiff was under a natural obligation to pay and thus there could be no recovery even if the payment were made by mistake. In reversing the trial court's judgment against LHHRA, the court of appeal held that the listing in article 1758 was not exclusive and concluded that plaintiff was under a natural obligation to repay LHHRA for medical services rendered:

Under general contract law, an individual unquestionably is obligated to pay the fair cost of medical services rendered to him by a hospital, either private or state supported. However, our legislature has established the policy that this obligation is not to be enforced against indigents receiving medical service in a state supported hospital. (*See* LA. R.S. 46:1 *et seq.*). Nevertheless, an obligation to pay exists, albeit unenforceable, against the indigent, as is evidenced by statutory provision permitting enforcement against non-indigents and third parties liable to the indigent in either contract or tort.(LA. R.S. 46:6-11; LA. R.S. 9:4571-4755).<sup>14</sup>

Therefore, under Civil Code article 1759(2) any money paid in fulfillment of a natural obligation cannot be recovered. Furthermore, even if a person pays by mistake, believing himself to be a debtor, he cannot recover what has been paid if a natural obligation to pay existed.<sup>15</sup>

In analyzing the reasoning of the court in *Muse*, it is first necessary to determine whether its decision that article 1758 was illustrative was necessary. Article 1758(1) provides that "[s]uch obligations as the law has rendered invalid for the want of certain forms or for some reason of general policy, but which are not in themselves immoral or unjust," are natural obligations. Adopting the same analysis used by the court in *Muse*, plaintiff's obligation was one rendered "unenforceable" for some reason of general policy (legislative policy in favor of protection for indigents), which

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13. LA. CIV. CODE art. 1965: "The equity intended by this rule is founded in the christian [religious] principle not to do unto others that which we would not wish others should do unto us; and on the moral maxim of the law that no one ought to enrich himself at the expense of another. . . ." For an excellent discussion of the quasi-contractual theory of unjust enrichment, see J. SMITH, LOUISIANA AND COMPARATIVE MATERIALS ON OBLIGATIONS (4th ed. 1973).

14. 328 So. 2d at 705.

15. LA. CIV. CODE art. 2302: "He who has paid through mistake, believing himself a debtor, may reclaim what he has paid."

LA. CIV. CODE art. 2303: "To acquire this right, it is necessary that the thing paid be not due in any manner, either civilly or naturally. A natural obligation to pay will be sufficient to prevent the recovery."

is not in itself immoral or unjust. According to Professor Litvinoff in his treatise on Obligations, "[t]hese obligations [1758(1)] result from transactions fulfilling all the requirements of a valid contract, but not provided with an action because of considerations of social utility."<sup>16</sup>

Gambling debts are the traditional example.<sup>17</sup> However, a more analogous example is *Ledoux v. Buhler*<sup>18</sup> in which the court held enforceable a promise made after the Civil War to honor a promissory note executed during the war by the parties—one a resident of the North, the other of the South. Had the court in *Muse* concluded that the obligation in question was natural under Civil Code article 1758(1), it could have avoided the legal issue of whether article 1758 is illustrative.

However, the court deliberately chose to base its decision upon a determination that the catalogue in article 1758 is an illustrative as opposed to exclusive listing. Although the Louisiana Supreme Court in *Succession of Miller* specifically held that the listing was exclusive, the great weight of the jurisprudence is to the contrary,<sup>19</sup> as the court in *Muse* observed. The effect of those decisions was to recognize certain obligations as natural which did not fall within the prescribed categories of article 1758.<sup>20</sup> Whether the categories are illustrative or exclusive has been the subject of debate for years, and no doubt the debate will continue. There are sound

16. 1 LITVINOFF at § 343.

17. *Id.* See also LA. CIV. CODE art. 2983; Comment, *The Non-Actionable Aleatory Contract*, 22 TUL. L. REV. 311, 315 (1947).

18. 21 La. Ann. 130 (1869).

