

## ABILITY OF FEDERALLY-INSURED MORTGAGORS TO CHALLENGE HUD ACTIONS

Two important problems affecting the enforcement and application of the National Housing Act were recently considered in the federal district courts. The first—whether a homeowner whose mortgage is insured by the Department of Housing and Urban Development (HUD) has standing to challenge an action by that agency—requires an affirmative answer if the homeowner is to be afforded access to the courts. The answer to the second—whether a homeowner will receive meaningful relief—will affect the administration of HUD mortgage programs. In *Davis v. Romney*<sup>1</sup> plaintiffs brought suit on behalf of themselves and all homeowners who purchased or would purchase existing homes through mortgages insured by the Federal Housing Authority (FHA) under section 221(d)(2) of the National Housing Act. Seeking declaratory and injunctive relief, plaintiff-homeowners alleged that the Secretary of HUD and the local FHA offices, in violation of their statutory duty,<sup>2</sup> had insured mortgages on dwellings that failed to comply with the local housing code. Plaintiffs also sought compensatory damages for the financial loss they had suffered or would suffer as a result of defendants' actions. The district court held that plaintiffs had standing to bring this action and granted

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1. 355 F. Supp. 29 (E.D. Pa. 1973).

2. 12 U.S.C. § 1715l (1970) provides in relevant part:

(a) This section is designed to assist private industry in providing housing for low and moderate income families and displaced families. . . . (d) To be eligible for insurance under this section, a mortgage shall . . . (2) be secured by property upon which there is located a dwelling conforming to applicable standards prescribed by the Secretary under subsection (f) of this section and meeting the requirements of all State laws, or local ordinances or regulations, relating to the public health or safety, zoning, or otherwise, which may be applicable thereto. . . . (f) The property or project shall comply with such standards and conditions as the Secretary may prescribe to establish the acceptability of such property . . . .

(Emphasis added.)

Secretary Romney stated that the Minimum Property Standards of the FHA "require that a property comply with local ordinances, codes and regulations . . . . [The FHA] does require that a property meet the FHA Standards or the local code, whichever is more stringent." *Hearing Before the Comm. on Banking and Currency on HUD Investigation of Low- and Moderate-Income Housing Programs*, 92d Cong., 1st Sess. 89 (1971).

declaratory and injunctive relief. The court also held, however, that it did not have jurisdiction to hear plaintiffs' prayer for damages. In *Jackson v. Romney*<sup>3</sup> a district court, presented with facts similar to *Davis*, held that the complainants failed to state a claim upon which declaratory or injunctive relief might be granted;<sup>4</sup> and, as in *Davis*, the court found that it did not have jurisdiction to hear plaintiffs' claim for damages.

### I. STANDING

Traditionally, to establish standing a person must satisfy the constitutional requirement of "case" or "controversy,"<sup>5</sup> have a stake in the outcome,<sup>6</sup> have more than a general interest in the alleged wrong,<sup>7</sup> and demonstrate an invasion of a legal right or privilege.<sup>8</sup> Standing focuses on the party, not the issues to be adjudicated, and the above criteria attempt to insure that plaintiff is the proper party to bring the action.<sup>9</sup>

In 1968 the Supreme Court in *Flast v. Cohen*<sup>10</sup> began to liberalize standing requirements. Federal taxpayers brought suit alleging that federal funds had been disbursed to religious schools under the Elementary and Secondary Education Act of 1965 in violation of the first amendment's establishment clause. The Court held that the taxpayers had standing, applying "injury in fact" as the test rather than the prior requirement of "legal interest."<sup>11</sup> Two years later, in *Association of Data Processing Service Organizations, Inc. v. Camp*<sup>12</sup>

3. 355 F. Supp. 737 (D.D.C. 1973).

4. While the court stated that it was dismissing the suit for failure to state a claim, the reasons given for the dismissal concerned plaintiffs' lack of standing.

5. U.S. CONST. art. III, § 2.

6. *Baker v. Carr*, 369 U.S. 186, 204 (1962).

7. *Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923).

8. *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 125 (1940). "Legal right" is a term of art referring to property or contract rights, rights arising from tortious invasion, and rights conferred by statute or guaranteed by the Constitution. 23 VAND. L. REV. 814, 816 (1970).

9. 43 Miss. L.J. 538, 539 (1972).

10. 392 U.S. 83 (1968).

