Third-Party Beneficiaries of Government Contracts: Imagining an Equitable Approach and Applying It to Broken Promises in Detroit

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NOTE

THIRD-PARTY BENEFICIARIES OF GOVERNMENT CONTRACTS: IMAGINING AN EQUITABLE APPROACH AND APPLYING IT TO BROKEN PROMISES IN DETROIT

Gabe Chess*

Courts have widely adopted a heightened standard for recognizing third-party beneficiaries of government contracts. But the justifications offered for the heightened standard do not withstand scrutiny. Instead, courts should apply a series of equitable factors to produce results consistent with the concern for “manifest justice” that animates third-party beneficiary doctrine. Governments make contracts frequently, often to address issues of huge importance to their citizens, including housing, economic development, and healthcare. In each of these areas, third-party beneficiary doctrine may be an important avenue of relief to citizens harmed by broken promises and may encourage the government and its contracting partners to more seriously include citizens in their decisionmaking. This Note proposes reforms to third-party beneficiary doctrine necessary for that to happen and applies those reforms to a pair of government contracts made in Detroit.

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In 1929, the Ford Motor Company commenced construction of a 12,000-foot-long tunnel to carry more than 913,600,000 gallons of water a day from the Detroit River to its River Rouge plant. It was nearly twice the amount of purified water used daily in the entire city of Detroit. The city awarded Ford a contract to construct the tunnel, which the city would own and then lease back to the company for one dollar a year. Ford promised to pay for any damage to private property resulting from construction.

During construction, Ford badly damaged a privately owned building. The owners of that building brought suit against Ford after the company refused to pay for repairs. The trial court ruled for the plaintiffs, finding that

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3. *Id.* at 908.
4. *Id.*
5. *Id.* at 908–09.
6. *Id.* at 913.
they were third-party beneficiaries of Ford’s promise. The Michigan Supreme Court affirmed in *Bator v. Ford Motor Co.*, reasoning that, despite the complexity of the case and lack of authorities squarely on point, “[t]o hold that these plaintiffs are without remedy” would be “shocking to one who believes that American liberties are founded on the principle of justice.”

The actors and tensions at work in this case resonate today in Detroit and in municipal landscapes across the United States. Powerful corporations continue to contract with cities and, in doing so, receive considerable private benefit. Yet, much like in *Bator*, issues can arise in the performance of government contracts. In such cases, third-party beneficiary doctrine may be necessary to avoid shocking results. But given the emergence throughout the twentieth century of a heightened standard applied when plaintiffs claim to be third-party beneficiaries of government contracts, it seems unlikely that *Bator* would come out today as it did then.

This Note argues that the heightened standard courts often cite for recognizing third-party beneficiaries of government contracts is inconsistent with the principles underlying third-party beneficiary doctrine. In place of that special rule, courts should apply a set of equitable considerations that are consistent with the doctrine’s original rationale. These principles, rather than the current rule, will lead to results more consistent with the concern for substantive justice at the core of the doctrine. Widespread privatization amplifies the need for this reform. As illustrated by this Note’s analysis of the doctrine at work in Detroit, privatization that is nominally intended to help citizens too often fails to deliver. A reformed approach could empower those citizens.

The analysis in this Note operates from a pair of baseline assumptions. First, the effects of privatization, defined here as the provision of public services through private interests, are felt most directly by communities of color.

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7. *Id.*
8. *Id.* at 914.
and marginalized, poor, and less politically powerful people. And second, both public and private law should serve the end of full and equal participation in democratic self-governance. A reformed third-party beneficiary doctrine can contribute to that end by recognizing legal rights that, in turn, empower citizen organizing around and participation in political decisionmaking in the face of increased privatization.

In Part I, this Note reviews the history of third-party beneficiary doctrine in the context of government contracts and argues that the often-applied heightened standard of Restatement (Second) of Contracts section 313 is unjustified. Part II outlines three equitable considerations that courts should emphasize in place of the standard of section 313: who stands to benefit from performance of the contract, the availability of other remedies to the plaintiffs, and the form of damages sought. Part III tests those equitable principles against two government contracts made in Detroit. Those contracts are the kind of government contracts where third-party beneficiaries plausibly exist, yet section 313 is likely to bar their claims.

I. A SPECIAL RULE FOR THIRD-PARTY BENEFICIARY CLAIMS TO GOVERNMENT CONTRACTS

Modern courts often apply a special rule to third-party beneficiary claims to government contracts. This rule amounts to a heightened standard, requiring more of would-be third-party beneficiaries of government contracts than is required when parties claim to be beneficiaries of contracts not involving the government. In Section I.A, this Note discusses the special rule’s history and its rationales. Section I.B argues that those rationales do not justify the special treatment of third-party beneficiary claims to government contracts.

A. Third-Party Beneficiaries of Government Contracts

The third-party beneficiary doctrine abrogated a touchstone maxim of contract law—the requirement of privity. Its development has been described as a “minor theoretical revolution.” Breaking from the privity requirement, the third-party beneficiary doctrine says that, in certain

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11. See IN THE PUB. INT., supra note 9, at 1.
13. See infra notes 38–43 and accompanying text.
14. See infra notes 38–43 and accompanying text.
16. Id. at 1113.
circumstances, a third party to the contract may enforce its terms.\textsuperscript{17} Courts allowing these claims generally require that the contracting parties must enter the contract with the intent to benefit the third party.\textsuperscript{18} Some courts also require that the benefit be either intended as a gift to the third party or meant to satisfy the promisee’s preexisting duty to the third party.\textsuperscript{19} In the former situation, the third party is dubbed a donee beneficiary, and in the latter, a creditor beneficiary.\textsuperscript{20} This novel rule “developed teleologically” so as to do “justice . . . between man and man.”\textsuperscript{21} It has, at its core, a concern for “someone outside of the act of contracting.”\textsuperscript{22}

As third-party beneficiary doctrine spread across U.S. jurisdictions,\textsuperscript{23} concerns particular to recognizing third-party beneficiaries of government contracts arose,\textsuperscript{24} including: (1) that all government contracts may be characterized as being for the benefit of the public, (2) that the possible liability to third-party beneficiaries of those contracts may therefore be expansive, and (3) that resulting costs for any party contracting with the government may be prohibitive.\textsuperscript{25}

These underlying concerns were famously articulated by then-Chief Judge Cardozo’s opinion in \textit{H.R. Moch Co. v. Rensselaer Water Co.}\textsuperscript{26} There, a fire destroyed the plaintiff’s warehouse.\textsuperscript{27} The city had contracted with a water company to provide water to fire hydrants at a specified pressure level. The

\begin{enumerate}
\item 17. \textit{RESTATEMENT (FIRST) OF CONTRACTS} § 133 (A.M. INST. 1932).
\item 18. Melvin Aron Eisenberg, \textit{Third-Party Beneficiaries}, 92 COLUM. L. REV. 1358, 1378 (1992) (“The test in most common use has been whether the promisee—or, in some formulations, the parties to the contract—intended to benefit the third-party beneficiary.”).
\item 19. \textit{E.g.}, Guy v. Liederbach, 459 A.2d 744, 751 (Pa. 1983) (“There is thus a two part test for determining whether one is an intended third party beneficiary: (1) the recognition of the beneficiary’s right must be ‘appropriate to effectuate the intention of the parties,’ and (2) the performance must ‘satisfy an obligation of the promisee to pay money to the beneficiary’ or ‘the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.’” (quoting \textit{RESTATEMENT (SECOND) OF CONTRACTS} § 302 (A.M. INST. 1981))).
\item 20. \textit{RESTATEMENT (FIRST) OF CONTRACTS} § 133 (A.M. INST. 1932).
\item 21. \textit{See} Waters, supra note 15, at 1151, 1199 (discussing the origins of third-party beneficiary doctrine as a move away from the formal requirement of privity so as to do justice).
\item 22. \textit{Id.} at 1112.
\item 23. \textit{Id.} at 1113, 1150–72.
\item 24. \textit{See}, e.g., German All. Ins. Co. v. Home Water Supply Co., 226 U.S. 220 (1912) (denying a third-party beneficiary claim against a water company that breached its municipal water contract because the city was under no obligation to provide water to the plaintiff). This case predates \textit{Moch} but bears a close factual resemblance. \textit{See infra} notes 26–37 and accompanying text.
\item 25. Waters, supra note 15, at 1201; Eisenberg, supra note 18, at 1407–09 (“[I]f third-party beneficiaries can enforce such contracts against the private actor, the result may be the imposition of liability well out of proportion to the benefits the private actor stood to receive under the contract.”).
\item 26. 159 N.E. 896 (N.Y. 1928).
\item 27. \textit{Moch}, 159 N.E. at 896.
\end{enumerate}
plaintiff claimed that, had the company performed their contract obligations, the fire would have been extinguished and would not have reached his warehouse.28 He brought a third-party beneficiary claim against the water company for breaching its contract with the city.29

