

Louisiana Law Review

Volume 45 | Number 3

The 1984 Revision of the Louisiana Civil Code's

Articles on Obligations - A Student Symposium

January 1985

Third-Party Beneficiary Contracts

Frederick McGaha

Repository Citation

Frederick McGaha, *Third-Party Beneficiary Contracts*, 45 La. L. Rev. (1985)

Available at: <https://digitalcommons.law.lsu.edu/lalrev/vol45/iss3/8>

This Comment is brought to you for free and open access by the Law Reviews and Journals at LSU Law Digital Commons. It has been accepted for inclusion in Louisiana Law Review by an authorized editor of LSU Law Digital Commons. For more information, please contact kreed25@lsu.edu.

THIRD-PARTY-BENEFICIARY CONTRACTS

There are times when two contracting parties intend for their agreement to benefit a third party. The third party is known as the beneficiary of the contract. Of the two contracting parties, one is the stipulator and the other the promisor. The stipulator instructs the promisor to render some performance to the beneficiary and the promisor agrees to do so. This is the basic format for a third-party-beneficiary contract, the stipulation *pour autrui*.¹ A simple example is where A (stipulator) sells B (promisor) a car and directs B to pay C (beneficiary) (example 1).

Third-party-beneficiary contracts are an exception to the general rule that contracts have effect only between the contracting parties.² In order to justify this exception, there must be some sort of relationship between the stipulator and the beneficiary. There could be a legal relationship where the stipulator owes an obligation to the beneficiary and performance of the stipulation by the promisor will discharge it. A factual relationship where the promisor's performance will protect the stipulator from future liability toward the beneficiary would also suffice as would ties of kinship or other indications that a gratuity was intended.³

The Louisiana Digest of 1808 dealt with the stipulation *pour autrui* in a single article:

A person may, in like manner, stipulate for the advantage of a third person, when such is the condition of a stipulation that he makes for himself, or of a donation that he makes to another.

He who has made such a stipulation, can no longer revoke it, if the third person has declared himself willing to avail himself of it.⁴

The wording of this article was changed in the Louisiana Civil Code of 1825 to read:

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

Copyright 1985, by LOUISIANA LAW REVIEW.

1. Articles 1756-2291 of the Louisiana Civil Code of 1870 [hereinafter cited as OA (old articles)] were abrogated and replaced by new articles 1756-2057 [hereinafter cited as NA]; see 1984 La. Acts, No. 331, § 1.

2. See *Carl Heck Eng'rs, Inc. v. Haselden & Assocs., Inc.*, 316 So. 2d 890, 894 (La. App. 1st Cir.), cert. denied, 320 So. 2d 912 (La. 1975).

3. Smith, *Third Party Beneficiaries In Louisiana: The Stipulation Pour Autrui*, 11 Tul. L. Rev. 18, 58 (1936).

4. La. Digest of 1808 bk. III, tit. III, art. 21.

consents to avail himself of the advantage stipulated in his favor, the contract can not be revoked.⁵

Article 1896 was added at this time:

But a contract, in which anything is stipulated for the benefit of a third person, who has signified his assent to accept it, can not be revoked as to the advantage stipulated in his favor, without his consent.⁶

These articles remained unchanged until the revision of 1984.⁷

To determine what changes, if any, have been made by the 1984 revision, it will be necessary to follow the jurisprudential development of articles 1890 and 1902 of the Civil Code of 1825. A comparison can then be made between the law as it stood prior to the revision and the new articles.

NA 1978: Stipulation for a third party

A contracting party may stipulate a benefit for a third person called a third party beneficiary.

Once the third party has manifested his intention to avail himself of the benefit, the parties may not dissolve the contract by mutual consent without the beneficiary's agreement.⁸

The "Commutative" Requirement

Though the reporter states that NA 1978 reproduces OA 1890 and 1902,⁹ this is misleading since NA 1978 eliminates the statement that a stipulation for another can be the condition or consideration of only a *commutative* contract. Formerly, a commutative contract was one in which one party's performance was considered equivalent to that of the other.¹⁰ Independent contracts were those in which the parties' performances had no relation to each other,¹¹ and they were not included in OA 1890. Bilateral contracts were presumed to be commutative unless the contrary was expressed,¹² thus making them independent.