11. See 43 Miss. L.J. 538, 539 (1972).

12. 397 U.S. 150 (1970). Suit had been brought to challenge a ruling by the Comptroller of the Currency permitting national banks to make data processing services available to other banks and banking customers. Plaintiff was in the business of providing data processing services.

the Court rejected the "legal interest" test because it went to the merits, whereas the issue of standing does not. The Court devised instead a two-part test requiring that plaintiff allege injury in fact<sup>13</sup> and that the interest sought to be protected or regulated be arguably within the scope of the statute or constitutional guarantee in question.<sup>14</sup> Applying this new test, the Court granted plaintiff standing.<sup>15</sup> The Court noted that the trend in standing decisions was toward enlargement of the class of persons who would be allowed to protest administrative actions and that enlargement of that class of persons defined as "aggrieved" reflected the trend.<sup>16</sup> While the acts relevant to the case did not specify a protected group, their policy was apparent, and therefore the parties affected by a broad or narrow interpretation of the acts were identifiable.<sup>17</sup>

Since the decision in *Data Processing*, courts have looked directly to the statutory provisions under which the administrative agency's

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13. *Id.* at 154.

14. *Id.* at 153.

15. Since the alleged injury resulted from the actions of an administrative agency, the Court also relied on the Administrative Procedure Act in granting plaintiffs standing. The Act states: "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702 (1970). The Administrative Procedure Act has had little impact on the right to judicial review other than to codify a presumption existing in case law. The presumption of reviewability granted to a party whose interests have been acutely affected by an administrative action began with *School of Magnetic Healing v. McAnnulty*, 187 U.S. 94 (1902), which held that "decisions of the officers of the department upon questions of law do not conclude the courts, and they have power to grant relief to an individual aggrieved by an erroneous decision of a legal question by department officers." *Id.* at 108. The Administrative Procedure Act provides that the presumption will not be extended when the statute specifically precludes review or when agency action is by law committed to agency discretion. The Supreme Court held in *Brownell v. We Shung*, 352 U.S. 180, 185 (1956), that exemptions from the Act are not to be lightly presumed. When a statute is silent as to reviewability, the Act grants it. L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 372 (1965).

16. 397 U.S. at 154.

17. *Id.* at 157. In a case decided the same day, *Barlow v. Collins*, 397 U.S. 159 (1970), the Court granted standing to tenant farmers to challenge a regulation of the Secretary of Agriculture concerning the definition of "making a crop," which determined the assignability of payments. The Court found that the legislative history indicated a congressional intent to benefit the tenant farmers. *Id.* at 164-65.

action was taken<sup>18</sup> or to the national policy reflected by the statute<sup>19</sup> to determine the standing of the parties to the suit. Further, it has been held that it is not only the primary beneficiaries of the statute who will be granted standing, but also any intended beneficiaries.<sup>20</sup>

The *Jackson* court denied plaintiff-homeowners standing on the basis of the legal interest test. The court relied on *United States v. Neustadt*,<sup>21</sup> which denied relief under the Federal Tort Claims Act to plaintiff-homeowner who had been furnished an inaccurate FHA inspection and appraisal report and, in reliance thereon, had purchased a home at a price in excess of its fair market value. The Court in *Neustadt* cited a congressional report emphasizing that the "primary and predominant objective of the appraisal system was the protection of the Government and its insurance funds."<sup>22</sup> The Court also noted that the Government had never suggested that the appraisal would serve as a guarantee to the purchaser of his receiving a good value for his money.<sup>23</sup> In light of the *Data Processing* holding, questions of "primary and predominant objectives" of a statutory provision are no longer controlling. The *Jackson* court's reliance on *Neustadt* is therefore misplaced. In holding that there is no legal relationship between the FHA and the individual mortgagor<sup>24</sup> and that the restrictions placed on HUD before it may guarantee a mortgage do not create a cause of action against the Government on be-

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18. *Coalition for United Community Action v. Romney*, 316 F. Supp. 742 (N.D. Ill. 1970).

19. *Peoples v. United States Dep't of Agriculture*, 427 F.2d 561 (D.C. Cir. 1970); *Norwalk CORE v. Norwalk Redevelopment Agency*, 395 F.2d 920 (2d Cir. 1968); *Scenic Hudson Preservation Conference v. FPC*, 354 F.2d 608 (2d Cir. 1965); *Nuclear Data, Inc. v. AEC*, 344 F. Supp. 719 (N.D. Ill. 1972); *Scherr v. Volpe*, 336 F. Supp. 882 (W.D. Wis. 1971).

