RESTITUTION

LIABILITY FOR INCIDENTAL BENEFICIARIES: CREATING THIRD PARTY LIABILITY IN QUASI-CONTRACT

The Arizona Supreme Court recently held, in *Murdock-Bryant Constr., Inc. v. Taylor Pearson*,[1] that a party who enters into a joint venture agreement with a general contractor may be liable for the value of a subcontractor's work, even though the joint venture partner was not a party to the subcontract, was not responsible for the misrepresentation which led the subcontractor to rescind the contract, and was not contractually related to the prime contractor at the time the subcontract was made.[2] The court held that the subcontractor may recover restitution[3] from the prime contractor and the joint venture partner upon showing their unjust enrichment.[4]

The *Murdock-Bryant* decision significantly modified the principles of quasi-contractual recovery. This Comment reviews the traditional scope of quasi-contractual actions and the limits to recovery in quasi-contract. Following a review of the reasons why other courts might have denied recovery, this Comment examines how the *Murdock-Bryant* decision modifies traditional quasi-contractual theory.

THE UNDERLYING CONTROVERSY

This case involves three parties: the prime contractor, the subcontractor, and the prime contractor's joint venture partner.[5] The prime contractor solicited a bid to clear dirt and rock from the site of a proposed shopping center. Initially, the subcontractor declined to bid for the job because it

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1. Murdock-Bryant Constr., Inc. v. Taylor Pearson, 146 Ariz. 48, 703 P.2d 1197 (1985).
2. *Id.* at 54, 703 P.2d at 1203.
3. Restitution is the remedy sought by the plaintiff in an action in quasi-contract. Courts apply restitution in a number of situations, not all involving implied contracts. D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 4.1, at 222 (1973). In this Comment, the term will refer only to the remedy granted in quasi-contractual actions.
4. *Murdock-Bryant*, 146 Ariz. at 54, 703 P.2d at 1203. The Arizona Court of Appeals, in City of Sierra Vista v. Cochise Enter., 144 Ariz. 375, 381, 697 P.2d 1125, 1131 (Ct. App. 1984), listed five requirements to justify a finding of unjust enrichment: 1) an enrichment, 2) an impoverishment, 3) a connection between the enrichment and impoverishment, 4) an absence of justification for the enrichment and impoverishment, 5) an absence of a remedy provided by law, (citing A & A Metal Bldgs. v. I-S, Inc., 274 N.W.2d 183, 189 (N.D. 1978)).

The principles of unjust enrichment dictate that benefits conferred in the absence of agreement, but with the expectation that compensation would be made, should be returned to the plaintiff. *See, e.g.*, Artukovich & Sons v. Reliance Truck Co., 126 Ariz. 246, 614 P.2d 327 (1980).

5. *Murdock-Bryant*, 146 Ariz. at 51, 703 P.2d at 1200. The parties were the prime contractor, Taylor Pearson, the subcontractor, Murdock-Bryant Construction, Inc., and the joint venture partner, Robert Wilbur. The Arizona Supreme Court remanded the case for determination of two questions: 1) the extent of the joint venture agreement; and 2) the degree of liability to be imposed on the joint venturer. The court held that an application of the equitable principles of unjust enrichment to the facts was necessary to determine the degree of liability. The extent to which each party requested the services should be used to determine the measure of the benefits conferred and therefore the liability of each party. *Id.* at 55-56, 703 P.2d 1204-05.

lacked opportunity to estimate the amount of work involved.[6] To induce the subcontractor to bid, the prime contractor offered its own estimates of the amount of earth to be moved, with assurances of their accuracy.[7] These estimates formed the basis of the subcontractor's winning bid.[8]

A few days after executing the subcontract, the prime contractor entered into a joint venture agreement with the joint venture partner.[9] Later, as the project neared completion, the subcontractor discovered that it had removed 18,000 cubic yards more rock than the amount specified in the subcontract.[10] When the prime contractor refused to pay for the extra work, the subcontractor ceased working and filed suit against the prime contractor and the joint venture partner for breach of contract. The subcontractor's complaint asked in the alternative for rescission of the contract and restitution for the work performed.[11]

After the subcontractor abandoned the breach claim, the trial court entered judgment against both the prime contractor and the joint venture partner and awarded restitution to the subcontractor on the theories of fraud, misrepresentation, mutual mistake and lack of mutuality.[12] On appeal, the Arizona Court of Appeals held that adequate evidence existed to find the prime contractor liable. The court ruled, however, that the joint venture partner was not liable on the subcontract because the joint venture agreement was executed after the subcontract.[13]

The subcontractor appealed to the Arizona Supreme Court on the issue of the joint venturer's liability: whether the joint venturer was liable in quasi-contract despite the lack of any direct relationship between the joint venture partner and the subcontractor.[14] The Arizona Supreme Court, in a unanimous decision, held that the joint venture partner, along with the prime contractor, was liable in *quantum meruit*.[15]

The court's decision followed the general analysis common to quasi-contractual claims. The joint venture partner had gained a benefit for which

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6. *Id.*

7. Murdock-Bryant Constr., Inc. v. Taylor Pearson, 146 Ariz. 57, 60, 703 P.2d 1206, 1209 (Ct. App. 1985).

8. *Id.*

9. *Murdock-Bryant*, 146 Ariz. at 51, 703 P.2d at 1200.

10. *Id.*

11. *Murdock-Bryant*, 146 Ariz. at 60, 703 P.2d at 1209 (Ct. App.).

12. *Id.* The trial court was acting on an advisory jury verdict, based on the equitable character of the claim for rescission. In determining that the joint venture partner was liable for restitution the trial court necessarily determined that there had been some benefit received. This Comment will follow the supreme court's assumption that a joint venture agreement to share profits would result in the joint venture partner receiving some benefit from the subcontractor's work. 146 Ariz. at 54, 703 P.2d at 1203.

13. *Murdock-Bryant*, 146 Ariz. at 64, 703 P.2d at 1213 (Ct. App.). The court of appeals also rejected the argument that the joint venture had ratified the misrepresentation of the amount of work needed. The supreme court upheld these rulings. *Murdock-Bryant*, 46 Ariz. at 52, 703 P.2d at 1201.

14. *Murdock-Bryant*, 146 Ariz. at 51, 703 P.2d at 1200.

15. *Id.* at 54, 703 P.2d at 1203. *Quantum meruit* is a subcategory of quasi-contract. The various types of quasi-contract differ only factually; the principles of unjust enrichment are the same. The degree of unjust enrichment determines the necessity and degree of restitution. D. DOBBS, *supra* note 3, § 4.2, at 235-36. Therefore, the implications of the *Murdock-Bryant* decision extend to all quasi-contractual actions in Arizona.

the subcontractor expected payment.[16] Since the joint venture partner had an interest in the successful completion of the subcontract, he also had an interest in the work done by the subcontractor.[17] According to the court, the subcontractor's expectation of payment, combined with the joint venturer's receipt of a benefit, satisfied the requisites for liability based on quasi-contract.[18] Such an interpretation represents a departure from the traditional rules governing quasi-contractual recovery.