An example of an independent contract containing a stipulation for another would be where A (stipulator) transfers a house to B (promisor) in consideration for B's taking care of A's mother for the rest of her life, and the parties state that the performances are not to be considered equivalents. Under OA 1890 this stipulation could not have been the

5. La. Civ. Code art. 1884 (1825).

6. La. Civ. Code art. 1896 (1825).

7. 1984 La. Acts, No. 331, § 1.

8. NA 1978.

9. NA 1978, comment (a).

10. La. Civ. Code art. 1768 (1870).

11. La. Civ. Code art. 1769 (1870).

12. La. Civ. Code art. 1770 (1870).

condition or consideration for A's transfer of the house since the contract is not commutative¹³ (example 2).

As early as 1846, in *Watt v. Rice*,¹⁴ the Louisiana Supreme Court recognized that an advantage stipulated for another is sufficient consideration for a contract. The court did not limit the application of this rule to commutative contracts. The equivalency of the objects was not at issue, however, and the contract should have been presumed to have been commutative, for the parties had not expressed any contrary intention. In light of these circumstances, this decision probably was not an attempt by the court to sidestep the "commutative" requirement in OA 1890. This writer has found no case involving an independent contract that contained a stipulation for another. The clear wording of the statute, which excludes independent contracts, must be compared with the new article to determine whether there are any changes.

The requirement that the obligation between the stipulator and promisor be a *commutative* contract has been removed from NA 1978. Now a party to any contract can stipulate for another. Also, OA 1769 has been eliminated; hence there is no longer a classification of independent contracts, nor is there a reference to equivalents.¹⁵ The contract is now to be considered commutative if the parties' promises are reciprocally dependent.¹⁶

In the past, stipulation for another could not support an independent contract like the agreement in example 2; today, however, it could support that agreement. We would no longer call this an independent contract: it would be commutative since the promises were reciprocally dependent. Hence there has been a change in the law, contrary to what is indicated in the comments to NA 1978.¹⁷

The "Onerous Donation" Requirement

According to OA 1890, a stipulation for another could be the condition or consideration for only an onerous donation. A donation can be either gratuitous, onerous, or remunerative,¹⁸ and an onerous donation is defined as "that which is burdened with charges imposed on the donee." Since NA 1978 no longer requires a donation to be onerous, if a stipulation for another can be a condition or consideration for a gratuitous or remunerative donation, there will be a change in the law.

13. This agreement could not be considered an onerous donation if each party bargained for the other's performance. 1 S. Litvinoff, *Obligations* § 103, at 180-81, in 6 *Louisiana Civil Law Treatise* (1969).

14. 1 La. Ann. 280 (1846).

15. NA 1911.

16. *Id.*

17. NA 1978, comment (a).

18. La. Civ. Code art. 1523.

However, the Louisiana Supreme Court, in *Thompson v. Societe Catholique D'Education Religieuse et Litteraire*, said "the charge or burden, to make the donation an onerous one, need not be one in favor of the donor, but it may be one in favor of a third person . . ."¹⁹ Thus, all donations with stipulations for third persons as charges on them are onerous donations. Today, therefore, if a person attaches a stipulation for another to a donation, that donation will be classified as onerous under the *Thompson* doctrine. This conforms to OA 1890's requirement that the donation be onerous, so there is no change in this aspect of the law.

"Acceptance" by the Beneficiary

The acceptance by the third party is not an acceptance of an offer made to him; rather, it is a ratification of an agreement made in his favor.²⁰ As a result, the beneficiary need not have contractual capacity at the time the contract between the stipulator and promisor was made, but only at the time he manifests his intent to avail himself of the benefit.²¹ Also, the beneficiary's right comes into existence the moment the contract is formed between the stipulator and the promisor, so the beneficiary or his heirs can accept the benefit even after the death of the stipulator.²²

There appears to be no practical difference between a beneficiary's consenting to avail himself of the advantage, as required in OA 1890, and the requirement in NA 1978 that he manifest an intention to avail himself of the advantage. Perhaps the change in wording was intended to prevent the inadvertant application of the rules of offer and acceptance to the assent by the beneficiary.²³ The jurisprudence shows that acceptance by the beneficiary does not have to be express but can be implied by actions of the beneficiary.²⁴ The courts have recognized some

19. *Thompson v. Societe Catholique D'Education Religieuse Et Litteraire*, 157 La. 875, 882, 103 So. 247, 249 (1924) (on reh'g). Chief Justice O'Neill dissented, arguing that a donation containing a stipulation for a third party could be gratuitous. *Thompson*, 157 La. at 887, 103 So. at 251 (O'Neill, C.J., dissenting).

