

## Using the Federal Lead Hazard Disclosure Rule's Private Right of Action for Compensatory Damages and Broad-Based Injunctive Relief

By Gregory D. Luce and Anne M. Phelps

**[Editor's Note:** Gregory D. Luce and Anne M. Phelps summarize Luce's research for Alliance for Healthy Homes, *Private Causes of Action Under the Residential Lead-Based Paint Hazard Reduction Act of 1992: An Analysis & Guide* (2004). For attorneys and individuals who work with community-based organizations, the guide gives background on the federal lead-hazard disclosure rule and a blueprint for legal action under the law's private cause-of-action provision. It contains sample pleadings, copies of relevant federal regulations, synopses of disclosure law cases, and additional tools for practitioners. To request a copy, contact Anne Phelps.]

The Residential Lead-Based Paint Hazard Reduction Act, which Congress passed in 1992, requires property owners of target housing (generally housing constructed before 1978) to disclose the presence of any known lead-based paint or lead-based paint hazards on their property before obligating a lessee or purchaser under a contract for sale or lease.<sup>1</sup> For most housing constructed before 1978, sellers, lessors, and their agents have the following duties under the Act:

- give the purchaser or lessee a pamphlet, entitled *Protect Your Family from Lead in Your Home*, approved by the Environmental Protection Agency (EPA);
- disclose the presence of any known lead-based paint or lead-based paint hazards;
- give the purchaser or lessee copies of all available reports or records concerning lead-based paint or lead-based paint hazards at the property;
- attach to the contract or lease (or include in the lease itself) a lead warning statement and confirmation that the seller or lessor has complied with all notification requirements; and
- secure written confirmation from the purchaser or lessee that he received the EPA-approved pamphlet and all information required under the Act.

In the sale of target housing, the purchaser also must have a ten-day period to conduct a paint inspection or risk assessment before being obligated under a contract.<sup>2</sup>

Recently the U.S. Department of Housing and Urban Development (HUD) and the EPA enforced the Act aggressively, bringing civil complaints against violators and obtaining consent decrees in which owners and property managers agreed to complete significant lead abatement activities on their properties.<sup>3</sup> Federal authorities also enforced the Act through criminal conviction of property owners or managers who obstructed investigations into compliance with the Act or lied about their compliance.<sup>4</sup> Often overlooked in the Act, however, is a provision that gives a purchaser or lessee the right to enforce the Act through a private lawsuit for damages.<sup>5</sup> The Act also allows, through its link to the Toxic Substance Control Act, a private party to seek injunctive relief.<sup>6</sup>

### I. Seeking Compensatory Damages Under the Act: Elements of a Claim

The elements of a private cause of action under the Act are relatively straightforward: a seller, lessor, or agent commits a knowing violation, involving a purchaser or lessee, and the purchaser or lessee sustains damages.<sup>7</sup>

<sup>1</sup>Residential Lead-Based Paint Hazard Reduction Act, 42 U.S.C. § 4852d (2003). Target housing is defined as any housing constructed before 1978, except housing for the elderly or persons with disabilities (unless a child under 6 resides or is expected to reside in the housing) or any zero-bedroom dwelling. "Lead-based paint" means paint or other surface coatings that contain lead equal to or in excess of 1.0 milligram per square centimeter or 0.5 percent by weight. "Lead-based paint hazard" means any condition that causes exposure to lead from lead-contaminated dust, lead-contaminated soil, or lead-contaminated paint that is deteriorated or present in accessible surfaces, friction surfaces, or impact surfaces that would result in adverse human health effects as established by the appropriate federal agency. 24 C.F.R. § 35.86 (2004); 40 C.F.R. § 745.103 (2004).

<sup>2</sup>U.S. Department of Housing and Urban Development and Environmental Protection Agency regulations are found at 24 C.F.R. § 35, subpt. H, and 40 C.F.R. § 745, subpt. F (2004), respectively.

<sup>3</sup>See, e.g., *United States v. Zeman*, No. 04-03087 (D. Minn. July 1, 2004); *United States v. Dominion Management Services*, No. 04-03088 (D. Minn. July 1, 2004) (Clearinghouse No. 55,839).

<sup>4</sup>See, e.g., *United States v. Nuyen*, No. 01-0134 (D. Md. March 14, 2001).

<sup>5</sup>42 U.S.C. § 4852d(b)(3).

<sup>6</sup>*Id.* § 4852d(b)(5).

<sup>7</sup>The property in question must be "target housing" not exempt from the Act. Housing for the elderly or persons with disabilities (unless any child who is younger than 6 resides or is expected to reside there) and zero-bedroom dwellings are not considered target housing. Disclosure is not required on sales of target housing at foreclosure, leases of target housing found lead-based-paint free by a certified inspector, leases of 100 days or less where renewal or extensions may not occur, and renewals of existing leases where disclosure occurred previously and no new information is available. 24 C.F.R. § 35.82; 40 C.F.R. § 745.101; see also Maria Rapuano & Anne Phelps, *Leveraging the Federal Lead Hazard Disclosure Law to Improve Housing Conditions*, in this issue.

