



Listing and Synopses of Selected Private Cases Brought Under the Act

- *Graham Court Owners Corp. v. Powell*, 196 Misc.2d 825, 766 N.Y.S.2d 760 (NY Civil Ct. 2003)
- *Gladysz v. Desmarais*, 2003 U.S. Dist. LEXIS 4252 (U.S. Dist. NH 2003)
- *Sipes ex rel. Slaughter v. Russell*, 89 F.Supp.2d 1199 (Kan. 2000)
- *Sweet v. Sheahan*, 235 F.3d 80 (2d Cir. 2000)
- *Flowers v. ERA Unique Real Estate*, 170 F.Supp.2d 840 (N.D. Ill. 2001)
- *Smith v. Coldwell Banker Real Estate Services*, 122 F.Supp.2d 267 (D.Conn. 2000)

I. Graham Court Owners Corp. v. Powell

Citation: 196 Misc.2d 825, 766 N.Y.S.2d 760
Court: Civil Court of the City of New York
Date Decided: July 3, 2003
Status: The matter is currently on appeal

Precise Issue: Whether a tenant may amend an answer in an eviction proceeding to assert a counterclaim for compensatory damages and attorney fees for the landlord's failure to comply with the Act.

Damages Claimed: \$45,000, representing the trebling of all rent paid during tenancy.

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. Seeking dismissal of the disclosure counterclaim, the landlord argued that 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, 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.

2. *Gladysz v. Desmarais*

Citation: 2003 U.S. Dist. LEXIS 4252
Court: U.S. District Court for the District of New Hampshire
Date Decided: March 17, 2003
Status: Dismissed, Closed

Precise Issue: Whether plaintiff-father and two of the father's children, who resided in an apartment where the mother-grandmother was the sole named leaseholder, are "lessees" within the meaning of the Act.

Damages Claimed: Not noted

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 had alleged violations of the Act.

Defendant, the trustee-owner of the property, sought dismissal of the RLPBRA 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, plaintiff's attorney appeared to concede that the father and the minor children were not lessees, and did not make any arguments with respect to privity of contract. Instead, plaintiff requested that the court merely interpret the statute broadly to include plaintiffs as a protected group.

Finally, because the remaining claims were state law claims, the court declined to exercise federal supplemental jurisdiction over those claims and dismissed the state law claims without prejudice.

3. *Sipes ex rel. Slaughter v. Russell*

Citation: 89 F.Supp.2d 1199 (Kan. 2000)
Court: U.S. District Court for the District of Kansas
Date Decided: January 12, 2000
Status: Claims under the Act dismissed

Precise Issue: Whether a private cause of action under the Act arose on the date that EPA and HUD actually promulgated the Act's regulations or on the date that the Act set for the regulations to take effect.

Damages

Claimed: Not specifically stated, though damages claimed for personal injuries sustained as a result of lead poisoning

While the precise holding in *Sipes* is largely irrelevant to claims that have arisen more recently under the Act, the court's dictum in *Sipes* is significant. While the court agreed with the defendant that the compensatory damages provision of Section 4852d(b)(3) did not arise until the actual promulgation of the EPA and HUD regulations, it nevertheless discussed another important provision in the Act that allows private individuals to seek injunctive relief. As the court noted, the Act's reference to the Toxic Substances Control Act (TSCA) and its citizen's suit provision of section 2619 in turn created a right of a private party to seek injunctive relief pursuant to the Act. While the defendant in *Sipes* argued that the court had no jurisdiction to consider a claim under TSCA's section 2619, the court disagreed, stating:

The Court possesses jurisdiction pursuant to 15 U.S.C. § 2619, which states that 'a private party may commence a civil action against any person . . . who is alleged to be in violation of this [Act] or any rule promulgated under section 2603, 2604, or 2605 to restrain such violation.' Section 2619 only provides injunctive relief for private plaintiffs, however, not compensatory damages. . . . Because plaintiffs do not seek injunctive relief under this section, the Court does not address whether such a claim would survive.

Though in dictum, the court in *Sipes*—as well as the defendant—indicated that a private party had a right to bring injunctive relief under the Act. Indeed, the plain language of the Act and its reference to TSCA establish such a right.

4. *Sweet v. Sheahan*

Citation: 235 F.3d 80 (2d Cir. 2000)
Court: U.S. Court of Appeals for the Second Circuit
Date Decided: December 13, 2000

Precise Issue: As of what date did lessors become legally obligated to comply with the Act's requirements? Was it (1) October 28, 1995, the date the Act states the regulations would become effective; or (2) the date set forth by the EPA and HUD as the effective date of the regulations?

Damages Claimed: Not specifically stated

Sweet is a case in which the plaintiffs, a tenant-mother and an infant son who had become lead poisoned in a property leased to her by one of the defendants, brought action against numerous parties, claiming in part that her landlord had failed to comply with the Act by failing to disclose known lead-based paint hazards and failing to provide a lead information pamphlet. The issue in *Sweet* is nearly identical to the issue in *Sipes v. Russell*: i.e, when did the private cause of action provision under the Act first become effective and create a legal duty with respect to private parties? Plaintiffs argued that it was on the effective date set by statute (October 28, 1995), while defendants argued that it was the date finally set by EPA's and HUD's final regulations (either September 6, 1996, or December 6, 1996, depending on the type of residential structure involved)

Defendant-landlord argued that, because the EPA and HUD had engaged in "legislative rulemaking," the effective date of the Act should be the date set by those agencies in the implementing regulations. The court in *Sweet* agreed, stating first that the statute itself did not impose any legal obligations on private parties. 235 F.3d at 86. Rather, the implementing regulations, which the court held to be "legislative rulemaking" and entitled to substantial deference, created the obligation of private parties under the Act. *Id.*, at 91-92. Accordingly, because plaintiffs resided in the landlord's apartment prior to the effective date set by the regulations, the court dismissed their claims under the Act.

