



Private Civil Actions Under the Residential Lead-Based Paint Hazard Reduction Act of 1992

This guide provides an overview of the Residential Lead-Based Paint Hazard Reduction Act (“the Act” or “RLPHRA”) and its provisions for private causes of action for compensatory damages and, potentially, injunctive relief for violations of the Act. In addition to analyzing the Act’s private cause of action provisions, this guide contains sample pleadings, all of the relevant federal regulations, synopses of reported and unreported cases involving the Act’s private right of action provision, and additional tools for the practitioner and others who are interested in the Act.

I. Background

A. Requirements of the Residential Lead-Based Paint Hazard Reduction Act of 1992

In 1992, Congress passed the Residential Lead-Based Paint Hazard Reduction Act, setting into motion a requirement that property owners and their agents must, in addition to providing general information on lead-based paint hazards, disclose to lessees and purchasers the presence of any known lead-based paint and/or lead-based paint hazards on their property at the time of sale or lease of the property. Commonly known as the “Lead Hazard Disclosure Rule” – in reference to the set of rules that HUD and EPA implemented pursuant to the Act in 1996 – the Act has become an effective tool for EPA and HUD to compel property owners to disclose known lead-based paint hazards in so-called ‘target housing.’ Significantly, EPA and HUD have brought federal civil complaints against violators of the Act, obtaining consent decrees in which owners and property managers have agreed to complete significant lead abatement activities on their properties. In some limited cases, the EPA has also enforced the Act through criminal convictions against property owners or managers who have lied about their compliance with the Act.

The Act’s requirements are straightforward. For most residential properties constructed prior to 1978, sellers and lessors – and their agents – have five primary duties toward purchasers and lessees of target housing:

1. Provide a written Lead Warning Statement to the purchaser or lessee;
2. Disclose the presence of any known lead-based paint and/or lead-based paint hazards. Disclosure must also include giving the purchaser or lessee copies of all available reports or records concerning lead-based paint and/or lead-based paint hazards at the property.
3. Provide the purchaser or lessee an EPA-approved Lead Information Pamphlet;

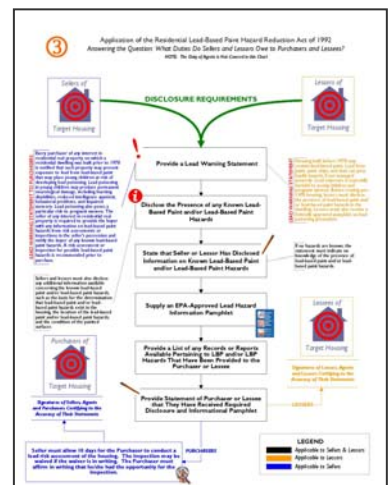


Figure 1. Flow chart demonstrating the interaction of various elements of the Act. See Tools.

4. Assure that purchaser or lessee have received the required disclosures and information pursuant to the Act: the purchaser or lessee must state affirmatively that disclosure has occurred; and
5. Obtain the signatures of the purchaser or lessee, acknowledging that they have received disclosure and the required information about lead-based paint and/or lead-based paint hazards.

In addition, purchasers of target housing have a right to conduct a risk assessment or inspection of the property before being obligated under a contract for purchase.

B. Enforcement of the Act

In the past five years, the federal government has aggressively enforced the Act through civil and criminal complaints against property owners, real estate agents, and property managers, seeking civil penalties and, in some cases, criminal sanctions against individuals and corporations that have failed to comply with the Act. Recently, HUD and the US Attorney's office in Minnesota announced two settlements involving two Minneapolis area landlords, in which the landlords agreed to test their properties for lead and abate all documented lead-based paint and lead-based paint hazards. The settlements affected nearly 4,000 apartment units in four states, resulting in an agreement by the landlords to provide more than \$1.25 million in abatement work.

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 against a person who violates the Act. Known as Section 1018(b)(3), the provision states that:

[a]ny person who knowingly violates the provisions of this section shall be jointly and severally liable to the purchaser or lessee in an amount equal to 3 times the amount of damages incurred by such individual.

42 U.S.C. § 4852d(b)(3). The Act further provides that a prevailing party in a private civil action may recover his or her attorney fees, costs, and witness fees. 42 U.S.C. § 4852d(b)(4).

In addition to the right to bring a civil action for compensatory damages, the Act allows, through its reference to the Toxic Substance Control Act, a private party to seek injunctive relief against anyone who violates the Act.

Ultimately, the Act's private right of action provision is an underutilized but powerful tool to assist in enforcing the disclosure requirements of the law and may be a method to compel property owners to remediate their properties. As one federal district court judge has noted:

Private enforcement of the lead paint disclosure requirements does not supplant or replace public enforcement by the federal government, but rather provides an additional remedy, thereby increasing the likelihood that the violator is discovered and such illegal conduct is discouraged.

While the automatic trebling of the plaintiff's actual damages incurred as a result of violating this federal statute certainly may serve some deterrent or disgorgement function, it also serves as an important incentive to those directly injured by the violation to seek compensation for their injury as well as their effort in enforcing the law.

