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# Third-Party Beneficiary Analysis in Federal Housing Law: In Search of Uniformity

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## THIRD-PARTY BENEFICIARY ANALYSIS IN FEDERAL HOUSING LAW: IN SEARCH OF UNIFORMITY

Under the United States Housing Act,<sup>1</sup> the Department of Housing and Urban Development (HUD) regularly contracts with local public housing authorities and private landlords to provide housing for low income families.<sup>2</sup> Most courts acknowledge that low income tenants are the intended beneficiaries of the Housing Act.<sup>3</sup> Yet many courts have declined to grant tenants standing to sue as third-party beneficiaries to the contracts between HUD and the landlord. This Recent Development explores third-party beneficiary claims under federal housing law, demonstrates the inconsistencies in analysis which have caused a split among the circuit courts, and suggests an alternative resolution of the issue.

Several cases arising in Washington, D.C. illustrate the increasingly restrictive view some courts have adopted toward third-party beneficiary claims under federal housing law. In an early case, *Knox Hill Tenant Council v. Washington*,<sup>4</sup> tenants brought an action against HUD and the local housing authority for failure to maintain and repair several housing projects.<sup>5</sup> The majority's conclusion that plaintiffs had stated a cause of action acknowledged, but did not rely on, third-party beneficiary theory.<sup>6</sup> In a partial concurrence, Judge Mackinnon stated

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1. United States Housing Act of 1937, as amended, 42 U.S.C. § 1437 (1982 & Supp. IV 1986); Housing Act of 1949, as amended, 42 U.S.C. § 1441 (1982 & Supp. 1986).

2. *Id.*

3. *See infra* note 45.

4. 448 F.2d 1045 (D.C. Cir. 1971).

5. *Id.* at 1046-47.

6. The actual holding in *Knox Hill* was narrow. Although the court surveyed the Housing Act, the Annual Contributions Contract, the Housing Regulations, and the

that the plaintiffs were entitled to sue as third-party beneficiaries of the contract between HUD and the local housing authority.<sup>7</sup> Judge MacKinnon stated that the third-party beneficiary claim presented an issue traditionally resolved by the courts.<sup>8</sup>

The United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) cited Judge MacKinnon's concurring opinion twelve years later in *Ashton v. Pierce*.<sup>9</sup> The *Ashton* court held that low income tenants, as third-party beneficiaries of the Annual Contributions Contract (ACC)<sup>10</sup> between HUD and the local housing authority, could compel HUD to enforce compliance with the Lead-Based Paint Poisoning Prevention Act (LPPA).<sup>11</sup> The court first noted that Congress required HUD to establish lead-based paint regulations to apply in housing programs such as the ACC.<sup>12</sup> Next, the court found that Congress expected HUD to monitor and enforce the authority's compliance with those regulations.<sup>13</sup> According to the court, the authority's duty under the ACC to provide "decent, safe and sanitary dwellings" and "to maintain each project in good repair, order and condition" implicitly gave rise to a duty to comply with the lead-based

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lease, the court ultimately held only that the district court should not have nonsuited appellants for failure to state a claim because the appellees' claim of sovereign immunity failed to deprive the court of jurisdiction. *Id.* at 1058. The court did not state which, if any, of the above factors provided a legitimate basis for the plaintiff's claims. The court did state, however, that it did not "regard any of these approaches as insubstantial." *Id.* at 1057.

7. *Id.* at 1066.

8. *Id.*

9. 716 F.2d 56, 66 (D.C. Cir.), *modified*, 723 F.2d 70 (D.C. Cir. 1983).

10. 42 U.S.C. § 1437c (1982). Section 1437c provides for the creation of Annual Contributions Contracts (ACCs). Although ACCs generally take the form of one of several standard contracts, HUD and the housing authority are often responsible for filling in the details of the ACC. *Id.*

11. Pub. L. No. 91-695, 84 Stat. 2078 (1971) (codified at 42 U.S.C. § 4822 (1982)). Congress amended the Act in 1973, adding § 302, which provides in pertinent part:

The Secretary of Housing and Urban Development. . . shall establish procedures to eliminate as far as practicable the hazards of lead-based paint poisoning with respect to any existing housing which may present such hazards and which is covered by an application for. . . housing assistance payments under a program administered by the Secretary.

Lead Based Paint Poisoning Prevention Act § 302, Pub. L. No. 93-151, 87 Stat. 565-66 (1973).

12. 716 F.2d at 66.

13. *Id.* at 67.

paint regulations.<sup>14</sup> As third-party beneficiaries, plaintiffs could enforce any duties arising in the contract.<sup>15</sup>

The D.C. Circuit limited the *Ashton* holding in *Samuels v. District of Columbia*.<sup>16</sup> In *Samuels*, the court allowed plaintiffs to maintain a section 1983<sup>17</sup> action against local public housing officials for failure to provide a statutorily required grievance procedure.<sup>18</sup> Although resolution of the third-party beneficiary claim was unnecessary, the court addressed the issue in a footnote.<sup>19</sup>

The *Samuels* court stated that section 1983, rather than third-party beneficiary law, provides the most direct means for redressing a local housing authority's violation of federal law.<sup>20</sup> The court stated, how-

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14. The Annual Contributions Contracts often contain two standard sections. Section 201 provides:

The Local Authority shall at all times operate each project (1) solely for the purpose of providing decent, safe and sanitary dwellings. . . within the financial reach of families of Low Income, (2) in such manner as to promote serviceability, efficiency, economy, and stability, and (3) in such a manner as to achieve the economic and social well-being of the tenants thereof.