20. 2 M. Planiol, *Treatise on the Civil Law* pt. 1, no. 1251 (11th ed. La. St. L. Inst. trans. 1959); see also NA 1843, which states in part: "Ratification is a declaration whereby a person gives his consent to an obligation incurred on his behalf by another without authority." But see *Cox v. W.R. Aldrich & Co.*, 247 La. 797, 174 So. 2d 634 (1965), where the court seemed to apply the rules of offer and acceptance to a third party's attempt to say he had consented to avail himself of the benefit stipulated in his favor.

21. 2 M. Planiol, *supra* note 20, pt. 1, no. 1252.

22. *Id.*

23. See *Cox v. W.R. Aldrich & Co.*, 247 La. 797, 174 So. 2d 634 (1965).

24. See, e.g., *Andrepoint v. Acadia Drilling Co.*, 255 La. 347, 231 So. 2d 347 (1969) (on reh'g).

actions by the beneficiary as an implied acceptance, for example: (1) the beneficiary drills a well in reliance on the stipulation;²⁵ (2) the beneficiary sells property to the stipulator who, in selling it to the promisor, instructed him to pay the beneficiary; the beneficiary accepts the benefit when he acquiesces in the promisor's use of the property;²⁶ (3) the beneficiary uses a servitude that was established by a stipulation in his favor;²⁷ (4) the beneficiary notifies the promisor that the debt stipulated in the beneficiary's favor is due.²⁸ The beneficiary's consent in each case is a manifestation of his intent to avail himself of the benefit; thus, it would also conform to the requirement in NA 1978.

In order to manifest an intent to accept a benefit, the beneficiary would have to be aware of the benefit. Silence could be a manifestation of an intent to avail oneself of a benefit.²⁹ However, silence by the beneficiary when he has no knowledge of the benefit stipulated in his favor should not qualify as a manifestation of an intent under NA 1978. The Louisiana Fourth Circuit Court of Appeal said that silence without knowledge would qualify as implied acceptance under OA 1890 in *Fidelity-Phenix Fire Insurance v. Forest Oil Corp.*³⁰ The court's language should be considered *dicta*, however, for it gave another justification for the holding. Common sense dictates a conclusion contrary to the wording used by the Fourth Circuit.³¹ Acceptance is a responsive act. If the stipulation is unknown to the beneficiary it is inconceivable that his actions are in response to the stipulation.

Dissolution of the Contract Before Acceptance by the Beneficiary

Prior law indicated that once the beneficiary "consents to avail himself of the advantage . . . the contract can not be revoked."³² Before the beneficiary accepted the benefit, the parties should have been free to revoke the contract,³³ but once the beneficiary accepted the benefit the parties were bound by the stipulation and could no longer revoke the

25. *First State Bank v. Burton*, 225 La. 537, 73 So. 2d 453 (1954).

26. *Muntz v. Algiers & G. Ry.*, 114 La. 437, 38 So. 410 (1905).

27. *Mallet v. Thibault*, 212 La. 79, 31 So. 2d 601 (1947).

28. *Bryant v. Stohart*, 46 La. Ann. 485, 15 So. 76 (1894).

29. See NA 1942.

30. 141 So. 2d 841, 847 (1962).

31. The court was not sure that the contract in question contained a stipulation *pour autrui* but stated that if it did and an acceptance was necessary, the defendant's silence was an implied acceptance whether the defendant knew of the stipulation or not. The court cited no authority and gave no justifications for its conclusion.

