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The Rogue Landlord: Tenants’ Recourse Against Self-Help for Damages Following a Residential Lease Termination

John N. Mansella, Esq.*

INTRODUCTION

The Rhode Island Residential Landlord Tenant Act¹ (the Act) proscribes the rights and obligations of landlords and tenants, while also serving an important consumer protection purpose. After termination of a residential lease, the Act specifies the rights and method by which a landlord may proceed against a former tenant on certain claims.² Some landlords may choose to “go rogue” and utilize self-help, not only for possession of the property (we have all heard the horror stories about locks being changed without a court order), but also for the amount that the landlord believes is owed in damages. “Going rogue” on damages means trying to collect the amount themselves or furnishing the alleged amount to a consumer reporting agency (CRA)³ or third-

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1. 34 R.I. GEN. LAWS §§ 34-18-1 to -57 (2017).

2. *Id.* § 34-18-43.

3. A “consumer reporting agency” is

any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other

party debt collector (TPDC). This Article takes the position that, following the termination of a residential lease, there is no set of facts under which a landlord may attempt to collect monies against the former tenant or furnish the alleged amount owed to a CRA, without facing potential causes of action from the tenant, unless the landlord first obtains a judgment in a court of competent jurisdiction.⁴

As the basis for this position, there are two sections of the

information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports.

15 U.S.C. § 1681a(f) (2012). A “consumer report” is

any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer’s credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer’s eligibility for—

(A) credit or insurance to be used primarily for personal, family, or household purposes;

(B) employment purposes; or

(C) any other purpose authorized under section 1681b of this title.

15 U.S.C. § 1681a(d)(1) (with certain exclusions).

In Rhode Island, a “Consumer Reporting Agency” is

any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties.

19 R.I. GEN. LAWS § 19-14.9-3(2) (2017). A “[d]ebt collector” is

any person who uses an instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another.

Id. § 19-14.9-3(5) (with certain enumerated exclusions that follow in the statute).

4. To the extent that any liability may attach to a TPDC, note that the Rhode Island Fair Debt Collection Practices Act contains an exception for debt collectors acting on behalf of a landlord. *See* § 19-14.9-1. However, this Article does not pertain to a “charge” or a “bill” for a sum-certain, making subsection (h) inapplicable, as further discussed herein. *See id.*

Rhode Island Residential Landlord Tenant Act⁵ which, read together, form both a sword and shield for the former tenant against careless or arbitrary debt collection attempts by a landlord or its agent. A landlord that attempts to collect upon an amount alleged to be due and owed following termination of the lease, without first obtaining a judgment, is engaging in reckless “self-help” for the recovery of damages.⁶ Similar to the prohibition on using self-help to regain possession of rented property (evictions without due process),⁷ likewise, self-help remedies are not available to the landlord here. The landlord—at a minimum—may expose him or herself to a negligence claim, in addition to other potential claims that may not otherwise be available to the former tenant absent these two sections of the Act. In this way, the Act is a tenant’s sword and shield against self-help actions by a landlord for recovery of damages that could cause *financial* or *economic* harm to the former tenant.

A negligence action in particular may seem to be far outside the realm of landlord-tenant law where recovery of damages is the only subject at issue and would appear to be the last cause of action one would contemplate in association with the Act. However, this Article demonstrates how a landlord’s self-help attempt to recover monies allegedly owed by a former tenant can easily meet the elements necessary for a negligence claim. This Article also shows that former landlords owe a “duty of care” to former tenants. No such claims discussed here, however, would be available to the former tenant if the landlord pursued the statutorily devised procedure in the Act to recover the landlord’s alleged damages after lease termination.⁸

There are, of course, other consumer debt or breach of contract actions that one tends to see on the court calendars in Rhode Island, such as medical provider or credit card debt, loans or other book accounts, where negligence would not be an available cause of action. First, note that this Article is not about a breach of contract action—an important distinction that will be discussed later. Second, it is not uncommon for alleged debts by

5. 34 R.I. GEN. LAWS §§ 34-18-5(a), -43 (2017).

6. *Id.* § 34-18-44, entitled “Self-help recovery of possession prohibited.”

7. *See id.* § 34-18-34.

8. *Id.* § 34-18-56 (emphasis added).

medical providers or credit lenders to be turned over to a TPDC or the amount furnished to a CRA. These alleged amounts can usually be substantiated by the book account or ledger. While other issues may arise in the consumer's defense of book account style debt collection actions, negligence would almost always be a "reach" because the initial threshold—establishing a financial "duty of care" from the creditor to the consumer—is nearly impossible. By contrast, this Article discusses how these two sections of the Act help a former tenant establish a duty of care for a negligence claim under Rhode Island common law, as well as other claims.

There is also a garden variety of breach of contract actions, such as the homeowner and kitchen remodeling contractor that may be unable to stop quarreling over whether money is indeed owed for that unsightly kitchen update with the pewter yellow counter tops that were supposed to be "indie green." This type of breach of contract action almost always involves issues of fact and law that cannot be determined with any mathematical certainty, which is why furnishing an amount to a CRA would be risky for the contractor. However, even if the contractor did furnish the alleged amount to a CRA, the contractor may bear liability under other law while, the homeowner, for example, would not necessarily have a state common law negligence claim against the contractor.

This Article is limited to a discussion of how self-help for recovery of damages after lease termination exposes a landlord to claims under at least two theories: one in common law, and the other statutory. Discussion of certain matters arising out of insolvency, such as bankruptcy or state receivership proceedings, are outside of the scope of this Article. However, the analysis presented herein should be considered by those with potential interest in applying this reasoning to claims filed in such proceedings by landlords or assignees of alleged debt owed to a landlord following a lease termination.