Section 209 of the ACC provides: "The Local Authority shall at all times maintain each Project in good repair, order and condition. Hereafter, these provisions will be referred to as the "decent, safe and sanitary" provisions."

15. 716 F.2d at 67. Significantly, the *Ashton* court later amended this opinion, deleting the following sentence: "Further, it is the duty of the Department under the Contract to ensure that the Authority keeps its promises or forfeits its annual right to contributions." 723 F.2d 70 (1983). The deletion of this sentence signals the court's retreat from imposing a duty on HUD to enforce the Authority's compliance with the "decent, safe and sanitary" provisions, not an attempt to rescind the Authority's duty to comply in good faith with the provisions.

16. 770 F.2d 184 (D.C. Cir. 1985).

17. 42 U.S.C. § 1983 (1982) provides citizens with a civil action against any state actor who deprives them of a federal right. The statute provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, 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 proceeding for redress.

*Id.*

18. 770 F.2d at 188. Specifically, the plaintiffs argued that the defendants had systematically failed to provide them with an administrative grievance forum for complaints concerning the defendants' failure to maintain their dwelling units in accordance with their leases. See Housing and Urban-Rural Recovery Act of 1983 § 204, Pub. L. 98-181, 97 Stat. 1153, 1178 (codified at 42 U.S.C. § 1437d(k) (1986)).

19. 770 F.2d at 201 n.14. Judge Friedman did not join the footnote because he did not consider it necessary to the disposition of the case. *Id.*

20. *Id.*

ever, that section 1983 does not provide public housing tenants with a cause of action for a landlord's random and unauthorized failure to maintain "decent, safe and sanitary dwellings" as required by federal law.<sup>21</sup> The court stated that to extend third-party beneficiary theory to establish a federal cause of action for discrete and random disputes would be plainly inconsistent with the structure of federal housing law.<sup>22</sup>

The *Samuels* court thus implicitly negated the *Ashton* ruling that the housing authority had a duty, enforceable by third-party beneficiaries in federal court, to comply with the ACC's requirement of "decent, safe and sanitary dwellings."<sup>23</sup> Instead, the court limited *Ashton* to its narrow facts: specifically, Congress' clear intent to require HUD to enforce the Authority's compliance with lead-based paint removal regulations.<sup>24</sup>

In the *Samuels* footnote, the D.C. Circuit apparently ignored the finding in *Ashton* that the Authority's duty to comply with the paint removal regulations arose from the contractual duty to provide decent, safe, and sanitary dwellings.<sup>25</sup> The court thus attempted to erase the *Ashton* language recognizing third-party beneficiary status to enforce the general maintenance provisions of the ACC.<sup>26</sup> The court's reasoning is faulty insofar as it would strike the basic duty of maintenance recognized in *Ashton*, while upholding the derivative duty to observe the regulations.

Recently, the United States District Court for the District of Columbia affirmed the *Samuels* reluctance to recognize third-party beneficiary status for federal housing tenants. In *Edwards v. District of*

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21. *Id.* See 42 U.S.C. § 1437 (1982 & Supp. IV 1986).

22. 770 F.2d at 201 n.14.

23. In addition, the court apparently intended to limit the scope of *Knox Hill Tenant's Council* in the *Samuels* footnote.

24. 770 F.2d at 201 n.14.

25. The *Ashton* court explicitly stated that the Authority's duty to comply with the lead-based paint regulations was derivative:

[B]y fair implication, compliance with the lead-based paint elimination requirements is a necessary component of the Authority's duties under sections 201 and 209 of the Contracts, respectively, to provide "decent, safe and sanitary dwellings" and to "maintain each Project in good repair, order and condition."

*Ashton v. Pierce*, 716 F.2d 56, 67 (D.C. Cir. 1983).

26. In addition, the court attempted to strike down any potential claim to a statutory duty in the housing authority to provide decent, safe and sanitary dwellings in accordance with 42 U.S.C. § 1437c (1982 & Supp. IV 1986). *Samuels*, 770 F.2d at 66.

*Columbia*,<sup>27</sup> plaintiffs claimed that a housing project owner who allowed a project to fall into a state of disrepair had constructively demolished the project without fulfilling certain statutory prerequisites to demolition.<sup>28</sup> In addition, the plaintiffs claimed that the Authority had failed to provide statutorily required standard housing.<sup>29</sup> According to the plaintiffs, the statutory violations amounted to a breach of the project owner's contractual duty to provide "decent, safe and sanitary" housing.<sup>30</sup> The plaintiffs sought to compel HUD to monitor and enforce compliance with the contract.<sup>31</sup>

The district court held that the plaintiffs did not have third-party beneficiary status to compel HUD to make the owner comply with the "decent, safe and sanitary" standard.<sup>32</sup> The court reasoned that the contract directed the project owner, not HUD, to meet this standard.<sup>33</sup> The contract provisions thus did not impose an obligation on HUD to ensure that the plaintiffs received standard housing.<sup>34</sup> In addition, the court reasoned that the *Samuels* footnote<sup>35</sup> merely suggested that the plaintiffs in *Ashton* could proceed against HUD "on a breach of contract theory [stemming] from the express command of the Lead-Based Paint Prevention Act, not the terms of the ACC or plaintiffs' status as third-party beneficiaries."<sup>36</sup>

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27. 628 F. Supp. 33 (D. D.C. 1985).

