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CONCLUSION

When it is called to mind that the income tax basis of property included in the gross estate is its value at the date of death, or the alternate valuation date if alternate valuation is used, it becomes apparent that in addition to the usual estate tax consequences arising from the alternate valuation, there are income tax consequences which may outweigh the estate tax consequences.

When Congress added this election to the law, it merely intended it as a relief measure for those estates which had suffered severe declines in value. In spite of the fact that it was enacted as a relief measure, the use of this election now presents problems undoubtedly not contemplated at the time of its passage. Therefore, it is necessary to consider, in addition to relative values, the inclusion of assets, their subsequent basis, income tax consequences and the effect on the beneficiary's legacies.[40]

40 See Price, "Alternate Valuation Date Problem," N.Y.U. 17th Inst. on Fed. Tax p. 1245 at 1265. 1265.

CASE COMMENT

LABOR RELATIONS – CONTRACTS – SET-OFF AND COUNTERCLAIM

John L. Lewis and others, as trustees for a union welfare and retirement fund, brought an action against Benedict Coal Corporation for payments allegedly due as the result of a collective bargaining agreement entered into between Benedict and The United Mine Workers of America. The company cross-claimed, asserting that the contract providing for the payments had been violated by the union and that the company was entitled to set-off damages arising from this breach against payments into the fund. The trial court found that the payments were due the trustees as alleged, but also found that Benedict was entitled to damages for the breach of the collective bargaining agreement by the union. The judgment against the union was given immediate execution with the proceeds to be paid into the registry of the court, while the judgment for the trustees was limited to satisfaction from the fund so created. The effect of this judgment, therefore, was allowance of the set-off against the third-party beneficiary of contract damages arising from a breach by the promisee. This decision was affirmed, except as to the amount of damages, by the Circut Court of Appeals, but was reversed by the Supreme Court on the grounds that it was against sound labor policy to allow such set-off. *Lewis v. Benedict Coal Corporation,* 80 Sup. Ct. 489 (1960).

Mr. Justice Frankfurter, in an excellently reasoned dissent, recognized the fact that this decision is against the great weight of authority of contract law and that sound labor policy did not require this decision.

The general rule is well established that the rights of a third-

party beneficiary of a contract are subject to all of the equities of the original contract.[1] The early decisions allowing a third-party beneficiary to bring an action in his own name were reasoned on the basis of a substitution of parties, the beneficiary for the promisee.[2] These cases have held that the right of the beneficiary to enforce the contract is subject to all the equities arising out of the contract.[3] State courts,[4] as well as federal courts,[5] have recognized this limitation on the rights of the beneficiary.

In recent decisions, the courts have restricted the beneficiary's right of recovery by placing the same limitations upon this recovery as are present in actions upon the original contract.[6] Professor Corbin has stated in his treatise on contracts that it is probably the just view to make the beneficiary subject to counterclaims against the promisee.[7] This "just view" is also taken by the American Law Institute in the *Restatement of the Law of Contracts*.[8] The Court, however, rejected these views as not applicable to the situation at hand and proceeded to decide the case upon the basis of a sound labor policy.[9]

The contract in question was made pursuant to the National Bituminous Coal Wage Agreement of 1950[10] and provided for payments into the welfare fund by each employer. These payments were to be made into the fund on the basis of each ton of coal mined by the individual mine operators. Two relevant clauses are contained in the contract, one providing that the no-strike clause is a part of the consideration for the contract, and the other, that the agreement is an integrated instrument and that the respective provisions are interdependent. The court does not deny that this would be sufficient to create a third-party beneficiary contract subject to set-off under normal circumstances, but states that it is not applicable to the situation at hand. This conclusion is based partly upon two provisions of the Taft-Hartley Act and partly upon an alleged interest in the trust fund by the employer.[11]

One provision of the Taft-Hartley Act provides that any money judgment against a labor organization is enforceable against the organization as an entity only, not against the assets of the individual members.[12] This provision was a result of the *Danbury Hatters* case[13] where the individual union members were held liable for the debts of the union. The amendment in question was passed, after several states had passed statutes which threatened a recurrence of

1 Ellis v. Harrison, 104 Mo. 270, 16 S.W. 198 (1891); Assets Realization Co. v. Cardon, 72 Utah 597, 272 Pac. 204 (1928).

2 Vrooman v. Turner, 69 N.Y. 280, 25 Am. Rep. 195 (1877).

3 Dunning v. Leavitt, 85 N.Y. 30, 39 Am. Rep. 617 (1881).

4 Union City Realty and Trust Co. v. Wright, 145 Ga. 730, 89 S.E. 822 (1916); Clay v. Woodrum, 45 Kan. 116, 25 Pac. 619 (1891); Greene v. McDonald, 75 Vt. 93, 53 Atl. 332 (1902); Farmers State Bank v. Nicholson, 36 Wyo. 221, 254 Pac. 134 (1927).