32. La. Civ. Code art. 1890 (1870).

33. 2 M. Planiol, *supra* note 20, pt. 1, no. 1247.

contract.³⁴ There apparently has been no case where a beneficiary prevented a *voluntary* dissolution between the stipulator and the promisor. However, in *Bryant v. Stothart*³⁵ where one party to the contract sued the other for dissolution, the courts still did not grant it: the beneficiary had accepted, and the contract could no longer be dissolved. An example of this situation is where A (stipulator) sells B (promisor) a car for \$1000 and instructs B to pay A \$400 and to pay C (beneficiary) \$600. If B does not pay A the \$400, A can sue B to dissolve the contract *only* if C has not yet accepted the benefit (example 3).

NA 1979: Revocation

The stipulation may be revoked only by the stipulator and only before the third party has manifested his intention of availing himself of the benefit.

*If the promisor has an interest in performing, however, the stipulation may not be revoked without his consent.*³⁶

When May the Stipulation Be Revoked?

We have seen that a *contract* cannot be dissolved by the contracting parties after the beneficiary accepts the benefit. NA 1979 extends this same concept to the *stipulation* within the contract. Thus, if A (stipulator) makes a donation to B (promisor) with a stipulation that part of it be used to pay C's (beneficiary) college education, and A and C later have a disagreement, A can revoke the stipulation (not the donation)³⁷ *only* if C has not yet manifested his intention to avail himself of it (example 4).

An example of this principle is given in *Cox v. W.R. Aldrich & Co.*³⁸ The Louisiana Department of Highways (stipulator) contracted with the defendant construction company (promisor) to widen a highway. As part of their performance, the construction company agreed to remove part of a building belonging to the plaintiff (beneficiary).³⁹ Prior to an

34. *Capital Loans, Inc. v. Stassi*, 195 So. 2d 670 (La. App. 1st Cir.), cert. denied, 250 La. 889, 199 So. 2d 912 (1967); *Tilley v. Camden Fire Ins. Ass'n*, 139 La. 985, 72 So. 709 (1916); *Pecquet v. Pecquet's Ex'r*, 17 La. Ann. 204 (1865); *Sargeant v. Daunoy*, 14 La. 43 (1839).

35. 46 La. Ann. 485, 15 So. 76 (1894).

36. NA 1979.

37. The donation still stands but B now has to give to A the part of the donation that prior to the revocation, he was bound to give to C. See NA 1980.

38. 247 La. 797, 174 So. 2d 634 (1965).

39. The highway department had agreed to remove part of the building to induce the plaintiff to agree to sell the highway department the land it needed to widen the road. This agreement was a separate matter and was not dealt with in the opinion.

acceptance by the beneficiary the highway department and the construction company excised the stipulation from the contract. The Louisiana Supreme Court stated on rehearing that the beneficiary had not accepted the benefit and the contracting parties were permitted to delete the stipulation from the contract.

Justice Sanders concurred in this result but recognized that this contract contained a provision allowing the highway department to eliminate certain obligations the construction company was to perform, including work on the plaintiff's building. From this he reasoned that the parties could revoke the stipulation whether or not the beneficiary had accepted,⁴⁰ since the beneficiary acquires the benefit subject to any conditions attached to it.⁴¹ Justice Sanders cited *Alba v. Provident Savings Life Assurance Society*⁴² in support of this principle. In *Alba* the purchaser of a life insurance policy reserved the right to change the beneficiary. The court said the beneficiary enjoys the benefit stipulated in his favor only as long as the insured (stipulator) does not change the designated beneficiary. Acceptance of the benefit by the beneficiary would not prevent the insured from changing the beneficiary of the policy since the beneficiary can have no vested interest in the policy during the lifetime of the insured.⁴³

The naming of beneficiaries in life insurance policies was removed from the purview of the Louisiana Civil Code by Act 292 of 1940.⁴⁴ Thus, the articles on third-party-beneficiary contracts no longer apply to these contracts and the validity of a change in the beneficiary of a life insurance policy depends on the wording of the policy.⁴⁵ Nevertheless, Justice Sanders's argument is still plausible, even without the support of the insurance cases, because the stipulator has bound himself to do only what he has promised. If his promise is limited by certain conditions, the beneficiary receives the benefit subject to these conditions.⁴⁶ Thus, it is clear that a stipulation is subject to revocation prior to "acceptance" by the beneficiary and it may be subject to revocation after the beneficiary has accepted if the stipulator provides for such revocation.

