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EMPLOYEE RIGHTS: ENFORCEMENT OF THE PUBLIC WORKS PREVAILING WAGE OBLIGATION

I. INTRODUCTION

For nearly fifty years, the State of California has maintained a policy of ensuring adequate wage standards for employees engaged in labor on projects of public work.[1] This policy is embodied in a complex statutory network set forth in the California Labor Code.[2]

Sections 1771 and 1774 of the Labor Code provide that contractors[3] engaged on projects of public works are obligated to compensate workers, employed in the execution of the public works contract, at rates not less than the general prevailing rate of wages[4] paid for work of a similar nature in the locality[5] where the labor is performed. The prevailing wage rate requirement applies to all contractors or subcontractors[6] utilizing employee labor in connection[7] with any contract for public works exceeding five hundred dollars.[8] The term "public works" encompasses, in part, "[c]onstruction, alteration, demolition or repair work done under contract and paid for in whole or in part out of public funds . . . ."[9] The term also includes "[w]ork done for irrigation, utility, reclamation and improvement districts" as well as "[s]treet,

1. In 1937, the state legislature enacted CAL. LAB. CODE §§ 1771, 1774. Labor Code Act, Ch. 90 §§ 1771, 1774, 1937 Cal. Stats. 243. These statutes mandate the payment of wages at rates equal to or exceeding a specified minimum level. Likewise, prior to the enactment of these statutes, the Act of May 25, 1931, Ch. 397 § 1, 1931 Cal. Stats. 910 required contractors to pay the prevailing rate of wages to employees engaged on public works.

2. CAL. LAB. CODE §§ 1720-1815 (West 1976).

3. The prevailing wage rate requirement applies only to public work performed under contract. Thus it does not apply "to work carried out by a public agency with its own forces." CAL. LAB. CODE § 1771 (West Supp. 1981).

4. The prevailing wage rates are ascertained and promulgated by the Director of the Department of Industrial Relations in accordance with standards and procedures prescribed by statute. CAL. LAB. CODE §§ 1770, 1773 (West Supp. 1981). The prevailing wage rate includes the sums attributable to an employer's payment for health and welfare, pension, vacation, travel time and subsistence pay. CAL. LAB. CODE § 1773.1 (West Supp. 1981). Thus, the amount payable to employees engaged on projects of public works equals the prevailing hourly rates paid to workers in similar crafts or classifications in the area plus the sums attributable to the usual benefits accorded to workers in these crafts or classifications.

5. CAL. LAB. CODE § 1724 (West 1971) defines locality as "the county in which the public work is done in cases in which the contract is awarded by the State, and means the limits of the political subdivision on whose behalf the contract is awarded in other cases."

6. CAL. LAB. CODE § 1774 (West 1971).

7. CAL. LAB. CODE § 1772 (West 1971).

8. CAL. LAB. CODE § 1771 (West Supp. 1981).

9. CAL. LAB. CODE § 1720 (West Supp. 1981).

sewer or other improvement work done under the direction and supervision or by the authority" of the state or any political subdivision.[10] Moreover, subject to certain conditions, construction work performed pursuant to a contract between private individuals falls within the rubric of "public works" if, upon completion of the project, more than 50 percent of the property is leased to the state or a political subdivision.[11] It is readily apparent that the prevailing wage rate requirement applies to a broad spectrum of construction and maintenance activities carried out by contractors on behalf of the public.

To ensure compliance with the mandate requiring the payment of prevailing wage rates, Labor Code section 1775 provides that a contractor shall forfeit as a penalty twenty-five dollars per day for each worker paid wages at less than the prevailing rate.[12] The statute further provides that the difference between the amount of wages due at the prevailing rate and the amount of wages actually paid shall be paid by the contractor to the worker.[13] Where an investigation[14] reveals that the contractor has violated the prevailing wage rate provisions, the public body which awarded the contract must withhold from sums due to the contractor an amount sufficient to cover the penalties and balance of wages due.[15]

In the event that the money due from the awarding body to the contractor is insufficient to offset the penalties and the balance of wages due, a suit may be initiated against the contractor for the recovery of these sums.[16] The responsibility for the maintenance of such an action is vested in the State Department of Industrial Relations, Division of Labor Standards Enforcement (hereinafter referred to as the Division).[17] The Division must pay the balance of wages due to the workers out of any money recovered in such an action. The funds remaining, if any, after the wages are paid constitute recovery of the penalty.[18]

This enforcement mechanism seems, at first glance, adequate to preserve and enforce the right of public works employees to receive the

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10. *Id.*
11. CAL. LAB. CODE § 1720.2 (West Supp. 1981).
12. CAL. LAB. CODE § 1775 (West Supp. 1981).
13. *Id.*
14. An investigation may be made by the Division of Labor Standards Enforcement or the public body awarding the public works contract. CAL. LAB. CODE § 1727 (West 1971).
15. *Id.*
16. CAL. LAB. CODE § 1775 (West Supp. 1981).
17. *Id.*
18. *Id.*

full amount of wages due. The Division's enforcement capability is seriously undermined, however, by the special period of limitations set forth in Labor Code section 1775. This statute provides that where suit must be brought by the Division against a public works contractor for the recovery of wages due at the prevailing rate, "[s]uch action shall be commenced not later than 90 days after the filing of a valid notice of completion . . . or not later than 90 days after acceptance of such public work, whichever last occurs."[19] The Division must discover the existence of the violation, conduct its investigation, and commence a suit within ninety days of the recordation of notice of completion or acceptance of the work. In many cases, this short period of limitation may foreclose the right to recover wages justly earned but unpaid.