5 United States v. Inorganics Inc., 109 F. Supp. 576 (E.D. Tenn. 1952); Fish v. First Nat. Bank of Seattle, Wash., 150 F. 524 (9 Cir. 1907).

6 United States v. Inorganics Inc., 109 F. Supp. 576 (E.D. Tenn. 1952); Petty v. Sloan, 197 Tenn. 630, 277 S.W.2d 355 (1955); Fulmer v. Goldfarb, 171 Tenn. 218, 101 S.W.2d 1108 (1937).

7 4 Corbin, Contracts, § 819 (1951).

8 A.L.I., Restatement, Contracts § 140, illustration 5 (1932).

9 "Finally a consideration which is not present in the case of other third-party beneficiary contracts is the impact of the national labor policy." 80 Sup. Ct. at 495.

10 25 L.R.R.M. 16.

11 "The Promisor's interest in the third party here goes far beyond the mere performance of its promise to that third party, i.e., beyond the payment of royalty." 80 Sup. Ct. at 495.

12 Labor Management Relations Act (Taft-Hartley Act) § 301(b), 61 Stat. 156 (1947) as amended, 29 U.S.C.A. § 185(b).

13 Lawlor v. Loewe, 235 U.S. 522 (1915); Loewe v. Lawlor, 208 U.S. 274 (1908); Loewe v. Savings Bank of Danbury, 236 F. 444 (2d Cir. 1916).

this type of liability to the individual members of the union, with the express intent of giving the advantages of limited liability to members of a labor union without the need for the incorporation of the union.[14]

The other provision[15] does not relate to the contractual capacity of the union, but instead, to the purposes for which the trust fund shall be used. These provisions relate to the creation of the fund and its subsequent use, but a search of the congressional record and the act does not disclose any intention or provision which would negate the rules applicable to legal contracts formed through the time-honored process of offer and acceptance.[16]

Local unions and their members are bound by contracts negotiated by their union bargaining agents, and they do not have the right to disregard the terms of a contract made on their behalf.[17] The employers are bound by the terms of a collective bargaining agreement to the same extent that the union and its members are.[18] It therefore follows that either party must substantially perform his contractual promises before he will be allowed to rely on the contract or seek its enforcement.[19] Under these circumstances, it is clear that the union could not avoid liability for damages occasioned by the employees breach, and might be deprived of its right to enforce the contract.[20] Should the third-party beneficiary be given a greater power of enforcement than that held by the party who created the beneficiary? Sound contract law says that it should not, but the Court disregarded these principles and allowed the beneficiary to exercise his judicially-created right at the expense of the Benedict Coal Corporation.

In the leading case of *Textile Workers of America v. Lincoln Mills of Alabama*,[21] the power of a federal court to create a body of federal substantive law for labor relations was first recognized. This power was granted by Section 301 (a) of the Taft-Hartley Act,[22] the same section which the court was considering in attempting to determine the rights of the parties under the present contract. It is ironic that the section which created this power could be the first crack in its foundation.

Since it is impossible to honestly reconcile the Supreme Court's decision with sound contract law, we must assume that the court was exercising its discretion in an attempt to shape a body of federal labor law. The question arises whether it is necessary to abandon the well established precepts of the law in an effort to form a policy for governing labor relations. One of the leading authorities on labor relations does not believe that such an abandonment of sound law is wise and warns against such a procedure, fearing the

14 S. Rep. No. 105, 80th Cong., 1st Sess. 14-15.
15 Labor Management Relations Act (Taft-Hartley Act) § 301(c)(5), 61 Stat. 157 (1947) as amended, 29 U.S.C.A. § 186(c)(5).
16 92 Cong. Rec. 4892-94, 4899, 5181, 5345-46; S. Rep. No. 105, 80th Cong., 1st Sess. 52; 93 Cong. Rec. 4678, 4746-47.
17 Flaherty v. McDonald, 178 F. Supp. 544 (S.D. Cal. 1959).
18 Enterprise Wheel and Car Corp. v. United Steelworkers of America, 269 F.2d 327 (4 Cir. 1959).
19 Flaherty v. McDonald, 178 F. Supp. 544 (S.D. Cal. 1959); Moran v. Lasette, 221 App. Div. 118, 223 N.Y. Supp. 283 (1927).
20 Flaherty v. McDonald, 178 F. Supp. 544 (S.D. Cal. 1959).
21 353 U.S. 448 (1957).
22 Labor Management Relations Act (Taft-Hartley Act) 301(a), 61 Stat. 156 (1947) as amended, 29 U.S.C.A. § 185(a).

abandonment of the well-founded legal precepts will result in a weakening of the entire legal and social system.[23]

Avoiding contracts on the basis of "public policy" is undoubtedly within the rights of the Court in this situation, but we must examine the advisability of such a decision. "[T]he very meaning of public policy is the interest of others than the parties, and that interest is not to be at the mercy of the defendant alone."[24] The same rules of law should be applied to all persons, insignificant individuals as well as vast and powerful labor organizations. The rights of the parties should not be determined by their power, monetarily or at the polls, but should be founded upon sound precepts of law which are applicable to large and small alike. It cannot be imagined that Congress intended an abandonment of all substantive law when empowering the courts to create a body of federal labor law.