28. *Id.* at 335. The court stated that the statutory prerequisites to demolition which arise under 42 U.S.C. § 1437p(b)(2) (1986) are only relevant once a demolition application has been approved. *Id.* at 342. Therefore, no federal statutory right was implicated, according to the court. Nonetheless, the court proceeded to address the contract claims. *Id.* at 342-43. See *infra* text accompanying notes 32-36.

29. 628 F. Supp. at 343-344. See 42 U.S.C. §§ 1437a(b)(1), 1439(d)(1) (1982 & Supp. IV 1986).

30. 628 F. Supp. at 344.

31. *Id.*

32. *Id.* The contract in *Edwards* thus contained the same §§ 201 and 209 as the contract in *Ashton*. For the text of those sections see *supra* note 14.

33. 628 F. Supp. at 344. See also *supra* note 14 for the text of the contract, which directs the local authority to provide decent, safe, and sanitary dwellings.

34. 628 F. Supp. at 344.

35. *Id.* See *supra* text accompanying notes 20-26.

36. 628 F. Supp. at 344. By stating that the defendants' duty in *Ashton* stemmed directly from the LPPA rather than the ACC, the district court in *Edwards* actually went beyond the court of appeals' footnote in *Samuels*. *Id.* The *Samuels* court did not expressly state that the third-party claim in *Ashton* was rooted in the language of the LPPA instead of the Authority's duties under the ACC. *Samuels v. District of Columbia*, 770 F.2d 184 (D.C. Cir. 1985). Rather, the *Samuels* court stated that no § 1983 action would lie for discrete and random disputes arising from the Authority's failure to

The district court in *Edwards* thus eviscerated the *Ashton* court's finding that the housing authority's duty to comply with the LPPA arose from an implied contractual duty to provide decent, safe and sanitary housing.<sup>37</sup> In addition, the *Edwards* court offered the implausible rationale that the *Ashton* plaintiffs proceeded on a breach of contract theory stemming from the express command of the Lead-Based Paint Prevention Act.<sup>38</sup> Because the LPPA does not expressly provide for the creation of any contracts, the court's reading of *Ashton* is suspect.<sup>39</sup> The court may have meant that the plaintiffs proceeded on the theory that they were third-party beneficiaries of an implied contract.<sup>40</sup> It is unlikely, however, that the *Edwards* court would accept third-party beneficiary claim on the basis of an implied contract when it was reluctant to allow such a claim on the express contracts between HUD and the housing authority.<sup>41</sup>

The *Edwards* and *Samuels* courts thus ignored the language in *Ash-*

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provide decent, safe, and sanitary dwellings in compliance with the statute, and that by analogy plaintiffs could not bring third-party beneficiary claims for discrete and random contract disputes. *Id.* at 201 n.14. The *Samuels* court thus implied that the language in *Ashton* which recognized a contractual duty in the Authority to provide decent, safe, and sanitary dwellings was either dicta or, at best, one possible basis for the decision. *Id.* The district court in *Edwards* went beyond this, however, stating explicitly that the defendants' duty in *Ashton* arose under the LPPA rather than the ACC. *Edwards*, 628 F. Supp. at 344.

37. The *Samuels* court may have been reluctant to explicitly overrule the language it had employed in *Ashton* only two years earlier. The *Edwards* court, on the other hand, may have seen the *Samuels* footnote as a springboard for rolling back earlier, overbroad language.

38. See *supra* note 36 and accompanying text.

39. The Housing Authority does not appear to have any contractual duty to eliminate lead-based paint under the LPPA unless the duty arises from the Authority's contractual duty to provide decent, safe, and sanitary dwellings. Pub. L. No. 91-695, 84 Stat. 2078 (1971) (codified at 42 U.S.C. § 4822 (1982)).

40. An implied contract is defined as:

one not created or evidenced by the explicit agreement of the parties, but inferred by the law, as a matter of reason and justice from their acts or conduct, the circumstances surrounding the transaction making it a reasonable, or even a necessary assumption that a contract existed between them by tacit understanding.

BLACK'S LAW DICTIONARY 292-93 (5th ed. 1979).