19. See note 10, *supra*. See also *Atkins v. Commissioner of Internal Revenue*, 30 F.2d 761, 763 (5th Cir. 1939) (federal court refused to adopt the interpretation that article 1758 was an exclusive listing and found a natural obligation "resting upon a parent to do equity between his children by equalizing his gifts to them during his lifetime"); *Central Savings Bank & Trust Co. v. Monroe*, 194 La. 743, 194 So. 767 (1940) (court found a natural obligation of the bank to contribute its proper share to the support of the municipal government from which it derived its benefits); *Barth v. LaCroix*, 29 La. Ann. 326 (1877) (court found that "remuneration" to a servant for long and faithful service after the master's death was in fulfillment of a natural obligation); *Beckley v. Clark*, 8 La. Ann. 8 (1853) (court found a natural obligation owed by defendant, who was responsible for the death of plaintiff's husband); *Beck v. Howard*, 3 La. Ann. 501 (1848), *Back v. Cahn*, 3 La. Ann. 101 (1848), *Booty v. American Fin. Corp.*, 224 So. 2d 512 (La. App. 2d Cir. 1969) (courts held that a debt discharged by a certificate of bankruptcy is a natural obligation); *Cook v. City of Shreveport*, 144 So. 145 (La. App. 2d Cir. 1932) (court held that there was a natural obligation to pay an indebtedness even though the lien filed was invalid).

20. In many of the cases cited in note 19, *supra*, the courts used the judicial technique of analogy to one of the categories in article 1758 in finding a natural obligation.

arguments that the listing should be considered exclusive,<sup>21</sup> for which there is additional support in the language of the redactors.<sup>22</sup> However, consistently with that language, the judiciary can interpret article 1758 as illustrative by concluding that it is actually a catalogue of moral duties found “concrete and urgent enough to be raised to the category of natural obligation.”<sup>23</sup> And, generally, other jurisdictions with such a catalogue of natural obligations assert that the list is illustrative.<sup>24</sup> But such a construction portends danger, which was the precise concern of the legal scholars who drafted our Code.<sup>25</sup> Should every moral duty—*e.g.*, exercising charity—be considered a natural obligation? As suggested elsewhere,<sup>26</sup> a functional approach to the nature of natural obligations is necessary to restrict the moral duties elevated to the status of natural obligations. Professor Litvinoff suggests that if article 1758 is to be considered illustrative, then a moral duty, to be accorded the effects of article 1759, must fulfill the following two requirements: “(1) [i]t must be owed by one particular person to another predetermined person, and not to anybody in

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21. See, *e.g.*, Note, 7 LA. L. REV. 445 (1947). In Professor Litvinoff's treatise, he explains the position in favor of an exclusive interpretation as follows: “If they [natural obligations] are to be considered as the remnant of a degenerate or abortive civil obligation, as classic French doctrine did, [see note 5, *supra*] the answer should favor the exclusive character of the list, because, according to this view, such obligations are exceptional, and in matter of exceptions none other than those anticipated by the law should be admitted. . . . As this series of instances is the one incorporated, in greater or lesser extent, into the codes that contain a list, including that of Louisiana, the conclusion seems to follow that code articles enumerating the situations giving rise to natural obligations should be interpreted as exclusive.” 1 LITVINOFF at § 351. Cf. Martin, *Natural Obligations*, 15 TUL. L. REV. 497 (1941); Comment, *Natural Obligations*, 12 LA. L. REV. 79 (1951).

22. “Although this kind of obligation [moral obligation] has no legal effect whatever, its definition is introduced because it is frequently referred to by commentators and sometime with such loose expressions, as might induce a belief that it had the effect of a natural obligation, unless the contrary was declared. In the common law of England, ‘natural affection’ which is an imperfect obligation, is a good consideration for a conveyance. As we do not mean to sanction this principle, it was the more necessary to declare it, because of the danger of introducing from the jurisprudence of our sister states principles inconsistent with that of our own.” La. Legal Archives: *Projet of the Civil Code of 1825* 226 (1937), comment to article 1751(1).

23. 1 LITVINOFF at § 351 (Emphasis added).

24. For example, countries with such a catalogue of natural obligations are Argentina, Chile, Colombia, Ecuador, Honduras, and Uruguay. See 1 LITVINOFF at § 351 n.95.

25. See note 22, *supra*. See also Comment, *Natural Obligations*, 12 LA. L. REV. 79 (1951).

26. 1 LITVINOFF at § 354.

general. . . . (2) [i]ts fulfillment must be susceptible of pecuniary evaluation."<sup>27</sup> Adopting this approach, the judiciary could alleviate many of the objections of critics and yet retain the flexibility necessary in the contractual field.

