

ANSWER TO QUESTION NO. 4

This question implicates the ability of third-party beneficiaries to enforce a contract. The governing Michigan statute, MCL 600.1405, provides:

"Any person for whose benefit a promise is made by way of contract, as hereinafter defined, has the same right to enforce said promise that he would have had if the said promise had been made directly to him as the promisee.

"(1) A promise shall be construed to have been made for the benefit of a person whenever the promisor of said promise had undertaken to give or to do or refrain from doing something directly to or for said person.

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"(2) (b) If such person is not in being or ascertainable at the time the promise becomes legally binding on the promisor then his rights shall become vested the moment he comes into being or becomes ascertainable if the promise has not been discharged by agreement between the promisor and the promisee in the meantime."

An intended beneficiary acquires a right under a contract by virtue of a promise. Restatement 2d, Contracts, §302(1).

The statute creates the status of third-party beneficiary to a contract. The statute provides protection to only those persons as to which the promisor undertakes an obligation directly or for that person or class or persons. See *Koenig v South Haven*, 460 Mich 667 (1999). The operative word in the statute to determine who holds the status of a beneficiary is "directly." The purpose of this statutory language is to assure that parties to a contract are clearly aware of the scope of their contractual undertaking in regard to third parties.

The statute creates rights only in third parties who are directly referred to in the contract. A third-party beneficiary may be specifically named in the contract or may be a member of a class, provided the class is sufficiently described to be reasonably identifiable. Such a class must be less than the world at large and cannot be designated by reference to the public at large. *Koenig, supra*.

The court will use an objective standard to determine from the contract itself whether the promisor undertook to give, to do, or refrain from doing something directly to, or for, the third-party

beneficiary. See *Koenig, supra*, at 680; *Guardian Depositors Corp v Brown*, 290 Mich 433, 437 (1939).

An incidental beneficiary is one who may be indirectly and only incidentally benefitted by the contract. Incidental beneficiaries are not covered by the statute and acquire no rights by virtue of a promise. Restatement 2d, Contracts §302(2). Therefore, a third person cannot maintain an action on a contract merely because he would receive a benefit from its performance or because he was injured by the promisor's breach of that contract. See *Greenlees v Owen Ames Kimball Co*, 340 Mich 670 (1974).

(a) Paul

In this instance, Paul was not identified in the contract by name nor was he a party to the contract. However, a class of persons, the tenants of the building, was specifically designated in the contract. Therefore, Quick Repair knowingly and expressly undertook an obligation directly for the benefit of the specific class of persons who were reasonably identified in the contract, the tenants. The language of the contract provides that Quick Repair will minimize any disruption to the tenants, including Paul. Quick Repair's promise in the contract comes within the third-party beneficiary statute, for it directly benefits the tenants who carry on operations in the building. Therefore, Paul was a member of the class that had been sufficiently described or designated in the contract, to wit, a tenant of the building. Paul therefore may proceed to maintain a breach of contract action under a third-party beneficiary theory to recover damages for the harm done to his furs and his loss of sales due to the business disruption.

(b) Victor

Victor vendor, however, is not a tenant of the building. Thus, as opposed to being a specifically designated person or a member of a reasonably identified class of persons who directly benefit from the contract, Victor is an indirect and incidental beneficiary of the contract. An incidental beneficiary has no rights under the contract. Victor cannot maintain an action against Quick Repair based on the contract between Larry Landlord and Quick Repair even though he suffered damages from Quick Repair's breach of the contract.