41. On appeal, the plaintiffs narrowed their claims, arguing only that they had third-party beneficiary status to challenge the explicit statutory protection against unwarranted demolition, and not to enforce the decent, safe, and sanitary provisions. *Edwards v. District of Columbia*, 821 F.2d 651, 653-54 (D.C. Cir. 1983). The court of appeals thus did not reach the issue of whether the plaintiffs could enforce the decent, safe, and sanitary provisions of the contract of the analogous statutory provisions. *Id.* Instead, the court held that the defendants had not violated the demolition statute;

ton which conferred a duty on the housing authority to provide decent, safe and sanitary housing. Neither court flatly rejected the holding in *Ashton*, however, and the resulting "reinterpretations" have muddled the third-party beneficiary issue in federal court. It is clear, however, that the D.C. Circuit currently disfavors third-party beneficiary claims by federal housing tenants.

Other courts have not been as circumspect when denying federal housing tenants' third-party beneficiary claims. In *Perry v. Housing Authority of the City of Charleston*,<sup>42</sup> the Fourth Circuit held that based on other court decisions, the statutory scheme, the ACC, and the lease, the plaintiffs were not third-party beneficiaries of the contract between HUD and the Housing Authority.<sup>43</sup> To the extent that the *Perry* court based its analysis of the statutory scheme on implied right of action analysis rather than third-party beneficiary theory, however, the court's reasoning fails.<sup>44</sup>

Courts frequently misapply the implied right of action test to third-party beneficiary claims.<sup>45</sup> To determine whether private parties have an implied right of action under a statute, courts first decide whether plaintiffs are members of the class that the legislation intended to benefit.<sup>46</sup> The *Perry* court found that tenants were only indirect benefi-

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therefore, even if the plaintiffs were third-party beneficiaries, there was no statutory violation on which to base recovery. *Id.* at 662.

42. 664 F.2d 1210 (4th Cir. 1981).

43. *Id.* at 1218.

44. See *infra* text accompanying notes 45-53 for a comparison of implied right of action analysis and third-party beneficiary theory.

45. See Note, *Third Party Beneficiary and Implied Right of Action Analysis: The Fiction of One Governmental Intent*, 94 YALE L.J. 875 (1985). This Note argues that courts mistakenly collapse the distinction between third-party beneficiary and implied right of action analysis. The author claims that in equating government intent with congressional intent, courts ignore the impact agencies can have on contractual intent through policymaking and contract drafting. While congressional intent is dispositive in implied right of action analysis, the Note continues, agencies often are capable of conferring third-party beneficiary status. When courts equate the two analyses, however, they undermine the independence of third-party beneficiary analysis which arises from the agency's role. *Id.* at 881-883.

46. In *Cort v. Ash*, 422 U.S. 66 (1975), the Supreme Court enumerated four criteria for determining an implied right of action:

- 1) whether the plaintiff is a member of the class for whose especial benefit the legislation was enacted;
- 2) whether there is an explicit or implicit indication of congressional intent to deny or create a remedy;
- 3) whether a private remedy would be consistent with the underlying purposes of the legislative scheme;



ciaries of the Act, while states were the primary, or direct beneficiaries.<sup>47</sup>

Next the court examines the statutory language and the legislative history to determine whether Congress intended to allow a private right of action for low income tenants.<sup>48</sup> The *Perry* court found that Congress did not implicitly grant low income tenants a private right of action under the Housing Act.<sup>49</sup> As a result, the court concluded that

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4) whether the action is one traditionally relegated to state law.

*Id.* at 78.

The *Cort* test, however, has been narrowed substantially. In *Touche Ross Co. v. Redington*, 442 U.S. 560, 578 (1979), Justice Rehnquist stated that the ultimate question is "one of congressional intent, not whether this Court thinks that it can improve upon the statutory scheme that Congress enacted into law." *Id.* The first three factors thus form the basis for discerning congressional intent; the Court now considers the fourth factor irrelevant. *Universities Research Ass'n v. Coutu*, 450 U.S. 754, 770 (1987). Specifically, the Court stated that in determining legislative intent, courts should consider the "language and focus of the statute, its legislative history and its purpose." *Touche Ross*, 442 U.S. at 575-576.

47. *Perry*, 664 F.2d at 1213.

48. *See supra* note 46.

49. 664 F.2d at 1213. Contrary to the *Perry* court interpretation, the statutory language indicates quite clearly that low income families are the intended beneficiaries of the Act. 42 U.S.C. § 1437 (1982) states in pertinent part:

It is the policy of the United States to promote the general welfare of the nation by employing its funds . . . to assist the several states. . . to remedy the unsafe and unsanitary housing conditions and the acute shortage of decent, safe and sanitary dwellings for families of low income.

*Id.*

42 U.S.C. § 1441 (1967) states:

[T]he general welfare and security of the Nation and the health and living standards of its people require housing production and related community development sufficient to remedy the serious housing shortage, the elimination of substandard and other inadequate housing through the clearance of slums and blighted areas, and the realization as soon as feasible of the goal of a decent home and suitable living environment for every American family.