A unanimous court dismissed the claim.30 Cardozo noted that “[n]o legal duty rests upon a city to supply its inhabitants with protection against fire.”31 He went on to acknowledge that a contract like that in this case could create a third-party beneficiary, but only if an “intention appears [in the contract] that the promisor is to be answerable to individual members of the public as well as to the city for any loss ensuing from the failure to fulfill the promise.”32 Here, he said, that intention did not appear in the contract.33

Cardozo observed that “[i]n a broad sense it is true that every city contract, not improvident or wasteful, is for the benefit of the public.”34 But, because of this reality, he demanded that the contracting parties must have intended to allow this particular member of the public to hold the water company liable for breach in court.35 To hold otherwise would expand liability beyond reasonable limits and burden the water company with an “assumption of a risk . . . overwhelming” the relatively modest compensation it received.36 To illustrate the concern, Cardozo imagined a visitor to an unheated public building who caught a cold holding liable the company that contracted with the government to heat the building.37

Similar concerns have led courts to often give special treatment to third-party beneficiary claims to government contracts.38 Both the First and Second Restatements include provisions speaking directly to recognition of third-party beneficiaries of government contracts.39 Courts have characterized these rules as embodying a “presumption against finding third-party liability” to those contracts.40 Courts often demand that the parties not only intend to benefit the third party but that they also intend to allow the third party to enforce

28. Id. at 897.
29. Id.
30. Id. at 899. Cardozo also dismissed the plaintiff’s tort and breach of statutory duty claims. Id.
31. Id. at 897. This reasoning was important to distinguish the underlying legal duty owed by a debtor to the creditor, which exists in the creditor–beneficiary category of third-party beneficiary claims. See supra notes 19–20 and accompanying text.
32. Moch, 159 N.E. at 897.
33. Id.
34. Id.
35. Id.
36. Id. at 898.
37. Id.
38. Eisenberg, supra note 18, at 1406.
the contract in court. But with nongovernmental contracts, courts only go so far as to discern the intent to benefit the third party in forming the contract. The inquiry in governmental cases creates a significantly higher burden for would-be third-party beneficiaries to meet.

Despite the heightened standard, claims brought by parties seeking recognition as third-party beneficiaries of government contracts are plentiful. And courts do occasionally recognize those plaintiffs’ rights under the contract.

B. Restatement (Second) of Contracts Section 313 and the Problem of the Heightened Standard for Government Contracts

Section 313 reflects the special treatment courts give to third-party beneficiary claims to government contracts. Courts frequently cite the rule and, despite the rule’s language indicating it is not to be applied to all claims on government contracts, often apply it as a blanket standard. It is appropriate, then, to assess the approach courts take to these claims by first assessing section 313. Section 313 has been plagued by the same problems that arise with

41. E.g., Martinez v. Socoma Cos. 521 P.2d 841, 847 (Cal. 1974) (“It is this absence of any manifestation of intent that defendants should pay compensation for breach to persons in the position of plaintiffs that distinguishes this case . . . .”); Klamath Water Users Protective Ass’n v. Patterson, 204 F.3d 1206, 1211 (9th Cir. 1999) (“The plain language of the Contract . . . illustrates [no] intention . . . to grant the Irrigators enforceable rights.”).

42. See, e.g., Scarpitti v. Weborg, 609 A.2d 147, 150 (Pa. 1992) (holding that a third-party beneficiary claim may be asserted so long as it is appropriate in carrying out the intent of the parties who formed the contract and that the third-party beneficiary is either a donee beneficiary or creditor beneficiary).

43. Compare id. at 149 (“[C]ontracting parties must have expressed an intention that the third party be a beneficiary . . . .”), with Klamath, 204 F.3d at 1211 (“Parties that benefit from a government contract are generally assumed to be incidental beneficiaries, and may not enforce the contract absent a clear intent to the contrary.”).

44. Waters, supra note 15, at 1173.


47. Crowder, supra note 12, at 318; see also Cooper v. Charter Commc’ns Enters. I, LLC, 760 F.3d 103, 109 (1st Cir. 2014) (“[G]overnment contracts by their very nature tend to benefit the public . . . .”).
third-party beneficiary doctrine outside of the government context. The application of the doctrine is inconsistent and unpredictable, hindering courts’ ability to apply the doctrine in a manner true to its emphasis on substantive justice.

But there are a few particular issues that arise with government contracts, each of which militates against imposing the heightened standard of section 313 to all government contracts. The first is the flawed nature of the rule’s most commonly invoked rationale: that recognizing third-party beneficiaries of government contracts will create large and limitless liability to unforeseeable classes of plaintiffs. The second is a misapprehension of sovereign immunity and third-party beneficiary doctrine itself. These intertwined misconceptions have led courts to suggest that section 313’s heightened standard is justified by a lack of preexisting governmental liability to the citizen. The third is an overly formalistic application of the creditor beneficiary and donee beneficiary categories, which has led courts to resist recognizing third-party beneficiaries of government contracts. And fourth is the uniquely unpredictable nature of the government as a contracting partner, which, if anything, favors a more liberal application of third-party beneficiary doctrine.

1. The Flawed Underpinnings of a Special Standard for Government Contracts

Underpinning the development of the special standard for government contracts is a fear of runaway liability for parties contracting with the government. However, that fear applies equally to nongovernmental contracts. In his seminal article on third-party beneficiaries, Professor Melvin Eisenberg explained the need to limit the creation of third-party beneficiaries to

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49. See, e.g., Prince, supra note 48, at 939–40 (discussing how, even with nongovernmental contracts, courts “improperly allow intended beneficiaries to fall into a gap” when applying certain forms of the third-party beneficiary test); Martinez v. Socoma Cos., 521 P.2d 841, 843 (Cal. 1974) (leaving local residents who had been classified as the “hard-core unemployed” with no remedy when the company that promised the Department of Labor to create jobs for them failed to do so).

50. See supra notes 36–37 and accompanying text.

51. See supra notes 36–37 and accompanying text.
appropriate circumstances because of this same fear of runaway liability. Proposing a hypothetical completely devoid of government involvement, Eisenberg imagined the runaway liability that would ensue if every link in a supply chain, from the retailer up, could sue a vendor who failed to deliver a part that the retailer’s manufacturer needed in order to deliver goods to the retailer on time. He posited that the manufacturer and vendor would never have agreed to a term allowing the retailer to enforce their contract because doing so would have imposed prohibitively high liability on the vendor.

This is the same kind of runaway liability that Cardozo feared in Moch. But, as Eisenberg’s hypothetical makes clear, this fear is not unique to government contracts. Cardozo seemed to recognize this and grappled with the same concern outside of the government context. Fear of runaway liability motivated him to apply rules that avoided exposing defendants to “liability in an indeterminate amount for an indeterminate time to an indeterminate class” in both contract and tort cases entirely absent any government involvement. This fear, then, does not seem to be particular to any feature of third-party beneficiary claims on government contracts. It emerges not from some unique characteristic of these claims but more generally from the nature of legal liability as imposed by private law. Standing alone, this fear cannot justify a special rule for government contracts.

2. Section 313’s Misguided Sensitivity to Sovereign Immunity

Courts have also justified the special rule for third-party beneficiary claims on government contracts by pointing out that, absent the formation of a contract, the third party seeking the benefit of the contract would have had no legal right to demand that benefit from the government. Lack of an underlying liability has led courts to deem these cases outside of the creditor–beneficiary category. This justification falls short in that it misapprehends the government’s immunity from legal liability and forgets that third-party beneficiary doctrine often creates new legal liability where none existed before.

52. See Eisenberg, supra note 18, at 1374–76.
53. Id. at 1374–75.
54. Id. at 1375–76.
55. See supra notes 36–37 and accompanying text.
56. Ultramares Corp. v. Touche, 174 N.E. 441, 444 (N.Y. 1931). Cardozo supported limiting the liability in Ultramares through the duty requirement by citing to a string of third-party beneficiary cases, including Moch. Id. at 181. In doing so, he bemoaned “[t]he assault upon the citadel of privity.” Id. at 445.
57. See, e.g., Martinez v. Socoma Cos., 521 P.2d 841, 845 (Cal. 1974) (“Clearly the Government . . . at no time bore any legal duty toward plaintiffs to provide the benefits set forth in the contracts . . . ”).
58. E.g., id. (“[P]laintiffs do not claim to be creditor beneficiaries.”).
The supposed lack of an underlying governmental liability to citizens flows from misconceptions about sovereign immunity. Sovereign immunity does not stand for the principle that the government owes no obligation to the citizenry or is incapable of breaching its duties. Instead, it is simply a legal shield, prohibiting courts from imposing liability on governments. Therefore, even where a sovereign is immune to legal liability, it may still be contracting to fulfill its obligations to citizens.