20. *Peoples v. United States Dep't of Agriculture*, 427 F.2d 561 (D.C. Cir. 1970).

21. 366 U.S. 696 (1961).

22. *Id.* at 709, citing H.R. REP. NO. 2271, 83d Cong., 2d Sess. 66 (1954). The Report, however, also states: "Nevertheless, the Congress has consistently recognized—and intended—that, notwithstanding the fact that, technically there is no legal relationship between the FHA and the individual mortgagor, these FHA procedures also operate for the benefit and protection of the individual home buyer." *Id.*

23. 366 U.S. at 709.

24. 355 F. Supp. at 742, citing H.R. REP. NO. 2271, 83d Cong., 2d Sess. 66-67 (1954).

half of any individual mortgagor,<sup>25</sup> the *Jackson* court denied plaintiffs standing on the basis of the legal interest test that *Data Processing* discredited.<sup>26</sup>

The crucial question for standing, given *Data Processing*, is whether the low- and middle-income homeowners whose mortgages were insured under section 221 (d) (2) are primary or intended beneficiaries of the Act. The *Davis* court tried to answer this question by applying the zone of interests test and looking to the national policy set forth in the Act to determine whether plaintiffs had standing. The Government's stated goal is "a decent home and suitable living environment for every American family."<sup>27</sup> This goal indicates a national policy to serve the needs of the people and not to focus on the benefits that the Government or the banking industry will receive as a result of maintaining a federal mortgage insurance program. Congressional reports similarly reflect this national goal. In making suggestions to improve the housing program, the House Committee on Banking and Currency urged HUD "to enable *potential beneficiaries* to adapt programs more specifically to their individual needs."<sup>28</sup> While the housing and mortgage markets are clearly beneficiaries of the Act, it seems equally clear that low- and middle-income homeowners who might not otherwise be able to purchase their own homes are also beneficiaries. Since standing under the zone of interests test is not made "dependent on some process of appraisal to determine whether the poor people weigh heavier on the scales . . . or . . . should be labeled the 'primary' beneficiaries,"<sup>29</sup> it would appear that homeowners should be given standing.

## II. ABILITY TO OBTAIN MEANINGFUL RELIEF

Once granted standing, plaintiff must show that a legal right has been violated or that a legal duty is owed to him in order to obtain relief. Being arguably within the zone of interests protected or regulated may not suffice to establish plaintiff's claim for a legal remedy.<sup>30</sup>

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25. 355 F. Supp. at 743.

26. See text at notes 12-14 *supra*.

27. 12 U.S.C. § 1701t (1970).

28. H.R. REP. No. 1585, 90th Cong., 2d Sess. 4 (1968).

29. *Peoples v. United States Dep't of Agriculture*, 427 F.2d 561, 564 (D.C. Cir. 1970).

30. See 23 VAND. L. REV. 814, 820 (1970). See also *Baker v. Carr*, 369 U.S. 186 (1962), in which the Court stated:

It would not be necessary to decide whether appellants' allegations of im-

In *Davis* the zone of interests test was sufficient to give plaintiffs standing, thereby enabling them to obtain injunctive and declaratory relief. The court, however, denied them compensatory damages, which was the primary relief sought, because the court held that it lacked jurisdiction to entertain the claim.

Jurisdiction in *Davis* for plaintiffs' damage claim was based on the Tucker Act.<sup>31</sup> The court determined that it did not have jurisdiction to hear that claim, relying chiefly on the interpretation given the Tucker Act in *Eastport Steamship Corp. v. United States*.<sup>32</sup> Plaintiff there brought suit to recover monetary damages arising from the loss of a sale of plaintiff's vessel to a foreign buyer due to defendant's delay in granting the necessary approval for the sale. The *Eastport* court discussed two classes of claims that were cognizable: when plaintiff asserts a right to either all or part of money paid to (or property taken by) the government,<sup>33</sup> or when plaintiff has made no payment of money to the government but alleges that a particular provision of law expressly or impliedly grants plaintiff the right to receive the payment of a certain sum.<sup>34</sup> Even though a claim may rest on the Constitution, an act of Congress, or an executive regulation, if the claim cannot fit within one of these two groups, it is beyond the court's jurisdiction.<sup>35</sup> The test adopted in *Eastport* is whether the constitutional clause or the legislation that claimant relies upon can fairly be interpreted as mandating compensation by the federal

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pairment of their votes by the 1901 apportionment will, ultimately, entitle them to any relief, in order to hold that they have standing to seek it. If such impairment does produce a *legally cognizable injury*, they are among those who have sustained it.