I. STARTING WITH THE BASICS: THE TWO SECTIONS OF THE ACT

The two sections of the Act at issue here are Rhode Island General Laws sections 34-18-43 and 34-18-5(a), which read as follows:

§ 34-18-43. Remedy after termination. If the rental agreement is terminated, the landlord has a *claim* for possession, for a *sum* for *reasonable use and occupation* subsequent to the termination, and for actual damages for breach of the rental agreement and reasonable attorney's fees.⁹

§ 34-18-5. Administration of remedies—Enforcement. (a) The remedies provided by this chapter shall be so administered that an aggrieved party may recover appropriate damages and injunctive relief, including temporary restraining orders, as set forth in § 34-18-6. *The aggrieved party has a duty to mitigate damages.*¹⁰

These two sections of the Act appear to require a procedure that must be followed by the landlord in the event that either party terminates a lease agreement, thereby removing this action from the standard breach of contract realm grounded in common law. The Legislature's specific word choice in these two sections is at the crux of this argument. The words "claim," "sum," "reasonable," and the phrase "use and occupation," all indicate that following termination of the lease, the landlord only has a *claim*, and never a sum-certain.¹¹ In other words, the Act does not describe how "sum" is to be computed so that the "sum" may be pursued by a landlord, or its debt collector, without granting potential causes of action to the former tenant.

Furthermore, the phrase "use and occupation," rather than "rent," is a critical distinction, and not mere semantics.¹² The Legislature's word choice further demonstrates that the landlord has only an unripened claim, and more accurately reflects the reality that various potential factual issues inevitably arise after

9. *Id.* § 34-18-43 (emphasis added).

10. *Id.* § 34-18-5(a) (emphasis added).

11. *See id.* § 34-18-23.

12. As acknowledged by the Rhode Island Supreme Court over a century ago, "the rentable value of the estate, as in an ordinary action for use and occupation, affords the fairest and most palpable test of the value of the use of the interest in it represented by the plaintiff." *Knowles v. Harris*, 5 R.I. 402, 404 (1858). Therefore, the phrase "use and occupation," rather than "rent," in the Act indicates a proactive decision for the particular wording to have significance.

the lease has been terminated. For example: does a landlord-tenant relationship still exist? If the tenant vacated, but the lease is still in effect, is the tenant still using and occupying the premises as defined in the statute? These are issues for a finder of fact. If the Legislature meant for a landlord to be able to claim a sum-certain and turn bills for unpaid rent directly over to a collection agency without court involvement, "rent" would have been the clearer word choice. "Use and occupation" encompasses factors beyond a simple "amount due" mathematical formula.

Next, the key word here, "reasonable," whether or not combined with the word "claim" in the same section, would require a fact-finder to determine the "sum" to which the statute refers.¹³ What is "reasonable" necessarily invokes the role of a fact-finder, as reasonableness may vary depending on the facts, circumstances, evidence, and the person(s) making the finding of fact. Finally, where the "aggrieved party" is the landlord, a myriad of questions may arise as to whether or not the landlord complied with mitigation efforts, creating innumerable factual issues and rendering a sum-certain for the debt impossible under any set of facts.¹⁴

Perhaps what is even more important about these two sections of the Act is the converse: what language is *not* included. For instance, title 34, section 18-24 of the Rhode Island General Laws does not say that, after termination, the landlord is owed the monthly *rent* at the rate of X dollars as found in the written or verbal lease to calculate the sum total due.¹⁵ It does not say that the landlord "may take possession" or "falls into possession following termination," but rather that the landlord has a *claim* for possession. Some final decision maker must ripen that claim into a judgment for or against possession, and for an amount that is either due or not due. In the absence of that judgment, all that exists is the landlord's claim for damages.

II. THE PUBLIC POLICY THRESHOLD

That these two sections exist gives former tenants a *prima facie* claim of negligence by being able to surmount the first

13. § 34-18-23.

14. *Id.* § 34-18-5(a).

15. *Id.* § 34-18-43.

element: duty of care. These two sections, taken together, unmistakably exist to protect a tenant by not only forcing a landlord to mitigate his or her damages, but also to mandate that the landlord's claim must ripen into a judgment in order for it to be enforceable, and to prevent self-help.¹⁶ Because these two sections exist primarily for a public policy benefit of a specific class of consumer—the former tenant—a landlord who engages in self-help for alleged debt recovery may be subject to a negligence action. For instance, the Rhode Island Supreme Court, for over seventy years, has held,

where there is the violation of an ordinance that prohibits the doing of a certain act or commands its performance and a person is injured by reason of the very commission or omission of such act, . . . the ordinance may be admitted in evidence and its violation proved as evidence of negligence. In *Oates v. Union Railroad Co.*, . . . this court says: “Although the violation of the statute or ordinance may not itself be a ground of action, yet if the violation of the duty imposed for the safety of the public is the *cause* of the injury evidence of the violation is prima facie evidence of negligence.”¹⁷

Although in *Sitko* the Court found no injury to the plaintiff that was the “natural and probable result of the defendant's negligence,”¹⁸ the Court's protocol of looking to an ordinance to find a basis for negligence was relied upon over fifty years later in *Sanchez v. Guy*¹⁹ and still remains good law today. In short, the existence of an express public policy bolsters a plaintiff's argument that a duty of care existed and was owed to the plaintiff.²⁰ An ordinance intended for the safety of the public, in other words, was part of the *Sitko* Court's basis for finding a duty of care.²¹ Therefore, whether in the form of an ordinance or statute, an express public policy directly aimed at the safety or

16. *Id.* §§ 34-18-5(a), -43.

17. *Sitko v. Jastrzebski*, 27 A.2d 178, 179 (R.I. 1942) (quoting *Oates v. Union R.R. Co.*, 63 A. 657, 677 (R.I. 1906)).

