

No. 09-1273

**In the
Supreme Court of the United States**

ASTRA USA, INC., ET AL.,
Petitioners,

v.

COUNTY OF SANTA CLARA,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

**BRIEF OF AARP AND NATIONAL SENIOR
CITIZENS LAW CENTER AS *AMICI CURIAE* IN
SUPPORT OF RESPONDENTS**

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STATEMENTS OF INTEREST¹

AARP is a nonpartisan, nonprofit organization dedicated to addressing the needs and interests of people aged fifty and older. AARP has a long history of advocating for access to affordable and quality health and long-term care. To that end, AARP supports efforts to protect state Medicaid funds because strengthening Medicaid is an essential foundation of the nation's health care system. Medicaid is the nation's largest payer for long-term care and is critical in redirecting care from institutions to often more cost-effective home and community-based settings that older persons prefer. Although older and disabled persons make up just one-quarter of Medicaid enrollees, they account for 70 percent of Medicaid spending; and Medicaid provides essential assistance to more than eight million "dual eligible" low-income Medicare beneficiaries who tend to have significant chronic health care needs. In addition, AARP has a strong interest in this case because ensuring that prescription medications are affordable is especially important to older people who have the highest rate of prescription drug use as a result of their higher rate of chronic and serious health conditions.

¹ Pursuant to Supreme Court Rule 37.6, counsel for *amici* represent that no counsel for a party authored this brief in whole or in part and that none of the parties or their counsel, nor any other person or entity other than *amici*, its members or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of *amicus* briefs and have filed letters reflecting their blanket consent with the Clerk.

Because prescription drug spending has skyrocketed over the last fifteen years, thereby limiting access to medically necessary medicines for many people, AARP advocates for policies, laws, and other efforts that broaden access to affordable prescription drugs.

The National Senior Citizens Law Center (“NSCLC”) is a non-profit organization whose principal mission is to protect the rights of low-income older adults. For more than 35 years, NSCLC has sought to ensure the health and economic security of older persons with limited income and resources, through advocacy, litigation, and the education and counseling of local advocates. NSCLC’s *Federal Rights Project* seeks to keep the courts open to justice and works to ensure that people retain the right to enforce basic guarantees to health care, economic security and civil rights. Medicaid is a critical source of health insurance for millions of low-income older persons, and NSCLC has participated as counsel in numerous lawsuits regarding Medicaid. NSCLC is profoundly concerned about the impact that the Court’s decision may have on its clients’ access to affordable prescription drugs.

SUMMARY OF THE ARGUMENT

Both federal and state common law provide a cause of action for an intended third-party beneficiary to bring suit for breach of contract. The Restatement (Second) of Contracts encapsulates the principles of common law and recognizes the availability of a contract claim to an intended third-party beneficiary. While the contract in this case

incorporates the requirements of federal law, there is nothing in the underlying statute which divests the courts of jurisdiction to decide contract claims.

Third-party beneficiary claims have widespread acceptance in the jurisprudence of state courts, though states utilize a variety of standards for determining whether a plaintiff meets the requirements for an intended third-party beneficiary. Numerous state courts have allowed third-party claims to proceed to enforce requirements incorporated in contracts between the government and private parties, when these contracts are designed for the intended purpose of benefitting a specific group. The decision regarding third-party beneficiaries in this case should not impede the right of states to develop their own common law of contracts.

ARGUMENT

I. IT IS WELL ESTABLISHED THAT THE COMMON LAW PROVIDES A CAUSE OF ACTION TO AN INTENDED THIRD-PARTY BENEFICIARY TO ENFORCE A CONTRACT

Petitioners argue that the absence of a statutory cause of action warrants dismissal of this case. Pet. Op. Brf. 17. Yet, the respondent's right to sue derives from a contract mandated by Congress, and nothing in the applicable statute suggests Congress intended to displace common-law contract remedies for intended third-party beneficiaries. Just as parties to a contract have a common law cause of action to bring suit for breach, it is firmly

established that intended third-party beneficiaries have a common law cause of action to enforce the promises made for their benefit.