The court in *Sweet* did not, as the court in *Sipes* had done, discuss the potential for injunctive relief through the Act's link to the Toxic Substances Control Act (TSCA).

5. *Flowers v. ERA Unique Real Estate*

Citation: 170 F.Supp.2d 840 (N.D. Ill. 2001)
Court: U.S. District Court for the Northern District of Illinois
Date Decided: October 29, 2001
Status: Dismissal of claims under the Act against the buyer's agents

Precise Issue: Whether a buyer's real estate broker is obligated as an 'agent' under the act to in assuring compliance with the disclosure requirements of the Act.

Damages

Claimed: Return of purchase money, loss of rental income, reimbursement of lead abatement costs, reimbursement of attorney fees from a separate lawsuit brought by the City of Chicago against the buyer for housing code violations related to lead-based paint

Plaintiff Tonia Flowers was the buyer of an apartment building in Chicago in 1998. During the course of the real estate transactions, plaintiff alleged that her broker failed to ensure that the parties comply with the disclosure requirements of the Act and failed to advise her of the ten-day period in which to perform an inspection for lead-based paint hazards. She also brought claims against the sellers and the seller's agent, but this decision did not involve those claims. The court rejected plaintiff's argument to extend the protection of the Act and obligate the buyer's agent to ensure compliance with the Act. The court rejected plaintiff's argument that the implementing regulations imposed a duty on a buyer's agent if the agent received compensation through a cooperative brokerage agreement. 170 F.Supp.2d at 843 (citing 35 C.F.R. § 35.86, which states that the Act applies to "any party who enters into a contract with a representative of the seller or lessor."). The court stated that the particular regulation was inconsistent with the "clear statutory mandate under the subject Act . . . to impose responsibility to ensure compliance solely on the seller's real estate agent and *not* on the buyer's agent." *Id.* (emphasis in original). The court also rejected plaintiff's argument that the Act created an implied right of action against a buyer's agent.

Note: A subsequent decision involving dismissal of plaintiff's state law claim of negligent misrepresentation is at 227 F.Supp.2d 998 (N.D. Ill. 2002)

6. *Smith v. Coldwell Banker Real Estate Services*

Citation: 122 F.Supp.2d 267 (D.Conn. 2000)
Court: U.S. District Court for the District of Connecticut
Date Decided: August 30, 2000
Status: Not presently known

Precise Issues:

1. Whether defendants violated the Act when they failed to provide purchasers with a copy of a lead paint report prior to closing of the sale;
2. Whether the defendants' failure to comply with the Act was excused when they informed purchaser of lead paint at property and of existence of lead paint report;
3. Whether the standard of a 'knowing' violation required a showing of bad faith or willfulness;

Damages Claimed: Not specifically stated

Plaintiffs were a couple that purchased a home in Milford, Connecticut in 1997. Prior to sale of the property, defendant owners had obtained a lead paint report showing lead paint on the property, but had only informed their broker/agent of the report and did not actually supply a copy to the agent until approximately three weeks prior to the closing for the sale. The seller's agent verbally advised the purchasers of the lead paint and lead paint report and were provided a lead information pamphlet, but were not provided a copy of the report until the closing date and did not sign the lead paint disclosure form acknowledging receipt of the information required under the Act.

Stating that the issue of imposing civil liability on private parties was one of first impression for the court, the court first explored whether contractual language in the sales document precluded a suit for damages. Specifically, defendants argued that, under the sales contract, the purchasers did not become 'obligated' to purchase until such time as the parties provided a fully-executed disclosure form. Because the purchasers did not sign the disclosure form, defendants argued that the parties were not obligated under the contract and thus there was no violation of the Act's requirement that disclosure must occur "before the purchaser . . . is obligated under any contract to purchase . . . the housing" Rejecting this argument as "circular," the court held that "[s]uch contract language, if inserted by all sellers and their agents and held enforceable by the courts, would frustrate the purpose of the statute and lead to an evasion of the statute." *Smith*, 122 F.Supp.2d at 272.

With respect to defendants' argument that they "substantially complied" with the Act by completing most of the requirements under the act—including providing 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.

The court turned next to defendants' argument that the Act required that plaintiffs show evidence of the defendants' intent to violate the Act, in that plaintiffs must show that defendants acted willfully or in bad faith. *Id.* at 273. The court rejected this argument as well and instead

relied upon a common legal definition of “knowingly,” 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.

Finally, the court in *Smith* bolstered its reasoning by examining the overall enforcement scheme of the Act. The court noted that, in addition to the public enforcement of the Act through the EPA and HUD, the Act relied upon individuals as private attorneys general to enforce the lead paint disclosure requirements. The court stated:

Since the statute enlists purchasers and lessors as private attorneys general to enforce the lead paint disclosure requirements, it also rewards them for their time and effort by trebling their actual damages. 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, 122 F.Supp.2d at 274. Accordingly, the court in *Smith* adopted a commonly understood meaning as the standard to apply to determine whether a violation under the Act was “knowing,” and granted summary judgment against two of the agents who admitted they knew they should have disclosed the existence of lead paint hazards. *Id.* The court ultimately denied summary judgment against the sellers, determining that questions of fact existed to warrant a trial with respect to the sellers on the issue of their knowing violation of the Act.