THE TRADITIONAL SCOPE OF QUASI-CONTRACTUAL RECOVERY

The focal point of the controversy in *Murdock-Bryant* was the lack of any binding contractual relationship between the subcontractor and the joint venture partner. Consequently, the only avenue of recovery available to the subcontractor against the joint venturer was in quasi-contract.[19]

The roots of quasi-contract reach back to early common law when recovery for the breach of a formal contract was difficult. Because recovery on the contract was so difficult, courts created an implied contract allowing the plaintiff to recover from the defendant the defendant's unjust enrichment.[20] Courts award quasi-contractual restitution when, in the absence of contractual obligations, there has been a transfer of benefits resulting in an injustice.[21] This transfer can occur, for example, where a contract was attempted but not formed, or where there was no bargaining or attempted contract.[22]

A. Quasi-Contractual Recovery for Unsuccessful Bargaining

Quasi-contract is not an alternative to an action on the contract. Quasi-contract may be a remedy, however, when the plaintiff can use an unsuccessful attempt to contract as evidence of the defendant's unjust enrichment. The more flexible doctrine of quasi-contract offers recovery for promises outside the context of a formal contract.[23] If a contract is unenforceable and has not been fully performed,[24] or has been breached,[25] the injured party may seek restitution of the defendant's unjust enrichment through an action in quasi-contract.

Arizona courts have granted restitution in several situations: when the defendant avoided a contractual obligation through a breach of the con-

16. *Murdock-Bryant*, 146 Ariz. at 54, 703 P.2d at 1203.

17. *Id.*

18. *Id.* at 53, 703 P.2d at 1202. The court cited specific cases to illustrate the provisions of quasi-contract in Arizona: Artukovich & Sons v. Reliance Truck Co., 126 Ariz. 246, 248, 614 P.2d 327, 329 (1980); Pyeatte v. Pyeatte, 135 Ariz. 346, 352, 661 P.2d 196, 202 (Ct. App. 1982).

19. *Murdock-Bryant*, 146 Ariz. at 54, 703 P.2d at 1203.

20. D. DOBBS, *supra* note 3, § 4.2, at 234-35.

21. Quasi-contracts are implied-in-law contracts because no express contractual obligations are necessary. 3 A. CORBIN, CORBIN ON CONTRACTS, § 564, at 293 (1960).

22. RESTATEMENT OF RESTITUTION § 40(b), (c) (1936).

23. *See generally* G. GILMORE, THE DEATH OF CONTRACT, at 88 (1974) (discussing the extent of breach of contract actions in various courts); Henderson, *Promises Grounded in the Past: the Idea of Unjust Enrichment and the Law of Contracts*, 57 VA. L. REV. 1115 (1971) (examining the attempts of courts to use quasi-contractual obligation to escape the strictures of contract law).

24. RESTATEMENT OF RESTITUTION § 40 (1936).

25. *Id.* § 108.

tract;[26] when the contract was not enforceable under the statute of frauds;[27] when there was mutual rescission;[28] when a condition precedent has not occurred;[29] and when the terms of the contract were too indefinite.[30]

B. Quasi-Contractual Recovery in the Absence of Bargaining

In certain circumstances, courts recognize quasi-contractual liability when no bargaining occurred between the parties.[31] In such circumstances, the defendant is liable, not because a promise was made, but because of the receipt of something of value from the plaintiff. If it would be unjust to allow the defendant to retain the benefits delivered by the plaintiff, the court will order restitution.[32] The defendant will have to return to the plaintiff all

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26. Spitalny v. Tanner Constr. Co., 75 Ariz. 192, 200, 254 P.2d 440, 448 (1953), *overruled in another context*, Schwartz v. Schwerin, 85 Ariz. 242, 254 P.2d 440 (1958).

27. Trollope v. Koerner, 106 Ariz. 10, 18-19, 470 P.2d 91, 99-100 (1970). This case is important because it allows flexibility in pleadings. In the original action the plaintiff pled only breach of an express contract. The court ruled, however, that whenever the claim alleged a transfer of benefits at the request of the defendant, pleadings of implied-in-fact and implied-in-law contracts were implicitly included. Because of this the court allowed recovery on an implied-in-law contract when there could have been no recovery on an express contract.

28. Musgrove v. Leonard, 97 Ariz. 44, 46, 396 P.2d 614, 616 (1964).

29. Ruck Corp. v. Woudenberg, 125 Ariz. 519, 522, 611 P.2d 106, 109 (Ct. App. 1980).

30. Pyeatte v. Pyeatte, 135 Ariz. 346, 353, 661 P.2d 196, 203 (Ct. App. 1982).

31. Courts award restitution when, despite the lack of a contractual relationship, it would be unjust not to create an obligation to return to the plaintiff that amount which has enriched the defendant. Artukovich & Sons v. Reliance Truck Co., 126 Ariz. 246, 248, 614 P.2d 327, 329 (1980).

A quasi-contractual obligation involves a benefit conferred in the absence of an enforceable agreement. Since no agreement is necessary, some courts have held that assent is never required in quasi-contractual actions. *E.g.*, Ferrous Prod. Co. v. Gulf States Trading Co., 323 S.W.2d 292, 297 (Tex. Ct. App. 1959). This finds its expression in Arizona in holdings that restitution will be imposed without reference to the intentions of the parties. *Murdock-Bryant* 146 Ariz. at 53, 703 P.2d at 1202; Artukovich & Sons v. Reliance Truck Co., 126 Ariz. 246, 248, 614 P.2d 327, 329 (1980). In cases prior to *Murdock-Bryant* this statement has been offered in the context of making a distinction between actions in contract and in quasi-contract: "The intention of the parties to bind themselves contractually in such a case is irrelevant." Pyeatte v. Pyeatte, 135 Ariz. 346, 353, 661 P.2d 196, 203, *citing* 1 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 3a, at 10-15 (3d ed. 1957). In *Artukovich*, for example, the court noted that the defendant intended to pay for the benefit. 126 Ariz. at 248, 614 P.2d at 329. Only with *Murdock-Bryant* does intent to confer a benefit or knowledge that payment is expected disappear as a requirement.

32. Although quasi-contract is an action at law, the equitable principles of unjust enrichment determine liability. D. DOBBS, *supra* note 3, § 4.1 at 225. The essence of liability in a quasi-contractual claim is that the defendant accepted benefits rendered under circumstances which would reasonably put him on notice that the person providing such benefits expected payment from the recipient. Crockett v. Sampson, 439 S.W.2d 355 (Tex. Ct. App. 1969).

The principles of quasi-contract often merge with the modern contract principles of reliance or promissory estoppel. *See* Childress & Garamella, *The Law of Restitution and the Reliance Interest in Contract*, 64 NW. U.L. REV. 433 (1969); Henderson, *supra* note 23; Perillo, *Restitution in a Contractual Context*, 73 COLUM. L. REV. 1208 (1973). Often the notion of reliance serves the same purpose as quasi-contract: to achieve justice by returning to the plaintiff any benefits gained by the defendant.

Arizona courts have taken a more restrictive view of awarding reliance damages. In Tam-O-Shanter Inv., Inc. v. Polacek, 101 Ariz. 493, 421 P.2d 512 (1966), the court refused to award damages for architectual drawings prepared in anticipation of a contract. In Trollope v. Koerner, the supreme court specifically held that reliance could not be used to recover on a contract void because of the statute of frauds. 106 Ariz. 10, 18, 470 P.2d 91, 99.