### THIRD PARTY BENEFICIARY CONTRACTS

Several cases decided during the recent term continue what must be termed, in the usually calm field of obligations, a virtual explosion of decisions using principles derived from article 1890 of the Civil Code which recognizes that contracting parties may agree between themselves that a third person not a party to the contract may derive benefit from it.<sup>28</sup> The range of subject matters covered in these cases indicates that contracting parties may make virtually any object desired by them a stipulation for the benefit of a third party.<sup>29</sup>

By definition, a third party beneficiary contract envisions three separate persons. Two of these are the parties to the contract, a promisor and a stipulator, sometimes referred to as a promisee. The third person is the beneficiary of the agreement between the promisor and the stipulator. The essence of the agreement is that the stipulator or promisee, as a cause for the confection of the agreement, stipulates some advantage for the beneficiary, which ordinarily is to result from some performance in his favor by the promisor. The promisor, for his part, agrees to perform in favor of the beneficiary in exchange for some cause or consideration offered by the stipulator. It can therefore be said that the promise to perform runs in favor of the stipulator (thus he is the promisee), and the performance itself runs in favor of the beneficiary.

#### *Relationship between the stipulator and the beneficiary*

The most important factor to be examined in determining whether this type of contract exists is the relationship between the stipulator and the beneficiary. Ordinarily, the stipulator's motive in making the agreement

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27. *Id.*

28. LA. CIV. CODE art. 1890: "A person may also, in his own name, make some advantage for a third person the condition or consideration of a commutative contract, or onerous donation; and if such third person consents to avail himself of the advantage stipulated in his favor, the contract can not be revoked." The French text of the article, unchanged since the Code of 1825, would better be translated "condition or price of a commutative contract." See 1972 COMPILED EDITION OF THE CIVIL CODES OF LOUISIANA art. 1890 (J. Dainow ed.)

29. In addition to the cases discussed in this symposium article, see *Mallet v. Thibault*, 212 La. 79, 31 So. 2d 601 (1947) (restriction in chain of title).

benefiting the third party will be apparent. Such a motive may offer sufficient justification for enforcing obligations to a person not a party to the contract—a conclusion otherwise somewhat unorthodox. Professor J. Denson Smith, in an article which remains the classic discussion of third party beneficiary contracts in Louisiana, summarized the relationships which might lead to such a conclusion:

In fine, in undertaking to determine whether an advantage for a third party has been provided by a contract between others, the following factors are important: (1) the existence of a legal relationship between the promisee and the third person involving an obligation owed by the promisee to the beneficiary which performance of the promise will discharge; (2) the existence of a factual relationship between the promisee and the third person, where, (a) there is a possibility of future liability either personal or real on the part of the promisee to the beneficiary against which performance of the [promise] will protect the former; (b) securing an advantage for the third person may beneficially affect the promisee in a material way; (c) there are ties of kinship or other circumstances indicating that a benefit by way of gratuity was intended.<sup>30</sup>

This article, and particularly this paragraph, has often been cited with approval by Louisiana courts<sup>31</sup> and has had substantial influence on the course of the jurisprudence decided under article 1890.

The first case in this latest wave of decisions concerning third party beneficiary contracts, or *stipulations pour autrui*, was *Andrepoint v. Acadia Drilling Co.*<sup>32</sup> Plaintiff entered into an oral surface lease with a Mrs. Murphy; subsequently Mrs. Murphy entered into a mineral lease with the defendant. The mineral lease contained the statement: "The Lessee shall be responsible for all damages caused by Lessee's operations." The defendant came onto the land, eventually drilled a dry hole, and departed. In the interim, its road construction, waste pits and impairment of drainage damaged plaintiff's soybean crop. When defendant departed, it "settled" any possible claim by Mrs. Murphy but despite repeated attempts, plaintiff was unable to get any compensation at all for the damages to his crop. He

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30. Smith, *Third Party Beneficiaries in Louisiana: The Stipulation Pour Autrui*, 11 TUL. L. REV. 18, 58 (1936).

31. *Hargroder v. Columbia Gulf Transmission Co.*, 290 So.2d 874 (La. 1974); *Andrepoint v. Acadia Drilling Co.*, 255 La. 347, 231 So.2d 347 (1969); *Snelling & Snelling v. Delta Data Serv. Inc.*, 259 So.2d 446 (La. App. 4th Cir.), *cert. denied*, 261 La. 1053, 262 So.2d 39 (1972).