18. *Id.*

19. No. 01-0294, slip op. at 6 (R.I. Super. Nov. 23, 2004).

20. *Id.* at 7.

21. *Sitko*, 27 A.2d at 179.

protection of certain persons can be instrumental in establishing a *prima facie* claim under the Rhode Island Deceptive Trade Practices Act.²² However, without *any* public policy in existence, a former tenant would not necessarily have the opportunity to make out a *prima facie* case against the rogue self-help landlord for any cause of action that so requires an express public policy, in the form of statute, ordinance, or otherwise.

III. A USEFUL HYPOTHETICAL

To illustrate the points in this Article, it is useful here to assume a hypothetical situation where a tenant (let us call the hypothetical tenant Terri Tenant) terminates the residential lease prior to its expiration. At the time of termination, the landlord (our hypothetical landlord is Larry Landlord) has three months left in the lease where Terri Tenant was paying \$1,500 per month. Larry Landlord may assume he is entitled to \$4,500. Assume further that Larry Landlord places one online advertisement for the premises only days after the termination. The cost of the advertisement is \$100, and the advertisement runs for one week on a popular apartment rental website. However, Larry Landlord receives no serious inquiries and takes no further action.

The remaining three months go by and the apartment remains unoccupied. Larry Landlord receives no rent for these last three months of the lease. Near the end of the three months no one is in the apartment, and despite Larry Landlord keeping the heat on at, what he believes to be a sufficiently warm, fifty-seven degrees, a small pipe burst due to cold weather. Larry Landlord has to pay \$700 to repair the pipe. Larry Landlord then proceeds under the assumption that he is owed three months' rent for a total of \$4,500, plus \$100 for the advertisement, plus another \$700 for the pipe repair. Larry Landlord then takes the next step of either furnishing this information to a CRA or furnishing the amount to a debt collector. The debt collector may or may not furnish the information to a CRA.

Several months later, Terri Tenant applies for credit elsewhere and is informed that she has a collection account for an unpaid balance of \$5,300 to Larry Landlord (or Larry's third-party debt collector). She is denied credit, and thereby suffers financial

22. 6 R.I. GEN. LAWS §§ 6-13.1-1 to -29 (2017).

harm. Terri Tenant later obtains credit, but at a substantially higher interest rate and with fees that she would not have had to pay absent the alleged unpaid balance due to Larry Landlord. Terri Tenant then has difficulty obtaining a mortgage, and the mortgage lender requires a larger down payment than it otherwise would have required absent the collection account. Terri Tenant also applies for a job, but is denied as a result of a credit check that reflected the collection account. In this hypothetical, Larry Landlord was careless because he believed he was owed a sum-certain and never filed a civil action to recover his alleged claim for damages.

The thought turning in the reader's mind at this point is likely something along the lines of, "Why is this different than any other contract action? The landlord still can just sue the former tenant. What is the point?" Or, "Are there other statutes that give a consumer such claims in other areas of law?" Yes, of course. The point here is that certain sections of the Act exist specifically for the former tenant's protection.²³ That alone creates a basis for the former tenant to establish a negligence claim for the landlord's conduct, or potentially pursue a claim under other consumer protection theories. By contrast, in other common breach of contract scenarios, one party can file suit against the other to recover damages, whether the breach is based on a book account (e.g., a credit card issuer or medical provider), or upon some other area of contract law (e.g., the pewter yellow versus the indie green counter top fiasco). Certainly, the homeowner may file an action against the contractor for breach of contract based on the allegation that the contractor did not perform as agreed. Conversely, the contractor may file an action against the homeowner for failing to pay for the work. And similarly, a medical provider or credit card issuer may file a breach of contract action for non-payment of a book account.

However, because two sections within the Act *require* judgment, they effectively serve as a safety valve to protect the consumer.²⁴ In that sense, the two sections of the Act inherently form a consumer protection mechanism—not only in mandating procedural due process for recovery of post-lease termination

23. 34 R.I. GEN. LAWS §§ 34-18-5(a), -43 (2017).

24. *Id.*

damages—but also for the former tenant to have notice and an opportunity to be heard.²⁵ Thus, because the *statute* is in place to protect the consumer against collection activity or furnishing to a CRA without obtaining a judgment, the Legislature has, whether it intended to or not, created a public policy that protects the tenant. Of course, a landlord could attempt to secure a settlement without litigation; however, a settlement not reduced to a judgment would appear to fall short of satisfying the Act. For instance, the Act clearly contemplates the problem of unconscionable agreements between a landlord and tenant:

§ 34-18-13. Unconscionability.

(a) If the court, as a matter of law, finds:

(1) A rental agreement or any provision thereof was unconscionable when made, the court may refuse to enforce the agreement, enforce the remainder of the agreement without the unconscionable provision, or limit the application of any unconscionable provision to avoid an unconscionable result; or

(2) A settlement in which a party waives or agrees to forego a claim or right under this chapter or under a rental agreement was unconscionable when made, the court may refuse to enforce the settlement, enforce the remainder of the settlement without the unconscionable provisions, or limit the application of any unconscionable provision to avoid an unconscionable result.