Smith v. Coldwell Banker Real Estate Services, 122 F.Supp.2d 267 (D.Conn. 1999).

II. Seeking Compensatory Damages Under the Act

A. The 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 of the Act
- involving a purchaser or lessee; and
- the purchaser or lessee sustains damages



Figure 2. Elements of a compensatory damage claim under the Act.

Each of these elements is discussed in more detail below. As an initial matter, it is presumed that the property in question involves “target housing” that is not exempt from the Act. For more information about the Act’s definition of target housing and specific transactions that are exempted from the Act, see Figure 1 and its accompanying flow chart (*see also*, Tools).

1. Seller, lessor or agent

A civil action for damages can only be pursued against sellers and lessors and/or their agents. 42 U.S.C. § 4852d(b)(3). Sellers and lessors can be individuals, as well as partnerships, corporations, trusts, government agencies, housing agencies, Indian tribes, and nonprofit organizations. 24 C.F.R. § 35.86. The regulations further define a lessor as “any entity that offers target housing for lease, rent, or sublease.” *Id.* The regulations define the term seller to include “any entity that transfers legal title to target housing, in whole or in part, in return for consideration.” *Id.* Under this definition, the EPA and HUD do not consider a gift of target housing to be a transaction covered by the Act. *See* Interpretive Guidance for the Real Estate Community on the Requirements for Disclosure of Information Concerning Lead-Based Paint in Housing, Part II, December 5, 1996, at p. 2.

An agent under the Act is considered “any party who enters into a contract with a seller or lessor.” 24 C.F.R. § 35.86. By its terms, the Act does not apply to a buyer’s agent or broker. The implementing regulations nevertheless provide that the Act is applicable to “any party who enters into a contract with a *representative* of the seller or lessor, for the purpose of selling or leasing target housing,” which would presumably include agents involved in a cooperative broker agreement. In *Flowers vs. ERA Unique Real Estate*, 170 F.Supp.2d 840 (N.D. Ill. 2001), however, the U.S. District Court for the Northern District of Illinois rejected the plaintiff’s argument that the Act applied to a buyer’s agent who was involved in a cooperative brokerage agreement. The court in *Flowers* stated that the regulation that included cooperative brokerage transactions was inconsistent with the “clear statutory mandate . . . to impose responsibility to ensure compliance solely on the seller’s real estate agent and *not* on the buyer’s agent.” *Id.* at 843 (emphasis in original).

The court also rejected plaintiff's argument that the Act created an implied right of action against the buyer's agent. Accordingly, practitioners should review the parties' brokerage agreements carefully to determine how compensation is structured before considering whether to add a particular agent as a defendant.

2. *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. A purchaser is defined by the implementing regulations in part as "an entity that enters into an agreement to purchase an interest in target housing . . ." 24 C.F.R. 35.86. A lessee is defined as "any entity that enters into an agreement to lease, rent, or sublease target housing . . ." *Id.* Purchasers and lessees may be "individuals, partnerships, corporations, trusts, government agencies, housing agencies, Indian tribes, and nonprofit organizations." *Id.*

In an unpublished federal district court decision from New Hampshire, the court limited recovery under the Act solely to the named leaseholder on the lease, despite the plaintiffs having resided in the leased target housing for an extended period of time. See *Gladysyz v. Desmarais*, 2003 U.S. Dist. LEXIS 4252 (Dist. N.H. 2003). In *Gladysyz*, plaintiffs were a father and two minor children who resided in a three bedroom apartment in Manchester, New Hampshire. The father had resided in the apartment with his mother since 1991, though at all times only the mother was the named leaseholder. Plaintiff subsequently became the father of two minor children in 1997 and 1998, and the children also resided in the apartment. In 1999, the two minor children became lead poisoned allegedly through ingestion of lead-based paint in the apartment. The decision does not mention how plaintiffs alleged specific violations of the Act.

Defendant, the trustee-owner of the property, sought dismissal of the RLPHRA claim, arguing that plaintiffs were not "lessees or purchasers" within the meaning of the Act. The court agreed, ruling that the plain language of the statute limited damage claims only to 'purchasers and lessees' and that the plaintiff and his two children were not lessees.

Significantly, the plaintiff's attorney in *Gladysyz* appeared to concede that the father and the minor children were not lessees, and did not provide argument with respect to the father's or children's privity of contract or status as lessees under any oral lease or understanding. Instead, plaintiff requested that the court merely interpret the statute broadly to include plaintiffs as a protected group.