This comment explores the issue of whether a right of action, independent of Labor Code section 1775, is available to public works employees who are damaged by their employer's failure to pay wages at the prevailing rate. It suggests that such employees have causes of action in the nature of an action premised upon a statutory liability and breach of contract, and that these actions may be brought independently of the procedures set forth in Labor Code section 1775. Accordingly, a suit to recover the balance of wages due at the prevailing rate may be maintained even though the ninety day period after the recordation of a notice of completion or acceptance of the work has expired.

II. Action Upon A Liability Created By Statute

The statutory liability theory may enable public works employees to bring an action for the recovery of wages after the ninety day period of limitations set forth in Labor Code section 1775 has expired. California Code of Civil Procedure section 338(1) establishes a three year period of limitations for "[a]n action upon a liability created by statute, other than a penalty or forfeiture."[20] Arguably, the ninety day limitation period applies only to actions brought by the Division, and the affected employees have a right of action independent of that enunciated in Labor Code section 1775. This independent right of action is created by sections 1771 and 1774 of the Labor Code.[21] These sections impose an obligation upon public works contractors to pay prevailing wage rates to employees engaged on public works. Because this obligation is imposed by statute, the three year period of limitations is appli-

19. *Id.*
20. CAL. CIV. PROC. CODE § 338(1) (West Supp. 1981).
21. *See* text accompanying note 3 *supra*.

cable.[22]

In *Raymond v. Christian*,[23] the court engaged in a similar analysis. The case involved an action taken against California by a state employee for wages due based upon the difference between the rate received and the rate which should have been paid according to civil service regulations. The court observed that the Civil Service Act imposed a duty upon the Civil Service Commission to adopt classifications and set salary schedules for these classifications.[24] The plaintiff was appointed to a position but was paid at a rate less than the minimum rate adopted for that classification by the commission. The court ruled that the salary rate upon which the employee based his claim was created under authority of statute. The obligation to compensate the employee at the specified rate would not exist but for the statute authorizing the regulatory scheme. "When a duty exists only by virtue of a statute, or an obligation to pay is fixed in the act itself, the obligation is one created by statute. Thus, [the] action . . . must be commenced within three years."[25]

In the case of the prevailing wage rate requirement, the obligation or liability would not exist except by virtue of sections 1771 and 1774.[26] The statutory obligation for payment of prevailing wage rates is even more direct than the obligation encountered in *Raymond v. Christian*. In *Raymond*, the wage rate obligation arose out of a regulation promulgated under a general statutory scheme.[27] The public works legislation, on the other hand, specifically mandates that the contractor must pay the prevailing wage rates as determined under the regulatory scheme.[28] Since this obligation is created by statute, an action may be commenced by the employees within a three year period[29] notwithstanding the ninety day period of limitations applicable to actions brought by the state under Labor Code section 1775.[30]

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22. CAL. CIV. PROC. CODE § 338(1) (West Supp. 1981).

23. 24 Cal. App. 2d 92, 74 P.2d 536 (1937).

24. *Id.* at 114, 74 P.2d at 548 (citing Act of March 26, 1903, ch. 364 § 2153(a), 1903 Cal. Stats. 485 (repealed 1937)).

25. 24 Cal. App. 2d at 115, 74 P.2d at 548 (citation omitted).

26. CAL. LAB. CODE §§ 1771, 1774 (West Supp. 1981).

27. 24 Cal. App. 2d at 114, 74 P.2d at 548.

28. *See* text accompanying notes 3-5 *supra*.

29. *See* text accompanying note 20 *supra*.

30. A potential impediment exists, however, to proceeding under the foregoing analysis. An action brought by a public works employee for the recovery of wages due at the prevailing rate will be foreclosed unless the court is satisfied that Labor Code section 1775 is not intended to be the exclusive remedial procedure. *See* notes 95-111 *infra* and accompanying text.

III. Third Party Beneficiaries of Contract

While an action premised upon a statutory liability would appear to resurrect the possibility of recovering wages when the ninety day period of limitations has expired, an alternative approach exists which may yield the same result. The public works employee damaged as a result of a contractor's failure to pay wages at the prevailing rate may, under appropriate circumstances, disregard the statutory basis for recovery and proceed under the common law theory of breach of contract.

Labor Code section 1775 requires that the public works contract contain a stipulation that the contractor will comply with the statutory provision respecting the payment of prevailing wage rates.[31] The contract thus incorporates the prevailing wage rate requirement, and the payment of wages at the stipulated rate becomes a contractual obligation.[32] This obligation necessarily inures to the benefit of the employees engaged in the execution of the public works contract because these rates form the basis of the compensation they receive for their labor.[33] Since this term of the contract operates for the benefit of the employees engaged in its execution, the employees have standing to enforce the obligation as third party beneficiaries of the contract.

A. Traditional View: The Donee-Creditor Beneficiary Dichotomy

In 1872, the California Legislature codified the common law prin-

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31. CAL. LAB. CODE § 1775 (West Supp. 1981) provides in pertinent part that "the body awarding the contract shall cause to be inserted in the contract a stipulation that the provisions of this section will be complied with."

32. CAL. LAB. CODE § 1773.2 (West Supp. 1981) gives further impetus to the theory that the prevailing wage rate requirement is intended to be a term of the public works contract. The section provides that "[t]he body awarding any contract for public work . . . shall specify in the call for bids for the contract, and in the bid specifications and in the contract itself, what the general rate of per diem wages is for each craft, classification or type of workman needed to execute the contract." This statute also provides an alternative method of compliance consisting of express references in the call for bids and in the contract that the published prevailing wage rates are on file with the awarding body and are available to interested parties on request. Clearly, one purpose of the statute is to require that information is made available to acquaint the contractor with the prevailing wage rate requirement for purposes of preparation of the bid on the contract. Accordingly, the requirement is within the contemplation of the parties when the bid is made and subsequently accepted by the awarding body and when the contract is formally executed. Therefore, because the wage rate requirement is within the parties' contemplation at the time the contract is entered into and an express stipulation that the prevailing wage rate provision will be complied with is made a part of the contract, the wage rate requirement is a contractual obligation. *See* RESTATEMENT (SECOND) OF CONTRACTS § 5, Comments b and c (1980). *See also* RESTATEMENT (SECOND) OF CONTRACTS § 207 (1980).