Who May Revoke the Stipulation?

The Louisiana Supreme Court has stated that if both the stipulator and the promisor have an interest in performing the stipulation, there

40. *Cox*, 247 La. at 817, 174 So. 2d at 641 (Sanders, J., concurring).

41. See also 2 M. Planiol, *supra* note 20, pt. 1, no. 1247; Smith, *supra* note 3, at 56-57.

42. 118 La. 1021, 43 So. 663 (1907).

43. *Pollock v. Pollock*, 164 La. 1077, 115 So. 275 (1927).

44. 1940 Acts, No. 292 §§ 1, 2; see also La. R.S. 22:1521 (1978).

45. NA 1979, comment (c).

46. 2 M. Planiol, *supra* note 20, pt. 1, no. 1247; Smith, *supra* note 3, at 56-57.

can be no revocation of that stipulation without their mutual consent.⁴⁷ This is in accord with the second paragraph of NA 1979.

The principle found in NA 1979 that only the stipulator can revoke the stipulation before its "acceptance" when the promisor has no interest in performing has its background in French law.⁴⁸ Professor J. Denson Smith, in his article on third-party-beneficiary contracts,⁴⁹ indicated that the revocation of a stipulation for a third party's benefit is a change in the terms of the contract that requires the consent of both contracting parties.⁵⁰ But the stipulation is only a *condition to* or *charge on* the contract. Therefore, the stipulator, as the party who imposed the condition or charge, should be allowed to remove it by his will alone, for the promisor was only bound to fulfill the condition or carry out the charge.⁵¹

The courts have not yet decided a case where the stipulator attempted to revoke a stipulation without the promisor's consent. If the problem had been presented, the courts would have been faced with deciding between the opposing views of Professor Smith and the French jurists. The 1984 revision clarifies the law on this matter by giving the stipulator the sole power to revoke the stipulation, before acceptance by the beneficiary, when the promisor has no interest in performing.⁵² The Digest of 1808 declared that "[h]e who has made such a stipulation, can no longer revoke it, if the third person has declared himself willing to avail himself of it."⁵³ The wording indicated that the stipulator *alone* could revoke the stipulation. Thus, the drafters of the Digest seem to have intended to follow the French doctrine. The clear wording of this article in the Digest was changed in article 1896 of the Civil Code of 1825 to state: "But a contract . . . cannot be revoked as to the advantage stipulated. . . ."⁵⁴ This phrasing is ambiguous as to who may revoke the advantage stipulated. The word *revoke* means "take back" or "recall" and since the stipulator was the proposer of the stipulation, it is only he who can "take it back"; the promisor cannot "take back" something that was proposed to him. Therefore, the use of the word

47. A. Bonnafé & Co. v. Lane, 5 La. Ann. 225, 229 (1850).

48. 2 M. Planiol, *supra* note 20, pt. 1, no. 1248.

49. Smith, *supra* note 3, at 18.

50. *Id.* at 55-56.

51. See 2 M. Planiol, *supra* note 20, pt. 1, no. 1248, which states in part: "In principle, the right of revocation belongs to the stipulator only: it was he who took the initiative for the stipulation; it is he who is interested in the third person, for whom he acts." See also 4 C. Aubry & C. Rau, *Droit Civil Français* § 343 (b), at 324 (E. Bartin 6th ed. 1965), in 1 *Civil Law Translations* (La. St. L. Inst. trans. 1965), which states that the stipulation may "be revoked by the stipulant without the consent of the promisor."

52. NA 1979.

53. La. Digest of 1808 bk. III, tit. III, art. 21.

54. La. Civ. Code art. 1896 (1825).

“revoked” in article 1896 was sufficient to retain the principle expressed in the Digest.

It is evident, therefore, that NA 1979 does not change the law as it relates to the stipulator’s having sole authority to revoke the stipulation when the promisor has no interest in performing.