Practitioners are advised to research state law in their jurisdictions to determine how broadly "tenant" is defined. While the federal regulations and the statute define a lessee in part as a person who "enters into an agreement to lease, rent, or sublease target housing," the regulations do not provide additional context to such agreements. Under state statutes and/or common law holdings, a tenant/lessee may hold leasehold rights under an oral lease or agreement. In implementing the federal regulations, HUD and

EPA first considered exempting oral leases from the Act's provisions, but reversed their initial decision after receiving public comment:

EPA and HUD have removed any implied exclusion for oral leases. In deciding not to exclude such leases, EPA and HUD drew heavily upon the public comments. Many of these comments suggested that the absence of a written lease may not have bearing on the "formality" of the housing arrangement. Commenters noted that oral leases make up a significant portion of the housing arrangements in certain areas, especially those that lack rental housing codes. Further, although the absence of a written lease provides challenges for certain Federal enforcement and compliance monitoring approaches, EPA and HUD now believe that enforcement is possible. Other evidence may exist, for example, to demonstrate that a leasing agreement exists between two parties. Congress also provided lessees with opportunities for redress under its civil penalty provisions at section 1018(b)(3). These safeguards are not dependent upon Agency actions and therefore should not be constrained by EPA and HUD limitations.

Federal Register, Vol. 61 No. 45, p. 9068 (March 6, 1996).

At a minimum, the question as to whether an individual is a "lessee" under the Act is fact-dependent, which in most cases will preclude summary judgment. Facts to consider in determining whether an individual is also a lessee include: the lessor's knowledge of the individual residing in the property; the lessor's acceptance of rent from the individual; the lessor's inclusion of the individual in notices provided to lessees in the dwelling; the lessor's general interactions with the individual; and/or any oral or written acknowledgment of the individual as residing in the property as an authorized tenant.

3. "Knowing" Violation

Determining what constitutes a violation under the Act is relatively straightforward and is best determined by consulting Figure 1 and its accompanying flow chart. Given the requirements of the Act and the ways a seller, lessor, or agent could violate the Act, there are a number of possibilities in finding a violation. A violation, for example, could involve failure to provide a lead information pamphlet, or it could involve a failure to disclose known lead-based paint or lead-based paint hazards. For a list of specific violations that the EPA considers in determining penalties for sellers, lessors and agents, see the EPA's Enforcement Response Policy, online at:

www.epa.gov/compliance/resources/policies/civil/tsca/lead.pdf

a. Full vs. 'Substantial Compliance'

At least two courts have considered whether 'substantial compliance' negates a finding of a knowing violation and is sufficient to avoid imposition of liability under the Act. In

the unpublished state court case of *Nunez v. J.L. Sims Co.*, 2003 WESTLAW 21473328

(Ohio Ct. App. 2001), an Ohio Court of Appeals panel determined that the defendants' providing of some lead-based paint information, along with a lead warning statement and plaintiff's acknowledgement of receipt of the information, constituted 'substantial compliance' with the Act and negated any finding of a knowing violation. Importantly, the court also noted that neither the sellers nor the agents knew of any lead-based paint or lead-based paint hazards at the subject property.¹

Practitioner's Note—Advocates considering a claim under the Act should approach the *Nunez* decision as an unpublished state court decision with little or no precedential value. As the court in the earlier *Smith* case notes, the Act does not provide for a defense of "substantial compliance." To the extent that a court considers substantial compliance in the context of a claim, it should only be considered in connection with assessing plaintiff's damages.

In *Smith v. Coldwell Banker Real Estate Services*, 122 F.Supp.2d 267 (D.Conn. 2000), the defendant agents argued that they had "substantially complied" with the Act by completing most of the requirements under the act, and had also allegedly provided verbal notice of lead-based paint and a lead-based paint report. The court succinctly rejected such a compliance standard, stating 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." *Id.* at 272-273.

b. Demonstrating a 'Knowing Violation'

The Act limits recovery of compensatory damages to "knowing" violations. With few reported court decisions involving the Act, the definition of "knowing" has not been fully developed. Nevertheless, consulting the implementing regulations – as well as

Practitioner's Note—Both the EPA and HUD may seek civil and criminal penalties against sellers, lessors, and agents who violate the Act. Curiously, the Act requires only HUD to demonstrate that an offending party committed a knowing violation. The EPA, on the other hand, enforces the Act through Section 409 of the Toxic Substances Control Act (TSCA), 15 U.S.C. § 2689, which is considered a strict liability statute. Accordingly, EPA need only show that a party violated the Act to obtain relief. There is no requirement that EPA also show that a defendant 'knowingly violated' the Act.

reviewing a federal district court case that discusses this element in detail – provides general working knowledge of what to consider in determining if a defendant has committed a knowing violation that provides a basis for a claim for compensatory damages.

Separate HUD regulations have assisted the agency and at least one administrative law

judge in determining what is a knowing violation. In *In Re American Rental Management Co.*, HUD-ALJ 99-01-CMP: May 26, 2000 ("the ARMC case") a HUD administrative law judge rejected a property management firm's argument that it had not 'knowingly' violated the act. The HUD ALJ instead relied on HUD's civil money regulations, 24 C.F.R. § 30, which defines knowing and knowingly as "having actual knowledge of or

¹ Two of the judges on the *Nunez* court's panel were involved in a subsequent appellate case in which the court badly misstated the federal law and its application to target housing. In *Steadman v. Nelson*, 800 N.E.2d 775 (Ohio App. Ct. 2003), judges Doan and Painter—who were two of the three judges in *Nunez*—joined an opinion that incorrectly found that the Act only applied to "public housing," and further confused plaintiff's claim under the Act with an entirely different federal Lead Poisoning Prevention Act, codified at 42 U.S.C. § 4822. See *Steadman*, 800 N.E.2d at 778-779.

acting with deliberate ignorance of or reckless prohibition” of the requirements of the Act. ARMC at 12. The ALJ concluded that:

The large number of violations over a significant period belies the argument that the violations were the result of mere mistake or inadvertence. The record shows an inattentiveness that constitutes a reckless disregard for the requirements of the law.