33. *See* text accompanying notes 13-18 *supra*.

ciple that third party beneficiaries of a contract have standing to enforce the performance of a contract. The statute states that "[a] contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it."[34]

As interpreted by the California courts, this statute gives a right of action to those not a party to the contract who fall within the category of either donee or creditor beneficiary as set forth in section 133 of the Restatement of Contracts.[35] The Restatement labels as a donee beneficiary a person who will benefit from performance of a promise in a contract

> if it appears from the terms of the promise in view of the accompanying circumstances that the purpose of the promisee in obtaining the promise of all or *part* of the performance thereof is to make a gift to the beneficiary *or to confer upon him a right* against the promisor to some performance . . . .[36]

The Restatement categorizes the benefited person as a creditor beneficiary if "performance of the promise will satisfy an actual or supposed or asserted duty of the promisee to the beneficiary, or a right of the beneficiary against the promisee which has been barred . . . ."[37] A beneficiary falling into either the donee or creditor beneficiary category is owed a duty by the promisor and the beneficiary may enforce the performance of this obligation for his own benefit.[38]

If the beneficiary fails to meet the conditions of either of the above described categories, he is deemed to be an incidental beneficiary[39] and

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34. CAL. CIV. CODE § 1559 (West 1954).

35. The California Supreme Court has declared that "American law generally classifies persons having enforceable rights under contracts to which they are not parties as either creditor beneficiaries or donee beneficiaries. (Rest. Contracts, §§ 133, subds. (1), (2), 135, 136, 147 . . . .) California decisions follow this classification." Martinez v. Socoma Cos., 11 Cal. 3d 394, 400, 521 P.2d 841, 845, 113 Cal. Rptr. 585, 589 (1974); *see* Southern Cal. Gas Co. v. ABC Constr. Co., 204 Cal. App. 2d 747, 752, 22 Cal. Rptr. 540, 544 (1962) (California cases follow the RESTATEMENT classifications); 1 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Contracts* § 500 (8th ed. 1973). Moreover, a court of appeal has held that the classification scheme is consistent with Civil Code § 1559 notwithstanding the use of the term "expressly" in that section: "[Civil Code] [s]ection 1559 says 'expressly for the benefit of the third party.' The word 'expressly,' by judicial interpretation, has now come to mean merely the negative of 'incidentally.' " Gilbert Financial Corp. v. Steelform Contracting Co., 82 Cal. App. 3d 65, 70, 145 Cal. Rptr. 448, 450 (1978).

36. RESTATEMENT OF CONTRACTS § 133(1)(a) (1932) (emphasis added).

37. *Id.* § 133(1)(b).

38. *Id.* §§ 135-136.

39. The RESTATEMENT defines an incidental beneficiary as one who is neither a donee nor a creditor beneficiary. *Id.* § 133(1)(c).

lacks standing to enforce the contract.[40] Under this analysis, it is necessary that the public works employees be viewed as falling within either the donee or the creditor beneficiary classification scheme if they are to acquire a right of action under this theory against the contractor for the recovery of their wages. The California Supreme Court has recognized that

> [e]ven though a person is not the intended recipient of a gift, he may nevertheless be a 'donee beneficiary if it appears from the terms of the promise in view of the accompanying circumstances that the purpose of the promisee in obtaining the promise . . . is . . . to *confer upon him a right against the promisor* to some performance . . . .'[41]

As previously noted, the awarding body inserts the prevailing wage rate provision into the public works contract in recognition of the employee's *right* to receive wages at the prevailing rate.[42] The promisee thereby expresses its intent, consistent with public policy, that employees engaged on the public works project should be paid wages at the rates prevailing in the locality. Clearly, this contractual term is not intended to confer a gift upon the employees. The provision is intended to confer a right against the promisor (contractor) to payment of wages at the prevailing rate. Consequently, the employees meet the criteria established for donee beneficiaries[43] and cannot be considered mere incidental beneficiaries. Under this analysis, the employees have standing to maintain an action against the contractor for his breach of the public works contract.

B. Modern View: Intended vs. Incidental Beneficiaries

It must be observed that the law in California, concerning the applicable test for distinguishing between those third parties who may maintain an action on a contract inuring to their benefit and those who have no such standing, is in a state of flux. The bifurcated approach to the third party beneficiary analysis, which at times necessitates a contrived molding of complicated fact patterns into an artificial creditor-donee categorization scheme, is beginning to be viewed with disfavor

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40. The RESTATEMENT provides that "[a]n incidental beneficiary acquires by virtue of the promise no right against the promisor . . . ." *Id.* § 147.

41. Martinez v. Socoma Cos., 11 Cal. 3d at 401, 521 P.2d at 845, 113 Cal. Rptr. at 589 (emphasis in original). *See* Note, *Martinez v. Socoma Companies: Problems in Determining Contract Beneficiaries' Rights*, 27 HAST. L.J. 137 (1975) [hereinafter cited as *Contract Beneficiaries' Rights*].

42. *See* notes 31-33 *supra* and accompanying text.