32. 255 La. 347, 231 So.2d 347 (1969).

brought suit against the defendant on a tort theory, alleging in the alternative that he was entitled to claim damages under the mineral lease as a third party beneficiary.

On rehearing, the supreme court agreed with plaintiff's alternative demand, holding that there was a legal relationship between the stipulator (Mrs. Murphy) and the plaintiff (that of lessor-lessee), involving an obligation owed by the stipulator to the plaintiff that performance of the promise would discharge. That obligation was to maintain the surface lessee in peaceful possession of the thing leased, and compensation for his damages would discharge that obligation. The court also held that a factual relationship which might be productive of future liability was also present, and thus found Professor Smith's criteria satisfied on two counts.

A similar case decided in 1974 affirmed the supreme court's dedication to this principle. In *Hargroder v. Columbia Gulf Transmission Co.*,<sup>33</sup> plaintiff was also a surface lessee who alleged certain damages had occurred due to the construction of a pipeline by the defendant. The right to construct the pipeline had been granted by the landowner-lessor. That construction agreement stipulated that the defendant agreed to pay "such damages which may arise to growing crops, timber, or fences from the construction of said line" without reference to any particular party who might bring the action. Unlike *Andrepoint*, the agreement further stipulated that defendant was not obligated to pay "grantors or any subsequent owner . . . any damages resulting from the construction of the first pipeline, such damages having been anticipated and paid in advance at the time of execution of this instrument." Despite that language, which would superficially appear to negative any stipulation for a third party, the supreme court held that there was a *stipulation pour autrui*, overruled the lower courts' sustaining of the peremptory exception of no right of action as to the surface lessee, and remanded for trial. Two justices agreed with the result, but thought the theory for recovery ought to be article 2315 of the Civil Code.

Another example of the creditor-debtor legal relationship between the stipulator and the beneficiary which helped the court conclude that the parties intended a third party beneficiary contract is found in *Snelling & Snelling v. Delta Data Service, Inc.*<sup>34</sup> Plaintiff was an employment agency which had placed an employee with the defendant. A commission was due the plaintiff by the employee for this placement service. In a letter to the employee confirming his acceptance of employment, the defendant stated

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33. 290 So.2d 874 (La. 1974).

34. 259 So.2d 446 (La. App. 4th Cir.), *cert. denied*, 261 La. 1053, 262 So.2d 39 (1972).

that it would “pay the placement fee with the understanding that you will repay the placement fee if you leave our employ within eighteen months.” When the placement fee went unpaid, plaintiff sued the employer, asserting that it was liable with the employee for the fee because in the contract of employment, a stipulation in favor of the employment agency had been made. The court agreed, presumably on the basis that the employee (stipulator) stood in the legal relationship of debtor to the employment agency (creditor beneficiary), and performance of the employer’s promise to pay the placement fee would discharge that obligation.

The second factor listed by Professor Smith is the existence of a factual relationship between the stipulator and the beneficiary with the possibility of future liability on the part of the stipulator to the beneficiary, which performance of the promise will discharge. The most common example of this situation is a construction bond. The beneficiaries of such a bond may be persons who have performed work or provided materials for construction for an owner of an immovable. This factual relationship may be productive of future liability to those persons by the owner if their just claims for services or materials are not paid by the contractor. To avoid this liability, a contract is entered in which the owner stipulates, and pays a premium for, coverage of these claims by the promisor, the surety.<sup>35</sup>

While this is the ordinary interpretation of such a bond, this conclusion does not always follow. For example, in *Arrow Construction Co., Inc. v. American Employers Insurance Co.*,<sup>36</sup> it was held that the language of the bond in question did not envision a claim by the plaintiff and any benefit under the bond was denied to it. Plaintiff had rented certain equipment to a sub-contractor, which had agreed with a general contractor to perform work for an owner and was bonded by defendant surety. The rental fee went unpaid, and plaintiff filed suit against the surety. The surety had agreed to be liable for all obligations of the sub-contractor under the private works act, and it seemed to be agreed that plaintiff’s claim was not lienable under that act. The surety had also agreed, in effect, to hold the obligee on the bond (the owner) harmless; and since the plaintiff had no claim against the owner under the private works act, the surety had no obligation under the bond to protect the owner, and thus no obligation to the plaintiff. The court acknowledged that other bonds had been interpreted in a different fashion, but placed its emphasis on the wording of this particular bond.<sup>37</sup>

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35. See generally Smith, *supra* note 30, at 35-47.