*Id.* at 208 (emphasis added).

31. 28 U.S.C. § 1346 (1970). The statute reads in part:

(a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of: . . . (2) Any other civil action or claim against the United States, not exceeding \$10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department . . . in cases not sounding in tort.

The Court of Claims is granted similar jurisdiction in 28 U.S.C. § 1491 (1970).

32. 372 F.2d 1002 (Ct. Cl. 1967).

33. *Id.* at 1007; *see e.g.*, *South Puerto Rico Sugar Co. Trading Corp. v. United States*, 334 F.2d 622 (Ct. Cl. 1964), *cert. denied*, 379 U.S. 964 (1965).

34. In the second class of claims, plaintiff must allege that the provisions of the statute relied upon expressly or impliedly grant him a right to be paid a certain sum of money. 372 F.2d at 1007; *see, e.g.*, *Aycock-Lindsey Corp. v. United States*, 171 F.2d 518 (5th Cir. 1948).

35. 372 F.2d at 1008.

government for the damages sustained.<sup>36</sup> Applying this test, the *Davis* court concluded that the housing programs "do not directly or impliedly create a right to a sum of money. These sections do not authorize or 'command' that money be granted to plaintiffs."<sup>37</sup> The court accordingly concluded that it lacked jurisdiction.

Since section 221 (d) (2) of the Housing Act does not explicitly provide the compensatory relief sought by the *Davis* plaintiffs,<sup>38</sup> plaintiff-homeowners on an appeal would have to rely on an implied right to monetary damages in order to come within the *Davis* holding.<sup>39</sup> The Supreme Court in *Texas & Pacific Railway v. Rigsby*<sup>40</sup> has held: "A disregard of the command of the statute is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover . . . is implied . . ." <sup>41</sup> The Court, resting its decision on common law principles,<sup>42</sup> granted an employee a civil remedy for injuries resulting from a disregard of the Safety Appliance Act, although the Act itself did not provide for such a remedy. In *J.I. Case Co. v. Borak*<sup>43</sup> the Court permitted private enforcement of the proxy rules of the Securities Exchange Act, stating that "it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose."<sup>44</sup> More recently, the Court held that violation of the fourth amendment right to be secure against unreasonable searches and seizures gives rise to a cause of action for damages.<sup>45</sup> Neither the

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36. *Id.* at 1009.

37. 355 F. Supp. at 47.

38. Homeowners assisted by 12 U.S.C. § 1715z (1970) (cooperative associations) can, however, receive compensation under 12 U.S.C. § 1735b(b) (1970), which authorizes the Secretary "to make expenditures to correct, or compensate the owner for, structural or other defects which seriously affect the use and livability of any single-family dwelling which is covered by a mortgage insured under section 1715z of this title . . ." A bill is now pending before Congress that would authorize similar expenditures for dwellings secured by a mortgage insured under 1715l. S. 855, 93d Cong., 1st Sess. (1973).

39. For a general discussion of this problem see 77 HARV. L. REV. 285 (1963).

40. 241 U.S. 33 (1916).

41. *Id.* at 39.

42. *Id.*

43. 377 U.S. 426 (1964).

44. *Id.* at 443.

45. *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971).

statutes nor the constitutional provisions involved expressly granted the injured party a right to seek compensatory damages. Yet the Supreme Court extended plaintiffs such a right.

Consistent application of the tests in *Rigsby* and *Borak* would appear to entitle plaintiffs to the damages they seek since the district court, in finding standing, interpreted the statute violated as conferring a benefit upon homeowners.<sup>46</sup> If the Third Circuit, on appeal, were to imply a cause of action, the probability that the agency would comply with the provisions of the statute would be increased, which in turn would further the congressional purpose.<sup>47</sup>

The jurisdictional tests applied in *Eastport* and *Davis* are more stringent than the tests applied by the Supreme Court for an implied right to monetary damages. *Eastport* may be distinguished on the basis that the Maritime Commission was given total discretion in approving sales to foreigners, and plaintiff was forewarned not only of the need for such approval, but also that such approval could be withheld altogether.<sup>48</sup> In *Davis* and the Supreme Court decisions of *Rigsby* and *Borak* the statutory requirements were not discretionary with the administrative agency but were direct mandates. Furthermore, the *Davis* court had previously decided that the statutory duties stated in section 221 (d) (2) conferred benefits on plaintiffs. In *Eastport* the approval or disapproval of a sale of a vessel to foreigners related to questions of national interest and security, not to the relative business advantages of the particular sale to plaintiff-seller.