43. *See* notes 36 & 41 *supra* and accompanying text.

by the legal community.[44] This doctrinal change has resulted primarily from the difficulties and confusion encountered in trying to classify cases into the categories.[45]

An alternative test for distinguishing beneficiaries with enforceable rights from those lacking such rights, is set forth in the Restatement (Second) of Contracts.[46] Under this analysis, beneficiaries are deemed to be either intended or incidental beneficiaries:

> [A] beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either (a) the performance . . . will satisfy an obligation of the promisee to pay money to the beneficiary; or (b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.[47]

The Restatement (Second) defines an incidental beneficiary negatively; any beneficiary who is not intended is incidental.[48] Under the Restatement (Second), the promise may be enforced by an intended beneficiary whereas an incidental beneficiary has no enforceable right.[49] Thus, the modern approach is to eliminate the artificial creditor-donee categorization scheme and approach the problem using an intent standard.[50]

There can be no doubt that the prevailing wage rate stipulation is inserted by the awarding body (promisee) in the public works contract for the purpose of ensuring the payment of prevailing wage rates to employees[51] engaged on the project.[52] Since the employees are the di-

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44. A California Court of Appeal has recently observed that:

> [T]he creditor-donee dichotomy as applied to third party beneficiaries is beginning to vanish. Although the two concepts are still viable, the specific descriptive words are being dropped by the courts and academicians to permit broader application of the doctrine. Restatement Second of Contracts (Tent. Draft No.4), *supra*, section 133, subdivisions (1), (2), for example, has recognized the need for a change and has done so by eliminating the creditor-donee terminology.

Gilbert Financial Corp. v. Steelform Contracting Co., 82 Cal. App. 3d at 71, 145 Cal. Rptr. at 451. (The section number cited by the court has been changed to § 302(1)-(2) in the 1980 Official Text.).

45. *Contract Beneficiaries' Rights*, *supra* note 41, at 143.

46. RESTATEMENT (SECOND) OF CONTRACTS § 302(1) (1980).

47. *Id.*

48. *Id.* § 302(2).

49. *Id.* §§ 304, 315.

50. With respect to the intent-to-benefit test, it is important to note that the focus is upon the *promisee's* intent. Lucas v. Hamm, 56 Cal. 2d 583, 591, 364 P.2d 685, 689, 15 Cal. Rptr. 821, 825 (1961).

51. The employees need not be specifically named as beneficiaries in the contract. It is sufficient that the beneficiary is a person or a member of a class for whose benefit the prom-

rect recipients of the wages, it is apparent that the provision is intended to give the employees the benefit of the promised performance. Accordingly, the employees satisfy the intent-to-benefit test and qualify as intended beneficiaries.

A case which illustrates these principles and is analogous to the issues under consideration is *Shell v. Schmidt*.[53] In *Shell*, the defendant was a building contractor who had entered into an agreement with the federal government under which he received priorities for building materials to build homes with required specifications for sale to war veterans at or below ceiling prices. Plaintiffs were twelve veterans, each of whom had purchased a home that failed to comply with the agreed specifications. They were held entitled to recover directly from the defendant contractor as third party beneficiaries of his agreement with the government.

The court held in part that:

> [T]he statute and the regulations passed thereunder resulting in the contract were passed to aid and assist veterans and for their benefit. Purchasing veterans constitute the class intended to be benefited, and the contract must therefore be for their benefit.
>
> Under Section 1559 of the Civil Code, embodying general common law principles, a third party beneficiary may maintain an action directly on such a contract. . . . The promise in such a situation is treated as having been made directly to the third party. . . . It is no objection to an action by the third party that the contracting party (here the government) could also sue upon the contract for the same breach.[54]

The circumstances involved in the present discussion may be analyzed similarly. Labor Code sections 1771 and 1774 mandate that a contractor pay prevailing wage rates to employees engaged on public works.[55] The contractual provisions resulting from this statutory obligation were designed to aid employees engaged on such public works.[56] As such, the employees constitute the class[57] intended to be benefited.[58]

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ise was made. Shell v. Schmidt, 126 Cal. App. 2d 279, 290, 272 P.2d 82, 89 (1954), *cert. denied*, 348 U.S. 916 (1955); RESTATEMENT (SECOND) OF CONTRACTS § 306 (1980).

52. *See* notes 31-33 *supra* and accompanying text.

53. 126 Cal. App. 2d 279, 272 P.2d 82 (1954), *cert. denied*, 348 U.S. 916 (1955).

54. *Id.* at 290, 272 P.2d at 89.

55. *See* notes 3-5 *supra* and accompanying text.

56. *See* notes 31-33 *supra* and accompanying text.

57. *See* note 51 *supra*.

58. *See* notes 48-52 *supra* and accompanying text.

As intended beneficiaries, the employees, under the common law principles expressed in Civil Code section 1559,[59] may maintain an action directly on the contract.[60]

Although the court in *Shell* did not rely on the principles set forth in the Restatement of Contracts section 145,[61] the California Supreme Court, in *Martinez v. Socoma Companies, Inc.*[62] has analyzed *Shell* in connection with this section of the *Restatement*. Even though it would appear that Restatement section 145 is not controlling in the context of the present case,[63] it may prove informative to engage in a similar analysis.

The Restatement of Contracts states:

> A promisor bound to the United States or to a State or municipality by contract to do an act or render a service to some or all of the members of the public, is subject to no duty under the contract to such members to give compensation for the injurious consequences of performing or attempting to perform it, or of failing to do so, unless, . . . an intention is manifested in the contract, as interpreted in the light of the circumstances surrounding its formation, that the promisor shall compensate members of the public for such injurious consequences . . . .[64]

In *Martinez*, the California Supreme Court observed that under section 145 of the Restatement, the plaintiffs in *Shell* were entitled to maintain an action as third party beneficiaries of the contract between the government and the building contractor because there was a manifestation of intent that the contractor should pay compensation for breach to persons in the position of plaintiffs. The court stated:

The legislation under which the agreement was made in-

59. CAL. CIV. CODE § 1559 (West 1954).

60. *See* text accompanying note 49 *supra*.

