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An Introduction to the Community Development Litigation and Its Impact

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That there has been a dramatic increase in grant litigation over the past decade is a proposition which is not disputed, and a subject which has been treated extensively in the legal literature and elsewhere.¹ And it is fair to say, I think, that there has also arisen a certain uneasiness on the part of many students of the federal grant-in-aid system at the sudden arrival in force of lawyers on the scene.

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Realistically, nonlawyers must not only recognize the existence of this phenomenon, but also try to understand it. If anything, the need for understanding is even greater on the lawyers' side; lawyers and judges need to appreciate the dynamics of the grant system far better than they do at present. As exhibit A, one might cite the initial decision of the fifth circuit in *Goolsby v. Blumenthal*². Initially, a 2-to-1 panel ruled that General Revenue Sharing funds were just like any other federal grant, and therefore the expenditures of them were subject to the *Uniform Relocation Assistance Act*.³ Now, if a court doesn't see the difference between revenue sharing on the one hand, and, on the other hand, the categorical grants which dominated the system when the *Relocation Act* was enacted, we should not be surprised when it renders a questionable decision. What is needed is an ongoing dialogue—a bridge, if you will—between the lawyers and the experts in other disciplines who are working on grant issues. The ACIR is in an ideal position to provide this bridge. Today's conference is, one hopes, an important first step.

“Those disputes which ultimately end up in court reflect political disputes in the society at large.”

The community development (CD) litigation is an interesting illustration of this point. Let me begin with a quote from an “Advocacy Guide” to the Community Development Block Grant Program put out by a major legal services group.

Struggles over the use of CDBG funds do not simply involve interpretations of the HCDA, but are part of much broader conflicts over the control and use of resources, and over broad public policy issues.⁴

44 As the quote suggests, those disputes which ultimately end up in court reflect political disputes in the society at large. As the volume of grant funds has expanded, and as Congress has utilized the grant mechanism to create a panoply of new interests, it is hardly surprising that the number of grant lawsuits has likewise increased.

Before proceeding further I have to enter one disclaimer about any analysis of the CD cases. It is true that grant cases in general are hard to find in the published reports. This difficulty seems even greater in the CD area. Many of the cases are not reported officially, but are “semireported,” that is, they can be found in the *Clearinghouse Review* or some other unofficial source.⁵ Some of them are not reported anywhere but are passed on by word of mouth and memoranda among various networks in the CD field.⁶

Despite the difficulties of getting a fix on the overall volume of CD litigation it is apparent that it is substantial. I base this statement on the 17 cases which I have found in the *Federal Reporter* and *Federal Supplement*, the large number of semireported cases, and the large number of settlements that one reads about in the literature. Others have reached the same conclusion. Writing in 1976, Prof. James Kushner stated that “more legal challenges have been made in the first year of the HCDA than under the past decade of urban renewal and categorical grants.”⁷ More recently, the “Advocacy Guide” quoted earlier stated that “each year of the CDBG program has seen an increasing number of cases brought . . .”⁸

Let us take this volume of cases as a given, and

ask ourselves the reason why. Why does this particular statute seem to engender so much litigation? The answer, I think, is to be found in the structure of the act itself. It invites controversy. Specifically, it invites challenges on the part of those within the community whose proposals did not get funded. The key lies in the change from a number of categorical grant programs to a single block grant. As The Brookings Institution points out, the range of eligible activities helped bring new groups into competition, and forced generalist local government officials to make specific choices.⁹ Moreover, these choices were highly visible given the act’s citizen participation mechanism.

Competition for funds has been intense. The city manager of Cambridge, MA, testified during renewal hearings about a program year in which he received \$8 million worth of requests for \$2.8 million in funds for which Cambridge was eligible.¹⁰ The natural result of such a situation will be fierce struggle in the political arena, with an inevitable number of losers. As I suggested a moment ago, the typical American phenomenon will then ensue: people who have lost in that arena will transfer the battle to the judicial arena, in this case the federal court.

With some exceptions courts tend to view the CD cases not as presenting unique questions of “grant law,” but as forms of the administrative law litigation to which they have become accustomed over the last half century. For example, the doctrine of scope of review is applied interchangeably in both grant cases and the more typical regulatory context.¹² In fact, the leading case on scope of review—*Citizens to Preserve Overton Park v. Volpe*¹³—involved a third-party challenge to a transportation grant. I would like to focus on CD litigation of a particular sort; suits by third parties who claim that they should benefit under the act but do not receive the appropriate quantum of benefits under their community’s application.¹⁴ These suits are usually brought against HUD to enjoin approval of the application.