In addition to reliance, there are alternative remedies which are sometimes available in situations analogous to *Murdock-Bryant*. These include at least constructive trusts, tracing of funds, and the doctrine of adoption. Some of these, especially the rules covering corporate liability for the actions of promoters, might have been used as analogies to achieve the same results in *Murdock-Bryant*. For a list and discussion of some of these alternatives, *see* Clifton v. Tomb, 21 F.2d 893 (4th that he gained as a result of the plaintiff's efforts.[33]

In determining whether to grant recovery in these circumstances, courts look to the respective characters of the plaintiff and the defendant. A key consideration is the plaintiff's motive in providing the benefits. The plaintiff cannot be an 'officious intermeddler' who took it upon himself to confer a benefit and who now seeks to impose an obligation along with the benefit.[34] The plaintiff must have simpler motives. The plaintiff must look to the de-

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Cir. 1927). *Murdock-Bryant* is noteworthy because of the particular circumstances and the method the court used to gain the result.

The alternative remedies mentioned are designed to deal with the problem of shifting benefits. They are based on the notion that a valid prior claim is not extinguished merely by a subsequent transfer. The recipient of a benefit is held to have taken the benefit subject to prior claims. These doctrines are well enough established so that the recipient can be regarded as choosing to take the liabilities along with the benefit. The most important limitation on these doctrines is that of the bona fide purchaser. Because the value paid includes a good title, the seller accepts a separation of the equitable liabilities from the benefit and a retention of these liabilities by the seller. An application of these same principles to quasi-contract law illustrates the traditional limits on recovery.

As a means of defining the limits of the doctrine, traditional quasi-contract theory has accepted that the defendant must have known and accepted the liabilities attached to the benefit when the benefit was accepted. That is, the defendant must have known that the plaintiff expected payment from him when the benefit was accepted. Whether because the plaintiff was a volunteer or because the benefit came indirectly through an intermediary, a lack of such direct knowledge was held to bar liability.

Quasi-contract involves a substitution of a money debt for something else; quasi-contract transforms a benefit into a personal debt. Courts have been willing to make this transformation only in the proper circumstances. Just as a bona fide purchase separates the benefit and preceding equitable liabilities, so too the acceptance of a benefit without the necessary knowledge of expected payment from the recipient separated the benefit from an obligation to pay in quasi-contract. By eliminating the requirement of a knowing choice, *Murdock-Bryant* makes restitution available in circumstances where it was not available before. Each of the alternative remedies mentioned carries with it certain requirements and restrictions, so that one cannot always be substituted for another. By expanding quasi-contractual recovery in the way that it did, the court in *Murdock-Bryant* makes recovery possible in areas which were previously closed.

33. D. DOBBS, *supra* note 3, § 4.5, at 260-65.

34. Dawson, *The Self-Serving Intermeddler*, 87 HARV. L. REV. 1409, 1444-47 (1974). The RESTATEMENT OF RESTITUTION § 2 (1976) uses the term officious intermeddler. An alternative term is volunteer. *See, e.g.*, Wade, *Restitution for Benefits Conferred Without Request*, 19 VAND. L. REV. 1183, 1184 (1966); D. DOBBS, *supra* note 3, § 4.9, at 300-305.

The classic example of officious intermeddling is the plaintiff who paints the defendant's house while the defendant is away and then presents the defendant with the bill upon return. D. DOBBS, *supra* note 3, § 10.7, at 713. Recovery is denied in such circumstances because, although the plaintiff expected payment, the defendant 1) had no choice in receiving the benefit, 2) could not choose to return the benefit, and 3) did not receive the benefit having knowledge that the plaintiff expected payment. The restrictions on restitution for such intermeddlers remain valid in Arizona. *See Murdock-Bryant*, 146 Ariz. at 54, 703 P.2d at 1203. *But see infra* notes 42 and 44.

As with many other aspects of quasi-contract, the distinction between intermeddler cases and others is often narrow. A plaintiff who has paid another's debt to protect the plaintiff's interest is entitled to recovery while one who merely volunteers to pay another's debt is denied recovery. *Compare* Western Coach Corp. v. Roscoe, 133 Ariz. 147, 154, 650 P.2d 449, 456 (1982) (lienholder who paid repair costs entitled to recovery) *with* Scoville v. Vail Inv. Co., 55 Ariz. 486, 103 P.2d 662 (1940) (gratuitous payment denied recovery). Commenting on the irony of assisting those who are protecting their own interests while denying assistance to the helpful, 3 G. PALMER, ON RESTITUTION § 10.1 at 362 (1978), says: "This is not a satisfactory state of affairs, at least as to money payments, but the fact that it is a generally accurate statement of the law highlights the traditional attitude toward the intermeddler."

Although *Murdock-Bryant* was not an officious intermeddler case in one narrow interpretation of the rule because the plaintiff did not confer a benefit directly on the joint venture partner, it was similar in that the plaintiff sought to impose liability on a defendant who did not seek a benefit from the plaintiff. The subcontractor conferred a benefit on the prime contractor who then chose to share this benefit with the joint venture partner. The *Murdock-Bryant* court determined that a sharing of benefits included a sharing of liabilities: when a defendant accepts a benefit from one party knowing fendant and have a reasonable expectation of payment from the defendant at the time that the defendant received the benefit.[35]

The character of the defendant is equally important. The defendant must have received some benefit for which he knew he was expected to pay.[36] In some cases, courts portray the defendant as an opportunist, one who perpetuates an injustice by seeking a free ride.[37] In other cases, courts can not find such culpable motives in the defendant. In these situations, courts justify restitution by assuming that an honest defendant, if asked, would consent to the enrichment and the obligation.[38] Thus, ordering the defendant to pay the plaintiff is little more than allowing him to do what he would have done, had he been given the chance.[39]

Whatever justification used by the court, the basic requirements for quasi-contractual recovery remain the same: 1) the defendant must have received a benefit from the plaintiff; and 2) the defendant should have known he was expected to pay for the benefit when received.[40] The knowing receipt of a benefit creates a relationship between plaintiff and defendant. The lack of a contract does not alter each party's awareness of the other's expectations. The test for determining whether restitution is appropriate examines the expectations of the parties at the time the services were rendered. By this test, imposing an obligation to pay in the absence of these expectations is unfair because "its effect would be to force a money obligation on the beneficiary to pay for services for which he did not contract. While he knowingly received the benefit of the services, he did not expect to pay for them, nor did the promisor expect him to."[41]

Courts developed quasi-contractual recovery to soften the harsh results created by the early, restrictive rules concerning recovery for breach of contract. The motive of doing justice, however, imposed limits on quasi-contractual recovery. The plaintiff must deserve the court's sympathy and be able to show that granting him restitution will not work an injustice on the

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(actually or by imputation) that the benefit was provided by a third party, the defendant becomes liable in quasi-contract to the third party. *Murdock-Bryant*, at 54, 703 P.2d at 1203.

35. G. PALMER, *supra* note 34, § 10.7, at 416-18 (1978).

36. *See supra* note 31.

37. Dawson, *supra* note 34, at 1412.

38. *See, e.g., In re* Crisan, 362 Mich. 569, 107 N.W.2d 907 (1961). Often these cases prove difficult for courts because there was no bargaining or attempted contract. In *Crisan*, for example, the court found an estate liable for medical care initiated after the deceased fell into a coma. Absent a supposed, unstated willingness to pay, no grounds for recovery exist. The court in Cotnam v. Wisdom, 83 Ark. 601, 602, 104 S.W. 164, 165-66 (1907), asserted a long established tradition of allowing doctors rendering aid to unconscious persons to recover in quasi-contract.