Id. See also, Walker, Claude E., The Lead-Based Paint Real Estate Notification and Disclosure Rule, BUFFALO ENVIRONMENTAL LAW JOURNAL, Fall 2000.

The court in *Smith v. Coldwell Banker* also adopted a definition of “knowingly” that relied on the commonly understood meaning of the term. In *Smith*, defendants argued that the Act required plaintiffs to show evidence of the defendants’ intent to violate the Act, in that plaintiffs must show that defendants acted willfully or in bad faith. *Smith*, 122 F.Supp.2d at 273. The court rejected this argument and instead relied upon a common legal definition, which is “commonly used and interpreted [to] mean[] that defendant was aware of his or her conduct and that defendant did not perform it merely through ignorance, mistake or accident.” *Id.*, citing BLACK’S LAW DICTIONARY 872 (6th ed. 1990). The court further supported its decision by examining the statutory scheme under which damages are imposed upon a knowing violation of the Act. Importantly, the court noted that the treble damages provision in Section 1018(b)(3) – 42 U.S.C. § 4852d(b)(3) – was nondiscretionary and mandated that damages be trebled upon finding of a knowing violation of the Act. *Id.* This, the court reasoned, distinguished it from punitive damages provisions that allowed discretion to juries or courts to impose additional damages upon a party by showing a parties’ evil motive or intent, or that parties’ reckless or callous disregard of the other parties’ rights. The court finally concluded that it sees “no basis to elevate the *scienter* requirement where the statute clearly establishes treble damages shall be awarded when a person knowingly violates the statute, without regard to their motivation or bad faith in doing so.” *Id.* at 273-274.

4. Compensatory Damages

The Act’s private cause of action provision provides in part that a person who knowingly violates the Act “shall be jointly and severally liable to the purchaser or lessee in an amount equal to 3 times the amount of damages incurred by such individual.” 42 U.S.C. § 4852d(b)(3). The Act also allows a court to “award court costs to the party commencing such action, together with reasonable attorney fees and any expert witness fees, if that party prevails.” 42 U.S.C. § 4852d(b)(4). Unlike some statutory attorney fees provisions, section 4852d(b)(4) does not provide a corresponding right of a defendant to seek attorney fees and costs against a plaintiff who fails to prevail in a claim under the Act. Rather, it allows recovery of attorney fees, costs, and witness fees only to the “party commencing such action.” *Id.*

B. Determining Damages

1. Compensatory Damages

Damages in a private cause of action under the Act are perhaps the most difficult to predict or determine. The variables contributing to the assessment of damages are potentially numerous, including the number of violations, the nature of the violations, and the effect of the violations upon the plaintiff. In addition, the two categories of plaintiffs – purchasers and lessees – each have differing expectations in their transactions with a lessor or seller, such as purchase price vs. monthly rent, cost of lead abatement vs. cost of displacement, and even loss of potential rental income in the case of a purchaser who bought a residential apartment building without receiving full disclosure under the Act. Because of the wide range of potential damages, it is best to provide general guidance as to what damages may be available under the Act, as the following table illustrates.

Plaintiff	Property Involved	Potential Damages
<i>Purchaser</i>	<i>Homeowner-Occupied Property</i>	<i>Purchase price; cost of lead-hazard remediation; financing costs; displacement or relocation costs; cost of new housing search; differential paid to new home; blood screening costs</i>
<i>Purchaser</i>	<i>Rental Property</i>	<i>Loss of rental income; cost of lead-hazard remediation; purchase price; financing costs</i>
<i>Lessee</i>	<i>Rental Property</i>	<i>Rent paid; abatement of future rent; displacement or relocation costs; apartment application or 'finder's' fees; blood screening costs</i>

It is important to note that two possible damage claims have not been included in this table: (1) damages associated with children who may have become lead poisoned at the property; and (2) extraordinary damages, such as mental anguish, stress, and/or suffering. Whether extraordinary damages are available under the Act is not known. With respect to damages associated with a child's lead poisoning, it is strongly recommended that the practitioner pursue a personal injury action. In such a personal injury action, however, the practitioner should include a claim for compensatory damages for failure to comply with the Act, in addition to the claim for personal injury.