The doctrine which has cropped up most frequently in these cases has been that of standing. Governmental defendants have consistently argued that the plaintiffs lacked standing, that is, that there was not a genuine adversary relationship between the would be challengers on the one hand and the defendant on the other hand. The fact that standing has arisen so frequently in this area of litigation is by no means unique. Prof. Richard

Cappalli estimates that the issue surfaces in almost one-half of all grant cases.¹⁵ In the CD context, at least, the party challenging standing almost always loses.¹⁶

The courts have, if anything, been somewhat uncritical in assuming that plaintiffs had suffered some harm and did stand to benefit if the court enjoined a community's application in its present form. An example is *Philadelphia Welfare Rights Organization v. Embry*¹⁷ a challenge to an application based on insufficient benefit to low income persons under that portion which financed housing rehabilitation. The court stated that "reallocation of Title I funds to benefit low income people will directly result in an increase in the availability of housing units for low income people,"¹⁸ without considering whether any such reallocation would result from its decree. Unless they wish to abandon traditional standing inquiries, courts would seem to be under a duty to consider whether the plaintiffs really will be any better off if they secure the relief which they seek. Perhaps their reluctance to engage in an extensive standing inquiry stems from a concern that strict application of Supreme Court cases such as *Simon v. Eastern Kentucky Welfare Rights Organization*,¹⁹ and *Warth v. Seldin*²⁰ would lead to conclusions that no one had standing to challenge CD applications.²¹

Of course, that inquiry can be exceedingly complex. Recently, minority residents of Boston sued HUD to enjoin the award of a UDAG grant to that city. They alleged that Boston did not meet the statutory criteria of having a demonstrable record of achievement in improving conditions for racial minorities.²² The district judge found that they lacked standing. He reasoned that if plaintiffs won, Boston would get nothing, and that, apart from spite, that result did not represent any benefit to them. The first circuit court of appeals reinstated the complaint, at least temporarily, although it too found the standing issue extremely difficult.²³ The court reasoned that some plaintiffs had been harmed by discriminatory housing conditions in Boston, and that if the projects to be funded were administered in nondiscriminatory fashion, that might well help the plaintiffs by enhancing their housing opportunities.²⁴ The principal problem with this analysis is that very little of the project funds were to be allocated to housing, and what housing there was would not seem to help plaintiffs find low cost shelter in an integrated neighborhood.²⁵

The court might have found standing if it had been willing to take an expansive view of the statutory benefit analysis utilized in some cases.²⁶ Congress might be viewed as having granted to plaintiffs an interest in having UDAG funds awarded only to communities which had actively worked, or which would work, to increase opportunities for minorities. The harm suffered is, thus, not the pre-existing condition, but the award of funds in a manner which does nothing to alleviate it.²⁷

Perhaps the source of much of the first circuit's difficulty is its apparent agreement with the second circuit's decision in the famous, some would say notorious, *Hartford* litigation.²⁸ In that case Hartford, and low income residents, sued in federal court to enjoin CD grants to a number of its suburbs on the ground that those communities were not correctly preparing the housing assistance plan which the act requires as a condition of receiving funds. In particular, Hartford asserted that they had failed to plan adequately for low and moderate income residents who might be "expected to reside" within their borders. Ultimately, the challenge was rejected on the ground that both Hartford and the low income residents lacked standing to bring the action. A majority of the second circuit emphasized the fact that if the suburbs conformed their plans to the act's requirements, Hartford would therefore get nothing. What the court failed to appreciate however is that Congress had declared that planning by suburbs to alleviate the municipal overburden of center cities such as Hartford would, in effect, lead to better conditions both for those communities themselves and for low and moderate income residents who might wish to move to suburban locations. This reasoning was adopted in a Michigan federal district court opinion—*Coalition for Block Grant Compliance v. HUD*.²⁹ That case relied on the statutory benefit analysis, and rejected the *Hartford* rationale.