61. RESTATEMENT OF CONTRACTS § 145 (1932).

62. 11 Cal. 3d 394, 521 P.2d 841, 113 Cal. Rptr. 585 (1974).

63. Arguably, the purpose of RESTATEMENT § 145 is to preclude suits against government contractors by members of the public at large unless members of the general public qualify under the exceptions specified in that section. However, it is inconsistent with the policy expressed in RESTATEMENT § 133 and unduly restrictive to conclude that section 145 operates to preclude actions taken by third parties who are identifiable intended beneficiaries of the contract and are thus set apart from the general public. *See Contract Beneficiaries' Rights*, *supra* note 41, at 155-56; Comment, *Third Party Beneficiaries In Government Contracts*, 63 CALIF. L. REV. 126, 129-32 (1975). Moreover, the American Law Institute has recognized the potential for unduly restrictive interpretations of section 145 and has sought to remedy the problem in RESTATEMENT (SECOND) OF CONTRACTS § 313 (1980). *See also* J. CALAMARI & J. PERILLO, CONTRACTS § 247 (1970).

64. RESTATEMENT OF CONTRACTS § 145 (1932).

> cluded a provision empowering the government to obtain payment of monetary compensation by the contractor to the veteran purchasers for deficiencies resulting from failure to comply with specifications. Thus, there was "an intention . . . manifested in the contract . . . that the promisor shall compensate members of the public for such injurious consequences [of non-performance]."[65]

In other words, the plaintiffs in *Shell* had a right to maintain an action against the contractor under the conditions set forth in Restatement section 145 because the legislation underlying the contract gave the government the right to sue contractors who had failed to comply with building specifications in order to obtain from these contractors compensation for veterans who had purchased deficient dwellings.

This reasoning is applicable to the issues here under consideration. The legislation upon which the prevailing wage rate stipulation in the public works contract is premised (California Labor Code sections 1700-1775) includes a provision empowering the government to obtain payment of monetary compensation by the contractor to employees for his failure to pay the prevailing wage rates. Labor Code section 1775 states that the government may maintain an action for "[t]he difference between such prevailing wage rates and the amount paid to each workman for each calendar day or portion thereof for which each workman was paid less than the prevailing wage rate."[66] Utilizing the precise analysis engaged in by the court in *Martinez*, it is evident that Restatement section 145 is not a bar to a breach of contract action brought by the public works employees as third party beneficiaries. An intention will be manifest in a public works contract, drafted in accordance with statutory mandates, that the promisor shall compensate members of the public for such injurious consequences of nonperformance. As in *Shell*, this intention will be manifested by the fact that legislation empowering the government to take action against the contractor is an underlying basis for the contractual provision in question.[67] Therefore, even though the applicability of Restatement section 145 is questionable in the context of the present analysis,[68] if it is found to be applica-

65. Martinez v. Socoma Cos., 11 Cal. 3d at 403, 521 P.2d at 847, 113 Cal. Rptr. at 591 (footnote omitted).

66. CAL. LAB. CODE § 1775 (West Supp. 1981).

67. Section 1775 expressly empowers the government to take action against a violating public works contractor to compensate employees damaged by his nonperformance. This same statute also mandates that the public works contract contain a stipulation that the prevailing wage rate requirements will be complied with.

68. *See* note 63 *supra*.

ble, the damaged employees satisfy the criteria of that section, as interpreted by the California Supreme Court, and as such have standing to maintain a common law action against the promisor.

C. *The Law in Other Jurisdictions*

The foregoing analysis demonstrates that the law in California relating to third party beneficiaries unquestionably supports the proposition that public works employees may maintain an action for breach of contract against the violating contractor. This position has been addressed in numerous other jurisdictions, but the conclusions have not been consonant.

In *Willis v. E. I. DuPont de Nemours & Co.*,[69] the federal government had entered into a written contract with the defendant contractor for the construction of a new ordinance facility. The contract contained a provision requiring the contractor to compensate his workmen at the prevailing wages specified by the Secretary of Labor.[70] Another provision required payment of wages at the rate of time and one-half for hours worked in excess of eight per day. Plaintiff and his assignors were employed by the contractor in the construction of the facility. Plaintiff subsequently brought an action against the contractor for its failure to remunerate its workmen in accordance with these provisions of the contract. Reliance upon any federal statute was specifically disclaimed. Plaintiff alleged only that the provisions respecting wages were inserted in the contract for the benefit of the employees and that the contract had been breached.[71] The court noted that the contract provisions relied upon were included in order that the contract might conform to the requirements of the Davis-Bacon Act.[72] It rejected plaintiff's attempt to avoid the statute and to state a claim based upon common law breach-of-contract concepts, concluding that the plaintiff failed to prove that the public works employees were intended beneficiaries of the compensation clause in the contract.[73]

Other courts, however, have reached contrary conclusions on the issue of whether a public works employee is a third party beneficiary of a contract containing a stipulation with respect to prevailing wage

69. 76 F. Supp. 1010 (E.D. Okla.), *rev'd on other grounds*, 171 F.2d 51 (10th Cir. 1948).
70. The provision was inserted into the contract according to the requirements of the federal Davis-Bacon Act, 40 U.S.C. §§ 276(a)-276(c) (1976).
71. 76 F. Supp. at 1012.
72. The prevailing wage rate provisions of the federal Davis-Bacon Act, 40 U.S.C. §§ 276(a)-276(c) (1976), are substantively identical to California's prevailing wage legislation.
73. 76 F. Supp. at 1014.