36. 273 So.2d 582 (La. App. 1st Cir. 1973).

37. There is some doubt whether even the difference in wording should have produced a holding that a third party beneficiary contract was not created. Consider

Other cases decided in the past few terms are examples of the final two factors mentioned by Professor Smith. In *Albert v. Cuna Mutual Insurance Society*,<sup>38</sup> the court apparently felt that there was a factual relationship between the stipulator and the beneficiary such that securing an advantage for the beneficiary might beneficially affect the stipulator in a material way. Plaintiff was a member of a credit union, who had certain outstanding loans at a time when he claimed to have become totally and permanently disabled. Defendant insurer had issued a group policy which provided that it would pay any outstanding loan balance up to \$10,000 for any credit union member who became totally and permanently disabled before his sixtieth birthday. When plaintiff presented defendant with a demand for the total loan balance due on the basis of his being totally and permanently disabled, it was rejected and litigation ensued. Plaintiff first sought a judgment in his favor in the amount of the loan balance and subsequently amended his petition to demand a judgment ordering the defendant to pay that amount to the credit union. The trial court entered such an order. Defendant asserted that plaintiff had no right of action, since there was no contractual relationship between the parties. The appellate court rejected that argument on the basis that the contract in question was written for the benefit of debtor members of the credit union such as plaintiff, and he could assert rights under that contract as a third party beneficiary. Although the court does not examine the relationship, it appears that the credit union (stipulator) secured the advantage for its members of payment of loan balances upon disability, and such an advantage would at the same time beneficially affect the credit union in a material way—assuring security of repayment of what otherwise might become a bad debt.

*Woodfork v. Sanders*<sup>39</sup> illustrates the “ties of kinship or other circumstances indicating that a benefit by way of a gratuity was intended” by the stipulator to the beneficiary. Woodfork was the understandably frustrated universal legatee of a will drawn by the defendant attorney, who had permitted Woodfork to sign the will as a witness. When offered for probate, the will was declared invalid. Woodfork then brought an action for damages against defendant, but the court ruled that, as between the parties to that law suit, the will was valid. Accordingly, no damages could be awarded on the basis of its invalidity. However, the court rejected defendant’s other

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the criticism of the cases which the court cites as authority in Smith, *supra* note 30, at 37-42.

38. 255 So.2d 170 (La. App. 3d Cir. 1971).

39. 248 So.2d 419 (La. App. 4th Cir.), *cert. denied*, 259 La. 759, 252 So.2d 455 (1971) (“judgment not final”).

contention that since plaintiff was not a party to the attorney-client contract to draw up the will, he could make no claim under it for damages suffered. The court reasoned that the client had stipulated in the contract with the lawyer to confect a will in which the plaintiff was to be a beneficiary. Apparently, this was a benefit by way of gratuity, since no other relationship between the parties appears.

There are other decisions in which the relationship between the stipulator and the beneficiary is more difficult to classify. In *J.M. Brown Construction Co., Inc. v. D & M Mechanical Contractors, Inc.*,<sup>40</sup> it was held that a general contractor could sue a surety which had issued a bond in favor of the state of Louisiana, as required by statute, so that a surplus line insurance broker could do business within the state. A complicated series of financial collapses (subcontractor, surplus line broker, surety on construction bond) left the statutory surety for the surplus line broker as the only possible solvent defendant. The supreme court, citing *Andrepoint*, concluded that the purpose of the statute was to ensure payment of taxes and to protect citizens of Louisiana. Even though plaintiff was not mentioned in the bond as a beneficiary, its action was proper as long as it could show a causal relationship between the breach of the duty imposed by the statute and the loss it incurred.<sup>41</sup>

It is also difficult to classify the relationship in *Guste v. Simoni, Heck & Associates*,<sup>42</sup> a decision in this term in which the state of Louisiana was permitted to bring an action under a contract between the Louisiana Office Building Corporation, a state agency, and the defendant general contractor and sub-contractors. The supreme court held that the contract was intended for the benefit of the state "as the ultimate owner of the building."