> [I]t must not be forgotten that the right of private contract is no small part of the liberty of the citizen, and that the usual and most important function of courts of justice is rather to maintain and enforce contracts, than to enable parties thereto to escape from their obligation on the pretext of public policy, unless it clearly appear that they contravene public right or the public welfare.[25]

This decision appears to be based upon strong union policy, not a doctrine of sound public policy. Benedict entered into the contract with the belief that it would be enforced as drafted and relied upon this belief in its negotiations with the union. The coal companies specifically provided in the contract, "This Agreement is an integrated instrument and its respective provisions are interdependent" with the expectation that the contract would be enforced as a whole, or not at all. To enforce the contract against one party thereto, while allowing the other party to twist the terms and escape, seems to contravene "public policy" to a greater extent than would enforcement of the contract as it was drafted by the parties.

A consistent application of the doctrine set forth by the Court might lead to a labor policy which would be disastrous to free enterprise. A breach by the union will not excuse the employer from the contract, but will render him liable for payments into the fund for coal mined by non-union laborers while the contract is in effect. These payments will be even more repugnant to justice if they are based upon time rather than production. In either case, the employer will be forced to pay amounts into a retirement fund for the benefit of persons whom he no longer employs, or be forced to retain substandard performance by his employees. To escape these alternatives, the employer must close his business for the life of the collective bargaining agreement. Whatever his choice, the employer will have no right to set-off the damages occasioned by the breach, against his payments into the union retirement fund. This type of application will not only be costly to the employer, but will place him at the mercy of the union in collective bargaining sessions.

The major consideration given by labor unions for collective bargaining agreements is the promise to refrain from slowdowns

23 Cox, The Legal Nature of Collective Bargaining Agreements, 57 Mich. L. Rev. 1 (1958).
24 Beasley v. Texas and Pacific R. Co., 191 U.S. 492, 498 (1903).
25 Baltimore and Ohio Southwestern Railway Co. v. Vogit, 176 U.S. 498, 505 (1900).

and work stoppages. If the union members are allowed to violate this promise and yet enforce the rights which are dependent upon it, management has gained nothing from the contract, but has incurred a substantial liability because of it. Such a violation of the basic requisites of contract cannot be reconciled, economically or socially, with the good of the nation or a sound labor policy.

This is an unfortunate decision and will perhaps be strictly construed by the courts to the exact factual situation. Those who value the advantages of free enterprise operated by private capital, as opposed to rule by the proletariat, must hope that the growing power of organized labor has not yet reached that point where the laws, which have stood the test of time and battering of social interests, are no longer applicable to labor while they continue to govern the other members of our society.

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BAR BRIEFS

TAX ASPECTS OF REAL ESTATE TRANSACTIONS

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(An address given under the auspices of the Taxation Law Section of the Colorado Bar Association under the chairmanship of T. Raber Tayler, Denver, Colorado at its 61st Annual Convention at the Broadmoor Hotel, Colorado Springs, Colorado, October, 1959.)

Real estate, because it has a certain innate flexibility, lends itself to effective tax planning. Unlike the business in which one must go on selling his product and replacing it with inventory, regardless of other circumstances, the real estate transaction can be both tailored as to type of transaction and as to time of transaction. This constitutes the basic ingredient for good tax planning. We shall consider tax planning within the framework of existing law and the present rate structure. While there is a certain inherent thinking that through postponement, good things are going to happen through rate reductions, we should not make that assumption. Rates have a tendency to creep upward rather than downward, and mere postponement in the hope of getting a lower rate structure is not a very fruitful approach to the subject. So we shall consider the problem within the present rate structure, with the assumption, however, that the rate structure of the future will not be higher. Let us assume that things will remain as they are.

Like Gaul, all of tax planning can be divided into three main categories. You either split your income and by this fragmentation method reduce the overall burden because small pieces under a graduated rate structure add up to a lesser tax; you try to convert your income into a capital gains pattern because of the favorable rate granted to capital gains; or you attempt procedures that will defer the tax and time your transactions for the best tax results.