The Restatement (Second) of Contracts sets forth “the principles of contract law” for contracts between private parties as well as for contracts entered into by governments. *Mobil Oil Exploration and Producing Se. Inc. v. U.S.*, 530 U.S. 604, 608 (2000). This Court has frequently applied the “common-law rules of contract interpretation” set forth in the Restatement (Second) of Contracts. *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 62-63 (1995). See e.g., *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 130 S. Ct. 1758, 1775 (2010); *Franconia Assocs v. U.S.*, 536 U.S. 129, 143 (2002). Appellate courts have recognized that the Restatement of Contracts is “an appropriate source of authority in contract cases.” *Hansen Bancorp., Inc. v. U.S.*, 367 F.3d 1297, 1308 n.9 (Fed. Cir. 2007). The Restatement “accurately reflects the general common law of the United States.” *Canfield v. Security-First Nat. Bank of Los Angeles*, 87 P.2d 840, 845 (Cal. 1939), cited in *Lake Almanor Assocs. L.P. v. Huffman-Broadway Group Inc.*, 178 Cal.App.4th 1194, 1201, n.4 (Cal. App. 1 Dist. 2009) (Restatement is “entitled to great consideration as an argumentative authority”).

The Restatement (Second) of Contracts § 302 provides criteria for distinguishing incidental beneficiaries from intended beneficiaries and establishes that an intended third-party beneficiary may enforce the duty contained in a promise in a contract that was intended for his or her benefit.

Restatement § 304. The Federal Circuit noted that, pursuant to the Restatement § 302, “a third-party beneficiary of a contract to which the government is a direct party may assert a claim ... in accordance with the rules applicable to third-party claims.” *Flexfab, L.L.C. v. United States*, 424 F.3d 1254 (Fed. Cir. 2005). The *en banc* Supreme Court of Missouri similarly explained, “A third-party beneficiary is one who is not privy to a contract or its consideration but who may nonetheless maintain a cause of action for breach of the contract.” *Andres v. Albano*, 853 S.W.2d 936, 942 (Mo. 1993) (*en banc*). Applying the Restatement § 302, the Supreme Court of Alaska observed that the third-party beneficiary cause of action arises under contract law and does not require a statutory cause of action. *Smallwood v. Cent. Peninsula Gen. Hosp.*, 151 P.3d 319, 324 (Alaska 2006). Thus, both the federal common law and the common law of many states follow the Restatement (Second) and provide intended third-party beneficiaries with a cause of action to remedy a breach of the contract.

The statutory provision that directs the federal government to enter into contracts limiting the price of drugs, 42 U.S.C. § 256b, does not divest federal courts of jurisdiction to hear contract claims. *See Verizon Md. Inc. v. Public Serv. Comm’n*, 535 U.S. 635, 642 (2002). Clearly, the parties to such a contract could sue each other for breach of contract, since there is nothing in the underlying statute precluding contract law remedies for the parties. Likewise, the statute does not divest federal courts of jurisdiction to hear common law contract claims brought by third-party beneficiaries.

Moreover, § 256b incorporates certain pricing standards from the Medicaid statute. The Medicaid statute does not contain a comprehensive remedial scheme that would preclude review, because this statute does not provide any remedies for private parties, such as respondent, under the circumstances of the instant case. This Court has noted that statutes may preclude other remedies when they provide a detailed remedial scheme for private parties. *Blessing v. Freestone*, 520 U.S. 329, 347 (1997). Even when beneficiaries have administrative remedies under the Medicaid statute, this Court has held that the statute does not contain a comprehensive remedial scheme that would preclude claims under 42 U.S.C. § 1983 for Medicaid recipients who are clearly the intended beneficiaries of the Medicaid law. *Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498, 521-22 (1990). See also *Wright v. City of Roanoke Redev. & Hous. Auth.*, 479 U.S. 418, 427-8 (1987); *Rosado v. Wyman*, 397 U.S. 397, 406 (1970). There is no logical basis for finding a comprehensive remedial scheme in the Medicaid law for precluding contract claims, since the Court has already held that the statute does not preclude § 1983 claims. Moreover, the absence of any administrative remedies for respondent demonstrates that there is not a comprehensive remedial scheme that would preclude ordinary contract law remedies, including third-party beneficiary claims.