Finally, in *F. Benjamin Toledano Insurance Agency, Inc. v. Toledano*,<sup>43</sup> an insurance agency not a party to a non-competition agreement was permitted to sue for its enforcement. The defendant, who happened to be president of the plaintiff insurance agency, approached another agency with an offer to sell all of the stock of the Toledano Insurance Agency. The insurance company accepted the offer and signed a purchase agreement, installing the defendant Toledano as president of both agencies and committing him to non-competition with those two agencies for five years if he

40. 275 So.2d 401 (La. 1973).

41. Difficulty in identifying the specific beneficiary will not defeat the possibility of a third party beneficiary contract. See *Pelican Well & Tool Supply Co. v. Johnson*, 194 La. 987, 195 So. 514 (1940); 1 LITVINOFF at § 24.

42. 331 So.2d 478 (La. 1976).

43. 292 So.2d 268 (La. App. 4th Cir. 1974).

should leave the employ of the two firms. Shortly thereafter, the defendant did quit and went into competition with the purchasing agency and with the Toledano agency. The Toledano agency, though not a party to the non-competition agreement, was permitted to assert rights under it. While the court did not examine the relationship between the beneficiary and the stipulator (presumably the purchasing agency), it held that the contract was clearly for the benefit of plaintiff.

While no specific issue is taken here with either the *J.M. Brown Construction Co.*, *Guste* or *Toledano* decisions, they appear to be focusing more on whether the contract, if enforced, will be beneficial to the plaintiff than on the relationship between the plaintiff and one of the contracting parties which might reveal a motive for the contract.<sup>44</sup> Article 1890 speaks in terms of a person making an advantage for a third person the "condition or consideration" of a commutative contract or onerous donation. Professor Smith also warns in his article:

But it is also true that not every promise, performance of which may be advantageous to a third person, will create in him an actionable right. The problem is to separate the cases where an advantage has been stipulated from those where the advantage relied upon is merely an incident of the contract between the parties.<sup>45</sup>

He suggests, of course, that the most practical approach to solution of the problem is to examine the relationship between the stipulator and the beneficiary to determine whether it will justify or support the conclusion that an advantage was intended and thus ought to be enforced.

The absence of such a relationship often leads to a conclusion that the third party is not a beneficiary of the contract and can assert no rights under it. In *Fontenot v. Marquette Casualty Co.*,<sup>46</sup> it was held that a tort victim is not the intended beneficiary of a re-insurance contract entered into by the alleged tortfeasor's insurer and another insurance company. In *Hertz Equipment Rental Corp. v. Homer Knost Construction Co.*,<sup>47</sup> a similar conclusion was reached in interpreting two insurance policies covering the lessor and the lessee respectively of heavy construction equipment.<sup>48</sup>

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44. This might have been behind the court's suggestion in *Stelly v. Gerber Products Co.*, 299 So.2d 529 (La. App. 4th Cir.), cert. denied, 302 So.2d 616 (La. 1974), that consumers might, as purchasers or third-party beneficiaries of a purchase, bring an action in contract for breach of the seller's warranty against redhibitory defects.

45. Smith, *supra* note 30, at 28.

46. 258 La. 671, 247 So.2d 572 (1971).

47. 273 So.2d 685 (La. App. 1st Cir. 1973).

48. See also *Brookshire v. Broussard*, 326 So.2d 893 (La. App. 3d Cir. 1976).

*Rights of the promisor against the beneficiary*

If the stipulator fails to perform on his promise to the promisor, then the promisor has no obligation to perform in favor of the beneficiary.<sup>49</sup> Some difficulty may arise, however, if the promisor has in fact already performed in favor of the beneficiary, and seeks to retract that performance. In *Pontchartrain Motor Co., Inc. v. Robert*,<sup>50</sup> the defendant's automobile had been damaged by Hurricane Betsy and declared a total loss by defendant's insurer. The insurer's adjuster contacted the plaintiff automobile agency and negotiated an agreement by which defendant could select a replacement automobile up to the allowed loss on the insured vehicle of \$5,477.00, paying any difference out of his own pocket. Pursuant to this agreement, defendant selected an automobile with a price of \$5,647.00 and tendered his check for the \$170.00 difference directly to the plaintiff agency. That check was accepted and the car delivered. The insurer sent a check for the balance but it was not paid due to insufficient funds; the insurer was then found to be insolvent. The agency sought payment from defendant of the balance of the purchase price. The underlying issue, of course, was whether the defendant or the plaintiff would bear the effect of the insolvency of the insurer. The court concluded that the defendant was only a third party beneficiary to the contract of sale between the insurer and the plaintiff, and was not a party to any contract with the plaintiff. Accordingly, the plaintiff had no right to recover the balance of the purchase price from defendant. Assuming that mere possession of the vehicle gives defendant no right to it, it seems that under these facts the defendant is entitled as a matter of law to the vehicle as against the plaintiff, without payment of the purchase price. What would the result have been if the car had not yet been delivered, and defendant was demanding its delivery?