In other cases, the defendant's choice in retaining the benefits removes the problem of a lack of bargaining. In Chase v. Corcoran, 106 Mass. 286 (1871), by reclaiming a lost boat the owner became liable for repair work done while the boat was lost. Similarly, in Hartford Fire Ins. Co. v. Albertson, 59 Misc. 2d 207, 210, 298 N.Y.S.2d 321, 324 (1969), a garage which towed and stored an abandoned auto upon police request was allowed to recover its cost from the owner when he reclaimed the car. Professor Dobbs emphasizes the element of choice as the most equitable justification for imposing liability despite a lack of bargaining. If the defendant chooses to retain the benefit once it is conferred, then, in effect, he chooses to pay for the benefit. D. DOBBS, *supra* note 3, § 4.9 at 302-05.

39. While not expressly stated in *In re Crisan*, it is implied that the plaintiff had no reason to know that the defendant would not be willing to pay. 107 N.W.2d at 910, *citing* RESTATEMENT OF RESTITUTION § 116 (1936).

40. D. DOBBS, *supra* note 3, § 4.9, at 300-01.

41. G. PALMER, *supra* note 34, § 4.12, at 469.

defendant. The need to balance the justice due the plaintiff with the justice due the defendant has defined the limits on recovery in quasi-contract.

TRADITIONAL BARRIERS TO QUASI-CONTRACTUAL RECOVERY

To satisfy the demands of traditional quasi-contract theory, the plaintiff must show not only that the defendant was enriched, but also that the defendant's retention of this enrichment would be unjust because the plaintiff conferred the benefit with the expectation that the defendant would pay. Where the defendant did not promise to pay for the benefits, the plaintiff must show that the defendant knew that the plaintiff expected payment.[42] This concept prevents recovery based on quasi-contract in a series of related actions, as a suit in quasi-contract cannot surprise a defendant with unexpected obligations.

Courts do not allow quasi-contractual recovery as an alternative to recovery on a completed contract. Often, after a contract is negotiated and performed, one party discovers that he will not gain the bargain he expected. In this situation, a court will not grant quasi-contractual recovery. The defendant's enrichment is not unjust, but rather part of a valid bargain.[43]

For the same reasons, courts do not allow a plaintiff to transfer liability from those with whom he has contracted to others who are not obligated to him. Courts do not allow a plaintiff who has performed a contractual obli-

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42. Great Western Bank & Trust v. Nahat, 138 Ariz. 260, 263, 674 P.2d 323, 326 (Ct. App. 1983) (complaint which alleges that defendant "knew or should have known" that benefits were wrongfully obtained is basis for restitution, even when restitution is not specifically requested). Alternatively, a plaintiff can allege that she believed there was a contract. Such belief will, if demonstrated, form the basis for restitution, Pyeatte v. Pyeatte, 135 Ariz. 346, 352, 661 P.2d 196, 202 (Ct. App. 1982).

G. PALMER, *supra* note 34, § 10.1, at 358-59, divides restitutionary actions into four categories: benefits transferred pursuant to an unenforceable agreement; benefits transferred pursuant to an agreement subject to rescission; benefits transferred through some tortious or inequitable action of the defendant; and unsolicited benefits. The last category is the only one where it is not at least possible that the defendant would know of the intended transfer of benefits, and is also the only category where there is a general policy against recovery. Professor Palmer divides the last category into two situations: plaintiff knowingly conferring an unsolicited benefit, where recovery is denied, and plaintiff mistakenly conferring a benefit, where recovery may be allowed. *Id.* at 359.

Murdock-Bryant represents either another category or a subcategory of the unsolicited benefits category, that of the incidental beneficiary. *See infra* note 44 and accompanying text. This situation is closely allied to the general category of volunteers (intermeddlers); Professor Palmer examines the rule and the accepted reasons for denying recovery from incidental beneficiaries in the chapter on unsolicited benefits. G. PALMER, *supra* note 34, § 10.7 at 418-422. Stated most broadly, recovery is denied because, since the plaintiff was not looking to this defendant for payment, the benefits received do not constitute unjust enrichment.

Courts occasionally use the term incidental benefit in a slightly different way: to refer to benefits for which a requestor may be liable, even though he did not directly receive them. Thus, in Earhart v. William Low Co., 25 Cal. 3d 503, 600 P.2d 1344, 158 Cal. Rptr. 887 (1979), the defendant was liable for the improvements made on his neighbor's property because the defendant requested the work be done at the same time that he requested work on his own property. This holding also represents a departure from the majority of previous holdings, although not such a major departure as *Murdock-Bryant*. *See* G. PALMER, *supra* note 34, § 4.12, at 476 n.27.

43. In Ashton Co., Contractors & Eng'rs v. State, 9 Ariz. App. 564, 570, 454 P.2d 1004, 1010 (1969), the court would not allow the plaintiff to recoup its contractual losses in a quasi-contract action. The contract had included a disclaimer of liability for mistaken estimates. The court held that the contract defined the plaintiff's expectations and that the frustration of these expectations was no reason to allow quasi-contractual recovery. *See also* RESTATEMENT OF RESTITUTION § 107 (1936) (recognizing the general principle).

gation for one party to seek recovery from anyone who may have benefitted from that performance.[44] Even if the plaintiff is faced with a breach of contract by the obligor, under traditional quasi-contract theory he cannot seek restitution from other recipients of the benefits. Because recovery is based on his expectations when conferring the benefit, the plaintiff can only look to those originally the target of his expectations for payment.[45] Finally, traditional quasi-contract theory does not allow a signator to a contract to use a quasi-contract claim to expand the number of parties liable.[46] Traditional quasi-contract theory does not allow the plaintiff, once benefits are transferred, to broaden his claim or look elsewhere for payment.[47]

Although a legally binding relationship is not necessary to create quasi-contractual liability, the parties must have expectations based on at least a constructive knowledge of each other.[48] Courts must find that the plaintiff expected this particular defendant to receive and to pay for the conferred benefits. If the plaintiff can show that the defendant knew, or should have known, of the plaintiff's expectations, the defendant then will be found lia-

44. In Advanced Leasing & Crane., Inc. v. Del Webb Corp., 117 Ariz. 451, 453, 573 P.2d 525, 527 (Ct. App. 1977), the plaintiff provided a crane to a subcontractor of the defendant to meet the subcontractor's contractual obligations. The court dismissed the plaintiff's claim because the defendant's obligations had been defined by the original subcontract. *See also* RESTATEMENT OF RESTITUTION § 110 (1936) (stating the basic principle). In *Advanced Leasing* the defendant was an incedental beneficiary of the plaintiff's performance to the subcontractor. An incidental beneficiary is one who receives a benefit because of the plaintiff's performance of a legal duty, including a contractual obligation to another. Chandler v. Washington Toll Bridge Auth., 17 Wash. 591, 597, 137 P.2d 97, 103 (1943). Traditional restitution theory does not allow recovery against incidential beneficiaries. *See* Wade, *supra* note 34, at 1183.