II. STATE CONTRACT LAW PROVIDES
REMEDIES TO INTENDED THIRD-PARTY
BENEFICIARIES AND STATE LAW
REMEDIES SHOULD NOT BE TRAMPLED
UPON

State courts and legislatures have addressed the availability of a cause of action for breach of contract for an intended third-party beneficiary in a myriad of ways. Some state legislatures have enacted statutes codifying the common law relief for intended third-party beneficiaries. In other states, the doctrine has been established entirely through case law. While many states have adopted the standards identified in the Restatement (Second) of Contracts, a few states have imposed more stringent criteria for a cause of action for third-party beneficiary claims. The Court's holding in this case should preserve the freedom of states to fashion contract law in accordance with divergent state preferences.

A. While State Standards Vary, State
Courts Permit Claims by Intended
Third-Party Beneficiaries

The Restatement (Second)'s formulation of the common law regarding intended third-party beneficiaries in § 302 has been adopted by the highest courts of numerous states. *See, e.g., Smallwood*, 151 P.3d at 324 ; *Rumford v. Valley Pest Control, Inc.*, 629 So.2d 623, 631 (Ala. 1993); *Scarpitti v. Weborg*, 530 Pa. 366, 370-71 (Pa. 1992); *Hill v. Sonitrol of Sw. Oh., Inc.*, 521 N.E.2d 780, 784 (Ohio 1988); *Fourth Ocean Putnam Corp. v.*

Interstate Wrecking Co., Inc., 485 N.E.2d 208, 212 (NY 1985); *Cretex Co., Inc. v. Constr. Leaders, Inc.*, 342 N.W.2d 135, 139 (Minn. 1984); *Midwest Dredging Co. v. McAninch Corp.*, 424 N.W.2d 216, 224 (Iowa 1988). Thus, numerous state courts recognize the right of third-party beneficiaries to sue to enforce a breach of contract.

Several states have enacted statutes that specify the right of intended third-party beneficiaries to bring an action under state contract law. For example, Georgia's statutory code provides: "The beneficiary of a contract made between other parties for his benefit may maintain an action against the promisor on the contract." Ga. Code. Ann. § 9-2-20. *See also* Mich. Comp. Laws § 600.1405 (1996); Cal. Civ. Code § 1559. Similarly, Louisiana's civil code states that a third-party beneficiary has "the right to demand performance from the promisor." LSA-CC Art. 1981. A comment to the Louisiana code notes that the "direct right of the beneficiary to demand performance has been consistently recognized by the Louisiana courts" since a case decided in 1818. In contrast, West Virginia's civil code drastically limits the availability of relief for third-party beneficiaries, specifying that a party may sue as a third-party beneficiary only if the promise in the contract has been made for his "sole benefit." W. Va. Code, § 55-8-12. *See E. Steel Constr. Inc. v. City of Salem*, 549 S.E.2d 266 (W. Va. 2001).

State courts in Illinois and Texas apply a strong presumption against third-party beneficiary enforcement of the contract. *Shank v. H.C. Fields*, 869 N.E.2d 261, 268 (Ill. App. 2007); *Ortega v. City*

Nat. Bank, 97 S.W.3d 765, 773 (Tex. App. 2003). Nevertheless, even in those states, third-party claims have prevailed when supported by evidence of the clear intent of the contract to confer a benefit on the third-party. *Stine v. Stewart*, 80 S.W.3d 586, 590 (Tex. 2002) (per curiam); *Bates & Rogers Constr. Co. v. Greely & Hansen*, 486 N.E.2d 902, 906 (Ill. 1985).