*May the stipulation be penal in nature?*

In an agreement between a contractor and an owner for development of a subdivision, stipulated damages for delay in completion of the contract were specified at \$50.00 per day, payable to the owner. An additional \$50.00 per day was to be paid to the engineer on the project, "for actual additional expense incurred by reason of such delay." The engineering firm, while not a party to the contract, claimed to be a third party beneficiary under the contract and sued the contractor for some \$55,000.00 in delay

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49. *Union Bank v. Bowman*, 9 La. Ann. 195 (1854).

50. 229 So.2d 458 (La. App. 4th Cir. 1969), *cert. denied*, 255 La. 554, 232 So.2d 77 (1970).

damages. The claim was dismissed by the trial court on the ground that the stipulation was penal in nature and unenforceable, citing *The New Orleans St. Joseph Ass'n v. A. Magnier*,<sup>51</sup> an 1861 decision. The appellate court in *Carl Heck Engineers, Inc. v. Haselden & Associates, Inc.*,<sup>52</sup> decided this term, reversed the trial court and remanded the case for trial.

In the process, the *Magnier* decision was severely discredited. In *Magnier*, a group of New Orleans merchants had agreed not to open their establishments on Sunday and that any violator of the agreement would pay a specified amount to the plaintiff charity. The decision has been properly criticized,<sup>53</sup> and the appellate court was correct in concluding that the fact that a provision for liquidated damages is penal in nature does not render it unenforceable. Nothing in article 1890 suggests that a stipulation made a condition or consideration of a commutative contract should be unenforceable merely because it has some penal aspects. The court may wish to refuse to enforce a stipulation which has only penal aspects, but this would rarely be the case. Ordinarily, a stipulation with penal aspects is secondary to some primary motive moving the parties to agree.

*Must the stipulation be in writing?*

In several cases, it is stated that the stipulation in favor of a third party must be in writing though there does not appear to be any support for this proposition. The first such statement appears to be in *Fontenot v. Marquette Casualty Co.*,<sup>54</sup> in which the court cites as authority articles 1890 and 1902 of the Civil Code. Neither article mentions a writing requirement. The statement in *Fontenot* may be dicta, since the agreement there under consideration was in writing; no issue was present on the effect of a non-written stipulation. The *Fontenot* statement was cited with approval in *Hertz Equipment Rental Corp. v. Homer Knost Construction Co.*,<sup>55</sup> in which it may have played some part in the court's conclusion that no third party benefit was present.

There is no more reason to require that an advantage for a third person stipulated in a contract be in writing than there is to have a general requirement that contracts be in writing. We have no such general require-

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51. 16 La. Ann. 338 (1861).

52. 316 So.2d 890 (La. App. 1st Cir.), *cert. denied*, 320 So.2d 912 (La. 1975) ("judgment not final").

53. Smith, *supra* note 30, at 48-49. See also 1 LITVINOFF at § 228 n.99.

54. 258 La. 671, 247 So.2d 572 (1971).

55. 273 So.2d 685 (La. App. 1st Cir. 1973).

ment, despite the requirement of writing for specific types of contracts.<sup>56</sup> While most stipulations for the benefit of third parties which are enforced in the jurisprudence are in writing, it does not appear to be wise to have a rule, absent codal or statutory authority, that such stipulations *must* be in writing.

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56. *See, e.g.*, LA. CIV. CODE art. 1536 and LA. R.S. 9:2721 (1950) (requirement that to affect third persons, instruments concerning immovables must be recorded, which assumes that they must be in writing of some form).