It is possible that circumstances will arise in which third parties wish to sue the grantee directly, rather than suing HUD. A somewhat extreme example of this configuration is *Angell v. Zinsser*.³⁰ In that case a group of residents are attempting to enjoin their town's *withdrawal* from the program. More frequent might be cases in which plaintiffs seek to enjoin expenditure of the funds until their own projects are included in the grantee's overall program.

Such lawsuits are liable to bring the plaintiffs

face to face with the doctrine of "implied rights of action" under federal statutes. This issue arises when a Congressional enactment creates a duty on the part of individuals (or governments) to be enforced by a federal regulatory agency, but does not provide for suit by other individuals who may suffer harm as a result of a breach of that duty. The question then is posed whether a right of action—suit by such aggrieved individuals—can be derived or "implied" from the statute. Although the Supreme Court has recently found in favor of a plaintiff invoking the implied right of action doctrine in the grant context,³¹ it has also suggested that it will utilize a much more restrictive approach in the future.³²

As of this writing there is the additional possibility that some grant suits of the nature under discussion can also be brought under Section 1983 of Title 42 of the United States Code which provides in part that "every person who, under color of any statute...of any state or territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any right, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress."³³

To conclude, what has been the impact of the CD cases? At first glance they appear to represent overwhelming victories for the government side, since virtually every one has been decided in the defendant's favor. Nonetheless, plaintiffs' lawyers

claim that the cases have had a tremendous beneficial impact on the low and moderate income persons whom they represent. They emphasize the extensive leverage which the ability to bring suit gives in overall political bargaining, as well as the possibility of settlements advantageous to their position. Let me quote again from the "Advocacy Guide": "Despite the lack of favorable case precedent, the cases have had significant favorable impact. Many cases have resulted in court settlements which greatly altered local policies and practices. Even the judicially unsuccessful cases have resulted in local programs being changed in the ways sought by plaintiffs. Other cases were mooted after the city made the sought after changes. Moreover, the symbolic effect of certain cases, like *Hartford v. Hills*, has altered HUD and local program behavior."³⁴

Whatever one thinks of the effect or desirability of this litigation, I am certain that the phenomenon is highly upsetting to advocates of the "New Federalism." As you recall, President Nixon's original goal in this area was a form of "special revenue sharing," which would get the federal administrative agencies completely out of the picture of influencing local priorities. As I read the CD cases, what emerges is not only an enhanced role for the agencies, but a dramatic entry of the federal courts into the heart of local government law. Regardless of one's position on the matter, it is surely an interesting area of federal grant law at work; and I think that we shall see more, rather than less, of it as the years progress.

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FOOTNOTES

¹E.g., R. Cappalli, *Rights and Remedies Under Federal Grants* 5-7 (1979); F. Michelman and T. Sandalow, *Government In Urban Areas*, Supplement 275 (1972).

²581 F.2d 456 (5th Cir 1978), *rev'd en banc*, 590 F. 2d 1369 (5th Cir. 1979), *Cert. denied*, 100 S. Ct. 462 (1979).

³42 U.S.C.A. §4601 (1977).

⁴CDBG Training Advisory Comm., "An Advocacy Guide to the Community Development Block Grant Program," 12 *Clearinghouse Review* 601, 641 (supplement 1979).

⁵E.g., *NAACP, Boston Branch v. Harris*, 12 *Clearinghouse Rev.* 915 (D. Mass.), *rev'd*, 607 F.2d 514 (1st Cir. 1979).

⁶See *Advocacy Guide*, *supra* note 4, at 675-77.

⁷Kushner, "Litigation Strategies and Judicial Review Under Title I of the Housing and Community Development Act of 1974," 11 *Urban Law Annual* 37,98 (1976).

⁸*Advocacy Guide*, *supra* note 4, at 663.

⁹P. Dommell, R. Nathan, S. Liebschutz, and M. Wrightson, *Decentralizing Community Development*, 198-99 (1978).

¹⁰*Housing and Community Development Act of 1977, Hearings Before the Subcommittee on Housing and Community Development of the House Committee on Banking, Finance and Urban Affairs*, 95th Cong., 1st Sess. 366-67 (1977) (statement of James L. Sullivan).

¹¹*City of Hartford v. Towns of Glastonbury*, 561 F.2d 1032, 1053 (2d Cir. 1977) (Kaufman, C.J., concurring).