Moreover, many third-party beneficiary cases create a new legal liability to the third-party beneficiary where no liability existed before the contract was formed. Donee beneficiary cases—cases in which the contract is formed to give a gift to the third party—always involve the creation of a new legal liability. Prior to the formation of the contract, the party meant to receive the gift had no right to demand it.

This reality, that third-party beneficiary doctrine is comfortable with the creation of legal liability where none existed before, is evident in the case credited with creating the doctrine, Lawrence v. Fox. There, the plaintiff, Lawrence, was owed a three-hundred-dollar gambling debt by a man named Hawley. At the time, gambling debts were unenforceable at law in a New York state court, so Lawrence had no legal claim for the debt against Hawley. But Hawley then loaned three hundred dollars to another man, Fox, in exchange for Fox's promise to pay off Hawley's debt to Lawrence. When Fox did not pay Lawrence the three hundred dollars, Lawrence sued Fox to recover

59. See Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 54 (1996) ("'[T]he Eleventh Amendment [stands for] the presupposition . . . which it confirms'][. . .] that each State is a sovereign entity in our federal system; and . . . that '[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent . . . ." (fourth alteration in original) (quoting Blatchford v. Native Vill. of Noatak, 501 U.S. 775, 780 n.1 (1991) and Hans v. Louisiana, 134 U.S. 1, 13 (1890)); Price v. United States, 174 U.S. 373, 375–76 (1899) ("The [federal] government is not liable to suit unless it consents thereto, and its liability in suit cannot be extended beyond the plain language of the statute authorizing it.").

60. See Erwin Chemerinsky, Against Sovereign Immunity, 53 STAN. L. REV. 1201, 1212 (2001) (summarizing that Kimel effectively said "states are left free to disregard federal law.").

61. Price, 174 U.S. at 375–76 ("It matters not what may seem to this court equitable . . . . Beyond the letter of such [statutory] consent the courts may not go, no matter how beneficial . . . their possession of a larger jurisdiction over the liabilities of the government."); Seminole Tribe, 517 U.S. at 72–73 ("The Eleventh Amendment restricts the judicial power under Article III . . . ." (emphasis added)).

62. See, e.g., Seaver v. Ransom, 120 N.E. 639 (N.Y. 1918) (allowing a niece standing as a third-party beneficiary to enforce her uncle's promise to his dying wife to give her house to the niece).

63. See id.

64. Eisenberg, supra note 18, at 1363 ("Lawrence v. Fox is often celebrated today as a landmark case that established the power of a third-party beneficiary to bring suit . . . .").


67. Lawrence, 20 N.Y. at 268–69.
the money. Despite the fact that Lawrence had no legal claim against Hawley for the initial debt because it was a gambling debt, the court held that Lawrence could enforce the contract Fox had entered with Hawley and demand that Fox pay him the three hundred dollars. From its earliest days, then, third-party beneficiary doctrine has dealt with the creation of a new legal liability through contract where no legal liability existed before. Hawley certainly owed Lawrence a debt and was wronging him by failing to pay that debt. But that wrong was not one cognizable in a New York State court and, as such, was not a debt that created legal liability.

The contract’s creation of a new legal liability flowing from Fox to Lawrence, despite the lack of a previous liability flowing from Hawley to Lawrence, parallels the structure in government contracts. While we do speak of the government as having a general duty of care to the citizenry, we do not always recognize it as a duty that creates legal liability. When the government contracts, the creation of liability in promisors to a third-party beneficiary is no more anomalous than creating liability in Fox to Lawrence, despite the fact that Lawrence had no avenue to bring a legal claim against Hawley. Therefore, there is no doctrinal issue with allowing the creation of a new liability in the promisor despite the government’s shield from legal liability that is sovereign immunity.

This is not to say that sovereign immunity concerns are irrelevant to the application of third-party beneficiary doctrine to government contracts. There are some situations in which sovereign immunity should shield private parties that contract with governments. But deciding if that shield is transferred entails a fact-specific inquiry particular to the concerns that motivate

68. Id.
69. Id. at 268.
70. See Waters, supra note 15, at 1127.
71. See, e.g., John H. Derrick, Annotation, Modern Status of Rule Excusing Governmental Unit from Tort Liability on Theory That Only General, Not Particular, Duty Was Owed Under Circumstances, 38 A.L.R.4th 1194, § 2 (1985) (contrasting the government’s duty to all, which most jurisdictions do not treat as a duty that creates tort liability, to the special duty the government can owe to particular citizens, which does create tort liability).
72. Regents of the Univ. of Cal. v. Doe, 519 U.S. 425, 429 (1997) (“It has long been settled that the reference [in the Eleventh Amendment] to actions ‘against one of the United States’ encompasses not only actions in which a State is actually named as the defendant, but also certain actions against state agents and state instrumentalities.” (quoting Poindexter v. Greenhow, 114 U.S. 270, 286 (1885)).
sovereign immunity. This test conveys sovereign immunity only when holding the defendant liable "would expose the government to financial liability or interfere with the administration of government programs." Because courts often speak of section 313 as a blanket rule applicable to all governmental contracts, the rule elides the more subtle analysis courts undertake when asking if a party is an arm of the state for purposes of sovereign immunity. The policy considerations underpinning sovereign immunity may call for special treatment of some third-party beneficiary claims to government contracts, but this treatment is not reflected in the heightened standard of section 313. Rather than muddying third-party beneficiary doctrine by conflating sovereign immunity concerns with the third-party beneficiary analysis, courts should address sovereign immunity separately by allowing parties to plead and make out that defense where they believe it applies.

3. An Overly Formalistic View of Creditor Beneficiary and Donee Beneficiary Categories

As third-party beneficiary doctrine gained traction, courts and commentators adopted categorical descriptions of common situations in which a third-party beneficiary was created by a contract. Those two situations were contracts that created (1) donee beneficiaries and (2) creditor beneficiaries. Courts continue to look to these categories when determining if a third-party beneficiary can enforce a contract. Courts struggle with slotting plaintiffs asserting third-party beneficiary rights under government contracts into one of these categories. They note that the creditor beneficiary category seems inappropriate because the plaintiffs

73. See, e.g., Shands Teaching Hosp. & Clinics, Inc. v. Beech St. Corp., 208 F.3d 1308, 1311 (11th Cir. 2000) ("Eleventh Amendment immunity may extend to defendants other than the State based upon: (1) how state law defines the entity; (2) what degree of control the State maintains over the entity; and (3) from where the entity derives its funds and who is responsible for judgments against the entity. . . . The pertinent inquiry is not into the nature of a corporation's status in the abstract, but its function or role in a particular context.").

74. Id.

75. See, e.g., Armstrong v. Exceptional Child Ctr., Inc., 575 U.S. 320, 332 (2015) (plurality opinion) ("[T]he modern jurisprudence permitting intended beneficiaries to sue does not generally apply to contracts between a private party and the government . . . .").

76. See infra Section II.C.

77. See, e.g., Fresenius Med. Care Cardiovascular Res., Inc. v. P.R. & the Caribbean Cardiovascular Ctr. Corp., 322 F.3d 56 (1st Cir. 2003) (analyzing sovereign immunity as a defense in a breach of contract suit by applying the arm-of-state test used in immunity analysis); Stewart ex rel. Womack v. City of Jackson, 804 So. 2d 1041 (Miss. 2002) (analyzing sovereign immunity as a defense to a breach of contract claim brought under third-party beneficiary theory).

78. Eisenberg, supra note 18, at 1373–74.

79. Id.; see also supra note 19–20 and accompanying text.

80. See supra note 19–20 and accompanying text.
Third-party beneficiaries of government contracts share characteristics with both creditor beneficiaries and donee beneficiaries. Even in \textit{Lawrence}—the quintessential creditor beneficiary case—the third-party beneficiary did not have a preexisting legal right against the promisee but instead had a claim that the promisee owed him a sort of moral duty (to repay the gambling debt). Accordingly, courts could plausibly treat third-party beneficiary claims to government contracts like creditor beneficiary cases, where the citizen lacked a legal right against the government (the promisee) but nonetheless was owed a general duty of care by the government.

Third-party beneficiary claims to government contracts also share a crucial characteristic with donee beneficiary claims. At first blush, the emphasis on donative intent to give a gift in donee beneficiary cases does not fit well with any conception of the government’s intent when contracting to benefit citizens. But the donee beneficiary category is not actually rooted in the parties’ intent to give a gift. Instead, the need to recognize donee beneficiaries is explained by the reality that donee beneficiaries are those beneficiaries who have a strong interest in performance of the contract in situations where the promisee themself lacks a strong interest in performance. Recognizing this as the rationale for allowing donee beneficiary claims makes clear that in certain instances, third-party beneficiaries of government contracts can be understood as having a right under the contract for the same reason as donee beneficiaries. Where citizens have a stronger interest in seeing the government’s contract performed than the government themselves, they share this key characteristic with donee beneficiaries.