*Id.*

Five of seven cases cited by the *Perry* court found that low income families were the primary beneficiaries of the Act. *See Falzarano v. United States*, 607 F.2d 506, 509 (1st Cir. 1979) (low income tenants are prime beneficiaries of § 1441); *Thompson v. Washington*, 497 F.2d 626, 633 (D.C. Cir. 1973) (section 1402 intended to limit rent for low income families); *Nat'l Tenants' Org. v. Dep't of Housing and Urban Dev.*, 358 F. Supp. 312, 314 (D. D.C. 1973) (public housing tenants are primary beneficiaries of Housing Act of 1937); *Silva v. East Providence Hous. Auth.*, 423 F. Supp. 453, 464 (D. R.I. 1976) (low income families are beneficiaries of § 1401). *But cf. Shivers v. Landrieu*, 674 F.2d 906, 911 (D.C. Cir. 1981) (12 U.S.C. § 1743 has no "especial beneficiaries"); *Tenants' Council of Tiber Island-Carrolsby Square v. Lynn*, 497 F.2d 648, 652 (D. D.C. 1974) (12 U.S.C. § 1715 was passed to eliminate slums, not to benefit any particular class of tenants). Note, however, that the last two cases cited by the court *contra* arose

plaintiffs were not third-party beneficiaries of the contract between HUD and the Housing Authority.

In addressing plaintiffs' third-party beneficiary claims, the *Perry* court erred by surveying only congressional intent and not the intent of HUD and the Housing Authority. Although an implied right of action analysis primarily involves discerning congressional intent, third-party beneficiary analysis involves surveying the intent of the parties to the contract.<sup>50</sup> To the extent that Congress gives an agency discretion to set the terms of a contract, the agency's intent is relevant to third-party beneficiary claims.<sup>51</sup> Because Congress left HUD considerable discretion to supply some of the terms of the Annual Contributions Contract, the *Perry* court should have examined the contract to determine if HUD intended to confer third-party beneficiary status on the tenants.<sup>52</sup>

This omission by the *Perry* court makes it difficult to discern whether HUD and the Housing Authority intended to make the tenants third-party beneficiaries of the contracts.<sup>53</sup> Coupled with the court's threadbare analysis, this oversight seriously weakens the *Perry* opinion. In addition, as the next section will demonstrate, other courts have read congressional and agency intent under the Housing Act to favor third-party beneficiary standing on the basis of contracts.

Despite *Perry*, the trend in the D.C. Circuit, and similar holdings in other jurisdictions, there is a small counter-trend arising in other circuits which recognizes third-party beneficiary status for claimants under the Housing Act.

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under the National Housing Act, 12 U.S.C. § 1701 (1934), not the United States Housing Act. In addition to erroneously treating these two Acts as interchangeable, the *Perry* court erred by confusing the statutory method of providing federal assistance to the states under the United States Housing Act with the "goal" of providing a "decent home and suitable living environment for every American family." 42 U.S.C. § 1441 (1982). As the Seventh Circuit Court of Appeals stated in *Holbrook v. Pitt*, 643 F.2d 1261 (7th Cir. 1981), "If the tenants are not the primary beneficiaries of a program designed to provide housing assistance payments to low income families, the legitimacy of the multi-billion dollar section 8 program is placed in grave doubt." *Id.* at 1271.

50. See Note, *supra* note 45, at 881-883.

51. *Id.*

52. Although Annual Contributions Contracts vary in type, HUD has considerable discretion to set many of the terms of the standard form contracts. An examination of the intent of HUD and the housing authority in the ACC, as well as of congressional intent, would have given the *Perry* court the proper perspective for applying third-party beneficiary analysis.

53. See *supra* note 52.

In *Holbrook v. Pitt*,<sup>54</sup> low income tenants brought an action seeking prompt implementation of the ACC and the receipt of retroactive housing benefits in response to the owner's improper certification of tenants which had resulted in the delayed start of payments.<sup>55</sup> The Seventh Circuit Court of Appeals held that plaintiffs had third-party beneficiary status to bring such claims.<sup>56</sup> The court based its determination on an analysis of congressional intent, the legislative history of the Housing Act, the terms of the Annual Contributions Contract, and the relevant HUD regulations.<sup>57</sup>

The *Holbrook* court first noted that Congress authorized section 8 housing payments in order to assist lower income families in obtaining decent housing and to promote economically mixed housing.<sup>58</sup> The court rejected HUD's argument that financially troubled HUD-insured housing projects were the prime beneficiaries of the contracts and that low income families were only incidental beneficiaries.<sup>59</sup> The court noted that because section 8 funds were allocated according to the financial needs of tenants, not the housing projects, Congress' primary intent was to benefit tenants.<sup>60</sup> In addition, the court reasoned that

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54. 643 F.2d 1261 (7th Cir. 1981).

55. *Id.* at 1265.

56. *Id.* at 1273.

57. *Id.* at 1264-76.

58. *Id.* at 1271.

59. *Id.*

60. The *Holbrook* opinion is also notable for its interpretation of the *Restatement* position. A proposed section of the *Restatement (Second) of Contracts* provided:

1) Unless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either

a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary; or

b) the promisee manifests an intention to give the beneficiary the benefit of the promised performance.

2) An incidental beneficiary is a beneficiary who is not an intended beneficiary.