¹²See e.g., *NAACP, Santa Rosa—Sonoma County Branch v. Hills* 412 F. Supp. 102, 108 (N.D. Cal. 1976).

¹³410 U.S. 402 (1971).

¹⁴E.g., *Broaden v. Harris*, 451 F. Supp. 1215 (W.D. Pa. 1978); *Philadelphia Welfare Rights Org. v. Embry*, 438 F. Supp. 434 (E.D. Pa. 1977); *NAACP, Santa Rosa—Sonoma County Branch v. Hills* 412 F. Supp. 102 (N.D. Cal. 1976); *Knoxville Progressive Christian Coalition v. Testerman*, 404 F. Supp. 783 (F.D. Tenn. 1975).

¹⁵Cappalli, *supra*, note 1 at 109.

¹⁶Of the eight reported cases in which standing is considered, it was ultimately the basis of dismissal in only one instance: the *Hartford* litigation. The First Circuit has left open the possibility of an eventual standing dismissal in *NAACP, Boston*

Branch v. Harris, 607 F. 2d 514, 526 (1st Cir. 1979). It should be noted that the incidence of standing questions in eight out of 17 reported cases bears out Prof. Cappalli's estimate.

¹⁷438 F. Supp. 434 (E.D. Pa. 1977).

¹⁸*Id.* at 438 (emphasis added).

¹⁹426 U.S. 26 (1976).

²⁰422 U.S. 490 (1975).

²¹See *Knoxville Progressive Christian Coalition v. Testerman*, 404 F. Supp. 783, 787 (E.D. Tenn. 1975).

²²Section 119(b) of the act provides, in part, that "Urban development action grants shall be made only to cities and urban countries that have, in the determination of the Secretary, demonstrated results in providing housing for persons of low-and moderate-income and in providing equal opportunity in housing and employment for low and moderate income persons and members of minority groups."

²³*NAACP, Boston Branch v. Harris*, 607 F.2d 514 (1st Cir. 1979).

²⁴*Id.* at 525-26.

²⁵The funds requested were primarily for economic and commercial development.

²⁶*Cf., Traficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972).

²⁷See *City of Hartford v. Towns of Glastonbury*, 561 F. 2d 1032, 1057 (2d Cir. 1977) (dissenting opinion).

²⁸*City of Hartford v. Towns of Glastonbury*, 561 F. 2d 1032 (2d Cir. 1977) *Cert. denied*, 434 U.S. 1034 (1978).

²⁹450 F. Supp. 43 (E.D. Mich. 1978).

³⁰473 F. Supp. 488 (D. Conn. 1979).

³¹*Cannon v. Univ. of Chicago*, 99 S. Ct. 1946 (1979).

³²*Transamerica Mortgage Advisers, Inc. v. Lewis*, 100 S. Ct. 242 (1979); *Touche Ross and Co. v. Redington*, 99 S. Ct. 2479 (1979); see *Cannon v. Univ. of Chicago*, 99 S. Ct. 1946, 1968 (1979) (Rehnquist and Stewart, JJ., concurring). The courts have, somewhat automatically, transferred the concept of implied right (or cause) of action from the regulatory context in which it originated. See, Cappalli, *supra* note 1, at 115-16. There may be important differences which caution against such an approach. For example, grant statutes do not, by themselves, establish binding norms of conduct. (Many grant conditions would, in fact, be beyond the power of Congress to enact through coercive legislation). It is only when the grant is accepted that the conditions became binding on the grantee. Thus a third party beneficiary analysis might be more appropriate than an implied right of action inquiry. However, grant lawyers differ sharply over whether contractual analyses are accurate or helpful in the grant context. Compare Cappalli, *supra* note 1 at 80-93 (grants not contracts) with Brown, "Federal Funds and National Supremacy: The Role of State Legislatures in Federal Grant Programs," 28. *American University Law Review* 279, 296-97 (1979) (contractual analysis of welfare litigation).

³³The argument is that since grant conditions are "laws" of the United States, section 1983 provides an express right of action. See *Tongol v. Usery*, 601 F. 2d 1091, 1099-1100 (9th Cir. 1979). The Supreme Court appears to have accepted this position in *Maine v. Thiboutot*, 100 S.Ct. 2502 (1980).

³⁴*Advocacy Guide, supra* note 4, at 663.