### A. Seller, Lessor, or Agent

A plaintiff may pursue a civil action for damages only against sellers and lessors or their agents.<sup>8</sup> Sellers and lessors can be individuals, partnerships, corporations, trusts, government agencies, housing agencies, Indian tribes, and nonprofit organizations.<sup>9</sup> The regulations define a lessor as “any entity that offers target housing for lease, rent, or sublease.”<sup>10</sup> The term “seller” covers “any entity that transfers legal title to target housing, in whole or in part, in return for consideration.”<sup>11</sup> An agent under the Act is “any party who enters into a contract with a seller or lessor.”<sup>12</sup> The Act does not apply to a buyer’s agent or broker.

### B. Purchasers and Lessees

The Act’s private cause of action applies solely to “purchasers or lessees” who sustain damages as a result of a defendant’s failure to comply with the Act. The regulations define a purchaser as “an entity that enters into an agreement to purchase an interest in target housing...”<sup>13</sup> A lessee is “any entity that enters into an agreement to lease, rent, or sublease target housing...”<sup>14</sup> Purchasers and lessees may be individuals, partnerships, corporations, trusts, government agencies, housing agencies, Indian tribes, and nonprofit organizations.<sup>15</sup>

Oral leases are not exempt from federal disclosure requirements.<sup>16</sup> Nevertheless, in an unpublished decision, a federal district court in New Hampshire limited recovery under the Act solely to the named leaseholder in the lease, despite plaintiffs having resided in the leased target housing for an extended period.<sup>17</sup> Practitioners should research state law in

their jurisdictions to determine how broadly “lessee” may be defined. The federal statute and regulations do not clarify what constitutes “an agreement to lease, rent, or sublease target housing.” Under state statutes or common law, an individual may qualify as a lessee under an oral lease or agreement.

### C. “Knowing” Violation

Sellers, lessors and agents can violate the Act in numerous ways. A violation, for example, can involve failure to give a lead information pamphlet or a failure to disclose known lead-based paint or lead-based paint hazards. The EPA’s enforcement policy lists specific violations that the EPA considers in determining penalties.<sup>18</sup>

The Act limits recovery of compensatory damages to “knowing” violations.<sup>19</sup> In *In Re American Rental Management Company* an administrative law judge relied on HUD’s civil money penalty regulations to determine the meaning of knowing. Those regulations define “knowing” as “having actual knowledge of or acting with deliberate ignorance of or reckless disregard for” the requirements of the Act.<sup>20</sup> The administrative law judge concluded that the defendants—who had sporadically complied with the Act’s requirements—showed “an inattentiveness that constitutes a reckless disregard for the requirements of the law.”<sup>21</sup>

In *Smith v. Coldwell Banker Real Estate Services* the court similarly rejected the proposition that the Act required plaintiffs to show evidence that the defendants had acted willfully or in bad faith.<sup>22</sup> The court found “no basis to elevate the *scienter* requirement where the statute clearly establishes treble damages shall be awarded when a per-

<sup>8</sup>42 U.S.C. § 4852d(b)(3).

<sup>9</sup>24 C.F.R. § 35.86.

<sup>10</sup>*Id.*

<sup>11</sup>*Id.*

<sup>12</sup>*Id.*

<sup>13</sup>*Id.*

<sup>14</sup>*Id.*

<sup>15</sup>*Id.*

<sup>16</sup>61 Fed. Reg. 9068 (March 6, 1996).

<sup>17</sup>*Gladysz v. Desmarais*, 2003 U.S. Dist. LEXIS 4252 (D.N.H. 2003).

<sup>18</sup>U.S. ENVIRONMENTAL PROTECTION AGENCY, SECTION 1018—DISCLOSURE RULE: ENFORCEMENT RESPONSE POLICY 12 (1999).

<sup>19</sup>42 U.S.C. § 4852(b)(3); 24 C.F.R. § 35.96(c); 42 C.F.R. § 745.118(c).

<sup>20</sup>*In Re American Rental Management Company*, HUD-ALJ 99-01-CMP (2000), at 12, citing 24 C.F.R. § 30.

<sup>21</sup>*Id.* See also Claude E. Walker, *The Lead-Based Paint Real Estate Notification and Disclosure Rule*, 8 BUFFALO ENVIRONMENTAL LAW JOURNAL 65 (2000).

<sup>22</sup>*Smith v. Coldwell Banker Real Estate Services*, 122 F. Supp. 2d 267, 273 (D. Conn. 1999).