NA 1980: Revocation or Refusal

*In case of revocation or refusal of the stipulation, the promisor shall render performance to the stipulator.*⁵⁵

Prior to the 1984 revision, the effect of a revocation or refusal of the stipulation on the obligation of the promisor was unclear. The promisor was necessarily either relieved of his obligation to perform or owed the performance to the stipulator in place of the beneficiary. Planiol believed it was impossible to formulate a general rule that covered all situations and therefore argued that the courts should look to the intent of the parties to determine whether the promisor owed the performance to the stipulator or was relieved of his obligation.⁵⁶ Aubry and Rau thought a revocation gave the stipulator the right to demand that the performance be rendered to himself, unless it was of such a nature that it could not be transferred from the beneficiary to the stipulator, in which case the promisor necessarily benefitted from the revocation.⁵⁷

Refusal of the Stipulation

Louisiana courts have recognized that when the stipulation is not accepted by the beneficiary, the promisor owes performance to the stipulator.⁵⁸ In *Martin v. Dickson*, a lessor stipulated that the lessee was to pay part of the rent to a third person. The beneficiary never accepted the benefit, and an assignee of the lessor sued the lessee for the amount stipulated to be paid to the third party. The court indicated that absent other circumstances, the assignee would have been entitled to recover.⁵⁹ The non-acceptance by the beneficiary did not end the promisor’s obligation to perform that part of the agreement; rather, the promisor owed performance to the stipulator instead of the beneficiary.

In the future, when the beneficiary does not accept the benefit or refuses it, the courts will have a clear guideline to follow in NA 1980—

55. NA 1980.

56. 2 M. Planiol, *supra* note 20, pt. 1, no. 1249.

57. 4 C. Aubry & C. Rau, *supra* note 51, § 343(b), at 324.

58. *Martin v. Dickson*, 35 La. Ann. 1036 (1883).

59. *Id.* at 1038.

an improvement since OA 1890 and 1902 provided no guidelines.

Revocation of the Stipulation

NA 1980 makes no distinction between a revocation by the stipulator alone and one that requires the promisor's consent. If the revocation requires the promisor's consent, he cannot be forced to render performance to the stipulator against his will. By refusing to consent to the revocation, the promisor can protect himself from being forced to render performance to a party other than the one to which he agreed. No similar protection exists if the benefit can be revoked by the stipulator alone. The promisor may be required to render performance to the stipulator, a party to whom he did not intend to render performance. An example would be where A (stipulator/publisher of a magazine) pays \$100 to B (promisor) for photographs of his girlfriend, who has recently won a beauty pageant, and stipulates that B is to give them to C (beneficiary/famous art gallery). When A revokes the stipulation before C accepts, B may not want to deliver the photographs to A (example 5).

Professor Smith said such a change in terms should require consent from both parties.⁶⁰ One way the courts could approach this situation is to give the term *interest* in NA 1979 a broad interpretation to include instances where the party (to whom performance is due) is a principal cause in the promisor's agreeing to contract. If this approach were taken, the revocation of the stipulation would require the promisor's consent. However, this approach would burden the courts, since lengthy inquiries into the intent of the parties would be required. Using this subjective approach, a court would probably not force B to deliver the photographs to A in example 5.

Another solution would be to hold the promisor to the knowledge that when he enters a third-party-beneficiary contract he may be required to render performance to the stipulator. Thus, the contract would include a tacit agreement on the part of the promisor to render performance to the stipulator if the benefit is revoked or refused. Using this approach, B would be forced to deliver the photographs to A in example 5. However, contracting parties are simply not going to consider these articles when contracting. Thus, holding a party to this knowledge would be unfair and would frequently force the courts to decide cases against their better judgment.

Is the Rule in NA 1980 Absolute?

The use of the words *shall* in NA 1980 and *must* in comment (b) to

60. J. Smith, *supra* note 3, at 56.

that article indicates the strong intent that this is as close to being an absolute rule as is possible. The wording permits no exceptions. Yet, the French commentators say that the nature of third-party-beneficiary contracts is such that exceptions are inherent in them. One exception occurs when the stipulation is of such a nature that it cannot be transferred from the beneficiary to the stipulator. For example, A (stipulator), who lives in an apartment and does not own a house, pays \$100 to B (promisor) and stipulates that he paint C's (beneficiary/A's mother) house (example 6). If the third party, C, refuses the benefit, it is obvious that B cannot paint A's house. How will the courts deal with such a situation in light of the *absolute* rule in NA 1980? If the stipulation *cannot* be transferred, it would be impossible for the promisor to render performance to the stipulator. Since a contract is null when its object is impossible,⁶¹ a contract should be null when the stipulation is revoked or refused and is incapable of being transferred from the beneficiary to the stipulator.