While utilizing not quite as stringent a standard as Illinois and Texas, the Supreme Courts of Arkansas and Kansas have applied a presumption that parties contract only for their own benefit. *Elsner v. Farmers Ins. Group*, 220 S.W.3d 633, 635 (Ark. 2005); *State ex rel. Stovall v. Reliance Ins. Co.*, 107 P.3d 1219, 1231 (Kan. 2005). These courts still permit third-party claims to proceed when there is substantial evidence of a clear intent to benefit a third-party. *Fasse v. Lower Heating & Air Conditioning, Inc.*, 736 P.2d 930, 934 (Kan. 1987); *Howell v. Worth James Const. Co.*, 535 S.W.2d 826, 829 (Ark. 1976).

In sum, there is a rich body of state doctrine permitting third-party beneficiary claims under state contract law. Petitioners' argument that a contract claim by a third-party beneficiary cannot proceed without a statutory cause of action ignores the acceptance of common law third-party beneficiary claims by numerous state courts.

B. Courts Applying State Law Have Permitted Intended Third-Party Beneficiary Claims Arising From Government Contracts Involving Health Care and Social Services

In recent years, for-profit firms have played a greater role in the delivery of health care and social services “as economic conditions make social welfare delivery increasingly attractive to for-profit firms.” Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. Rev. 543, 595 (2000). Due to the “inadequacy of traditional accountability mechanisms” when for-profit firms administer public programs, “enforceable legal contracts emerge as a potentially crucial tool.” *Id.* at 598. Third-party beneficiary claims can serve “to protect the public interest and to supplement the efforts of regulatory agencies.” Irma S. Russell, *A Common Tragedy: The Breach of Promises to Benefit the Public Common and the Enforceability Problem*, 11 Tex. Wesleyan L. Rev. 557, 561 (2005).

State courts and federal courts applying state law have permitted third-party beneficiary claims against private parties to enforce contracts enacted to implement Medicaid requirements, provide services to prisoners, and supply housing. The decision in this case should not encroach upon the power of states to permit claims by intended third-party beneficiaries under state law.

In *Smallwood*, 151 P.3d at 319, the hospital admitted that it automatically billed Medicaid recipients for charges rejected by the state, a

practice known as “balance billing.” This practice was in direct violation of federal and state Medicaid law, encapsulated in the hospital’s agreement with the state, which prohibit providers from billing Medicaid patients for amounts beyond authorized copayments. The Alaska Supreme Court held that the plaintiff could pursue injunctive and declaratory relief as a third-party beneficiary of the contract between the hospital and the state. Following the Restatement § 302, the court found that “the state intended that Medicaid recipients like Smallwood benefit from providers’ promises not to balance bill.” *Id.* at 325. The court therefore permitted the plaintiff to enforce the provider agreement as a third-party beneficiary. The court also held that the possibility of enforcement by the government did not foreclose the plaintiff’s claim because he had no assurance of enforcement in *his* case, and he was not entitled to a state administrative hearing regarding the hospital’s improper billing. *Id.* at 326-27.

In another case involving a violation of Medicaid law, a nursing home refused to readmit a paraplegic resident after he went to the hospital for treatment of an ulcer. *Smith v. Chattanooga Med. Investors, Inc.*, 62 S.W.3d 178, 181 (Tenn. Ct. App. 2001). The contract between the state and the nursing home required the nursing home to comply with federal and state rules, including rules governing the readmission of a patient after a transfer to a hospital. *Id.* at 187. The state appellate court noted that the intent of the contract was specifically to benefit Medicaid-eligible residents who receive care at that facility, and not to benefit the general public. *Id.* at 185-86. The court

therefore concluded that the plaintiff could bring suit as a third-party beneficiary to enforce the contract between the state and nursing home. *Id.*