81. See, e.g., H.R. Moch. Co. v. Rensselaer Water Co., 159 N.E. 896, 897 (N.Y. 1928) (“No legal duty rests upon a city to supply its inhabitants with protection against fire. That being so, a member of the public may not maintain an action under \textit{Lawrence v. Fox} . . . .”) (citations omitted).

82. E.g., Martinez v. Socoma Cos., 521 P.2d 841, 845 (Cal. 1974) (“[P]laintiffs do not claim to be creditor beneficiaries . . . . [T]he fact that a Government program for social betterment confers benefits upon individuals . . . . does not necessarily imply that the benefits are intended as gifts.”).

83. See supra Section I.B.2.

84. See supra note 71 and accompanying text.

85. See supra note 82 and accompanying text.

86. See infra Section II.A.
The donee and creditor beneficiary categories were adopted as ways of describing common situations in which it was fair to allow a third-party beneficiary to enforce the contract.\textsuperscript{87} Where the same dynamics that call for recognition of third-party beneficiaries in those common situations exist in other situations, an overly formalistic adherence to the terms of the categories is unwarranted.\textsuperscript{88} Because government contracts can create third-party beneficiaries who share characteristics with both creditor beneficiaries and donee beneficiaries, a formalistic view of the categories should not create an additional barrier to their recognition and does not justify special treatment of their claims.

4. The Government Is a Uniquely Unpredictable Contracting Partner

Finally, the government’s unreliable enforcement of contracts counsels against a higher standard for recognizing third-party beneficiaries of its contracts. Because the government’s “intent” is particularly apt to change in light of shifting political realities, allowing third-party beneficiaries to enforce the contract may be the only way to ensure that the parties’ objectives at the time of contract formation are actually carried out.

A principle of contract law is the quest to adopt default rules that reflect what rational parties would have bargained for were they to have contemplated the rule when they formed the contract.\textsuperscript{89} This idea assumes that a rational actor negotiating a contract would have agreed to remedies and rules that would effectuate the objectives they had when they entered into the contract.\textsuperscript{90}

In many instances, this view of a rational actor with consistent objectives does not map onto the government as a contracting party. For one, ascribing a singular intent to any governmental action is notoriously hard.\textsuperscript{91} By design, the government’s intent changes as we change the government.\textsuperscript{92} A government may contract for a benefit to be conveyed in the future, but come time for performance, the government may no longer want that benefit conveyed.

And even where the government’s intent does not change, it may nonetheless lack the political will to demand performance. The government might, for instance, recognize that it needs to extract a promise for the benefit of some group for political purposes when it is forming the contract but then yield at

\textsuperscript{87} Eisenberg, \textit{supra} note 18, at 1373–74 (“There are two well-established basic categories of third-party beneficiaries who can enforce contracts.”).

\textsuperscript{88} Waters, \textit{supra} note 15, at 1165–66 (discussing Corbin’s view that “limiting the recognition of third party rights to these categories was unwarranted”).

\textsuperscript{89} See Eisenberg, \textit{supra} note 18, at 1386–87.

\textsuperscript{90} Id.


\textsuperscript{92} See, e.g., United States v. Winstar Corp., 518 U.S. 839, 872 (1996) (“[O]ne legislature may not bind the legislative authority of its successors . . . .”)}
a later date to a more powerful political interest that does not want that promise performed. Given that privatization most endangers politically marginalized citizens, the government may less vigorously demand performance of contracts that benefit the very people most reliant on those contracts.

This creates scenarios where the government may one day contract with certain objectives to be fulfilled by performance, and then the next day change its mind or lack an interest in demanding performance. This was the exact dynamic that Professor Samuel Williston believed gave rise to the strongest case for allowing a third-party beneficiary to enforce a contract. Where the promise (here, the government) lacks an interest in demanding performance, the case is strongest for allowing the third party who was the intended beneficiary of that performance to enforce the contract. Otherwise, the contracting parties' initial intention is unlikely to be carried out.

The government's unpredictability, and the greater likelihood that it will not demand performance compared to private parties, also create a dynamic in which parties contracting with the government may underbid, knowing that they are less likely to face liability if they breach. The inability of the third-party beneficiary to enforce the contract creates an incentive for firms to bid beneath the expected cost of performance and then breach. They do so knowing that they will likely escape liability for a breach but will win contracts because of lower bids.

II. TOWARD AN EQUITABLE APPROACH

Not only is the application of a blanket heightened standard for recognizing third-party beneficiaries of government contracts unjustified, it also tugs third-party beneficiary doctrine away from its equitable roots. Third-party beneficiary doctrine was, from the beginning, concerned with the third party itself and the unfairness of leaving it without a remedy when a promise made for its benefit was broken. Section 313 produces results that undermine the

93. See, e.g., Part III (discussing particular examples in Detroit, where the city government may not have vigorously sought performance of promises it extracted because that enforcement ran counter to the interests of politically powerful actors).
94. See supra note 11 and accompanying text.
96. See id.
97. See id.
99. Id.
100. Id.
101. See, e.g., Lawrence v. Fox, 20 N.Y. 268, 275 (1859) (dismissing the possibility that a different result should be reached in the case because of technical contract doctrine when “manifest justice” demanded that the third-party beneficiary to the contract should have a remedy); see also Williston, supra note 95, at 775 (“The denial of relief to a beneficiary is [as] obviously
fairness concerns that animate third-party beneficiary doctrine and offers insufficient guidance for resolving the real questions that are particular to recognizing third party-beneficiaries of government contracts. Proper guidance can come from an approach focused on answering the question that originally gave rise to third-party beneficiary doctrine: is it fair to let this party enforce the contract? Three inquiries with deep roots in third-party beneficiary cases can help answer that question. First, who benefits from performance of the contract? Second, will the party injured by nonperformance be left with no remedy if denied third-party beneficiary status? And third, what remedy is the would-be third-party beneficiary seeking?

A. Who Benefits from Performance?

The first consideration reframes the question courts answer when they look to the intent of the contracting parties by instead asking: who benefits from performance of the contract? Because of the difficulty with ascribing intent to the government, courts should look less to the intent of the parties and instead look to the structure of the contract itself. This approach is consistent with Williston’s rationale for allowing third-party claims in one category of case. Williston identified a class of contracts that create a third-party beneficiary because that party is the “sole beneficiary” of the contract. Williston believed these were the cases where justice most strongly favored allowing the third-party beneficiary’s claim. In determining when a contract creates a “sole beneficiary,” Williston asked whether, after the contract is formed, the promisee retains any pecuniary interest in its performance. If the promisee does not have a pecuniary interest, and the third party does, the
third party is best understood as the “sole beneficiary” of the contract, meaning it is fair and necessary to let the third party enforce the contract.\(^ {109} \)

Williston’s approach deemphasizes the intent of the parties and instead asks: who stands to gain what from the performance of this contract? This is the right approach with government contracts for three reasons.

First, it shifts the inquiry away from the classical categories of donee beneficiaries and creditor beneficiaries. The “sole beneficiaries” with whom Williston was concerned were those beneficiaries that many courts—and the First Restatement—came to describe as donee beneficiaries.\(^ {110} \) This slippage of language from sole beneficiaries to donee beneficiaries causes confusion in the government context.\(^ {111} \) As Williston explained, the rationale for allowing third-party claims in these types of cases is not that the benefit was intended as a gift but rather that only the third-party beneficiary has a pecuniary interest in performance.\(^ {112} \) By refocusing on who has a strong pecuniary interest in performance, courts can avoid some of the confusion that has resulted from applying donee beneficiary and creditor beneficiary categories to government contracts.

Second, Williston’s approach helps courts focus on the appropriate third-party beneficiary of any given contract. The “sole beneficiary” analysis involves the same difficult line drawing questions that concerned Chief Judge Cardozo in \textit{Moch}.\(^ {113} \) But this approach aligns courts’ analyses in these cases with the same line drawing analysis that must be done in all third-party beneficiary cases: a focus on who stands to benefit from the contract.\(^ {114} \)

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109. \textit{Id.} at 772–75. It is necessary because failure to allow them to enforce the agreement makes it unlikely the objectives of the contracting parties would be carried out. \textit{Id.}

110. \textit{RESTATEMENT (FIRST) OF CONTRACTS} § 133(1)(a) (AM. L. INST. 1932). For example, Williston includes \textit{Buchanan v. Tilden} in his list of cases where recovery was allowed by the sole beneficiary. Williston, \textit{supra} note 95, at 804. That case provided the doctrinal underpinnings for \textit{Seaver v. Ransom}, which was a New York case decided sixteen years after Williston published his article. 120 N.E. 639, 641 (N.Y. 1918). \textit{Seaver} is often cited as the quintessential donee beneficiary case as the Restatement named this category of case. \textit{See}, e.g., Eisenberg, \textit{supra} note 18, at 1371.