45. In Chrysler Corp. v. Airtemp Corp., 426 A.2d 845, 850 (Del. Super. Ct. 1980), the court dismissed an action against a wholly owned subsidiary because, despite the subsidiary being a third party beneficiary of the breached contract, there was no unjust enrichment where the benefits came as a result of a contract with the parent corporation. *See also* RESTATEMENT OF RESTITUTION § 110 (1936) (barring recovery from third parties where the primary obligor is in ordinary breach).

46. In Roman Mosaic and Tile Co. v. Vollrath, 226 Pa. Super. 215, 218-19, 313 A.2d 305, 306 (1973), the court did not allow the plaintiff to expand a quasi-contract suit to include the spousal joint owner of a laundromat when the plaintiff had not known of the shared ownership during the negotiation of the original contract. Recovery was precluded because the plaintiff could not say that it had relied on the unknown spouse for payment.

47. *E.g.*, RESTATEMENT OF RESTITUTION § 110 (1936).

48. *See supra* note 42 and accompanying text. One common term used to describe this relationship in contract actions is privity. The term is also often used in quasi-contract questions. *E.g.*, Commercial Fixtures & Furnishings, Inc. v. Adams, 564 P.2d 773, 774 (Utah 1977) (lack of privity bars recovery); Annot., 62 A.L.R.3d 288 (1975) (privity is commonly used to bar recovery); *contra* Paschall's Inc. v. Dozier, 219 Tenn. 45, 50, 407 S.W.2d 150, 155 (1966) (lack of privity is no bar to an action in quasi-contract); 17 C.J.S. Contracts, § 6, 572 (1963) (privity is not necessary in quasi-contracts).

" 'Privity,' as used with respect to contracts, leases, etc., implies a connection, mutuality of will, an interaction of parties . . . For one not a party to a contract to successfully bring suit upon it, or for a party to a contract to successfully sue one not a party to it, the privity above defined must exist." Hyink v. Low Line Irrigation Co., 62 Mont. 401, 404-05, 205 P. 236, 237-38 (1922) (quoted by A. CORBIN, *supra* note 21, § 778, at 28 n.44). When privity does not exist the beneficiary is essentially a stranger outside the contemplation of the plaintiff.

The use of the term privity in quasi-contractual cases leads to confusion because privity of contract depends on an express contract, while restitution is based on the lack of a contract. Hope, *Officiousness*, 15 CORNELL L.Q. 25, 30 (1929). The traditional limits on quasi-contractual liability, however, have mirrored the limitations imposed by the privity requirement in contract cases: liability should be based on the expectations of the parties dealing with one another.

Courts are reluctant to allow a plaintiff in a quasi-contract action to shift liability where there was no prior expectation of payment, because this does not meet the definitional requirements of an unjust enrichment. *See* Dawson, *supra* note 34; G. PALMER, *supra* note 34, § 4.12 at 468-70.

ble. This relationship is not adequate to support a contract, but it is enough to create quasi-contractual liability based on mutual expectations.

The *Murdock-Bryant* court is not the first to recognize the injustice of an obvious recipient of benefits escaping liability, but it is the first to create a rule making all such defendants liable. The most common statutory exception to the rule limiting liability was created because the incidental beneficiary is actually the initiator of the requests for the benefits.[49] Aside from fraudulent transactions, other courts have only made an exception to the limits on liability when the plaintiff can show reasonable grounds for his mistaken expectation of payment.[50]

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49. The most common statutory exceptions are the mechanic's lien statutes. *See, e.g.*, ARIZ. REV. STAT. ANN. §§ 33-981 to 33-1001 (1980). Such statutes allow a subcontractor to impose a lien on property when not paid by the prime contractor for work done. The lien transfers the debt from the contractor to the property, and thus to the property owner. In this way, the subcontractor escapes the usual limits on quasi-contractual recovery and regains the value of his work from the intended recipient, the owner. Mechanic's liens observe the basic intent of the traditional limits on quasi-contract: they do not impose on a stranger an unjust, unexpected burden.

The subcontractor in *Murdock-Bryant* could not have recovered under the mechanic's lien statute, because the statute is an abrogation of the common law and strict compliance with all particulars is necessary. *See, e.g.*, Stratton v. Inspiration Consol. Copper Co., 140 Ariz. 528, 531, 683 P.2d 327, 330 (Ct. App. 1984).

Some states have also passed betterment statutes, which allow recovery by a claimant who, in the mistaken belief that it is his own land, has improved the land of another. *E.g.*, IOWA CODE §§ 560.1 to 560.7 (1954) (no removal of one who has made valuable improvements under good faith color of title until improvements paid for or removed); TEX. REV. CIV. STAT. art. 7393-7401 (Vernon's 1960) (adverse possession in good faith for one year protects against ejectment until reimbursed). These statutory exceptions can be justified by the rationale of quasi-contractual liability: if a defendant voluntarily accepts a benefit, he also accepts a liability. *See* G. PALMER, *supra* note 34, § 10.9, at 442; Merryman, *Improving the Lot of the Trespassing Improver*, 11 STAN. L. REV. 456 (1959).

50. Professor Palmer rationalizes these exceptions by pointing out that fraud, duress, mistake, or breach of warranty would invalidate a contract and allow recovery in a two party situation, and that the rights of a donee beneficiary should be no greater. G. PALMER, *supra* note 34, § 4.12, at 468.

Professor Palmer also argues that while the RESTATEMENT OF RESTITUTION § 110 (1936) would not allow recovery for any type of beneficiary in the absence of fraud or similar circumstances, the better view is to allow recovery unless the recipient is a creditor beneficiary, because if the beneficiary "had been a party to the contract along with the [promisor], it could be required to make restitution either specifically or in value, and the [defendant] should not escape accountability for its enrichment merely because it was not a party." G. PALMER, *supra* note 34, § 4.12, at 480. This comes very close to being a justification for the decision in *Murdock-Bryant*.

The only remaining distinction between this argument and the decision in *Murdock-Bryant* is that the beneficiaries in Professor Palmer's argument were, by definition, within the contemplation of the contracting parties at the time the contract was made, while the joint venture partner in *Murdock-Bryant* was not yet present. Professor Palmer defines creditor beneficiaries according to the RESTATEMENT OF CONTRACTS § 133(1)(b) (1932) which would preclude considering the joint venture partner as a beneficiary.

Because fraud was not a basis of recovery against the joint venture partner in *Murdock-Bryant*, cases where the fraudulent concealment of an additional beneficiary warranted recovery do not apply. *Compare Murdock-Bryant*, 146 Ariz. at 52, 703 P.2d at 1201, *with* Joan Briton, Inc. v. Streuber, 36 A.D. 464, 321 N.Y.S.2d 195 (N.Y. App. Div. 1971) *aff'd* 30 N.Y.2d 551, 281 N.E.2d 555, 330 N.Y.S.2d 612 (1972) *and* Degasperi v. Valicenti, 198 Pa. Super. 455, 181 A.2d 862 (1962).