(b) If unconscionability is put into issue by a party or by the court upon its own motion, the parties shall be afforded a reasonable opportunity to present evidence as to the setting, purpose and effect of the rental agreement or settlement to aid the court in making the determination.²⁶

If a landlord has already furnished the alleged amount and attempts to secure a settlement agreement, and release of claims thereafter, there is arguably a problem with unequal bargaining

25. *Id.*

26. *Id.* § 34-18-13.

power between the parties. Even where the landlord attempts to secure a settlement before furnishing, there is still potential for litigation over unconscionability, fraud, coercion, or even duress, given that it is expressly contemplated by the Act.²⁷ Even though the Act contemplates these problems mostly with rental agreements,²⁸ the disparity that exists between a landlord and former tenant could give rise to claims against the landlord in how the agreement was formed, or even whether it is enforceable. Therefore, the landlord's most prudent and safest course of action is to pursue a civil action against the former tenant. Any agreement reached should be presented to the Court for review and a determination as to whether it will be reduced to writing and entered as a judgment. Any other course of action constitutes self-help for damages, and the penumbras of the Act, as cited herein, arguably weighs against such conduct.²⁹

IV. A CAUSE OF ACTION IN NEGLIGENCE

A. *Sections 34-18-5(a) and 34-18-43 Create a Duty of Care to the Former Tenant*

A former tenant may be able to cross the threshold for the first element of a negligence claim, duty of care, if a landlord utilized self-help to recover damages. The duty of care analysis and standard of review, however, must be carefully scrutinized in order to potentially apply it to our hypothetical scenario. To begin, it is well settled that “[t]o properly set forth ‘a claim for negligence, a plaintiff must establish a legally cognizable duty owed by a defendant to a plaintiff, a breach of that duty, proximate causation between the conduct and the resulting injury, and the actual loss or damage.’”³⁰ However, a defendant cannot be held liable under any theory of negligence “unless the defendant owes a duty to the plaintiff.”³¹ Whether a legal duty exists, in any given case, is a question of law for the court.³² If

27. *See id.* §§ 34-18-3, -13.

28. *Id.* § 34-18-13.

29. *Id.* §§ 34-18-5, -13, -43.

30. *Brown v. Stanley*, 84 A.3d 1157, 1161–62 (R.I. 2014) (quoting *Mills v. State Sales, Inc.*, 824 A.2d 461, 467 (R.I. 2003)).

31. *Id.* at 1162.

32. *Willis v. Omar*, 954 A.2d 126, 129–30 (R.I. 2008) (citing *Martin v.*

the court concludes that no duty exists, “the trier of fact has nothing to consider and a motion for summary judgment must be granted.”³³ A legal duty is found on a case-by-case basis,³⁴ and a court will examine a number of relevant factors, which include: “the relationship of the parties, the scope and burden of the obligation to be imposed upon the defendant, public policy considerations, and notions of fairness.”³⁵

While there is no determinative rule in place, the Rhode Island Supreme Court has consistently applied a five-factor test when determining whether a duty of care exists in a particular case.³⁶ Those factors are:

- (1) the foreseeability of harm to the plaintiff, (2) the degree of certainty that the plaintiff suffered an injury, (3) the closeness of connection between the defendant’s conduct and the injury suffered, (4) the policy of preventing future harm, and (5) the extent of the burden to the defendant and the consequences to the community for imposing a duty to exercise care with resulting liability for breach.³⁷

If a landlord engages in self-help against a former tenant to recover monies allegedly due following a lease termination, and ignores Rhode Island General Laws sections 34-18-43 and 34-18-5(a),³⁸ the five factors enumerated by the Rhode Island Supreme Court would be satisfied.³⁹ These two sections of the Act form a clear and unmistakable duty to the public—namely, to a specific class of persons—in this case, residential former tenants of landlords who are engaged in the trade or practice of leasing residential dwellings. Additionally, these two sections exist to afford both parties, including tenants, notice and an opportunity to be heard to prevent self-help by a landlord to the former tenant,

Marciano, 871 A.2d 911, 915 (R.I. 2005)).

33. *Gushlaw v. Milner*, 42 A.3d 1245, 1252 (R.I. 2012) (quoting *Berardis v. Louangxay*, 969 A.2d 1288, 1291 (R.I. 2009)).

34. *Brown*, 84 A.3d at 1162 (citing *Martin*, 871 A.2d at 915).

35. *Gushlaw*, 42 A.3d at 1252 (quoting *Volpe v. Gallagher*, 821 A.2d 699, 705 (R.I. 2003)).

36. *Banks v. Bowen’s Landing Corp.*, 522 A.2d 1222, 1225 (R.I. 1987).

37. *Woodruff v. Gitlow*, 91 A.3d 805, 814–15 (R.I. 2014) (quoting *Banks*, 522 A.2d at 1225).

38. 34 R.I. GEN. LAWS §§ 34-18-43, 5(a)(2017).

39. *Woodruff*, 91 A.3d at 815 (quoting *Banks*, 522 A.2d at 1225).

or vice versa.

When a landlord violates a statute, which alone creates a duty to the public, a plaintiff may rely on the violation as evidence that an existing duty was breached.⁴⁰ The Rhode Island Supreme Court also stated long ago that “the violation of a statute or an ordinance [is] not of itself ground for a civil action unless such right was annexed thereto,⁴¹ . . . or unless it *prescribed a duty* for the benefit of a particular class of persons.”⁴² Additionally, roughly twenty years after the Court’s holding in *Grant v. Slater Mill and Power Co.*, the Court in *Oates v. Union Railroad Co.* expressly held that if a statute imposed a duty intended to protect the safety of the public, violation of that statute would be *prima facie* evidence of negligence, but would not constitute negligence per se.⁴³ In total, the case law supports the idea that “a violation of a statute, which itself creates a duty to the public, may be relied on by a plaintiff as evidence of the existence of a duty and the breach of that duty.”⁴⁴

These two sections of the Act are designed to protect the financial and/or economic safety of a particular class of persons in the community—namely, consumers who are residential tenants.⁴⁵ The two sections impose a duty upon a residential landlord to pursue its *claim* against the tenant for a judgment regarding what constitutes “reasonable” damages to the landlord as a result of the lease termination, or if the landlord has been damaged at all (considering the duty to mitigate).⁴⁶

Here, had Larry Landlord filed a civil action against the former tenant, there would be substantial questions of fact over what the “reasonable” damages may have been. Without a judgment, there is no way to know whether Larry Landlord properly mitigated his damages or paid too much or too little for the pipe repair, or advertised enough such that Terri Tenant’s

40. *Sanchez v. Guy*, No. 01-0294, slip op. at 4 (R.I. Super. Nov. 23, 2004).