643 F.2d at 1270-71 n.17 (citing *RESTATEMENT (SECOND) OF CONTRACTS* § 133 (Tent. Draft 1968)). The *Holbrook* court reject the opinion in § 1(b) that only the intention of the "promisee" (HUD), and not the intention of the promisor (the housing authority), is relevant to a determination of the tenants' rights as possible third-party beneficiaries. The court stated: "Contracts are the product of shared intentions. . . . It is improper to neglect the reasonable expectations of the promisor. . . ." *Id.* *But cf.* *Vazman, S.A. v. Fidelity Int'l. Bank*, 418 F. Supp. 1084 (S.D.N.Y. 1976); *O'Boyle v. DuBose-Killeen Properties, Inc.*, 430 S.W.2d 273 (Tex. Civ. App. 1968).

The *Holbrook* court failed to note an ambiguity in the language of § 1 of the *Restatement* which supports the court's interpretation. Section 1 states that the intention of

under agency regulations HUD made funding calculations on the basis of tenant, not project, need.<sup>61</sup>

Finally, the court found numerous contract provisions which clearly indicated the contracts existed primarily for the tenant's benefit.<sup>62</sup> In particular, the court relied on paragraph 1.7 of the contract, which required the owners to "maintain and operate the contract unit. . . as to provide decent, safe and sanitary housing."<sup>63</sup> The *Holbrook* opinion thus appears to contradict the statement in the *Samuels* footnote that tenants would not have third-party beneficiary standing to sue project owners for failure to comply with contractual provisions calling for the maintenance of "decent, safe and sanitary dwellings."<sup>64</sup> If *Holbrook* is distinguishable from the *Samuels* footnote, it is because in *Holbrook* plaintiffs did not seek to compel compliance with the "decent, safe and sanitary" terms, but instead sought to compel prompt implementation of the ACC and the receipt of retroactive benefits.<sup>65</sup> Nonetheless, it is likely that the *Holbrook* court would have upheld a third-party beneficiary claim against the project owner for failure to provide "decent, safe and sanitary" dwellings as required in the contract.<sup>66</sup>

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the "parties" is relevant to whether plaintiffs are third-party beneficiaries under the contract, indicating that the intent of the promisor, as well as the intent of the promisee in § (1)(b), should be considered in third-party beneficiary analysis. For a detailed discussion of this point and the *Restatement (Second)* treatment of third-party beneficiary claims, see Note, *Third Party Beneficiaries and the Restatement (Second) of Contracts*, 67 CORNELL L. REV. 880, 887-99 (1982). See also 2 S. WILLISTON, *CONTRACTS* § 356A (1959) ("[I]t is the intent or purpose of the promisee who pays for the promise that has been generally looked upon as governing.").

61. The *Holbrook* court examined 42 Fed. Reg. 5602 (1977) which provides: "The purpose of this program is to assist families presently in occupancy in a HUD-insured or HUD-assisted project to more easily carry their rental burden." *Id.*

The court also examined 24 C.F.R. § 886.197(d) (1980), which provides that contracts may be executed only after a project owner establishes that a significant number of potential or existing tenants "are eligible for and in need of Section 8 assistance." *Id.*

62. 643 F.2d at 1272.

63. *Id.* The *Holbrook* court also examined paragraph 1.3(b)(1) of the contract which provided: "The Government hereby agrees to make housing assistance payments on behalf of families to lease Decent, Safe and Sanitary housing pursuant to Section 8 of the Act." *Id.* at 1272.

In addition, the court noted that paragraph 1.10 of the contract restricts owners' rights to evict tenants, paragraph 1.9(a) required affirmative action in leasing, and paragraph 1.9(b) limited the owner's discretion in collecting and refunding utility and security deposits. *Id.*

64. See *supra* text accompanying note 25.

65. 643 F.2d at 1265.

66. The *Holbrook* court stated, "The plaintiffs have enforceable rights since the con-

Two federal district courts have recently followed *Holbrook* in recognizing federal housing tenants' claims to third-party beneficiary status under the contracts between HUD and local housing authorities. In *Mabry v. Village Management, Inc.*<sup>67</sup> the United States District Court for the Northern District of Illinois granted third-party beneficiary status to federal housing applicants who alleged discriminatory tenant selection policies.<sup>68</sup> The *Mabry* court considered two factors dispositive.<sup>69</sup> First, the court noted that the Housing Act was designed to aid lower income families in obtaining decent housing.<sup>70</sup> Next, the court noted that the housing project owners had agreed to a contract provision prohibiting discrimination in tenant selection.<sup>71</sup> Following *Holbrook*, the *Mabry* court found that the plaintiffs were the intended beneficiaries of the contracts between HUD and the project owners. Consequently, the tenants could sue to enforce the anti-discrimination provisions.<sup>72</sup> Thus, the *Mabry* court expanded *Holbrook* the decision by extending third-party beneficiary status to federal housing applicants.

In *Gonzalez v. St. Margaret's House Housing Development Fund Corp.*,<sup>73</sup> the United States District Court for the Southern District of New York also followed *Holbrook*, holding that tenants had standing as third-party beneficiaries to challenge certain contract provisions.<sup>74</sup> The plaintiffs in *Gonzalez* were federal housing tenants who challenged a mandatory meal charge as violative of rent limitations imposed by the Brooke Amendment.<sup>75</sup> Describing the *Holbrook* language as "per-

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tracts were intended to provide them with rental assistance." *Id.* at 1273. Although this statement is broader than the court's actual holding that plaintiffs were entitled to prompt implementation of the ACC and the receipt of retroactive benefits, the court's specific analysis of the contract provisions indicates that the court was inclined to allow tenants to enforce those provisions as third-party beneficiaries.