111. \textit{See supra} Section I.B.3.

112. Williston, \textit{supra} note 95, at 772–75.

113. \textit{See supra} Section I.B.1.

114. \textit{See supra} notes 95–97 and accompanying text. For an example of a court undertaking this sort of line drawing analysis in relation to a government contract, see \textit{Price v. Pierce}, 823 F.2d 1114, 1121–22 (7th Cir. 1987) (deciding that prospective tenants of federally subsidized housing did not have standing to enforce their prospective landlords’ contracts with HUD, in contrast with current tenants who did).
And third, it avoids trying to identify a singular intent behind the government’s decision to contract. That analysis raises all sorts of difficult questions, and if it can be avoided while applying a test consistent with third-party beneficiary doctrine, it ought to be. Asking who stands to benefit from performance, rather than who the government intends to benefit, accomplishes that.

B. Will the Injured Party Seeking Third-Party Beneficiary Status Be Left Without a Remedy If That Status Is Denied?

After looking at the structure of the contract to decide if the plaintiff was the sole beneficiary of its performance, courts should ask if that plaintiff would be left without a remedy if they could not enforce the contract. The desire to avoid leaving the third party without a remedy is at the very heart of third-party beneficiary doctrine. It was exactly this concern that led the court to grant third-party beneficiary status to the plaintiff in Lawrence.

The court was aware that Lawrence would not have a legal remedy to seek the underlying gambling debt from Hawley. If the court did not allow Lawrence to recover as a third-party beneficiary, Lawrence would have no way to collect the money. The court was undeterred, writing that if “it could be shown that a more strict and technically accurate application of the rules . . . would lead to a different result[,] . . . the effort should not be made in the face of manifest justice.”

Courts should similarly be loath to leave a party for whom the government contracted to benefit with no remedy if that benefit is not conveyed. Courts too often dismiss this concern as beyond the scope of their role in determining if a third-party beneficiary can enforce the contract. This inquiry can also resolve an area of particular sensitivity in relation to government contracts: whether recognizing a third-party beneficiary will undermine the will of a democratic body. Government contracts can take on a “dual character as both contract-like instruments and public lawmaking instruments.” Because the contract can be used by governments as a “lawmaking instrument,” courts should hesitate to recognize third-party beneficiaries where doing so would directly undermine the democratic will under which

115. See supra note 91 and accompanying text; see also Fahey, supra note 104, at 2389 (“If third-party rights do stem from the agreement, whose intent determines third-party-beneficiary status?” (italics omitted)).


117. For a discussion of the facts in the case, see supra notes 64–70 and accompanying text.

118. Lawrence v. Fox, 20 N.Y. 268, 268 (1859); see also Waters, supra note 15, at 1127.

119. Lawrence, 20 N.Y. at 275.

120. E.g., Clifton v. Suburban Cable TV Co., 642 A.2d 512, 515 (Pa. Super. Ct. 1994) (denying third-party beneficiary status and noting that it was “beyond the purview of this appeal” to ask why the state was not enforcing the terms of the contract).

121. Fahey, supra note 104, at 2330.
the contract was formed. This concern is most salient and likely to dictate the result where the contract is made pursuant to a statute that prescribes enforcement of the contract’s substantive obligations.\footnote{122}

Courts can be sensitive to this dynamic by considering the availability of other remedies to the plaintiff. Where a democratic body has expressly provided an enforcement mechanism through which the plaintiff can seek performance, allowing the third-party beneficiary to sue would undermine that mechanism. The availability of another remedy would also weaken the plaintiff’s claim that equity requires they enforce the contract as a third-party beneficiary. And any undermining of the democratically devised scheme would be avoided.

In \textit{Astra USA, Inc. v. Santa Clara County}, for example, Santa Clara County sought damages for breach by Astra and other pharmaceutical companies of their contractual obligation to provide drugs for a price less than what they charged the county.\footnote{123} The county claimed to be a third-party beneficiary of the contract between the federal government and the companies, which capped the price the drug companies could charge.\footnote{124}

The Supreme Court unanimously rejected the county’s argument that it was a third-party beneficiary.\footnote{125} The Court noted that the statute establishing the drug price caps did not create a private right of action for overcharged providers to bring claims directly against the drug companies and instead provided an administrative enforcement mechanism through the Health Resources and Services Administration (HRSA).\footnote{126} The county could complain to the HRSA, which could require an overcharging drug manufacturer to reimburse the county.\footnote{127} The Court made particular note that Congress had recently passed a new law directing the Secretary of the U.S. Department of Health and Human Services to “develop formal procedures” for these complaints, whereby the secretary will “reach an ‘administrative resolution’ that is subject to judicial review.”\footnote{128} As such, \textit{County of Santa Clara} does not suggest that a third-party beneficiary has another remedy if their only recourse is to lobby political actors to enforce a contract more vigorously. Instead, it means that the equitable case for a third-party beneficiary claim is weaker where a formal adjudicative remedial procedure is available.\footnote{129}

\footnote{122. \textit{E.g., Astra USA, Inc. v. Santa Clara Cnty.} 563 U.S. 110 (2011) (giving controlling importance to the fact that the contracts under which the third-party beneficiary sought to sue were made pursuant to a statute that provided other remedies).}
\footnote{123. \textit{Id.} at 116.}
\footnote{124. \textit{Id.} at 117.}
\footnote{125. \textit{Id.} at 110.}
\footnote{126. \textit{Id.} at 117, 121–22.}
\footnote{127. \textit{Id.} at 115.}
\footnote{128. \textit{Id.} at 116.}
\footnote{129. \textit{Contra Cooper v. Charter Commc’ns Entts. I, LLC,} 760 F.3d 103, 110 (1st Cir. 2014) (“[I]n situations in which an elected local government holds enforcement power, citizens can seek recourse by acting through the political process to cause the municipality to seek a remedy . . . .”).}
C. What Remedy Is the Plaintiff Seeking?

Considering the form of remedy sought can also help courts decide if a plaintiff is a sole beneficiary with the right sort of relationship to the contract. Where the plaintiff is seeking restitution or specific performance, they are more likely to be a third-party beneficiary of the contract. This is consistent with one strand of third-party beneficiary cases from Lawrence onward. In these cases, breach by the promisor equated to holding money that should belong to the beneficiary. In Lawrence, Fox was essentially holding money from Hawley that belonged in Lawrence’s hands. In a more recent case that involved a government contract, Zigas v. Superior Court of San Francisco, the plaintiffs demanded rents collected by their landlord in excess of the maximum amount the landlord had promised to charge in its agreement with the U.S. Department of Housing and Urban Development (HUD). The landlord had already collected the excess rent, and the tenants sought return of that money.

Where that dynamic exists, the plaintiffs are asking for the promise to be performed by demanding restitution of the money they lost because of the breach. This dynamic can exist even where the parties have not lost money but instead have been denied the benefits of a public program and are seeking injunctive relief demanding access to those benefits. Where a plaintiff seeks specific performance or restitution, the doctrine most strongly demands they be recognized as third-party beneficiaries to the contract.

Considering the form of damages sought as an equitable factor responds to Cardozo’s concerns in Moch of spiraling liability from the very nature of government contracts. Where the plaintiffs will be made whole by the performance of the contract, or the transfer of assets they have lost directly because of the breach, they are more likely to be a member of “identifiable classes . . . for whose particular benefit” the government has exacted a promise from the defendant. By contrast, where the plaintiff seeks consequential damages, courts might look more closely to ensure that they do not expose the promisor to unforeseen, unlimited liability. Section 313 reflects this concern, providing

130. See Waters, supra note 15, at 1191.
131. See id.
132. See supra notes 64–70 and accompanying text.
134. Id.
135. Waters, supra note 15, at 1204–06; see, e.g., Hook v. Ariz. Dep’t of Corr., 972 F.2d 1012 (9th Cir. 1992) (where third-party beneficiary plaintiffs were denied access to their mail as promised in a consent decree).
136. Williston, supra note 95, at 773–76 (contending that denying a party standing to seek performance as a third-party beneficiary is most unjust in those situations where the “only satisfactory relief is something in the nature of specific performance”).
137. See supra notes 34–37 and accompanying text.
that the contracting party is not liable to “a member of the public for consequential damages” unless the heightened standard of section 313(2) is satisfied.\footnote{139} But courts too often apply this heightened standard even where the plaintiff seeks restitutionary or equitable damages.\footnote{140}

This is not to say that no plaintiff seeking consequential damages should have third-party beneficiary standing. But akin to the general rule for consequential damages,\footnote{141} where it was not foreseeable to the government and party it contracted with that this plaintiff would suffer this sort of harm from breach, it is far less likely that the plaintiff is the sole beneficiary of the contract.