rates. In *Fata v. S. A. Healy Co.*,[74] the high court of the State of New York ruled that an employee of a contractor engaged in public works may maintain a common law action against the contractor, as a third party beneficiary, for violation of a provision of the contract entered into between the contractor and a public agency, for the payment of prevailing wage rates. The applicable public works statute[75] provided that a schedule of prevailing wage rates was to be annexed to the contract. The court observed that this prevailing wage rate statute was intended to directly benefit those employed on a project of public works.[76] It reasoned that the statutory requirement that public works contracts contain a prevailing wage rate provision was also for the direct benefit of the recipient of the wages.[77] Accordingly, the court held that the employees were entitled to pursue the statutory remedy or to bring an action premised on the contract.[78]

In *Stover v. Winston Bros. Co.*,[79] an action to recover the difference between wages paid and the rate provided for in a public works contract between the city of Seattle and a building contractor was brought by plaintiff on behalf of employees of the contractor whose claims had been assigned to him. Pursuant to a city ordinance, the public works contract incorporated the provisions of the city charter and the city ordinances as to wages for labor and provided that the defendant's employees on the work should not be paid less than the current rate of wages paid by the municipality for similar work. The Washington Supreme Court observed that the primary purpose of the contractual compensation provision was to benefit the employees engaged on the project.[80] After examining in detail the progression of the law of third party beneficiaries since the famous case of *Lawrence v. Fox*,[81] the court announced that the public works employees were intended beneficiaries of the wage provision in the contract and had standing to sue

74. 289 N.Y. 401, 46 N.E.2d 339 (1943).

75. The New York public works statute provided that "[t]he wages to be paid for a legal day's work . . . to laborers, workmen or mechanics upon such public works, shall not be less than the prevailing rate of wages . . ." and that each contract made by a contractor for such public works "shall contain a provision that each laborer, workman or mechanic . . . shall be paid the wages herein provided." Act of Apr. 5, 1935, ch. 300, 1935 N.Y. Laws 791 (current version at N.Y. LAB. LAW § 220(3) (McKinney Supp. 1980)). The New York statute is strikingly similar to the California prevailing wage rate legislation. *See* CAL. LAB. CODE §§ 1770-1775 (West 1971).

76. 289 N.Y. at 405, 46 N.E.2d at 341.

77. *Id.*

78. *Id.*

79. 185 Wash. 416, 55 P.2d 821, *appeal dismissed*, 299 U.S. 508 (1936).

80. *Id.* at 425, 55 P.2d at 824.

81. 20 N.Y. 268 (1859).

on the contract for the recovery of their wages.[82] The court then held that because the cause of action was based upon the common law theory of breach of contract, the statute of limitations applicable to breach of written contracts was to be applied.[83]

Similarly, the court in *Austin Bridge Co. v. Teague*,[84] considered an action brought against a contractor by an employee who alleged that he was a third party beneficiary of a provision in a contract between the contractor and the State of Texas mandating the payment of prevailing wage rates. The state's prevailing wage statute[85] provided that a public works contractor was to pay not less than the prevailing wage rate, such rate to be determined by the state, and that a penalty would be forfeited by the contractor for failure to pay the applicable rate. The statute further provided that a stipulation as to the stated requirement was to be included in the contract.[86] As to the issue of plaintiff's right of action as a third party beneficiary of the public works contract, the court observed that because the statute required that a prevailing wage rate clause was to be inserted in the contract, an intent was manifested that the employees were to be benefited by this contractual provision. The court ruled that the employees were third party beneficiaries of the contract, and as such, they were entitled to bring a breach of contract action against the violating contractor.[87]

Recently, in *Rogers v. Speros Construction Co.*,[88] the Arizona Court of Appeals ruled that employees of a public works contractor are third party beneficiaries of a prevailing wage rate provision contained in a contract between the contractor and the awarding body.[89] The contract specified that the contractor was to pay the general rate of per diem wages as determined by the Industrial Commission of Arizona. The court observed that the "[p]laintiffs' claims are predicated on the contract itself, and not upon the [public works] statute. The general contractor agreed that wages would be paid at a specified rate . . . ."[90] The court then declared that plaintiffs had a right of action against the general contractor as third party beneficiaries of the public works con-

82. 185 Wash. at 428, 55 P.2d at 826.

83. *Id.* at 429, 55 P.2d at 826.

84. 149 S.W.2d 674, *rev'd on other grounds*, 137 Tex. 119, 152 S.W.2d 1091 (1941).

85. *Id.*, citing TEX. REV. CIV. STAT. ANN. art. 5159(a) (Vernon 1971).

86. These aspects of the Texas prevailing wage rate legislation are similar to the California provisions. *See* CAL. LAB. CODE §§ 1770-1775 (West 1971).

87. 149 S.W.2d at 677.

88. 119 Ariz. 289, 580 P.2d 750 (1978).

89. *Id.* at 292-93, 580 P.2d at 753.

90. *Id.* at 292, 580 P.2d at 753.

tract.[91]

Although the conclusions respecting the third party beneficiary status of public works employees have not been unanimous in the various jurisdictions, the theory is certainly viable. Moreover, this theory is particularly attractive when considered in light of the evolution of the law in California concerning third party beneficiaries of contract.