2. Treble Damages

The treble damages provision under the Act contemplates an *automatic* trebling of damages if a plaintiff proves a knowing violation of the Act. It does not contemplate discretion on the part of the court in determining whether damages should or should not be trebled. As the court stated in *Smith v. Coldwell Banker Real Estate Services*, 122 F.Supp.2d 267 (D.Conn. 2000):

There is nothing discretionary about the trebling of actual damages upon proof of knowing violation of the statute. Such treble damage award under § 4852d is thus distinguished from punitive damages that may be awarded by a jury in a § 1983 case when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others

Id. at 273.

III. Using the Act Defensively: Counterclaims in Eviction Proceedings

At least two jurisdictions have sought to enforce the Act through counterclaims in eviction proceedings. In a case of first impression in New York City's Housing Court, a tenant sought leave to amend her answer to assert two counterclaims, one of which asserted a claim for treble damages under the Act. *Graham Court Owners Corp. v. Powell*, 196 Misc.2d 825, 766 N.Y.S.2d 760 (NY Civ. Ct. 2003). Seeking dismissal of the RLPHRA counterclaim, the landlord argued that New York's Housing Court did not have jurisdiction over the claim. The landlord stated that the federal courts had original jurisdiction over the claim, in particular over "any action or proceeding for the recovery or enforcement of any fine, penalty, or forfeiture" 196 Misc.2d at 829 (quoting 28 U.S.C. § 1355(a)).

The court rejected the landlord's argument, holding 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 for the ruling, 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 instead – the landlord's citation of 28 U.S.C. § 1355(a) was misplaced. *Graham Court Owners Corp.*, however, is presently under appeal and should be monitored for any change in disposition.

In another case of first impression, attorneys in Indiana asserted a counterclaim in an eviction proceeding, asserting that the tenant was entitled to treble damages for violations of the Act. See [Tools, Indiana Counterclaim Case](#). The parties reached an out-of-court settlement.

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 eviction and obtain 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 raised in an eviction proceeding but not expressly resolved, may operate to bar any later claim brought under the Act in a different forum.

IV. Statute of Limitations Issues in RLPHRA Compensatory Damages Claims

The Act contains no explicit statute of limitation that provides a time period in which to bring a claim for compensatory damages pursuant to section 1018(b)(5). Generally, when citizen suit provisions in environmental statutes do not contain explicit statutes of limitations, courts must determine whether an analogous federal or state statute of limitation applies. In several citizen suits brought under the Clean Water Act (CWA) and the Resource Conservation and Recovery Act (RCRA) (neither of which has an express statute of limitation), courts have applied the five-year statute of limitations from 28 USCA § 2462, a statute of limitation provision for commencing suits that involve a civil fine. Accordingly, it is possible that a court may apply section 2462 to a private action under the Act.

Both RCRA and the CWA, however, differ significantly from the RLPHRA in available remedies. While money damages are not available to citizens suing under RCRA and the CWA, purchasers and lessees can seek treble damages under the RLPHRA. In applying the five-year statute of limitation provision of 28 USCA § 2462, courts in the RCRA and CWA cases noted that private compensatory damages were not available under the statutes. Accordingly, while the CWA and RCRA cases shed some light on this issue, courts may reach a different decision with regard to the application of a statute of limitation to compensatory damage claims under the Act.

Practitioners are strongly advised to research the law in their own jurisdictions to determine if a particular state statute of limitation could be interpreted to apply to a claim for compensatory damages under the Act. Moreover, practitioners should consider applying the five year statute of limitations at 28 USCA § 2462, or be prepared to argue that, because there is no express statute of limitations, only the equitable doctrine of laches applies. Ultimately, the best practice is to avoid any statute of limitation issue by acting diligently to protect a client's interest.