**Table 1.—Potential Damages Under the Residential Lead-Based Paint Hazard Reduction Act**

Plaintiff	Property Involved	Potential Damages
Purchaser	Homeowner-occupied property	Purchase price; cost of lead-hazard remediation; financing costs; displacement or relocation costs; cost of new housing search; difference paid for new home; blood-screening costs
Purchaser	Rental property	Loss of rental income; cost of lead-hazard remediation; purchase price; financing costs
Lessee	Rental property	Rent paid; abatement of future rent; displacement or relocation costs; apartment application or “finder’s” fees; blood-screening costs

son knowingly violates the statute, without regard to their motivation or bad faith in doing so.”<sup>23</sup>

The *Smith* defendants also argued that verbal notice of the existence of lead-based paint and of a lead-based paint report “excused” them from liability for failing to comply fully with the Act.<sup>24</sup> The court, rejecting the defendants’ argument, stated that it was “unwilling to recognize such a defense absent any language in the statute or its regulations supporting a defense of ‘substantial compliance’ with the purpose of the statute.”<sup>25</sup> Although one unpublished state court decision held that partial compliance precluded a finding of a knowing violation, that decision is best seen as an anomaly.<sup>26</sup> Rather, to the extent that a court considers substantial compliance, it is best understood as a factor in determining how the lack of compliance contributed to plaintiff’s damages, not to excuse full compliance with the Act’s requirements.

#### D. Damages

In private enforcement actions under the Act, a person who knowingly violates the Act is “jointly and severally liable to the purchaser or lessee in an amount equal to three times the amount of damages incurred by such individual.”<sup>27</sup> This provision mandates trebling the damages if a plaintiff proves a knowing violation.<sup>28</sup> The Act allows a court to award court costs, reasonable attorney fees, and any expert witness fees to the party

commencing such action if that party prevails.<sup>29</sup> A defendant has no corresponding right to seek costs against a losing plaintiff.<sup>30</sup>

Damages in a private cause of action are difficult to calculate. Numerous variables contribute to the assessment of damages. These include the number of violations, the nature of the violations, and the effect of the violations upon the plaintiff. In their transactions with a violator, the two categories of plaintiffs—purchasers and lessees—each have differing expectations, such as purchase price versus monthly rent and cost of lead abatement versus moving costs. Table 1 offers general guidance as to what damages may be available under the Act.

Table 1 omits two possible damage claims: (1) damages associated with children who may have been lead-poisoned at the property and (2) extraordinary damages, such as mental anguish, stress, or suffering. An examination of damages associated with a lead-poisoned child in a personal injury claim is beyond the scope of this article. Whether extraordinary damages are available under the Act is not known.

#### II. Using the Act Defensively: Counterclaims in Eviction Proceedings

Attorneys in New York recently sought to enforce the Act through a counterclaim in eviction proceedings. In a case of first impression in New York City’s housing

<sup>23</sup>*Id.* at 273–74.

<sup>24</sup>*Id.* at 272.

<sup>25</sup>*Id.* at 272–73.

<sup>26</sup>*Nunez v. J.L. Sims Company*, 2003 WL 21473328 (Ohio Ct. App. 2001).

<sup>27</sup>42 U.S.C. § 4852d(b)(3).

<sup>28</sup>*Id.* See also *Smith*, 122 F. Supp. 2d at 273.

<sup>29</sup>42 U.S.C. § 4852d(b)(4).

<sup>30</sup>*Id.*

court, a tenant sought leave to amend her answer to assert a counterclaim for treble damages under the Act.<sup>31</sup> Seeking dismissal of the counterclaim, the landlord argued that only federal courts had jurisdiction over the claim because it invoked a federal statute regarding civil penalties and fines.<sup>32</sup> Rejecting that argument, the court held that the counterclaim for treble damages was “inextricably intertwined” with the eviction case and that the Act explicitly allowed private causes of action for damages. While not explicitly stating its reasoning, the court’s holding clearly implied that, because the private cause of action under the Act did not seek to enforce a penalty or fine but sought civil damages, the landlord’s jurisdictional argument was misplaced.<sup>33</sup> The case is under appeal and should be monitored for any change in disposition.

Not all states recognize counterclaims in eviction proceedings. For those that do, the compensatory damages provision under the Act may be a useful tool to overcome an eviction and to secure compensatory damages. Conversely, given the relative speed and informality that attends an eviction proceeding, practitioners should be careful about the effect of *res judicata*. A counterclaim for damages under the Act, even if not expressly resolved in the eviction proceeding, may operate to bar any later claim under the Act in a different forum.

### III. Injunctive Relief Under the Act

While the Act’s compensatory damages provision is generally straightforward, obtaining private injunctive relief is legally more complicated. With some notable exceptions, however, private injunctive relief under the Act can best be summed up as follows: what the EPA can do, most private plaintiffs can do.