Finally, *Murdock-Bryant* did not have the element of a family relationship that usually exists when courts allow recovery against the unexpected beneficiary for an improver's mistaken reliance on the occupant's ability to pay. *See, e.g.*, Karon v. Kellog, 195 Minn. 134, 261 N.W. 861, 862 (1935) (true owner/brother held liable when permanent resident and former owner contracted for reasonable repairs); Beacon Homes, Inc. v. Holt, 266 N.C. 467, 474, 146 S.E.2d 434, 439 (1966) (recovery against true owner/son because of reliance on assurances of good title by father); Paschall's Inc. v. Dozier, 219 Tenn. 45, 50, 407 S.W.2d 150, 155 (1966) (recovery allowed against true

Prior to *Murdock-Bryant*, restitution based on quasi-contractual obligations was not available to make non-bargaining third parties liable,[51] or to give contracting parties something for which they neither bargained for nor relied on in reaching an agreement.[52] When the plaintiff can show that he relied when performing on payment by a third party, recovery may be granted. Absent such reliance, the receipt of a benefit did not make incidental beneficiaries liable.

MURDOCK-BRYANT HURDLES TRADITIONAL BARS TO QUASI-CONTRACTUAL RECOVERY

The decision in *Murdock-Bryant* departed from traditional quasi-contract theory by removing limitations on recovery, thus expanding the group of potential defendants.[53] The facts of *Murdock-Bryant* help to explain the decision.[54] Joint venture partnerships are formed with the intent to share assets and liabilities for mutual benefit.[55] The court declared that it would be unjust to allow the joint venturer to share in the benefits without having to share the costs.[56] The joint venturer would realize benefits from the subcontractor's work. The subcontractor expected payment for the benefits conferred. Combining the subcontractor's expectation of payment with the joint venture partner's obvious receipt of benefits created liability on the part of the joint venture partner.[57]

With this last step, imposing liability on a third party, the *Murdock-*

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owner/parents of daughter who contracted for interior decoration). *Murdock-Bryant* represents an expansion of the law because it does not fit into any of these categories.

51. *See supra* notes 42-46 and accompanying text. *See also* Eastern Renovating Corp. v. Roman Catholic Bishop of Springfield, 554 F.2d 4, 7 (1st Cir. 1977) (recovery not allowed when plaintiff knew that promisor had no power to obligate defendant).

52. Advanced Leasing & Crane., Inc. v. Del Webb Corp., 117 Ariz. 451, 455, 573 P.2d 525, 529 (Ct. App. 1977); *see also* A & B Boiler Co. v. Garde Corp., 32 Conn. Supp. 615, 349 A.2d 155 (Conn. Super Ct. 1975); Haggard Drilling, Inc. v. Greene, 195 Neb. 136, 236 N.W.2d 841 (1975).

53. 146 Ariz. at 54, 703 P.2d at 1203. The test of unjust enrichment set out in *Murdock-Bryant* modifies the traditional view in small, but significant, ways. In *Murdock-Bryant*, the expectations are generalized rather than specific. The court redefines unjust enrichment to include incidental beneficiaries by holding: "[in] determining whether it would be unjust to allow the retention of benefits without compensation, a court need not find that the defendant intended to compensate the plaintiff for the services rendered or that the plaintiff intended that the defendant be the party to make compensation." 146 Ariz. at 54, 703 P.2d at 1203.

54. *See supra* notes 6-12 and accompanying text.

55. *See, e.g.*, Ellingson v. Sloan, 22 Ariz. App. 383, 386, 527 P.2d 1100, 1103 (1974).

56. *See supra* notes 15-18 and accompanying text.

57. That the plaintiff is not attempting to shift liability from one party to another is important. *See supra* notes 45-47 and accompanying text. In *Murdock-Bryant*, the plaintiff was pursuing the more equitable goal of apportioning liability among all beneficiaries.

One issue not dealt with in *Murdock-Bryant* was the defendant joint venture partner's possible equitable defenses. There was no claim that the benefit conferred was consideration for other benefits given to the prime contractor by the joint venture partner. If the joint venture partner had already paid, or promised to pay, for the benefit, then there would be no unjust enrichment because there would be no additional enrichment. Creditor beneficiaries are not required to make restitution. G. PALMER, *supra* note 34, § 4.12, at 466. Because the decision in *Murdock-Bryant* emphasized the equitable character of restitution, and because the decision changed the limits on quasi-contractual recovery from rules concerning expectation to the simple question of whether there was any receipt of benefits, defenses in future quasi-contract cases will also have to change to address these concerns. Defendants will no longer be able to rely on a defense based on traditional rules. Instead, they must argue the equitable principles underlying those rules and any specific facts of their case that would make a denial of restitution more just than imposition.

Bryant court broke through the traditional quasi-contract barriers. The plaintiff need not show either that he expected payment from the defendant for the benefits at the time conferred or that the defendant knew that the benefits were gained at the plaintiff's expense.

Traditional quasi-contract theory would not view the joint venture partner's benefit as an unjust enrichment because the benefit resulted from the subcontractor's obligation to the prime contractor.[58] The court in *Murdock-Bryant* separated the expectation from the benefit: an expectation of payment from someone (the prime contractor) also supported a claim against an incidental third party receiving the benefit (the joint venture partner).

Prior to the decision in *Murdock-Bryant*, requiring expectation or knowledge was a means of insuring that, while courts were doing justice for a plaintiff, they did not do an injustice to an unsuspecting defendant. This motive is not contradicted by a holding that assent is never required in quasi-contract actions.[59] Rather, such a holding merely differentiated the assent necessary to support an action on the contract, from the requirements necessary for quasi-contractual recovery.

Courts order restitution regardless of the intention of the parties because to limit recovery in quasi-contract to the expectations of both sides would make implied-in-law contracts no different from implied-in-fact contracts. Prior to *Murdock-Bryant*, however, restitution depended on either the plaintiff's or the defendant's actual knowledge that a benefit had been directly transferred accompanied by an intent to be paid. The expansive definition of unjust enrichment used by the court in *Murdock-Bryant* modified the traditional requirement of injustice: if the plaintiff expected payment and any type of benefit was received by anyone, then retention of that benefit would be unjust.[60]

Under traditional quasi-contract theory the contract between the prime contractor and the subcontractor would have limited or precluded recovery by the subcontractor.[61] In *Murdock-Bryant* the court transformed the contract from a barrier to recovery into proof that the plaintiff expected payment, which in turn supported recovery from non-contractual parties.[62]

THE IMPACT OF *MURDOCK-BRYANT* ON RESTITUTION IN ARIZONA

The most immediate impact of *Murdock-Bryant* will be an increased flexibility for Arizona courts in setting the amount of liability owed in quasi-contractual actions. By emphasizing the equitable character of quasi-contract and by allowing the extent of quasi-contractual recovery to be determined by the relationship between the parties, *Murdock-Bryant* grants more

58. RESTATEMENT OF RESTITUTION § 110 (1936). This parallels the rule of contract law that a prior obligation will not serve as consideration. *See generally* Henderson, *supra* note 23.

59. *See supra* note 31.

60. *Murdock-Bryant* 146 Ariz. at 54, 703 P.2d at 1203.

61. If fully performed, the contract would have precluded recovery, if breached or rescinded prior to full performance the contract would have defined expectations and therefore limited the extent of recovery and the number of defendants available to the plaintiff. *See supra* notes 26-33 and accompanying text.