41. *Clements v. Tashjoin*, 168 A.2d 472, 474 (R.I. 1961) (citing *Heeney v. Sprague*, 11 R.I. 456 (1877)).

42. *Id.* at 474–75 (citing *Grant v. Slater Mill & Power Co.*, 14 R.I. 380 (R.I. 1884)) (emphasis added).

43. *Oates v. Union R.R. Co.*, 63 A. 675, 677 (R.I. 1906).

44. *Marchakov v. Champagne*, C.A. No. 00-1861, 2004 LEXIS 125, at *9 (R.I. Super. Ct. July 8, 2004).

45. *See Clements*, 168 A.2d at 474–75.

46. 34 R.I. GEN. LAWS §§ 34-18-5, -43(2017).

liability may have been less, more, or zero, because Larry Landlord failed to follow section 34-18-43 in the first place (and by doing so, also failed to “mitigate” its damages in accordance with section 34-18-5(a)).⁴⁷

Under the present facts in our hypothetical, all five factors enumerated by the Supreme Court⁴⁸ are satisfied, and thus, establishes that a duty of care exists between the landlord and the former tenant. Those factors and the reasoning behind each are discussed below.

1. “[T]he foreseeability of harm to the plaintiff”⁴⁹

Larry Landlord carelessly turned over an arbitrary amount of alleged monies owed to him to a debt collector and/or furnished the alleged amount to a CRA. However, the final “sum” of what was “reasonable,” based on the evidence, is not final absent the fact-finding function of a court. A collection account on one’s credit report not only damages his or her credit score, but also his or her ability to obtain credit in the future as previously discussed. It is foreseeable and common knowledge today that furnishing any amount allegedly owed to a debt collection agency will result in financial or economic harm to an individual.

2. “[T]he degree of certainty that the plaintiff suffered an injury”⁵⁰

In general, the credit and reputation of a former tenant could be negatively impacted by a landlord’s self-help attempt at recovery of a sum for damages or furnishing an arbitrary “sum” to a CRA; thereby, resulting in financial and/or economic injury to the former tenant. With the financial life of a former tenant negatively impacted or even ruined, that individual may be denied credit, offered less favorable borrowing terms, or even forced to pay a higher monthly payment on loans or leases had his or her credit history not have been unfairly and unlawfully tarnished. A plaintiff in this situation could, of course, present evidence of being denied credit, paying higher interest rates, or the like, to

47. *Id.*

48. *Woodruff v. Gitlow*, 91 A.3d 805, 814–15 (R.I. 2014) (quoting *Banks v. Bowen’s Landing Corp.*, 522 A.2d 1222, 1225 (R.I. 1987)).

49. *Banks*, 522 A.2d at 1225.

50. *Id.*

show financial or economic injury. While the damage to reputation may be non-economic, if it results in a denial of employment or quantifiable economic damages such as higher interest rates or down payments for credit, evidence of these economic damages could be presented with certainty.

3. “[T]he closeness of connection between the defendant’s conduct and the injury suffered”⁵¹

Larry Landlord’s self-help conduct would be directly and unequivocally connected to the financial and/or economic injury suffered by the former tenant. It was Larry Landlord’s self-help approach of “taking the law into his own hands” by failing to comply with sections 34-18-5(a) and 34-18-43 that would result in Terri Tenant’s injury.⁵² If the landlord had filed a civil action seeking damages against the tenant for termination of the lease prior to its written expiration and requesting that the court determine the amount of damages reduced to a judgment, there could be no connection between any resulting financial and/or economic injury and the landlord’s conduct. The tenant would have been given notice and an opportunity to be heard before a report was sent to the credit bureaus. There is, of course, no way to predict what the court as fact-finder would determine. The court as fact-finder may have found that a higher, lower, or *no* amount was due to the landlord, which further demonstrates the lack of any sum-certain in these cases until judgment enters. In any event, the tenant would have had the opportunity to be heard and to protect his or her credit worthiness by tendering the amount found by the court to be due to the landlord, if any was found at all.

However, Larry Landlord computed his own unsubstantiated version of the damages due and attempted to recover it by furnishing it to a CRA and a TPDC. Hence, Larry Landlord’s conduct would be commercially unreasonable and harmful to the tenant and would cause financial and/or economic injury. There would be no intermediate steps between the landlord’s reporting to a credit bureau or furnishing to a TPDC and the financial or economic injury. The reporting or furnishing is, in and of itself,

51. *Id.*

52. *See* 34 R.I. Gen. Laws §§ 34-18-5, -43 (2017).

the conduct that would cause the injury to the former tenant.

4. “[T]he policy of preventing future harm”⁵³

If a landlord, upon termination of the lease by a tenant, is allowed to circumvent the landlord’s duty to mitigate damages pursuant to Rhode Island General Laws section 34-18-5(a)⁵⁴ and to ‘take the law into his or her own hands’ by failing to comply with its statutory “claim” for possession and damages pursuant to Rhode Island General Laws section 34-18-43,⁵⁵ then these two sections of the Act would be rendered completely meaningless. Complying with Rhode Island General Laws section 34-18-43 is not some mere “option” available to the landlord, but rather a statutory mandate against self-help that requires judicial intervention. These two Act sections were clearly enacted to prevent the exact type of harm that occurred to Terri Tenant. If these two sections, particularly the filing of a civil action for a claim pursuant to section 34-18-43,⁵⁶ are not followed, then a landlord could conjure up any arbitrary amount the landlord believes is due. This could potentially ruin a tenant’s financial life without the tenant ever having notice and an opportunity to be heard, which is implicit by the very nature of the passage into law and existence of Rhode Island General Laws section 34-18-43.⁵⁷

5. “[T]he extent of the burden to the defendant and the consequences to the community for imposing a duty to exercise care with resulting liability for breach”⁵⁸

There is simply no “burden” upon a defendant-landlord to comply with sections 34-18-15(a) and 34-18-43.⁵⁹ Rather, it is the law of the State of Rhode Island and not some *optional* course of action to be pursued or not pursued at the whim of a landlord. As for the “consequences to the community for imposing a duty to exercise care with resulting liability for breach,”⁶⁰ these two Act

53. *Banks*, 522 A.2d at 1225.