EPA enforces the Act in part through the Act’s reference to the Toxic Substance Control Act: “It shall be a prohibited act under section 409 of the Toxic Substances Control Act (15 U.S.C. 2689) for any person to fail or refuse to comply

with a provision of this section or with any rule or order issued under this section.”<sup>34</sup>

Section 2689 of the Toxic Substance Control Act states that “[i]t shall be unlawful for any person to fail or refuse to comply with a provision of this subchapter or with any rule or order issued under this subchapter.”<sup>35</sup> The diagram at the end of this article illustrates the statutes’ interplay. When the two statutes are read together, the Residential Lead-Based Paint Hazard Reduction Act defines a violation of its provisions and rules as a corresponding “prohibited practice” under the Toxic Substance Control Act, thus triggering an important and significant enforcement provision of the latter act: the private citizen suit to enjoin violators from committing unlawful acts.

#### A. Toxic Substance Control Act Citizen Suits to Enjoin Lead-Hazard Disclosure Violations

The Toxic Substance Control Act’s citizen-suit provision states, in part, that “any person may commence a civil action ... against any person ... who is alleged to be in violation of this chapter ... to restrain such violation....”<sup>36</sup> At least one federal court has noted the right of a private citizen to seek injunctive relief through the Toxic Substance Control Act for violations of the statutory provisions and rules of the lead hazard disclosure law.<sup>37</sup> While the court in *Sipes ex rel. Slaughter v. Russell* rejected the plaintiff’s claim that the Toxic Substance Control Act allowed for compensatory damages, the court did not question that it allowed a private party to seek injunctive relief against a violator of the lead hazard disclosure law.<sup>38</sup>

The Toxic Substance Control Act’s citizen-suit provision places limits on the use of private citizen suits, most notably in requiring private plaintiffs to notify the EPA of intent to sue before bringing suit.<sup>39</sup> The act further provides that a private citizen may not bring suit if the EPA or the U.S. attorney is already “diligently prosecuting” a violator under the Toxic Substance Control Act.<sup>40</sup> Nevertheless, if the EPA or the U.S.

<sup>31</sup>*Graham Court Owners Corporation v. Powell*, 196 Misc. 2d 825, 766 N.Y.S.2d 760 (N.Y. Civ. Ct. 2003).

<sup>32</sup>*Id.* at 763.

<sup>33</sup>*Id.* at 763–64.

<sup>34</sup>42 U.S.C. § 4852(b)(5).

<sup>35</sup>15 U.S.C. § 2689 (2004).

<sup>36</sup>*Id.* § 2619(a)(1).

<sup>37</sup>*Sipes ex rel. Slaughter v. Russell*, 89 F. Supp. 2d 1199 (D. Kan. 2000).

<sup>38</sup>*Id.* at 1204–5.

<sup>39</sup> 15 U.S.C. § 2619(b)(1)(A).

<sup>40</sup>*Id.* § 2619(b)(1)(B).

attorney commences an action after a private citizen gives the requisite sixty-day notice, that private citizen may intervene in the action as a matter of right.<sup>41</sup>

**B. Scope of the Injunction**

Restraining a violation of the lead hazard disclosure rule may appear limited—after all, a court simply would order that the violator comply with the Act. This is an unduly limited perspective on the power of equitable relief and also ignores the potentially powerful combination of a dual claim for damages and injunctive relief. Courts have inherent equitable power to order broad relief in Residential Lead-Based Paint Hazard Reduction Act cases. The EPA's enforcement policy notes that the U.S. Department of Justice may ask the court to use its general equity powers to compel a violator of the disclosure rule to abate the lead-based paint or lead-based-paint hazard in the target housing.<sup>42</sup> A federal court may have, one commentator noted, the authority to compel abatement under the Toxic Substance Control Act to protect the public interest.<sup>43</sup> In the same manner that broad equitable relief is available to the federal government in enforcing the Act, such relief is available to private parties in citizen-suit actions under the Toxic Substance Control Act.

A claim for injunctive relief, in combination with a claim for compensatory damages, may afford a party

complete relief with respect to the Act's requirements and may be an incentive for settling such claims with remedies that would not otherwise be available under the Act. Accordingly the private citizen-suit provision can be a powerful tool to address lead-based paint hazards in rental properties, in much the same way that the EPA and the Justice Department have used it to compel property owners to complete lead-hazard abatement at their properties. It also may be a mechanism for a community-based organization, particularly in communities that are disproportionately affected by lead-based paint hazards, to seek injunctive relief for violations of the Act, so long as the organization can satisfy constitutional requirements for legal standing.

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<sup>41</sup>*Id.*

<sup>42</sup>U.S. ENVIRONMENTAL PROTECTION AGENCY, *supra* note 18, at 8.

<sup>43</sup>Walker, *supra* note 21.