The theory of cause may also be used to explain the necessity of an exception to the strict application of NA 1980. This is in conformity with Planiol's observation that it is necessary to look to the intent of the parties to determine whether the promisor must render performance of the revoked or refused benefit to the stipulator.⁶² For example, A (stipulator), while installing cable television in the home of C (beneficiary), accidentally destroys a portrait of C's grandmother. To prevent or limit future liability, A hires B (promisor) to repaint the portrait for C. If C refuses the stipulated benefit before B begins painting and A informs B he no longer desires the portrait to be painted, the courts should not force A to accept a painting of C's grandmother (example 7). The cause of A's contracting was not to receive the portrait, but to prevent future liability;⁶³ therefore, the contract should fail due to failure of cause,⁶⁴ and NA 1980 would not apply.

The exceptions proposed by examples 6 and 7 to NA 1980's absolute rule are situations where the obligation is rendered null by other provisions of the Civil Code. The drafters undoubtedly recognized the possibility that the promisor would not be able to render the performance to the stipulator and the possibility that one or both parties did not intend for the promisor to render performance to the stipulator if the benefit was refused or revoked. Thus, NA 1980 should be read as an absolute rule *unless* the contract is nullified by other provisions of the Civil Code.

61. NA 1972.

62. NA 1980.

63. NA 1967.

64. See NA 1966.

NA 1981: Rights of Beneficiary and Stipulator

The Stipulation gives the third party beneficiary the right to demand performance from the promisor.

Also the stipulator, for the benefit of the third party, may demand performance from the promisor.⁶⁵

The Beneficiary's Right to Demand Performance

The third-party-beneficiary is not a party to the contract between the stipulator and the promisor. The Louisiana jurisprudence is clear that one cannot complain of the conditions or non-execution of a contract to which he is not a party.⁶⁶ The maxim that "[a] thing done between some can neither harm nor profit others"⁶⁷ aptly states this principle. This is a general rule, however, and the courts have recognized an exception in third-party-beneficiary contracts. It is clear that our courts allow the third-party-beneficiary to bring an action on the contract to enforce the stipulation if he does so before it is revoked.⁶⁸ This rule is deeply rooted in our jurisprudence and dates back to 1818.⁶⁹

That the beneficiary can sue the promisor as a result of the third-party-beneficiary contract in no way diminishes his right of action against the stipulator when the beneficiary is a creditor of the stipulator. The acceptance of the contract benefit is not a novation of the debt the stipulator may owe the beneficiary.⁷⁰ A stipulation for the benefit of a third person has the effect of giving the beneficiary an additional creditor—the promisor.⁷¹

The Stipulator's Right to Demand Performance

The stipulator either owes the beneficiary something, may have some future liability to him, or intends to confer a gratuity toward him. In these instances the stipulator has a keen interest in the promisor's performing. Thus, the stipulator should be allowed to demand that the promisor render the performance to the beneficiary. The stipulator is a party to the contract and has standing to demand performance from his co-contractant. It is important to realize that, though the stipulator

65. NA 1981.

66. See, e.g., *State v. Simoni, Heck & Assocs.*, 331 So. 2d 478 (La. 1976); *Police Jury v. Alexandria Gravel Co.*, 146 La. 1, 83 So. 316 (1919); *Schwartz v. Thirty Two Flatboats*, 14 La. Ann. 243 (1859).

67. 2 M. Planiol, *supra* note 20, pt. 1, no. 1172.

68. See, e.g., *New Orleans St. Joseph's Ass'n v. Magnier*, 16 La. Ann. 338, 339 (1861).

69. *Mayor v. Bailey*, 5 Mart. (o.s.) 321 (La. 1818).