V. Injunctive Relief Under the Act

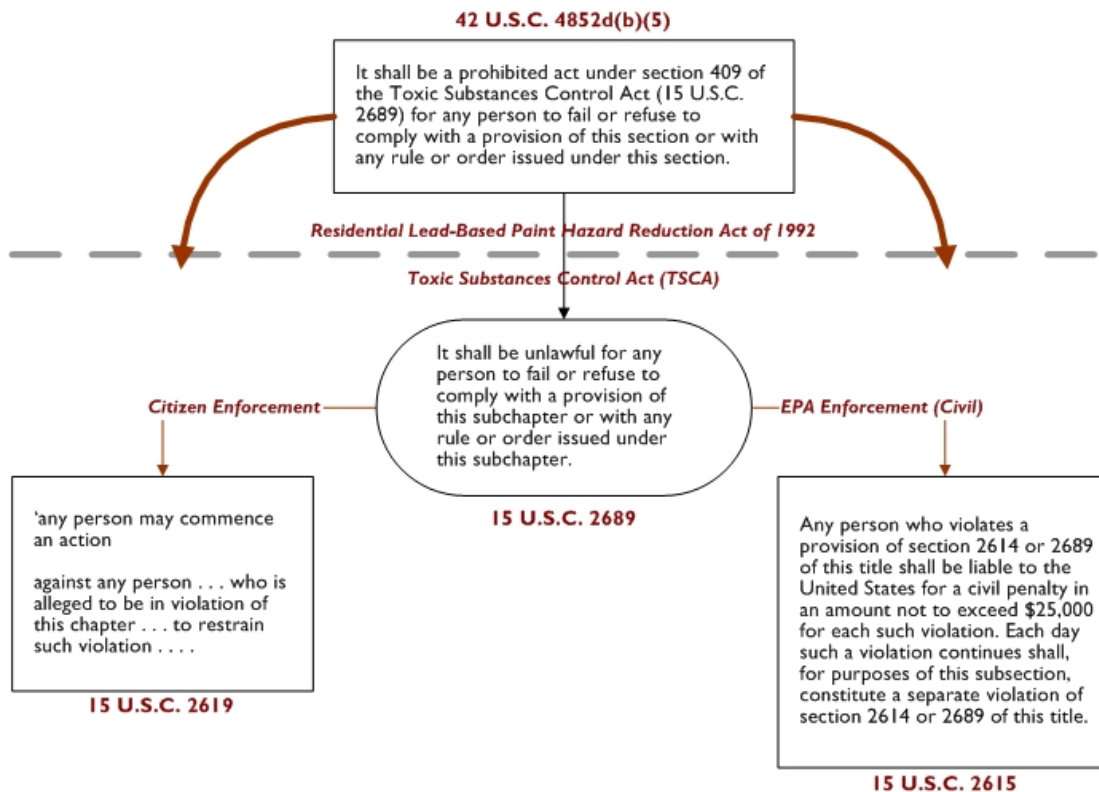
A. Background and Statutory Framework

While seeking compensatory damages under the Act is a well-recognized legal right, obtaining private injunctive relief is legally more complicated and requires careful legislative analysis to support the availability of such relief.

Section 4852d(b)(5) defines additional legal action that may be sought against sellers, lessors and agents who violate the Act. Section 4852d(b)(5) provides:

Prohibited 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. For purposes of enforcing this section under the Toxic Substances Control Act (15 U.S.C. 2601 et seq.), the penalty for each violation applicable under section 16 of that Act (15 U.S.C. 2615) shall not be more than \$10,000.²

Section 2689 of TSCA – also known as Section 409 in reference to its original legislative codification – provides 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.” 15 U.S.C. § 2689 (2004). A graphic illustration of the interplay between the



two statutes demonstrates how the statutes complement each other:

Reading the two statutes together, the RLPHRA simultaneously defines a violation of its provisions and rules as a corresponding ‘prohibited practice’ and violation of TSCA, thus triggering an important and significant TSCA enforcement provision: the private citizen suit to enjoin violators from committing unlawful acts. While one federal district court has noted the ability of an individual to seek injunctive relief through TSCA, no courts have yet to entertain the potential for organizations or membership-based associations to similarly seek injunctive relief against violators. The availability of TSCA’s citizen suit provisions will allow such actions under certain constraints.

B. TSCA Citizen Suits to Enjoin Lead-Hazard Disclosure Violations

TSCA section 2615 currently provides the statutory authority for the EPA to bring civil actions to enforce violations of the RLPHRA lead-hazard disclosure provisions. 42 U.S.C. § 2615. As the previous chart shows, EPA obtains its statutory authority through section 4852d(b)(5) of the RLPHRA – and its corresponding link to TSCA – allowing the EPA to seek and enforce administrative, civil, and criminal actions against violators. *See, e.g., Complaint, United States v. Robert Zeman*, ¶¶ 14-15 (setting out authority of the United States in seeking injunctive relief under the Act).

Subdivision 4852d(b)(5) of the Act does not limit its force and authority to EPA-initiated proceedings. Indeed, at least one federal court has noted the right of a private citizen to seek injunctive relief through TSCA for violations of the statutory provisions and rules of the lead hazard disclosure rule. In *Sipes ex. rel Slaughter v. Russell*, 89 F.Supp.2d 1199 (Kan. 2000), the court rejected the plaintiff’s claim that the Act – through TSCA – allowed for compensatory damages. Nevertheless, the court did not question that TSCA allows a private party to seek injunctive relief, even through the RLPHRA. While compensatory damages are unavailable under TSCA’s framework, its interplay with the RLPHRA – most notable through its use by the EPA – gives private citizens the authority the bring claims for injunctive relief.

TSCA’s citizen suit provision is in section 20 of TSCA (15 U.S.C. § 2619). It provides in part that:

. . . any person may commence a civil action–

- (1) against any person . . . who is alleged to be in violation of this chapter or any rule promulgated under section 2603, 2604, or 2605 of this title, or subchapter II or IV of this chapter, or order issued under section 2604 of this title or subchapter II or IV of this chapter to restrain such violation

15 U.S.C. § 2619(a)(1).

² In 1997, the EPA provided for an inflationary adjustment of the civil penalties from \$10,000 to \$11,000 for each violation. *See* 40 CFR Part 745 (June 27, 1997).