54. § 34-18-5(a).

55. *See* § 34-18-43.

56. *Id.*

57. *See id.*

58. *Banks v. Bowen’s Landing Corp.*, 522 A.2d 1222, 1225–26 (R.I. 1987).

59. §§ 34-18-5(a), -43.

60. *Banks*, 522 A.2d at 1225.

sections exist to protect the tenant community against arbitrary and capricious actions taken by landlords without notice and an opportunity to be heard.

Rhode Island General Laws section 34-18-43 is clear in stating that upon breach by the tenant, the landlord has a “claim” for possession and the “reasonable” amount of “use and occupation” (of importance is that the statute uses the term “use and occupancy” and not “rent”).⁶¹ The use of the words “claim” and “reasonable,” taken together, provide that the landlord must present his or her claim to the court, and that the court, as fact-finder, makes a determination of the “reasonable” amount due to the landlord, or if any amount is due at all. This is not a “burden” to the landlord-defendant—it is the law.

If the courts allowed landlords to collect any payment amount that he or she alleged from former tenants and to send this amount into a collections account or to furnish it to a CRA, there would be no purpose in the Legislature ever having enacted section 34-18-43 in the first place. The danger to the community (specifically, to residential tenants) who terminate their lease agreements due to some perceived wrong done to them by a landlord would be harsh and unfounded. Accordingly, these factors delineated by the Rhode Island Supreme Court impose a duty of care from a landlord to former tenants.⁶²

B. Breach of the Duty of Care

Having established above that a duty of care exists, it next must be shown that the landlord breached the duty of care. A landlord would breach the above-articulated duty of care to former tenants by failing to comply with Rhode Island General Laws sections 34-18-5(a) and 34-18-43,⁶³ because these two sections were specifically designed to protect the financial or economic safety or security of tenants from arbitrary actions by a landlord. A landlord who carelessly turns over an alleged debt to a debt collector, furnishes the amount to any third-party, or somehow uses the alleged amount in any manner without first filing a civil action breached the duty of care articulated herein.

61. § 34-18-43.

62. See *Banks*, 522 A.2d at 1225–26.

63. See §§ 34-18-5(a), -43.

C. Causation

But for a landlord's breach of his or her duty of care, former tenants would necessarily have notice and an opportunity to be heard to raise affirmative defenses or counterclaims. Additionally, if a judgment was rendered against the former tenants, the former tenants could simply pay the judgment to the landlord and possibly avoid the furnishing to a CRA or being pursued on the judgment by a debt collector. Any number of outcomes would be possible. But, these other outcomes all would require that the tenant, at the very least, have notice and the opportunity to be heard on the matter in accordance with the plain language and intent of sections 34-18-5(a) and 34-18-43. Accordingly, the end result may or may not result in the tenants owing damages to the landlord because, in accordance with these two sections, there are questions of fact that must first be determined.⁶⁴ If the landlord followed the Act, no credit reporting could take place before a tenant had the opportunity to be heard. Therefore, a landlord's failure to follow the law and instead furnish an arbitrary, unsubstantiated, and unfounded amount to a debt collector or CRA without first obtaining a judgment, would be the actual and proximate cause of any financial and/or economic damages upon the former tenant.

D. Damages

Importantly, because tenants are consumers and not businesses, tenants are not barred by the economic loss doctrine from recovering for financial injury in a negligence action.⁶⁵ In upholding the motion justice's application of the economic loss doctrine, the *Drexel* Court reasoned that "commercial transactions are more appropriately suited to resolution through the law of contract, than through the law of tort."⁶⁶ Using key language appropriate to a negligence claim, the *Drexel* Court also stated,

64. *See id.*

65. *See Franklin Grove Corp. v. Drexel*, 936 A.2d 1272, 1276 (R.I. 2007) ("[T]he economic loss doctrine is not applicable to consumer transactions." Thus, although this Court recognizes the economic loss doctrine as a bar to recovery, we limit its application to disputes involving commercial entities." (quoting *Rousseau v. K.N. Constr., Inc.*, 727 A.2d 190, 193 (R.I. 1999))).

66. *Id.* at 1275 (citing *Boston Inv. Prop. # 1 State v. E.W. Burman, Inc.*, 658 A.2d 515, 517 (R.I.1995)).

“[d]espite defendants’ argument, this Court does not require that the commercial entities be ‘sophisticated.’ Rather, it is inherent in the very nature of a commercial entity that it is indeed sophisticated when compared with a consumer.”⁶⁷

The Rhode Island Residential Landlord-Tenant Act is distinct from Rhode Island General Laws section 34-18.1, “Commercial Leasing and Other Estates,” which by its definition does *not* involve residential landlord-tenant relationships.⁶⁸ Hence, the subject of this Article involves protection of the consumer, not a dispute between commercial entities, and would therefore not be barred by the economic loss rule.