In \textit{Sussex Tool \& Supply, Inc. v. Mainline Sewer \& Water, Inc.},\footnote{142} for example, a Wisconsin court denied a small business’s claim that it was a third-party beneficiary of a construction company’s promise to a city government to maintain vehicle access at all times for businesses affected by its construction.\footnote{143} Because the construction company breached that provision of its contract, the business lost profits during construction.\footnote{144} The court acknowledged that the provision of the contract requiring vehicle access did evince an intent to benefit parties like this business.\footnote{145} Yet the court held that, because the plaintiff sought economic damages resulting from the breach, rather than injunctive relief, the lack of an express contractual provision making the construction company liable for damages to parties like the plaintiff meant the business did not satisfy section 313.\footnote{146}

The court, by inquiring about the form of damages sought and the beneficiary of the contract’s vehicle access term, was identifying who was and was not a sole beneficiary of the contract. Applying section 313 served only to shift the court’s attention away from that question. The court’s analysis would have been more responsive to the doctrine’s concerns had it simply asked if the third party’s consequential damages were foreseeable at the time of contracting. In doing so, the court might have avoided the strange result of holding

\footnotesize{
\begin{itemize}
  \item 139. \textsc{Restatement (Second) of Contracts} § 313 (Am. L. Inst. 1981) (emphasis added).
  \item 141. \textit{See} \textit{Hadley v. Baxendale} (1854) 156 Eng. Rep. 145 (Ex.) (establishing the doctrine of foreseeability for consequential damages: “Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.”).
  \item 142. 605 N.W.2d 620 (Wis. Ct. App. 1999).
  \item 143. \textit{Sussex Tool \& Supply}, 605 N.W.2d 620.
  \item 144. \textit{Id.} at 622.
  \item 145. \textit{Id.} at 625–26.
  \item 146. \textit{See id.} at 626.
\end{itemize}
}
that a business denied vehicular access to its property was not the sole beneficiary of a promise to “provide vehicular access at all times to the properties affected by this project.”

Where the plaintiff will be made whole either by specific performance or restitution, courts should be assured that the plaintiff is a sole beneficiary under third-party beneficiary doctrine. Where plaintiffs seek consequential damages instead, courts should ask if those damages were foreseeable to determine if the plaintiff is a third-party beneficiary. This analysis, more so than section 313, recognizes plaintiffs with the right relationship to government contracts while also responding to concerns about spiraling liability.

III. The Equitable Approach Applied in Detroit

The importance of reviving an equitable approach to these claims is clear when considering the contemporary landscape of privatization. We all rely on government contracts to deliver basic services and benefits. Private partners contracting with the government deliver water, education, roads, parking meters, public transit, healthcare, and more. Contract law should be prepared to enforce the terms of those contracts made for our benefit.

Two contracts at the center of recent efforts to stimulate Detroit’s economy, and at the center of considerable political controversy, illustrate how the equitable principles outlined in this Note can produce results truer to the third-party beneficiary doctrine’s purpose. Detroit is a fitting landscape in which to examine the need for and promise of an equitable approach. In the wake of decades of divestment, racist public policy, and economic decline, the city and state government have frequently turned to public–private partnerships as an effort to address the city’s challenges. And many engaged organizers, activists, and citizens have sought to monitor, push back on, and

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147. Id. at 622.


influence those partnerships to ensure they are actually benefitting Detroiters.\textsuperscript{150} As a result, it is an environment where you might expect to find a number of potential third-party beneficiary claims to government contracts and where treating those claims equitably might go some way to empowering citizens impacted by privatization.

A. The Little Caesars Arena Deal

In September 2017, Little Caesars Arena opened in Detroit.\textsuperscript{151} Over $320 million of public money funded the new home of the Pistons and the Red Wings.\textsuperscript{152} In exchange for public funding, the arena’s owner, Olympia Development of Michigan (ODM), and its concessionaire, Olympia Development of Michigan Events Center (ODMEC), made a series of contractual promises about how the stadium would be built, what would be invested in the areas surrounding the arena, and who would be employed in constructing and operating the arena.\textsuperscript{153} ODM and ODMEC made those contracts with the City of Detroit Downtown Development Authority, an agency created by state statute and governed by a board appointed by Detroit’s mayor.\textsuperscript{154}


\textsuperscript{153.} Fifth Amendment to Master Development and Reimbursement Agreement (EC Ancillary Development Project) by and Between City of Detroit Downtown Development Authority and Olympia Development of Michigan, L.L.C. (June 4, 2019) (on file with author); Fifth Amendment to Amended and Restated Concession and Management Agreement (May 30, 2019) [hereinafter CMA] (on file with author).

Citizen watchdogs and media have heavily critiqued the wisdom of providing this public funding. They have also pointed out that the promises that were specifically made to benefit Detroiters (however limited they may have been) have been broken. Contractors building the stadium failed to ensure that their workforce was made up of at least 51 percent Detroiters, as promised. Furthermore, there is an open question of whether the arena’s concessionaire has satisfied its obligations to hire the agreed-upon percentage of Detroiters for its estimated 1,100 jobs or to instate programs “to maximize . . . opportunities to hire and promote Detroit residents” and purchase goods and services from Detroit businesses.

Political dynamics may have contributed to the city’s failure to demand performance of these promises, showing why third-party beneficiary claims are necessary. Companies owned by the Ilitch family, the owner and operator of ODM and ODMEC, control 60 percent of the properties in the central business district near the arena. Those properties account for 83.8 acres, more than all of downtown Detroit. The family’s companies are the fourth largest employer in the city. The venues they own attract more than 10 million visitors annually, and they own two of the city’s professional sports teams. All that is to say that the Ilitch family is a politically powerful stakeholder, and, for better or worse, the city might not be inclined to go to battle with them over broken promises.

Should the people who were meant to benefit from those promises be able to battle where the city government will not? Applying the equitable factors

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157. Id.


160. Id.

161. Id.

162. Id.
outlined in this Note might yield different results for those hurt by the non-performance of the different employment promises.163

1. The Construction Contractors’ Failure to Hire Enough Detroiter

When ODMEC contracted with the city, it knew that satisfying its promise to employ at least 51 percent Detroiter in the arena construction workforce would be a challenge, if not impossible.164 Indeed, a very limited number of contractors satisfied the obligation.165 All told, Detroit residents performed only 25 percent of the almost 3 million hours worked on the project.166 ODMEC and its contractors explained the failure by citing a lack of skilled trade workers living in the city.167 But there were at least some skilled trade workers in Detroit who were available to work on the project but were not hired.168

These workers could argue that they were third-party beneficiaries of the term that each contractor would “take positive action to ensure” that Detroit residents made up at least 51 percent of the workforce.169 Applying the equitable considerations outlined in this Note should lead a court to grant them standing as third-party beneficiaries. By contrast, a court applying section 313 would likely deny their claim.170

163. Professor Patience A. Crowder has persuasively argued that § 313 is not applicable to these sorts of urban “redevelopment contracts” because they are not contracts to benefit a “large and indeterminate public.” Crowder, supra note 12, at 318 (emphasis omitted). While this Note is consistent with Crowder’s argument, it goes further in arguing that § 313 is generally wrong-headed and therefore considers these contracts under the rubric of equitable factors proposed here as a replacement for § 313.


165. Id.


167. Neher, supra note 164.

168. See, e.g., Complaint at 8, Wilson v. Hardman Constr., Inc., No. 5:18-cv-10431 (E.D. Mich. Feb. 6, 2018) (“During the months of April and May when Hardman gave Wilson [a bona fide Detroit resident] the run around, the Company had over $41,000 in recruitment fees because only 7 and 3 percent of the hours worked on the project had been by residents of the City of Detroit.”).

169. CMA, supra note 153, at Exhibit I-3.

170. The liquidated damages provision inuring to the benefit of the government in the CMA would likely lead a court applying § 313 to err against treating these workers as third-party beneficiaries. See, e.g., Martinez v. Socoma Cos., 521 P.2d 841, 846 (Cal. 1974) (denying a third-party beneficiary claim because the contract included a liquidated damages provision inuring to the benefit of the government); see also, e.g., infra notes 171–172 and accompanying text.
The damages clause of the contract suggests that eligible workers are the sole beneficiaries of the term. The contract provides “Non-Compliance Remedies” for failure to hit the 51 percent mark.\textsuperscript{171} If the contractors breached their promise, the city would receive support in addressing the macro-conditions that led to the breach by requiring the contractors to pay money or provide in-kind contributions to programs to train new skilled trade workers.\textsuperscript{172} In that sense, the city had little or no pecuniary interest in the performance of the promise. It was interested in the macro benefit of the creation of economic opportunity, and because the remedy for breach would provide funds to train new workers through apprenticeships, it would receive that benefit even if the contractors breached.\textsuperscript{173} The city may have even preferred receiving the funding to train new workers. Therefore, the workers who were prepared to fill jobs on the construction project had the strongest pecuniary interest in the performance of the promise that would see them receive those jobs.