Section 2619(b) provides further constraints on the use of private citizen suits, most notably in requiring private plaintiffs to notify the EPA of the intent to sue under TSCA before bringing suit. Section 2619(b) provides in part that:

No civil action may be commenced –

(1) under subsection (a)(1) of this section to restrain a violation of this chapter or rule or order under this chapter –

(A) before the expiration of 60 days after the plaintiff has given notice of such violation (i) to the Administrator, and (ii) to the person who is alleged to have committed such violation, or

15 U.S.C. § 2619(b)(1)(A). Subdivision 2619 further provides that no private citizen suit may be brought if the EPA or US Attorney is already diligently prosecuting a violator for violations under TSCA. 15 U.S.C. § 2619(b)(1)(B). Nevertheless, if the EPA or the US Attorney commences an action after a private citizen provides the requisite 60 day notice under TSCA, that private citizen may intervene in the action “as a matter of right.” *Id.*

C. *Injunctive Relief Available*

As the TSCA citizen suit provisions provide, a person may restrain the violation of any prohibited practice under TSCA, which includes violations of the RLPHRA. Restraining a violation in the context of the lead hazard disclosure rule may appear limited – after all, a court will order that the violator comply with the Act’s requirements. Such a narrow view, however, takes 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.

As noted by the EPA and at least one commentator, courts have inherent equitable power to order broad relief in RLPHRA cases. In the EPA’s Section 1018 Enforcement Response Policy, the EPA notes:

The EPA may obtain injunctive relief by enlisting the legal support of the U.S. Department of Justice (“DOJ”). DOJ may make an application for injunctive relief in U.S. district court under TSCA Section 17(a) to direct a violator to comply with the Disclosure Rule. In addition to requesting such relief, DOJ may also request on EPA’s behalf that the court use its general equity powers to compel a violator of the Disclosure Rule to abate the lead-based paint and/or lead-based-paint hazard in the target housing.

U.S. Environmental Protection Agency, Section 1018 – Disclosure Rule Enforcement Response Policy, December 1999, p. 8. One commentator has also noted that:

A federal court may have the authority to compel a seller or lessor to abate lead-based paint under the TSCA to protect the public interest. . . . Congress granted federal courts jurisdiction over civil actions to restrain any violation of TSCA § 409. Consequently, EPA may seek injunctive relief in a federal court for a violation of the Disclosure Rule. In granting such relief, a court in equity may direct a violator to take certain action to protect the public health, such as abatement.

For example, if EPA seeks injunctive relief against a landlord who repeatedly violated the Disclosure Rule, and young children residing on the landlord's property are suffering from the effects of lead poisoning . . . a federal district court may be well within its powers to compel the landlord to comply with the Disclosure Rule and pay for abatement to eliminate this public interest.

Walker, Claude E., *The Lead-Based Paint Real Estate Notification and Disclosure Rule*, BUFFALO ENVIRONMENTAL LAW JOURNAL, Fall 2000 (citations omitted).

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 also provide a powerful incentive for settling such claims with remedies that would not otherwise be available under the Act. Importantly, it may also provide a mechanism for a community-based organization to seek injunctive relief for violations of the Act, so long as the organization can satisfy constitutional requirements for legal standing. 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 DOJ have used it to compel property owners to complete lead-hazard abatement activities at their properties.

D. Complying with Preliminary Requirements to Bring Private Injunctive Relief

1. Standing

While TSCA states that 'any person' may commence an action, the U.S. Constitution limits federal courts to consider only present 'cases and controversies.' U.S. Const. Art. III, § 2; *Vermont Right to Life Committee, Inc. v. Sorrell*, 221 F.3d 376, 381 (2d Cir. 2000). A central component of this constitutional limitation is the maxim that plaintiffs must have legal standing to bring suit. *Allen v. Wright*, 468 U.S. 737, 750, 104 S.Ct. 3315 (1984).

A thorough discussion of the concept of legal standing is beyond the scope of this guide. Nevertheless, a brief overview of standing and its relevance to TSCA's private citizen suit provision is necessary to understand the potential to seek injunctive relief through a citizen suit.

a. Individual Standing

An individual plaintiff establishes Article III standing to sue by fulfilling three requirements:

- (1) the plaintiff must have suffered an ‘injury in fact’ that is concrete and particularized, and actual or imminent, as opposed to conjectural or hypothetical;
- (2) a causal connection must exist between the plaintiff's injury and the complained of conduct that makes the injury fairly traceable to the complained of conduct, as opposed to being the result of independent acts by a third party not before the court; and
- (3) it must be likely, as opposed to merely speculative, that the plaintiff's injury will be redressed by a favorable decision.

See Friends of the Earth v. Laidlaw Environmental Services, Inc., 528 U.S. 167, 181-83, 120 S.Ct. 693 (2000); *see also, Arbor Hill Concerned Citizens Neighborhood Assoc. v. Albany*, 250 F.Supp.2d 48 (N.D. NY 2003)(discussing standing with respect to TSCA citizen suit provision and organization’s lead-based paint hazard claims).