67. 1986 WL 5743 (N.D. Ill.).

68. 1986 WL 5743 at 2.

69. *Id.* at 5-6.

70. *Id.* at 6.

71. *Id.* at 7.

72. The *Mabry* court cited *Holbrook* for the proposition that § 8 was intended to benefit lower income families. *Id.* at 5-6.

73. 620 F. Supp. 806 (S.D.N.Y. 1985).

74. *Id.* at 810.

75. The Brooke Amendment to § 8 of the United States Housing Act of 1937, 42 U.S.C. § 1437a(a)(1)(A) (West Supp. 1988) imposes a 30% rent limitation on assisted units, which prohibits requiring a tenant to pay more than 30% of her family's monthly adjusted income as rent. The tenants in *Gonzalez* argued that "rent" included utilities,

suasive," the *Gonzalez* court stated that tenants are the prime beneficiaries of the section 8 housing payments program.<sup>76</sup>

The Supreme Court recently held, in *Wright v. City of Roanoke Re-development and Housing Authority*,<sup>77</sup> that tenants have a private section 1983 cause of action to enforce the rent limitations of the Brooke Amendment. This holding reinforces the *Gonzalez* opinion, yet also diminishes its importance.<sup>78</sup> Plaintiffs aggrieved by alleged rent overcharges may now bring a section 1983 action directly against the project owner, thus eliminating the need to rely on the third-party beneficiary theory.<sup>79</sup> *Gonzalez* nonetheless retains significance as the only recent case outside of the Seventh Circuit to grant federal housing tenants standing as third-party beneficiaries of the housing contracts.<sup>80</sup>

The circuit courts are divided as to whether low income tenants have third-party beneficiary status to contracts arising under the Housing Act. In the D.C. Circuit, early cases apparently recognized such status, but the court recently denied tenants' standing as third party beneficiaries to enforce the "decent, safe and sanitary" provisions of the Annual Contributions Contract. Meanwhile, the *Perry* court and other jurisdictions have denied third-party beneficiary status to tenants, in part because of the inappropriate application of the implied right of action test to third-party beneficiary analysis.<sup>81</sup> Conversely, *Holbrook*, *Mabry*, and *Gonzalez* represent three instances where courts have granted third-party beneficiary status to federal housing tenants.<sup>82</sup> The contradictory holdings in these cases is due in part to varying factual settings and the courts' focus on different statutory language and contract provisions. Nonetheless, both the spirit and the language of the opinions are occasionally in direct conflict.

Whether plaintiffs have third-party beneficiary status often depends on whether the applicable contract provision sets forth "enforceable

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and therefore, a utility surcharge imposed on them violated the statute. 620 F. Supp. at 810.

76. *Id.*

77. 479 U.S. 418 (1987).

78. *Id.* at 429. The *Wright* opinion also reinforces the *Samuels* footnote, if only indirectly, by endorsing the plaintiffs' use of the private § 1983 cause of action. This parallels the *Samuels* court's emphasis on § 1983 actions as an alternative to third-party beneficiary claims in a similar case.

79. *See supra* note 78.

80. 620 F. Supp. at 811.

81. *See supra* text accompanying notes 42-53.

82. *See supra* text accompanying notes 54-80.

standards.”<sup>83</sup> Because courts have broad discretion to determine the enforceability of a contract provision, a section 1983 claim may be a more direct means to determine which federal housing claims belong in federal court.<sup>84</sup> Section 1983, however, only applies when a state actor deprives a person of a right secured by the Constitution or by federal law.<sup>85</sup> Where the housing statute and the housing contract contain provisions calling for “decent, safe and sanitary” dwellings, tenants may choose to employ a section 1983 action rather than a contract claim.<sup>86</sup> Tenants who seek to enforce a contract provision when there is no analogous statutory provision, however, cannot utilize section 1983.<sup>87</sup>

The *Samuels* court’s emphasis on section 1983 actions is misplaced. The *Samuels* court erred by focusing solely on Congress’ intent in the federal housing laws, while ignoring the intent of the contracting parties.<sup>88</sup> Resolution of the section 1983 question fails to address the intent of HUD and the local housing authority regarding a plaintiff’s status as a beneficiary of the contract.<sup>89</sup> Courts must address these issues separately in order to assess properly the rights of federal housing tenants.<sup>90</sup>

Even a court that properly undertakes third-party beneficiary analysis will face varying interpretations of the test.<sup>91</sup> The *Restatement (Second) of Contracts* is ambiguous as to whether courts should consider the intent of both the promisor and the promisee.<sup>92</sup> Other authorities state that the intent of the promisor, or the performing party, is most relevant.<sup>93</sup> In the federal housing law context, the question

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83. See *Edwards v. District of Columbia*, 628 F. Supp. 33 (D. D.C. 1985).