As previously discussed, it is entirely foreseeable that a former tenant would suffer financial injury due to damaged creditworthiness or credit rating, or a collection account. If the collection account or the unsubstantiated amount furnished to a CRA is the sole factor, or a major factor, that caused financial injury to the tenant, the landlord may be held liable for damages resulting from “going rogue” by avoiding the two Act sections and using self-help to furnish or attempt to recover on an amount not first reduced to a judgment.

A former tenant who prevails on the negligence action may recover based upon the financial or economic injury inflicted by the landlord’s failure to follow the proscribed procedure of the two sections of the Act. Thus, a landlord who engages in self-help recovery of damages in a dispute following lease termination may, ironically, end up owing the former tenant more on a judgment than what the landlord would have claimed in a civil action for damages.

V. WHAT ABOUT THE RHODE ISLAND DECEPTIVE TRADE PRACTICES ACT (RIDTPA)?

A private right of action under the RIDTPA is created by statute for, in part, “[a]ny person who . . . leases *goods or services* primarily for personal, family, or household purposes and thereby

67. *Id.* at 1277.

68. 34 R.I. GEN. LAWS § 34-18.1-1 (2017) (“This chapter shall apply to all commercial properties and other estates, excluding residential properties governed by the Residential Landlord and Tenant Act, chapter 18 of this title.”).

suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by another person of a method, act, or practice declared unlawful by [section] 6-13.1-2.”⁶⁹

This cause of action would arguably only be available in limited circumstances because the RIDTPA’s applicability for a private cause of action is limited to “goods and services,” and therefore may not be applicable depending on the facts and whether a court interprets its applicability to a landlord tenant relationship.⁷⁰ However, if the premises involved, perhaps, a furnished apartment, the appliances in the apartment may constitute “goods.”⁷¹ Likewise, the landlord’s services in maintaining the premises in a safe and habitable condition may be “services” subject to the RIDTPA.⁷² Such factual issues would control whether a former tenant could plead the *prima facie* elements of a claim under the RIDTPA. If the dispute arose over some damaged furniture in a leased apartment, the RIDTPA may apply. Otherwise, a former tenant should be cautious in pleading under this statute lest it be dismissed on summary judgment or a Rule 12 motion to dismiss.

A threshold question would be whether the former tenant was leasing goods and/or services. That being determined, we would move on. To find whether a trade practice violates the RIDTPA, a Rhode Island court considers several factors:

- (1) Whether the practice, without necessarily having been previously considered unlawful, offends *public policy* as it has been established by *statutes*, the common law, or otherwise—whether, in other words, it is within at least the *penumbra* of some common-law, *statutory*, or other established concept of unfairness;
- (2) whether it is immoral, unethical, oppressive, or unscrupulous;
- (3) whether it causes substantial injury to consumers (or competitors or other businessmen).⁷³

69. 6 R.I. GEN. LAWS § 6-13.1-5.2(a) (2017).

70. *See id.*

71. *See id.*

72. *See id.*

73. *Ames v. Oceanside Welding & Towing Co. Inc.*, 767 A.2d 677, 681

The Rhode Island Supreme Court noted that “plaintiffs need not establish every factor, and they may prove unfairness by showing that a trade practice meets one factor to a great degree or two or three factors to a lesser degree.”⁷⁴

Let us focus primarily on the first factor. Without belaboring the point, the Court’s use of “public policy,” “statutes,” “penumbra,” and “statutory” in this context all indicate that having a public policy in place, particularly one rooted in a statute, is crucial to determining whether a practice is unfair or deceptive.⁷⁵ Enter the two sections of the Act, in that a landlord’s failure to comply with sections 34-18-43 and 34-18-5(a) “offend” public policy “as it has been established” by “statute” in a simple plain reading of the Act’s two sections.⁷⁶ These two sections of the Act were specifically designed to give residential tenants and landlords a statutorily devised procedure for resolving disputes following a tenant’s termination of a lease without the landlord taking arbitrary or self-help action against the former tenant. In this sense, a landlord’s self-help attempt at the recovery of monetary damages would be akin to an unlawful ouster, and contrary to “at least the penumbra of some common-law, statutory, or other established concept of unfairness.”⁷⁷ The Act, specifically sections 34-18-43 and 34-18-5(a), shows the Legislature’s intent to ensure a proper procedure for the resolution of such disputes, such that the tenants would not be harmed by arbitrary and capricious self-help actions by the landlord in the event that the tenants believed termination to be necessary. Rhode Island General Laws section 34-18-43 protects the interests of both the landlord and tenant by providing a cause of action whereby both parties may be heard, and a final decision rendered on the merits.⁷⁸

As to the second factor, the landlord’s conduct in our hypothetical would satisfy this prong if the landlord utilized self-help for recovery of damages by failing to follow sections 34-18-43

(R.I. 2001) (quoting *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244–45 n.5 (1972)) (emphasis added).

74. *Long v. Dell*, 93 A.3d 988, 1001 (R.I. 2014).

75. *Id.* at 1000.

76. *Id.*

77. *Id.*

78. 34 R.I. GEN. LAWS § 34-18-43 (2017).

and 34-18-5(a), perhaps in an attempt to save money on court costs and attorney's fees, and thereby failed to provide the former tenants with the judicial procedure they would be entitled to by virtue of these two sections of the Act.⁷⁹ Instead, our hypothetical landlord avoided the court and decided to, as the colloquialism goes, become judge, jury, and executioner by arbitrarily determining an amount without regard to mitigation and the procedures set forth by the Act. Such conduct would almost certainly meet the definition of "immoral, unethical, oppressive, or unscrupulous"⁸⁰ on its face. Moreover, the landlord had a statutory procedure to use in the first place and disregarded it.