Assuming the public works employees have standing to maintain an action on the contractor's breach of the prevailing wage rate provision in the public works contract,[92] the applicable statute of limitations is four years.[93] Thus, by disclaiming reliance on the statutory provisions respecting the contractor's prevailing wage rate obligation and framing a cause of action for breach of contract, the damaged employees stand in a more favorable procedural position. This position may enable such employees to bring a direct action for the recovery of wages due where recovery may otherwise be foreclosed under the procedural strictures imposed upon an action taken by the Division under Labor Code section 1775.[94]

IV. EXCLUSIVENESS OF STATUTORY REMEDY

The rule concerning the exclusiveness of statutory remedies raises a potential barrier to a direct action taken by public works employees for the recovery of wages due at the prevailing rate. The generally accepted rule of law is that if a new right is created by statute and the remedy for violation of that right is prescribed by the statute, then the statutory remedy is exclusive.[95] Thus, it may be argued that because Labor Code section 1775 sets up a remedial procedure for the recovery of wages, where the contractor has violated the statutorily created right

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91. *Id.* at 292-93, 580 P.2d at 753.

92. For purposes of this discussion, it is assumed that the public works contract is in writing.

93. CAL. CIV. PROC. CODE § 337 (West Supp. 1981) provides that "[a]n action upon any contract, obligation or liability founded upon an instrument in writing" must be commenced within four years.

94. *See* text accompanying note 19 *supra*. Proceeding under this theory may also resurrect the right of the Division of Labor Standards Enforcement to proceed against the violating public works contractor. CAL. LAB. CODE § 96(a) (West Supp. 1981) provides that the Division shall take assignment of employees' claims for wages. CAL. LAB. CODE § 98.3 (West Supp. 1981) provides that the Division may "prosecute all actions for the collection of wages." Thus, when the ninety day period of limitations set forth in section 1775 has expired, the Division may nevertheless proceed by taking assignment of the employees' claims and prosecuting an action against the contractor for breach of contract under the third party beneficiary theory.

95. 1 AM. JUR. 2d *Actions* § 73 (1962); 56 C.J.S. *Master Servant* § 160(1) (1948); Gold v. Los Angeles Democratic League, 49 Cal. App. 3d 365, 373, 122 Cal. Rptr. 732, 738 (1975).

to prevailing wage rates, the statutory remedy must be pursued to the exclusion of all other remedies.[96]

This position is subject to attack, however, predicated upon the exceptions to the general rule which have been recognized by courts in California. One exception arises when the right was established at common law or by statute *before* the new statutory remedy was enacted. Under these circumstances, the statutory remedy is considered cumulative to the older remedy, and the plaintiff may elect to pursue either course of action.[97]

The statutory right to wages at the prevailing rate was enacted by the California Legislature in 1931.[98] The concomitant statutory remedial provision was not enacted until 1963.[99] Thus, the statutory right existed prior to the enactment of the statutory remedy and the case would fall within the exception to the general rule relating to exclusiveness of statutory remedies.

Moreover, where a cause of action is not predicated upon the contractor's breach of the statutory duty, but proceeds on the common law theory of breach of contract, a similar result would follow. In 1872, the

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96. This argument was successfully raised in two public works cases arising in Tennessee. In those cases, the court held that since the applicable statute provided that all disputes concerning prevailing wage rates must be referred to the Secretary of Labor for determination, employees were foreclosed from bringing an action at law where they had failed to submit their dispute to the Secretary. A.W. Kutsche & Co. v. Anderson, 169 Tenn. 98, 83 S.W.2d 243 (1935); A.W. Kutsche & Co. v. Keith, 169 Tenn. 399, 88 S.W.2d 454 (1935). *Accord*, Southern Prison Co. v. Rennels, 110 S.W.2d 606 (Tex. Civ. App. 1937) (statutory remedy providing that only the commissioners court had the power to determine the per diem wage rate on public works contracts is exclusive).

97. CAL. CIV. CODE § 22.2 (West 1954) provides that "[t]he common law of England, so far as it is not repugnant to or inconsistent with . . . the . . . laws of this State, is the rule of decision in the courts of this State." In the context of the present discussion, this statute means that "where a right exists at common law a statutory remedy for its enforcement is but cumulative, and ordinarily the common law remedy, or that afforded by statute may be pursued." Jewett v. City Transfer & Storage Co., 128 Cal. App. 556, 559, 18 P.2d 351, 352 (1933). *Accord*, Estate of Ward, 127 Cal. App. 347, 354, 15 P.2d 901, 904 (1932) (statutory remedy cumulative to pre-existing common law remedy); Shell v. Schmidt, 126 Cal. App. 2d at 287, 272 P.2d at 86 (common law remedy not displaced by statutory remedy); Grey v. Sutherland, 124 Cal. App. 2d 280, 290, 268 P.2d 754, 761 (1954) (common law remedy may be pursued notwithstanding subsequently enacted statutory remedy).

98. Act of May 25, 1931, ch. 397, § 1, 1931 Cal. Stats. 910 (current version at CAL. LAB. CODE § 1771 (West Supp. 1981) and CAL. LAB. CODE § 1774 (West 1971)).

99. Act of May 18, 1963, ch. 467, § 1, 1963 Cal. Stats. 1320 (current version at CAL. LAB. CODE § 1775 (West Supp. 1981)). Prior to the 1963 amendment, Labor Code § 1775 provided that the Division of Labor Standards Enforcement could bring an action for the recovery of statutory penalties due under that section. The 1963 amendment added language expressly authorizing the Division to bring an action for recovery of the other "amounts due." This language implicitly refers to wages due at the prevailing rate.