84. See *supra* note 17 for text of § 1983.

85. See *Id.*

86. Compare the suggestion of the *Samuels* court in its footnote, discussed *supra* in text accompanying notes 20-26.

87. Section 1983 will not provide a cause of action for the plaintiffs suing on a contract because the rights of the tenants under the contract do not constitute rights secured by the federal laws or the Constitution.

88. See *supra* note 45.

89. See *supra* note 45.

90. See *supra* notes 45-49 and accompanying text.

91. See *supra* note 60.

92. See *supra* note 60 for text of the *Restatement (Second)* position.

93. See Note, *Third Party Beneficiaries and the Restatement (Second) of Contracts*, 67 CORNELL L. REV. 880 (1982). See also *supra* note 60 and cases cited therein. Moreover, several writers have criticized the *Restatement (Second)* test of intent as too nar-

becomes whether to examine only HUD's intent in the contract, or to examine the intent of the local housing authority as well. The *Holbrook* court examined both and determined that the housing authority's agreement to certain restrictions on its behavior demonstrated intent to grant the benefit of the contract to the tenants.<sup>94</sup>

Because contracts embody "shared intentions,"<sup>95</sup> the *Holbrook* approach seems superior to the *Restatement's*. Nonetheless, all parties who enter contractual relationships agree to restrict their behavior in some manner. Courts therefore should determine when agreement to restricted behavior demonstrates a promisor's intent to grant the benefit of a contract. Courts should consider the nature and magnitude of the restrictions as well as comparable statutory provisions as evidence of the intent of the agency and the housing authority. Courts should also carefully differentiate between congressional intent and agency intent when the agency lawfully exercises its discretion.

In the federal housing context, courts could interpret the housing authority's agreement to provide "decent, safe and sanitary" housing as evidence of the authority's intent to confer the benefit of the contract upon the tenants. Although these terms lack specificity, they arguably provide judicially enforceable standards similar to the warranty of habitability found in landlord tenant law.<sup>96</sup> In addition, congressional in-

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rowly focused. See, e.g., Note, *Third Party Beneficiaries and the Intention Standard: A Search for Rational Contract Decisionmaking*, 54 VA. L. REV. 1166 (1968). The author suggests that courts should consider reliance by third parties and social policy concerns in hearing third-party beneficiary claims. Although no courts appear to have adopted this approach explicitly, these factors may affect courts' judgments even though they profess to apply the intent tests. In the housing context, social policy considerations weigh heavily in favor of allowing tenants to sue to enforce the housing contracts as third-party beneficiaries. On the other hand, reliance factors would weigh against low income tenants because their lack of viable housing alternatives often means that they have not relied to their detriment on the promises between HUD and the housing authority. Another author proposes that contracting parties create third-party beneficiary status in another when either the contract contains an express promise to that effect or such a promise may be reasonably implied in fact. See Note, *The Third Party Beneficiary Concept: A Proposal*, 57 COLUM. L. REV. 406 (1957). Unfortunately, the "reasonably implied in fact" test does not provide judges with particularly helpful standard to determine intent. See generally Jones, *Legal Protection of the Third Party Beneficiaries: On Opening Courthouse Doors*, 46 U. CIN. L. REV. 313 (1977).

94. See *supra* notes 62-63 and accompanying text.

95. *Holbrook v. Pitt*, 643 F.2d 1261, 1272 (7th Cir. 1981).

96. See, e.g., *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071 (1970), *cert. denied*, 400 U.S. 925 (1970); *Kline v. Burns*, 111 N.H. 87, 276 A.2d 248 (1971); *Jack Spring, Inc. v. Little*, 50 Ill.2d 351, 280 N.E.2d 808 (1972); RESTATEMENT (SECOND) OF THE LAW OF PROPERTY §§ 5.1-5.6 (1977).



tent in the housing statute could support a parallel finding that tenants are third-party beneficiaries of the contract, although courts must acknowledge that agencies can confer such status without an expression of congressional intent.<sup>97</sup> Furthermore, third-party beneficiary status is implied by contract provisions employing the mandatory "shall" in directing the project owner to provide "decent, safe and sanitary" housing.<sup>98</sup>

Finally, despite the fears of the *Samuels* and *Edwards* courts,<sup>99</sup> recognition of third-party beneficiary status in federal housing tenants will not result in federal litigation over "random and unauthorized" activity by a local housing authority.<sup>100</sup> Isolated incidents of disrepair will not amount to breaches of the ACC because the purpose of the contract is to ensure that the authority provides decent, safe and sanitary conditions in the entire housing project.<sup>101</sup> Tenants aggrieved by isolated incidents should seek their remedies under the lease in the state court, leaving federal courts as the proper forum for significant, project-wide disputes which stem from federal housing policy or HUD's failure to enforce the ACC.

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97. *See supra* note 45.

98. *See supra* note 14 for text of the contract provisions.

99. *See supra* text accompanying footnotes 20-22 and 32-36.

100. *See supra* text accompanying footnotes 21-22.

101. *See supra* note 14 for the text of §§ 201, 209 of the ACC. Section 209 directs the housing authority to maintain each *project* in good repair, order, and condition.

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