62. *Murdock-Bryant* 146 Ariz. at 54, 703 P.2d at 1203.

freedom to Arizona courts in the application of the principles of quasi-contract.[63]

By allowing a claim for restitution against a joint venturer who had no prior dealings with the plaintiff, the Arizona Supreme Court also expanded the types of claims eligible for quasi-contractual restitution. After *Murdock-Bryant*, plaintiffs will have a claim against third parties who received benefits because of the plaintiff's contractual obligation to someone else. Even limited to its facts, *Murdock-Bryant* represents a significant departure from traditional quasi-contract theory. The broad language of the decision and the simple definition of the principles significantly expand the potential of quasi-contractual actions.[64]

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63. *Murdock-Bryant* represents not only a modification of the principles of quasi-contract but also a clarification of the scope of recovery available in quasi-contractual actions. The basic assumption of all quasi-contract claims is that the defendant should return to the plaintiff the value of the benefits received. Especially when the defendant has not specifically bargained for the benefits, courts limit the amount of recovery to the amount of actual benefit received by the defendant. D. DOBBS, *supra* note 3, § 4.5 at 260.

The difficulty in determining the value of the benefits often leads a court to rely on the most objective measure: the plaintiff's costs. *Id.* Reflecting the equitable principles of such claims, however, other courts attempt to assess damages according to whether the defendant requested the services and according to the defendant's culpability in gaining the unjust enrichment. *See, e.g.*, Murdock-Bryant Construction, Inc. v. Taylor Pearson, 146 Ariz. 57, 68, 703 P.2d 1206, 1217 (Ct. App. 1985) (value of services, expenses and reasonable profits when contract void due to fraud, resulting in recovery higher than contract price); Western Coach Corp. v. Roscoe, 133 Ariz. 147, 154, 650 P.2d 449, 456 (1982) (value of improvements when work done without bargaining); Ruck Corp. v. Woudenberg, 125 Ariz. 519, 522, 611 P.2d 106, 109 (Ct. App. 1980) (value of services and expenses when defendant breached contract); Musgrove v. Leonard, 97 Ariz. 44, 46, 396 P.2d 614, 616 (1964) (value of services when contract rescinded by mutual agreement).

The decision in *Murdock-Bryant* ratifies the flexible, fact based determination of damages. The court of appeal's imposition of liability on the prime contractor was approved, but the case was remanded to determine the liability of the joint venture partner based on whether he would be liable only for the value to him of the services because he had not requested the services, or liable for the value to the plaintiff because the services had been requested. 146 Ariz. 56, 703 P.2d 1205. Here, as in other aspects of quasi-contract, the decision in *Murdock-Bryant* makes the facts of each case more important than any general principle. Turnkey Corp. v. Rappeport, 720 P.2d 115 (Ct. App. 1986), represents an application of *Murdock-Bryant*'s clarification of the freedom to fashion the recovery to fit the situation.

64. As with any decision which redefines a legal doctrine, the impact of *Murdock-Bryant* will depend on what language in the decision later courts emphasize. *Murdock-Bryant* represents a change in past rules concerning quasi-contractual recovery. To the extent that such a change serves the underlying purpose of restitution—to do justice by restoring an equitable balance of enrichment and payment—the decision does no more than continue the natural growth inherent in the law.

Certain interpretations of the decision in *Murdock-Bryant* would make contractual relationships less predictable. The freedom of contract carries with it a freedom not to contract: to choose not to take on additional obligation. Quasi-contract is an equitable exception to this rule, in that it limits the defendant's ability to avoid liability for benefits voluntarily accepted. The question which has always defined the limits of quasi-contract is: how far should the reach of liability for benefits received extend?

Traditional quasi-contractual recovery has not considered certain benefits to be unjust enrichment. If the defendant has already paid for the benefit, if the defendant did not ask for the benefit but has little choice in keeping the benefit, or if the benefit was conferred without an intent by either party that it be paid for, traditional quasi-contract would not create a liability on the part of the defendant. This limit includes situations where the benefit was conferred as a gift and situations where payment for the benefit was expected from another.

In every contract there is a balancing of risks, a risk of unsatisfactory performance balanced by a risk of nonpayment. Actions for breach of contract balance these risks to insure that the risks actually taken are compensated according to the original expectations of the parties. The same principles apply in quasi-contractual actions. Courts seek to make sure that those parties who meet the plaintiff's expectations by accepting a benefit that the plaintiff tendered pay for the benefits received. The plaintiff's risks are defined by those to whom he looked for payment when conferring

The decision in *Murdock-Bryant* could alter the traditional outcome of quasi-contract actions in several important areas. Subcontractors with a valid claim against the contractor should more easily obtain compensation from property owners.[65] Contractors should more easily gain compensation from landlords who previously have escaped liability for the benefits ordered by defaulting tenants.[66] Furthermore, *Murdock-Bryant* can be interpreted to give plaintiffs access to previously unavailable assets.[67]

The change in quasi-contract liability also may affect actions concern-

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the benefit. *Murdock-Bryant* shifts the balance of risks by allowing a plaintiff to expand his expectations, and thereby reduce his risks, after performance.

If the decision in *Murdock-Bryant* expands liability to parties who were, by imputation, reasonably within the contemplation of the plaintiff at the time the benefits were provided, the decision does no more than expand the scope of quasi-contract while observing the basic intent of the doctrine. To make liable those who the plaintiff would have known to be direct beneficiaries if certain circumstances existed, such as property owners if the prime contractor defaulted, landlords if the contracting tenant defaulted, or joint venture partners who sought to adopt the previous benefits produced by their partners, does not violate the intent of restitution.

The holding of *Murdock-Bryant* can be interpreted to support at least three modifications in prior limits to quasi-contractual recovery against non-privy third parties. Each of these modifications focuses on a different party or relationship which gives rise to the claim.

The least expansive interpretation would emphasize the existence of the joint venture contract and hold that, in order to be found liable, all defendants must either have a direct relationship with the plaintiff or receive benefits by way of a contract with a directly related defendant. Even this most limited interpretation would have a major effect on quasi-contract litigation in Arizona, because it would eliminate the need for mechanic's lien statutes.

A second, more expansive modification of quasi-contract would emphasize the intentions of the prime contractor in creating a joint venture. *Murdock-Bryant* could be interpreted as holding that the knowing receipt of benefits from one who intended to share the benefits would make a defendant liable in quasi-contract. This could make most third party beneficiaries liable, and could make landlords liable for the benefits ordered by defaulting tenants, contrary to the holding in such cases as Commercial Fixtures & Furnishings, Inc. v. Adams, 564 P.2d 773, 774 (Utah 1977).

The third modification would focus on the plaintiff's intention in bringing the suit. This modification would emphasize the language concerning the receipt of a benefit and the implication of constructive knowledge in its receipt, so that all those who received a benefit from the actions of the plaintiff should be liable.

65. *Murdock-Bryant* eliminated the traditional requirement in quasi-contractual actions that the plaintiff expected the defendant to pay. Even if liability is based on a contractual relationship between beneficiaries, property owners should now be liable in quasi-contract for work performed by subcontractors. Previously such claims have been barred unless it could be shown that the owner had dealt directly with the subcontractor. *See, e.g.*, Costanzo v. Stewart, 9 Ariz. App. 430, 453 P.2d 526 (1969).

66. As with subcontractor's claims against property owners, the barrier to such claims in the past has not been proof that the defendant has received a benefit, but the problem of the incidental beneficiary: that the defendant did not expect to pay and the plaintiff did not provide the services with the expectation that this defendant would pay. Commercial Fixtures & Furnishings, Inc. v. Adams, 564 P.2d 773, 774 (Utah 1977).