In light of Supreme Court precedent and the fact that *Eastport* can be readily distinguished, it appears that the *Davis* court could have found jurisdiction to entertain plaintiffs' claim for compensatory relief under the Tucker Act. Plaintiffs were within the class for whose benefit the statute was enacted. The violation of the statute was clearly wrongful since the administrators violated an express man-

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46. The Chairman of the House Banking and Currency Committee seemed to indicate that compensatory damages might be appropriate when he stated: "We must see that anyone victimized in the past because of either improper administration of the program or the shady actions of a few are made whole." *Hearing Before the Comm. on Banking and Currency on HUD Investigation of Low- and Moderate-Income Housing Programs*, 92d Cong., 1st Sess. 2 (1971).

47. 77 HARV. L. REV. 285, 291 (1963).

48. 372 F.2d at 1010.



date, not merely a discretionary one.<sup>49</sup> Granting the compensatory relief sought would further the congressional purpose of decent homes for American families.<sup>50</sup> The *Data Processing* test of standing, which requires that the party sustain injury in fact and that the interest to be protected be arguably within the scope of the statute in question, would seem to give rise to an implied cause of action. Without an implied remedy for persons so injured, *Davis* results in an unjust situation—plaintiffs have standing to challenge the action of the agency but are unable to obtain any meaningful remedy. This provides little incentive for persons to bring an action and even less incentive for the administrative agency to comply with the mandates of the legislation.<sup>51</sup> The tests laid down in *Rigsby* and *Borak* may indicate that the Supreme Court would be willing to grant compensatory relief.

Plaintiffs similar to those in *Davis* need compensatory relief to improve their homes in order to comply with the local housing codes. Failure to comply may result in fines that FHA-subsidized homeowners, due to their low income levels, are unable to pay. Yet it is their income level that enables them to obtain the federally insured mortgages and purchase the homes initially. The result is that the federal government, having assisted the families in the purchase of their homes, has failed to carry out its duty to prevent potentially large financial obligations resulting from housing code violations. Implying a cause of action to grant the *Davis* plaintiffs compensatory relief would not involve a large expenditure of federal money. Homeowners are presently without adequate remedy,<sup>52</sup> and compensatory re-

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49. After the filing of the action in *Davis*, a federal grand jury convened in May 1971 to investigate abuses in the FHA housing programs. Indictments against 70 persons have been handed down, and there have been 33 convictions, including those of the former Director and Deputy Director of the Philadelphia Office of the FHA. Brief for Appellant at 2 n.1, *Davis v. Romney*, 490 F.2d 1360 (3d Cir. 1974).

50. 12 U.S.C. § 1701t (1970).

51. It was the filing of the action in *Davis* that started the grand jury investigation. Since 70 indictments have resulted, it would appear that private suits exert more influence on an agency's compliance with the statutory provisions than does any intragovernmental control.

52. *But see* note 38 *supra*.

lief would achieve the stated legislative purpose. To subvert a stated congressional purpose when a remedy can easily be fashioned is inequitable.\*

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\* In a decision handed down early in 1974, *Davis v. Romney*, 490 F.2d 1360 (3rd Cir. 1974), the court of appeals held that, though plaintiffs did have standing to sue, the class action was improper because the district court failed to comply with Rule 23 of the Federal Rules of Civil Procedure, which requires that the court, as soon as practicable, determine whether a class action may be maintained and describe the members of that class. The court therefore treated the suit as one of individual claims by the named plaintiffs. *Id.* at 1366.

The court vacated the district injunction that prevented defendants from insuring mortgages on homes in Philadelphia that were not in compliance with the Philadelphia Housing Code. The injunction, in the court's opinion, did not remedy the harm to the individual plaintiffs since there was no allegation of an intent to purchase another home under the program. The case was remanded to determine whether a more narrowly drawn injunction could be fashioned to fit the needs of this case. *Id.* at 1371.

Although the court held that it had jurisdiction under the Tucker Act to entertain plaintiffs' claim for damages since it was founded upon an act of Congress, the claim was denied. The court, for reasons similar to those of the district court, found that the provision requiring the FHA to comply with local ordinances was intended to assure adequate security for the federal government for the mortgage and held that no cause of action for damages would be implied. *Id.* at 1370-72.