In two suits in federal court against nursing homes alleging the failure to provide the level of care agreed to in contracts between the states and nursing homes, district courts permitted third-party beneficiary claims to proceed. *Brown v. Sun Healthcare Group Inc.*, 476 F. Supp. 2d 848, 853 (E.D. Tenn. 2007) (applying Tennessee law); *Brogdon v. Nat'l Healthcare Corp.*, 103 F. Supp. 2d 1322 (N.D. Ga. 2000) (applying Georgia law). In both cases, the courts found that the Medicaid statute did not provide an implied private right of action to Medicaid recipients. *Brown*, 476 F.Supp.2d at 851; *Brogden*, 103 F.Supp.2d at 1330. Nevertheless, under both Tennessee and Georgia law, Medicaid recipients could pursue contract claims against the nursing facilities as intended third-party beneficiaries. *Brown*, 476 F.Supp.2d at 853; *Brogden*, 103 F.Supp.2d at 1334; accord *Solter v. Health Partners of Philadelphia Inc.*, 215 F. Supp. 2d 533, 539 n.8 (E.D. Pa. 2002) (no private right of action under Medicaid Act but third-party beneficiary claim under state law available to enforce contract between managed care organization and state regarding provision of medically necessary care). The courts both found that Congress did not intend to “displace state law in this area.” *Brown*, 476 F.Supp.2d at 853; *Brogden*, 103 F.Supp.2d at 1334. In *Brogdon*, the court refused to dismiss the case based on the doctrine of primary jurisdiction, noting that “Medicaid provides no scheme for

administrative enforcement of Plaintiffs' claims.”
103 F.Supp.2d at 1329.

The Supreme Court of Virginia similarly allowed a prisoner who alleged that he was injured by inadequate medical care to enforce a contract between the state and a private provider of medical services for prisoners. *Ogunde v. Prison Health Serv. Inc.*, 645 S.E.2d 520 (Va. 2007). The contract's stated purpose was to “provide cost effective, quality inmate health care services for up to . . . inmates,” and it defined the scope of services to be provided to the prisoners. *Id.* at 525-26. The court found that the contract rendered a direct benefit to the inmates, which was clearly the intention of the contracting parties, and therefore reversed the dismissal of the prisoner's third-party beneficiary contract claim. *Id.* Accord *Rathke v. Corr. Corp. of Am.*, 153 P.3d 303 (Alaska 2007) (prisoners are third-party beneficiaries of contract between state and private prison operator). See also *Miller v. Corr. Corp. of Am.*, 239 Fed. App'x. 396 (9th Cir. 2007) (applying Alaska law and following *Rathke*).

The Supreme Judicial Court of Massachusetts held that, under Massachusetts law, tenants can pursue contract claims as third-party beneficiaries of housing contracts enacted pursuant to federal housing programs, in cases involving landlords' failure to correct lead paint hazards. *Campbell v. Boston Hous. Auth.*, 823 N.E.2d 363 (Mass. 2005); *Ayala v. Boston Housing Authority*, 536 N.E.2d 1082 (Mass. 1989). Nevertheless, in both housing and prisoner cases, third-party beneficiary claims have been denied when the contracts included

exclusionary clauses disclaiming any intent to confer rights to performance on third-parties. *Jama v. U.S. Immigration and Naturalization Serv.*, 334 F. Supp.2d 662, 687 (D.N.J. 2004) (prisoner); *Anderson v. D.C. Hous. Auth.*, 923 A.2d 853, 863 n. 20 (D.C. 2007) (housing); *Dewakuku v. Cuomo*, 271 F.3d 1031 (Fed. Cir. 2001) (housing).

Petitioner's argument that no third-party beneficiary claims should be permitted without a federal statutory cause of action would undermine state law cases permitting recipients of federal benefits to enforce contracts against private providers for violations including improper billing, unlawful eviction from nursing homes, inadequate medical care, and hazardous lead paint. State courts and legislatures should be free to develop state law to protect their residents from such harms.

CONCLUSION

For the reasons stated, *amici* urge the Court to affirm the decision below.

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Respectfully Submitted,

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