Thus, for example, an individual tenant whose landlord did not comply with the Act would generally have legal standing to bring a citizen suit for injunctive relief under TSCA. The conferring of legal standing, however, does not guarantee success in the overall action. Success for an individual tenant will depend on a number of factors, including the nature of the landlord’s failure to comply, whether the home has documented lead-based paint hazards, and/or whether and how the tenant has been specifically affected by lead-based paint and/or lead-based paint hazards.

b. Associational Standing

In *Sierra Club v. Morton*, 405 U.S. 727, 735, 92 S.Ct. 1361 (1972), the U.S. Supreme Court explained that “an organization whose members are *injured* may represent those members, but that an organization whose members alleged an *interest but no injury* was not adversely affected and thus could not have standing.” Associational standing requires an organizational plaintiff to meet three elements:

- (1) the association’s members would otherwise have standing to sue in their own, individual right;
- (2) the interest the association seeks to protect through the lawsuit is germane to its purpose; and
- (3) neither the claim asserted nor the relief requested requires participation in the lawsuit by the individual members of the association;

Hunt v. Washington State Apple Advertising Commission, 432 U.S. 333, 97 S.Ct. 2434 (1977).

In *Arbor Hill Concerned Citizens Neighborhood Assoc. v. Albany*, 250 F.Supp.2d 48 (N.D. NY 2003), the U.S. district court for the Northern District of New York held that an unincorporated neighborhood association did not have legal standing under TSCA to challenge the City of Albany's lead poisoning prevention activities, including the qualifications of lead abatement workers. Critical to the court's ruling was the fact that "not one of plaintiff's member's names is ever explicitly mentioned in the complaint as having [lead abatement] work done to his or her home, or as being specifically injured." *Arbor Hill Concerned Citizens*, 250 F.Supp.2d at 57. Rather, the court concluded, the association did not provide allegations of injury "to specific members of the organization" and thus did not meet the first prong of the *Hunt* test for standing. *Id.*

Significantly, the court in *Arbor Hill* further found that the association failed to meet the third prong of the *Hunt* test, in that individual members would need to participate in the lawsuit to afford relief to the association. The court recognized that the third prong of the *Hunt* test is "more readily satisfied when the association is seeking injunctive or declaratory relief." *Id.* at 58, citing *United Food & Commercial Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544, 546 (1996). The court nevertheless closely examined the association's claims and the relief requested, finding that the broad remedial relief that it sought "is inconsistent with the notion that the benefit of the litigation inures to the group as a whole, in that it focuses more on individual injuries that may have been suffered by individual members." *Arbor Hill Concerned Citizens* at 59.

c. Associational Standing and Injunctive Relief Under TSCA

An organizational action to obtain injunctive relief for violations of the Act is an available, overlooked, and extremely powerful tool for communities to use, particularly communities that are disproportionately impacted by lead-based paint hazards. While injunctive relief under the Act necessarily depends upon the finding of a violation of the Act, present enforcement of the Act depends entirely on HUD and/or EPA involvement. Accordingly, it is recommended that practitioners and community based organizations begin to look carefully at the possibility of injunctive relief as a means to compel disclosure. More significantly, threatened or actual litigation that seeks injunctive relief and/or compensatory damages could lead to settlements between private parties that could require lead-hazard abatement.

2. Compliance with Pre-Litigation Notice

TSCA section 2619 requires, prior to commencement of a citizen suit, that the plaintiff give notice to the EPA of the intent to sue. The statute requires that a private plaintiff provide at least 60 days notice of any alleged violation to the EPA, and to the person who is alleged to have committed such violation. 15 U.S.C. § 2619. The EPA has implemented regulations concerning such notice, which must contain the following:

- a. the specific provision of TSCA or of the rule or order under TSCA alleged to have been violated.
- b. the activity alleged to constitute a violation.
- c. the person or persons responsible for the alleged violation.

- d. the location of the alleged violation.
- e. the date or dates of the alleged violation as closely as the citizen is able to specify them.
- f. the full name, address, and telephone number of the citizen giving notice.
- g. the name, address, and telephone number of legal counsel, if any, representing the citizen giving the notice.

42 CFR § 702.62. The full regulation, including additional information as to whom notice is served, is set forth in the **Tools** section of this paper.

VI: Conclusion

The Act's provision for a private cause of action for compensatory damages is an underutilized though effective legal provision for legal practitioners, especially for pro bono attorneys interested in high-impact litigation as well as staff attorneys who often represent low-income tenants. Ultimately, a private right of action could be used to avoid an eviction, obtain damages for a client, and – through settlement or informal resolution of a claim – compel a property owner or landlord to remediate a property.

In combination with a claim for compensatory damages, a claim for injunctive relief may afford a party complete relief with respect to the Act's requirements, and may also provide a powerful incentive for settling such claims with remedies that would not otherwise be available under the Act. Importantly, it may also provide a mechanism for a community-based organization to seek injunctive relief for violations of the Act, so long as the organization can satisfy constitutional requirements for legal standing. 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 U.S. Department of Justice have compelled property owners to complete lead-hazard abatement activities at their properties.