California Legislature gave statutory recognition to the common law right of action held by third party beneficiaries of contracts.[100] Clearly, the common law right of third party beneficiaries to bring an action for damages upon a contractual breach predated the statutory remedy established for the recovery of wages due at the prevailing rate.[101] Therefore, since the common law right of action for breach of contract existed prior to the statutory obligation, the statutory remedy should be deemed non-exclusive and the aggrieved employee should be permitted to pursue either course.[102]

It is patent that when a remedial statute expressly characterizes a remedy as exclusive, no other may be pursued.[103] Where, however, the statute is silent on this point, courts have looked to legislative intent to determine whether the statutory remedy is exclusive.[104] For example, in *Shell v. Schmidt*,[105] the court determined that the statutes under consideration[106] were passed for the purpose of benefiting an identifiable group.[107] The court reasoned that the fundamental purpose of the statute would, in many cases, be defeated because of the relatively short period of limitations set forth in the statute if the statutory remedies were considered exclusive.[108] Thus, the court allowed the damaged group to proceed as third party beneficiaries of the contract under the common law theory of breach of contract, holding that the statute merely created new remedies without displacing others.[109]

This reasoning is applicable to the issues presently under consider-

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100. *See* text accompanying note 34 *supra*.

101. *See* note 99 *supra*.

102. *See* notes 98-99 *supra* and accompanying text.

103. *See* Modern Barber College v. California Employment Stabilization Comm'n, 31 Cal. 2d 720, 723-24, 192 P.2d 916, 918-19 (1948) (statutory remedy is exclusive when statute expressly prohibits other methods of redress).

104. 1 AM. JUR. 2d *Actions* § 76 (1962).

105. 126 Cal. App. 2d 279, 272 P.2d 82 (1954), *cert. denied*, 348 U.S. 916 (1955). *See* text accompanying notes 53-54 *supra*.

106. The statute under consideration was the Veterans Emergency Housing Act of 1946, ch. 268, §§ 1-12, 60 Stat. 207.

107. The group benefited by the Act consisted of veterans purchasing homes under the Act. 126 Cal. App. 2d at 286, 272 P.2d at 87.

108. The court observed:

> We agree with respondents that the federal statute should not be interpreted as containing the exclusive remedies of purchasers so as to deprive them of their common law remedies. To do so would be to deprive veterans of most important rights, and after one year from the date of purchase (the statute of limitations provided in the statute for the statutory remedies of purchasers) to confer immunity on contractors in their relations with purchasers. This would be in subversion of the very purpose and intent of the statute.

Id. at 285, 272 P.2d at 86.

109. *Id.* at 287, 272 P.2d at 87.

ation. The prevailing wage rate provisions do not contain express pronouncements that the remedies set forth therein for the collection of wages are intended to be exclusive.[110] Moreover, this legislation directly benefits an identifiable group, the employees to whom the wages are to be paid. If the statutory remedy were exclusive, the damaged employees could recover only if the Division were able to file an action within the ninety-day period of limitations.[111] It is evident that in many cases this short period of limitation would operate to deprive employees of wages lawfully due to them, and the violating contractors would escape with impunity. Under these circumstances, the purpose of the statute would be defeated and public policy would be undermined. Accordingly, under the principles enunciated in *Shell*, the statutory remedy set forth in Labor Code section 1775 should be considered as merely cumulative to the existing common law remedies.

V. Conclusion

California has long maintained the policy of ensuring an adequate wage scale for employees engaged on projects of public works. This statutory benefit may prove illusory in many instances, however, because of the procedural strictures imposed upon the governmental body charged with the enforcement of the prevailing wage provisions. The ninety day period of limitations applicable to such enforcement proceedings will, in many cases, inevitably operate to foreclose the right to recover wages which were earned but unpaid by the violating contractor. This procedural limitation casts the state into the posture of giving a benefit with one hand and taking it away with the other. This anomalous state of affairs may be corrected, however, if the courts allow the aggrieved employees to bring a direct action against the violating con-

110. CAL. LAB. CODE § 1775 (West Supp. 1981) sets forth the remedial procedures to be followed by the Division for the collection of wages. There is no express indication in this statute that it is intended as the exclusive remedy. Furthermore, the statute's legislative history clearly indicates the legislature's intent that the statute not serve as the exclusive remedy. CAL. LAB. CODE § 1781, prior to its repeal by Act of May 10, 1957, ch. 396, § 1, 1957 Cal. Stats. 1240, read as follows: "The penalties and remedies provided for in §§ 1775 and 1777 shall be the exclusive penalties and remedies against any contractor or subcontractor for any violation of §§ 1770 to 1777 or of the provisions inserted in any call for bids, specifications or contracts pursuant thereto." Labor Code Act, ch. 90, § 1781, 1937 Cal. Stats. 245. Subsequent to the repeal of this exclusivity statute, the legislature amended Labor Code § 1775 to permit the Division to bring an action against the violating contractor for the recovery of wages as well as for penalties. *See* note 99 *supra* and accompanying text. A reasonable inference drawn from these legislative actions is that the remedial procedures expressed in Labor Code § 1775 are not exclusive.

111. *See* text accompanying notes 17-19 *supra*.

tractor. If the damaged employees are allowed to pursue a direct action, disclaiming any reliance upon Labor Code section 1775, their right of recovery will be resurrected and public policy will be vindicated.

Such an independent action should be available under two theories. First, employees may rely upon the statutes which require the contractor to pay wages at the designated scale. A cause of action may thus be framed around the contractor's breach of this statutory duty. Proceeding under this theory would enable employees to bring a recovery action within three years of the violation.

Alternatively, employees may disclaim reliance upon the prevailing wage statutes altogether, and bring a common law action premised upon breach of contract. Employees damaged as a result of the contractor's breach of the prevailing wage stipulation, contained in the public works contract, may sue to enforce the obligation as third party beneficiaries of the contract. Under this theory employees may initiate an action within four years of the contractor's breach.

Acceptance by the courts of either theory of recovery would substantially protect the rights conferred by the state upon public works employees. This conclusion is consistent with public policy and is also just and equitable.

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