67. There are two issues which are raised but not directly answered by the decisions in *Murdock-Bryant.* First, under traditional quasi-contract there was no question that a plaintiff could not recover from a defendant if the plaintiff knew that the defendant was not expected to pay. Eastern Renovating Corp. v. Roman Catholic Bishop of Springfield, 554 F.2d 4, 7 (1st Cir. 1977). There is language in *Murdock-Bryant* to the effect that the plaintiff's expectations concerning the defendant are unimportant, but there is also specific reference to the limits on quasi-contractual recovery when benefits are conferred gratuitously. *Murdock-Bryant*, 146 Ariz. at 54, 703 P.2d at 1203.

Second, there is no indication that the plaintiff must include the prime contractor in the suit. At the same time, however, there is no indication that a plaintiff could shift liability by bringing suit against a third party without including the party who would be the equivalent of the prime contractor. *Murdock-Bryant* can be seen as a case where the plaintiff expanded the number of parties liable, rather than a case allowing a shifting of liability from one party to another. Whether *Murdock-Bryant* is seen as only allowing a plaintiff to reach into more pockets, or if it does allow reaching past some pockets to others, the increased number and potentially added depth of the pockets improves the plaintiff's chances of gaining complete compensation.

ing limited partnerships, transactions between corporations, and claims against third party beneficiaries. Although the nature of the relationship between the prime contractor and the joint venture partner was not an issue in *Murdock-Bryant*, their contract was the basis for the assumption that the joint venture partner received some benefit. Whether that contract limited the joint venture partner's liability was not addressed, but any such limits may have been unimportant because quasi-contractual recovery is not constrained by the limits of contract theory. After *Murdock-Bryant*, contractual limits on liability may become inconsequential. Each defendant's obligation to the plaintiff will be determined by the benefits received, not by contractual provisions. This may effect the formation of limited liability partnerships.

Another entity affected by the expanded recovery limits may be the parent of a wholly owned subsidiary. If the parent maintains a contractual relationship with the subsidiary and the parent derives some benefit from the activities of the subsidiary, the holding in *Murdock-Bryant* would make the assets of the parent available to quasi-contractual claimants against the wholly owned subsidiary.[68]

When, as in *Murdock-Bryant*, the plaintiff broadens a claim to include a third party outside his original expectations solely because the third party received some benefit, the third party may be forced to pay the larger share of the liability to match its larger share of the benefit. The greatest impact of this will be in claims against third party beneficiaries, where the benefits were conferred with no intention that the third party beneficiary should pay. A breach by the original promisor would create the same situation as in *Murdock-Bryant*. With the elimination of the requirement that the plaintiff expect payment from the recipient, all third party beneficiaries may become liable for benefits received.[69]

The frequent use of any legal doctrine encourages its expansion. *Murdock-Bryant* illustrates that quasi-contract is no exception to this general tendency. Even if a contractual obligation between the prime obligor and

68. Chrysler Corp. v. Airtemp Corp., 426 A.2d 845 (Del. Super. Ct. 1980), involved making a subsidiary liable for the actions of its parent because the subordinate received some benefit as a result of the actions of the parent. Following the traditional rules, the court denied recovery. After *Murdock-Bryant*, these limits may not apply.

A primary objective of incorporation is to limit liability to the assets committed to the corporation. There are other methods whereby a parent corporation can become liable for the actions of its subordinates, i.e., equitable subordination or piercing the corporate veil, but these depend on the corporations having intentionally ignored the corporate formalities for their own benefit. Clark, *The Duties of the Corporate Debtor to its Creditors*, 90 HARV. L. REV. 505, 559-60 (1977). *Murdock-Bryant* is important in this regard because of its holding that intent with regard to recipients and obligations is not relevant to quasi-contractual obligations. *Murdock-Bryant*, 146 Ariz. at 52, 703 P.2d at 1201.

69. This would represent a holding opposite to that in Chrysler v. Airtemp, 426 A.2d 845. The third party might be more liable than the primary promisor. If the primary promisor receives no benefit because, for example, it has become bankrupt, the third party may be faced with total liability.

Courts already allow claims against donee beneficiaries. G. PALMER, *supra* note 34, § 4.12 at 467. The decision in *Murdock-Bryant* may have enlarged this to include creditor beneficiaries. The contract which creates the obligation and the benefit would serve as an indication of the benefit unless the creditor beneficiary could raise the defense of having already given consideration for the benefit. *See supra* note 57.

the third party remains necessary to create liability, *Murdock-Bryant* expands the scope of quasi-contractual recovery into areas where it comes into conflict with other legal doctrines.[70] Ultimately, plaintiffs may be able to establish claims against the third party without the need of a transfer of benefits based on a contract between the prime obligor and the third party.

CONCLUSION

The Arizona Supreme Court, in *Murdock-Bryant Constr. Inc. v. Taylor Pearson,* granted a subcontractor's claim for restitution not only against the prime contractor who was found to have misrepresented the facts underlying the subcontractor's contract, but also against the prime contractor's joint venture partner. The joint venture partner was liable despite the lack of shared responsibility for the misrepresentation and despite the formation of the joint venture after the signing of the subcontract. The joint venture partner was liable as a third party recipient of benefits conferred under a contractual obligation of the subcontractor to the contractor, despite the lack of any contractual relationship or expectation of payment between the subcontractor and the joint venturer.

By discarding the traditional requirement of an expectation of payment from the defendant in quasi-contract cases, by allowing recovery against third parties for benefits conferred pursuant to another contract, and by expanding and simplifying the definition of quasi-contract, the Arizona Supreme Court, in *Murdock-Bryant,* changed the nature of quasi-contract claims in Arizona. The question now posed by quasi-contractual claims in Arizona is not one of benefits and expectations, but rather which side is most deserving of justice.

Milo R. Mecham

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70. Justice Holmes recognized the limits of this process: "All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached." Hudson County Water Co. v. McCarter, 209 U.S. 349, 355 (1908).

In future quasi-contract actions which involve the same issues as *Murdock-Bryant,* those policies which are infringed upon by the expansion of quasi-contract should be brought to the attention of the court. *Murdock-Bryant* type quasi-contract actions will involve a balancing of intentions and equitable principles on both sides. In these actions the social principles embodied in other aspects of the law should be considered and balanced along with the particular facts of each case. The same cautionary principles that have been applied to quasi-contract in general may be applied to the changes which flow from *Murdock-Bryant.*

> There are many other policies in the law that must temper ideals against unjust enrichment. One who appeals to res judicata, the statute of frauds, or the statute of limitations may be, in some sense, unjustly enriched by these doctrines or statutes. But moral outrage is no substitute for law or policy, and these doctrines of law and policy give the defendant a right to whatever enrichment he achieves through them. If they are wrong then they should no doubt be changed; but often enough they are based on some wider perception of public policy that is willing to permit individual injustice in the interest of more general justice and stability. . . .

D. DOBBS, *supra* note 3, § 4.1 at 226.

Murdock-Bryant places a new burden on defendants who have received some benefit through a plaintiff's efforts. No longer can they rely on the traditional barriers to recovery in quasi-contract. After *Murdock-Bryant* they must show why their particular situation and/or other legal policies preclude plaintiff's recovery.