The damages clause similarly sheds light on the second of the equitable factors: whether these already-qualified workers would be left without a remedy. Because the training programs were designed to train new skilled trade workers,\textsuperscript{174} existing skilled trade workers who did not receive jobs would have no remedy for the breach.\textsuperscript{175} Both the sole-beneficiary analysis and inquiry into the availability of other remedies make clear that Detroit’s existing qualified skilled trade workers were the intended beneficiaries of the promise to employ at least 51 percent Detroiters. They should have standing as third-party beneficiaries to seek damages for breach of that promise.

2. The Concessionaire’s Failure to Employ and Train Enough Detroiters

The other possible third-party beneficiary claims, based on promises to employ a certain percentage of Detroiters in the arena’s concession operations and to provide certain training programs, are not as strong as the claim by the qualified, skilled trade workers. Here, the sole-beneficiary analysis does not favor the potential employees as strongly as it does above. As outlined, the city does have a strong pecuniary interest in economic opportunity produced by

\begin{itemize}
  \item \textsuperscript{171} CMA, \textit{supra} note 153, at Exhibit I-16.
  \item \textsuperscript{172} \textit{Id.} at Exhibit I-16–17.
  \item \textsuperscript{173} See Sarah Cwiek, \textit{It’s Go Time for Little Caesar’s Arena and “District Detroit”,} MICH. RADIO (Sept. 5, 2017, 9:00 PM), https://www.michiganradio.org/news/2017-09-05/its-go-time-for-little-caesars-arena-and-district-detroit [perma.cc/S7RL-V529] (“City Council President Brenda Jones said everyday Detroit residents deserve some return on that investment. ‘Everyone knows what was important to me is when you’re spending taxpayers' dollars, you give something back to the city,’ she said. Jones believes the city is getting something back, in the form of jobs and skilled trades apprenticeships for Detroiters.”).
  \item \textsuperscript{174} See \textit{supra} note 172 and accompanying text.
  \item \textsuperscript{175} \textit{Contra Martinez,} 521 P.2d at 846 (deeming the contract’s inclusion of a liquidated damages provision providing that damages for failure to provide the promised jobs would be paid to the government as evidence that the government and company did not manifest an intention to create third-party beneficiaries in the contract). 
\end{itemize}
the stadium. Because the city is not guaranteed funding to create additional economic opportunity if the arena breaches those ongoing promises, the city can only secure the benefit it is interested in by demanding performance.

These claims may turn on the line drawing analysis the sole-beneficiary inquiry helps guide. If the person claiming to be a third-party beneficiary were a person who either worked at or tried to work at the arena and lost or was denied employment because of ODMEC’s failure to perform, they have a strong pecuniary interest in the performance of the contract. Unlike the city, whose interest in performance is macroeconomic and disconnected from individual hiring or firing actions, this worker’s entire pecuniary interest in the contract turns on ODMEC’s performance of its employment promise. The same would be true of an employee denied the benefit of promised training opportunities. By contrast, an individual who never applied for employment would have only the same sort of macroeconomic interest in performance that the city has and, as such, does not have a stronger pecuniary interest in performance than the city.

B. Detroit Land Bank Authority Contracts

Another program central to Detroit’s plans for economic growth that raises possible third-party beneficiary issues is the Detroit Land Bank Authority. The Detroit Land Bank Authority (the “Authority”) was created in 2008 and is authorized by the 2003 Land Bank Fast Track Act. Land banks take control of properties held by cities, most often in their possession because of tax foreclosure, and either demolish dilapidated properties or sell properties for rehabilitation and use.

176. See supra note 173 and accompanying text.
177. CMA, supra note 153, at 22.2 (outlining ODMEC promises to make “commercially reasonable efforts” to “recruit qualified Detroit residents[,] . . . provide internal or external development and training opportunities[, and offer other] . . . promotion[al] opportunities”).
178. See supra notes 113–114 and accompanying text.
179. Cf. Price v. Pierce, 823 F.2d 1114, 1121 (7th Cir. 1987) (deciding that prospective tenants of federally subsidized housing did not have standing to enforce their prospective landlord’s contracts with HUD, in contrast with current tenants who did).
The Authority is the largest land bank in the country. At one point, it owned around 20 percent of single-family homes in Detroit. Its size is the product of a confluence of conditions, including the shrinking population of the city over the past half century, macroeconomic conditions affecting the city, the subprime mortgage crisis, and overassessment of home values (which led to inflated taxes owners could not afford to pay). The high number of vacant properties in the city contributes to and results from some of the most significant challenges the city and its residents face, including declining homeownership, a declining population and tax base, and the presence of speculators. The Authority is constituted to address the complicated problem of these blighted and vacant properties and to eventually return them “to productive use.”

One of the key tools that the Authority leverages to accomplish this mission is the sale of homes through auction or its “Own It Now” program. When a buyer purchases a home through one of these programs, they sign a Purchase & Development Agreement including covenants that the buyer will rehabilitate the home and “provide proof that the Property is renovated and occupied” within 180 days of closing.

Some residents have complained that purchasers of Authority properties have failed to renovate and occupy the homes within 180 days, as they are contractually required to do. In a high-profile example, current Michigan

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183. Id.
186. Alvarez & Samuel, supra note 184 (“Detroit has gone from having one of the nation’s best rates for black homeownership to being a majority-renter city.”).
187. Trickey, supra note 182.
188. See Gallagher, supra note 180 (discussing how a similar dynamic with speculators purchasing foreclosed properties in Flint led to the creation of the Genesee County Land Bank Authority).
189. Policies & Procedures, DETROIT LAND BANK AUTH., https://buildingdetroit.org/our-policies [perma.cc/8WLS-GTRR]; Trickey, supra note 182 (“[Mayor Duggan] wanted to bring people back into the city, increase the tax rolls and save Detroit . . . . One of the keys to his plan was to radically enlarge the city’s tiny land bank program.”).
Lieutenant Governor Garlin Gilchrist purchased a property from the Authority in 2016 for $13,500 and then failed to renovate and occupy it by the 180-day deadline, prompting complaints from neighbors that became a scandal in the 2018 gubernatorial election.\(^{193}\)

The Authority’s current director has acknowledged issues with clarity around its compliance program.\(^{194}\) But what are Detroit residents to do when homes in their neighborhood were sold to buyers who never renovated and occupied them? Detroiters living near these homes may have plausible claims for breach of contract as third-party beneficiaries.

Applying the equitable approach, courts can be responsive to the individual plaintiff’s relationship to the contract and the Authority’s enforcement mechanisms. Rather than applying a blanket presumption against recognizing third-party beneficiaries to these government contracts—which would likely bar any claim—the equitable approach would help to distinguish long-term residents from speculative purchasers. It would also allow the court to be sensitive to the Authority’s actual enforcement of Purchase Agreements, ensuring that the third party does not interfere with the function of the government program, while prohibiting unaccountable actors from making empty promises and leaving residents with no remedy for the breach.

A court should first ask who stands to benefit from performance of the renovation and occupancy term of the contract. The Authority is interested in distributing houses in its possession so that they can be put to productive use.\(^{195}\) The Authority’s pecuniary interest in performance is therefore weakened, but not extinguished, once they transfer the property. They have satisfied the inventory reduction aspect of their mission simply by selling the house (and have already received their compensation for the sale). But, insofar as the Authority has an interest in ensuring properties are actually put to productive use (both because it is a mandate of their mission, and perhaps more tangibly because it will impact future funding), they do retain a pecuniary interest in the performance of this promise.

Despite this residual pecuniary interest, the Authority’s incentive to demand performance is diminished by the unappealing nature of their available remedies. The remedies provision of the contract provides that the Authority can, in the case of breach, retain the purchase price as liquidated damages while reclaiming ownership of the property.\(^{196}\) Because the Authority has a


\(^{194}\) Perkins, supra note 190.

\(^{195}\) See supra note 189 and accompanying text.

\(^{196}\) Purchase Agreement, supra note 191, at § 12.
strong interest in not reclaiming properties they have already sold ("Occupancy is the goal—we don’t want to take those houses back at all . . . ."), their pecuniary interest may actually cut against seeking performance of the buyer’s obligations. This is even more salient when the buyers have political or economic power that might influence the Authority’s actions.

By contrast, the neighbors of properties purchased from the Authority do have a strong pecuniary interest in performance. Their property values and quality of life are tied to the improvement of the properties in their neighborhoods. This equitable consideration should at least make a court seriously consider a neighbor as a valid third-party beneficiary.