70. See NA 1882 & comment (c).

71. *First State Bank v. Burton*, 225 La. 537, 73 So. 2d 453 (1954).

can demand *performance* only for the third party's benefit, he should still be entitled to claim damages for himself, if any should result from the promisor's non-performance.⁷²

A literal reading of NA 1981 gives the stipulator and beneficiary independent rights to demand performance. If one demands performance and loses, is the decision *res judicata* for the other? The wording of the article indicates that the stipulator and the beneficiary have separate rights of action and need not join each other's suit as plaintiffs. To avoid the possibility of having to litigate the matter twice, the defendant should be able to compel the joinder of the stipulator and beneficiary as indispensable parties.⁷³ If one demands performance and loses, the judgment should not be *res judicata* for the other because there is no identity of the parties.⁷⁴ They stand in different capacities toward the promisor.

NA 1982: Defense of the promisor

*The promisor may raise against the beneficiary such defenses based on the contract as he may have raised against the stipulator.*⁷⁵

The cause for the promisor's binding himself to render some performance to the beneficiary is usually to obtain the performance the stipulator agrees to render him. If the stipulator does not perform, the promisor has no cause to render performance to the beneficiary. For example, A (stipulator) buys a car from B (promisor) and instructs him to deliver it to C (beneficiary) in sixty days. After C accepts, A defaults on his note to B before making any payments. On the sixtieth day B does not have to deliver the car to C (example 8).

The courts recognized this reasoning in *Union Bank v. Bowman*.⁷⁶ The defendant had promised his vendor that he would pay the remainder of the vendor's note to the plaintiff in partial consideration for the purchase of some land and stock. The court held that the defendant (promisor) was not personally liable for the note because the vendor (stipulator) had not been able to deliver all of the land. Since the validity of the stipulation depends on the validity of the contract in which it is contained, it follows that any defenses the promisor has that would

72. See 2 M. Planiol, *supra* note 20, pt. 1, no. 1258; 4 C. Aubry & C. Rau, *supra* note 51, § 343(b), at 323.

73. See La. Code Civ. P. arts. 641-642; see also NA 2044 & comment (c) (stating that when the stipulator is a debtor of the beneficiary irrespective of the third party beneficiary contract, the beneficiary must join the stipulator in a suit by the beneficiary against the promisor to enforce the stipulation *pour autrui*).

74. La. R.S. 13:4231, as amended by 1984 La. Acts, No. 331, § 7.

75. NA 1982.

76. 9 La. Ann. 195 (1854).

invalidate the contract would nullify the stipulation and defeat the beneficiary's action.

Defenses available to the promisor when performance is demanded of him by either the stipulator or the beneficiary may include: personal incapacity, vices of consent, improper contractual form (when required), nullity, and non-performance by the stipulator.⁷⁷

Conclusion

The law of third-party-beneficiary contracts has been clarified to a certain extent by the 1984 revision. The articles are clear, concise, and informative and will be of great help to the attorney who deals with these contracts only infrequently. There have been a few minor changes, but they will have little impact on everyday practice. The 1984 revision should make drafting third-party-beneficiary contracts and dealing with their problems much easier. Since parties will be more aware of their rights and obligations under these contracts, the number of disputes arising from them should decrease.

It is unfortunate that the legislature was not informed of these changes through the comments to the articles.⁷⁸ Such negligence does little to foster trust and cooperation between the legislative and academic communities. Also, this failure of explanation presents the courts with a dilemma in applying the new articles: the legislative intent conflicts with the drafters' intent. The legislature, relying on the comments that the articles do not change the law, voted for the articles thinking (and intending) that they would not change the law. But the drafters necessarily intended certain changes.⁷⁹ The courts will have to apply the clear wording of the articles, but if a case is presented that must be decided based on the intent of the articles, the court should deny any interpretation that would be a change from prior jurisprudence. The legislative intent, based on what the legislature was told about these articles, should control over the drafters' intent when a conflict exists between the two.

Fred McGaha

77. 2 M. Planiol, *supra* note 20, pt. 1, no. 1264.

78. The comments to each article dealing with third-party-beneficiary contracts declare that the articles do not change the law.

79. See Obligations Revision—Third Party Beneficiary Proposal, Meeting of the Advisory Committee, Art. I, Reporter's Note (Apr. 20, 1979) (on file with Louisiana State Law Institute, Paul M. Hebert Law Center, Baton Rouge, Louisiana).