The second and third considerations posited in this Note help guide an inquiry into the actual enforcement processes at the Authority and draw out the distinctions between long-time resident plaintiffs and speculator plaintiffs. Asking whether the neighbor will be left with no other remedy should they be denied third-party beneficiary status requires an inquiry into the Authority’s enforcement mechanism. The Authority has a compliance team tasked with ensuring that property owners renovate their purchased properties. Although the Authority does not provide an explicit process for filing complaints if a neighbor is not in compliance, it does provide a general contact number. Notably, neither the statute that authorizes the creation of land banks, nor the Intergovernmental Agreement between the City of Detroit and Michigan Land Bank Fast Track Authority (which contractually creates the Authority), speaks to any reporting or enforcement mechanism for citizens aggrieved by the Authority’s failure to ensure compliance with purchase agreements.

To know whether these plaintiffs would be left without remedy requires an inquiry into how the Authority accepts and responds to citizen compliance.

197. Perkins, supra note 190 (quoting Saskia Thompson, Director, Detroit Land Bank Authority).

198. Lieutenant Governor Gilchrist is an example of one such buyer. Charlie LeDuff, Screw You, Detroit! Garlin Gilchrist Lets House Go to Hell, DEADLINE DETROIT (Oct. 12, 2018, 10:21 AM), https://www.deadlinedetroit.com/articles/20797/leduff_screw_you_detroit_whitmer_s_pick_lets_house_go_to_hell [perma.cc/DK55-VCFU]. But this example is certainly not unique, nor perhaps of the sort that is most concerning or pervasive. The Authority also sells to developers who own large numbers of properties and may have political influence and power that makes the Authority hesitant to vigorously enforce compliance. See, e.g., Aaron Mondry, Core City Developer Outlines Grand Plans for District, CURBED DETROIT (Feb. 18, 2020, 1:43 PM), https://detroit.curbed.com/2020/2/18/21142560/core-city-detroit-philip-kafka-true-north [perma.cc/5MUU-R6CT].

199. See, e.g., Alo, supra note 192.


201. Id.

complaints in practice. If a plaintiff can show that the Authority is not recep-
tive, the court should err toward recognizing the plaintiff as a third-party ben-
eficiary. But, if the court believes there are administrative remedies in place, 
the court should hesitate to grant third-party beneficiary status. In that case, 
the equities weigh against the plaintiff. And looking into the availability of 
other remedies ensures the court does not undercut a good faith enforcement 
scheme administered by a representative body.\footnote{203} The absence of any enforce-
ment scheme indicates the court is not undercutting a democratic design but 
instead is allowing the third-party beneficiary to seek performance where no 
adquate enforcement mechanism exists.

Also salient here is the fact that the Authority is free to grant extensions 
to purchasers who request more time to complete renovations. Those owners, 
in turn, are not in breach of their contracts when they fail to complete the 
renovation within 180 days of purchase.\footnote{204} This too ensures that third-party 
beneficiaries are not bringing claims that undercut the administration of the 
program, as the Authority can grant extensions where it deems necessary. This 
shows that, despite Cardozo’s fears in \textit{Moch},\footnote{205} courts need not restrict third-
party beneficiary claims to prevent rising costs that dissuade parties from con-
tracting with the government. As the Authority has done, parties can structure 
contracts to avoid placing the promisor in breach where the government 
knows it wants to provide flexibility. The Authority may know buyers will not 
purchase these homes without the flexibility of deadline extensions and can 
act accordingly. The rights of third-party beneficiaries need not be dimin-
ished.

Finally, looking at the form of remedy sought helps distinguish plaintiffs 
who should have third-party beneficiary standing from those who should not. 
Even for long-term residents who have houses in their neighborhoods sold by 
the Authority, their damages are consequential. They seek the lost “profits” 
(the increased property values) that would have resulted from the purchaser 
meeting their renovation requirements. This weakens their third-party bene-
ficiary claim but does not extinguish it. Instead, as courts generally do when 
assessing claims for consequential damages from a breach of contract, the 
court should ask if the damages this plaintiff suffered were foreseeable to the 
Authority and purchaser at the time of sale.\footnote{206}

Where the plaintiff resided in the neighborhood at the time the Authority 
made the sale and expected a property value increase from the renovation of 
a neighboring house, any such consequential damages were foreseeable to the 
buyer. That foreseeability suggests that these plaintiffs were the kind of third 
parties the government sought to benefit by entering the contract.\footnote{207} In fact,
they are likely the exact sort of plaintiffs the government intended to benefit: long-time residents who have stayed in the city despite vacancies and blight in their neighborhood.\textsuperscript{208}

Consequential damages may not be foreseeable when the plaintiff is engaged in speculation, though. A speculator might, for example, purchase properties in a neighborhood where the Authority has previously sold a number of homes because they take the sales as a signal that property values will go up. They may then hope to sell or rent the properties at a large profit once the neighboring homes are occupied as the Authority buyers promised.\textsuperscript{209} If, however, the speculator was expecting a kind of return that was not foreseeable to the Authority buyer when they entered the contract, the equitable case for allowing the speculator to enforce the contract is weaker. Perhaps the speculator purchased properties with plans to sell to a commercial developer or to develop the properties themselves.\textsuperscript{210} The original purchaser of the land bank property may have foreseen when they purchased that the neighboring residential properties would expect modest increases in value but may not have been able to foresee that a speculator would expect profits at a commercial scale based on their promise to renovate. Justice may not demand a remedy for that speculator who effectively gambled on the purchaser fulfilling their promise. The foreseeability analysis called for in this Note can help distinguish between these two sorts of putative third-party beneficiaries.\textsuperscript{211}

\textbf{Conclusion}

When citizens are promised benefits by a party contracting with the government and left empty-handed when those benefits are not delivered, justice

\begin{itemize}
  \item \textsuperscript{208} See Trickey, supra note 182 (“[W]e still have time to save the large stretches of this city that are still filled with residents who want to stay in their homes.” (quoting Mayor Mike Duggan)).
  \item \textsuperscript{209} That is not to say that no plaintiff who bought a house next to an Authority purchase after the Authority already made the sale would have third-party beneficiary standing. As with third-party beneficiary claims where homeowners new to a neighborhood rely on Homeowners Association contracts that predate their arrival to preserve the value of their homes going forward, a resident new to a neighborhood could rely on the buyer’s promise to renovate the house even though it predates their arrival in the neighborhood. See, e.g., Scarpitti v. Weborg, 609 A.2d 147 (Pa. 1992).
  \item \textsuperscript{210} As one of many possible examples, a recent development in Islandview, a neighborhood east of downtown Detroit, illustrates the need for foreseeability analysis in deciding if a developer could enforce a Land Bank Authority contract as a third-party beneficiary. A developer is investing $2.46 million into a building in the neighborhood to convert it into townhouses, with rents starting around $1,300 per month. John Carlisle, \textit{Detroit Neighborhood Group Sees Gentrification as the Enemy}, DETROIT FREE PRESS, (May 24, 2020, 9:24 AM), https://www.freep.com/in-depth/news/columnists/john-carlisle/2020/05/24/detroit-neighborhood-gentrification-protest-carlisle/4954702002 [perma.cc/4GTE-XSKV]. It would be inequitable to allow that developer to seek lost profits from rents far higher than the neighborhood norm if another Islandview resident who purchased a home from the Land Bank failed to complete their Land Bank renovations on time, making it harder for the developer to find renters.
  \item \textsuperscript{211} See supra Section II.C.
\end{itemize}
demands a remedy. An equitable approach to the third-party beneficiary doctrine can provide one. Empty and broken promises harm citizens. They allow governments to extract goodwill or ease political pressure only to underdeliver down the line, thereby undermining trust in government. And they give a windfall to private parties contracting with the government. The costs of broken promises are clear in Detroit:

“Everybody knew you couldn’t get to 51 percent.”
Yet this was the major jobs promise extracted from the contractors hired to build the Little Caesars Arena; 51 percent of the construction jobs would go to bona fide Detroiters. In exchange, the developers received more than $300 million of taxpayer money.

An equitable approach to third-party beneficiary doctrine can make clear to governments and their contracting partners that when they say they are contracting to benefit a group of citizens, they should mean it. And it empowers citizens to make them mean it.

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212. See, e.g., Louis Aguilar, Detroit’s Decade of Growth Has Been Separate and Unequal, New Study Finds, BRIDGE MICH. (May 16, 2021), https://www.bridgemi.com/urban-affairs/detroits-decade-growth-has-been-separate-and-unequal-new-study-finds [perma.cc/XKW3-MF8Z] (“[P]olicies focused too much on giving tax breaks for downtown projects and new housing where rent is too expensive for most residents [while] neighborhoods and longtime Detroiters grappled with mass tax foreclosures, prohibitive lending practices and inadequate public transit.”).

213. See supra note 164 and accompanying text.