As to the third and final factor, there is absolutely *no doubt* that this type of conduct would cause "substantial injury" to the former tenants, who are consumers, and that the same or similar conduct toward other tenants in the future would do the same.⁸¹ A former tenant's reputation, creditworthiness, and financial well-being are at stake. A collection account or unpaid balance on a credit report can wreak havoc on that consumer's ability to obtain a mortgage, purchase or lease a car, lease an apartment elsewhere, or move on with his or her financial life. This is within the realm of common knowledge. If the former tenant was given notice and an opportunity to be heard on the merits, depending on the facts of the case, any amount, no amount, or something in between may have been owed. But, at the very least, there would be no practical or useful *need* for the landlord to even furnish the amount to a CRA or TPDC in the first place.

In sum, assuming goods or services are involved in the post-termination of the lease dispute, a landlord's conduct could very well be found deceptive within the meaning of Rhode Island General Laws section 6-13.1-2, which states that "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are declared unlawful."⁸² For a violation found under this statute, the court may award "actual damages or two hundred dollars (\$200), whichever is greater"⁸³ and "[t]he court may, in its discretion, award punitive

79. See *Long*, 93 A.3d at 1000 (citation omitted).

80. *Id.*

81. *Id.*

82. 6 R.I. GEN. LAWS § 6-13.1-2 (2017).

83. *Id.*

damages and may provide other equitable relief that it deems necessary or proper” as well as reasonable attorney’s fees and costs.⁸⁴

Larry Landlord’s conduct may even warrant the imposition of punitive damages, as is allowed in the discretion of the court pursuant to section 6-13.1-5.2(a), as an effective deterrent to future landlords engaging in similar harmful conduct against former tenants. As a threshold matter, it should be noted that, although a landlord may have a claim against the former tenant for monies due and owing, punitive damages are not available in a breach of contract claim “absent the most egregious circumstances.”⁸⁵ At this point, it should be reiterated that the cause of action by the former tenant against the landlord for punitive damages under the RIDTPA would *not* be grounded in a breach of contract claim, but rather that the landlord failed to comply with the two sections of the Act as against public policy. In that sense, the landlord’s conduct might well fall into the categories of “bad faith, illegality, misconduct, or any other factor that might alter the legal relationship of [the] parties” which *may* be grounds for a punitive damages award.⁸⁶ In other words, if the landlord proceeds against the former tenant using statutorily proscribed procedure mandated by the two sections in the Rhode Island Landlord Tenant Act, then the former tenant would almost certainly have no claim under the RIDTPA, and punitive damages should not even be meaningfully considered, because the landlord would have proceeded according to the statute. By contrast, it is no longer a simple breach of contract action if the landlord goes rogue and attempts to engage in self-help to collect the alleged damages or furnish it to a CRA.

Accordingly, if the landlord’s conduct is found to be deceptive within the meaning of Rhode Island General Laws section 6-13.1-2, *et seq.*, the former tenant may plead for actual plus punitive damages as well as equitable relief for the landlord to

^{84.} *Id.*

^{85.} *O’Coin v. Woonsocket Inst. Tr. Co.*, 535 A.2d 1263, 1266–67 (R.I. 1988).

^{86.} *See Chapman v. Vendresca*, 426 A.2d 262, 264 (R.I. 1981) (holding that punitive damages for a breach of contract to purchase real estate require evidence “of fraud, bad faith, illegality, misconduct, or any other factor that might alter the legal relationship of the[] parties”).

immediately cease and desist collection activity and to take all immediate actions to remove the collection account from the former tenant's credit reports. Furthermore, the former tenant could enjoin the landlord from reporting the alleged debt to any other TPDC or CRA, and thereby limit the landlord to only pursue rights and remedies he or she may have in accordance with state law.

Again, it is important to note that whether a former tenant would be able to meritoriously plead under the RIDTPA would turn on whether goods or services were involved, absent a more expansive interpretation by the court of the RIDTPA's applicability. The point, nonetheless, is the general proposition that because of the existence of the Act's two sections, the former tenant may be able to meet the elements of various negligence and consumer protection-based claims that otherwise would not be available. With express statutory public policy in place, the former tenant may be able to meet a crucial element under the RIDPTA, which is, as discussed earlier, whether there is public policy or a statute in place for the protection of such persons.⁸⁷ Whether or not a particular former tenant is able to plead under the RIDTPA or not, it should nonetheless alert landlords, debt collectors, and parties to insolvency proceedings that there may be claims or defenses against landlord-based claims for damages *because of* the two sections of the Act.⁸⁸ The RIDTPA claim is a possibility, but should be read here as more of an example of claims that could be raised against a self-help rogue landlord or its agent.

CONCLUSION

A landlord may believe that an amount of damages is owed following termination of the lease. However, depending on the facts of the dispute—for example, whether it involves goods and/or services, use and occupation, and so forth—there is no set of facts under which a landlord could utilize self-help to recover the amount without some level of risk. While some conjure up images of furniture on the sidewalk and changed locks when thinking of

87. *See Long v. Dell, Inc.*, 93 A.3d 988, 1000 (R.I. 2014) (citation omitted).

88. 34 R.I. GEN. LAWS §§ 34-18-5, -43 (2017).

the phrase “self-help,” it is crucial to remember that although self-help for *possession* is an ongoing and real-world problem, self-help can exist purely in the financial realm without all the physical fanfare of such conduct. The risk to the landlord is created by a public policy inherently found in these two sections of the Act. As a public policy created for the protection of former tenants, these former tenants can then utilize the *failure* of the landlord to follow the very statutory procedure designed to protect the tenants as the basis for other claims that require such public policy as a condition of meeting an element. Negligence, or the RIDPTA, are only possible examples presented herein. However, a former tenant financially or economically affected by a landlord’s failure to follow the Act should not simply give up and resign his or herself to financial ruin and misery. On the other side, the landlord should protect itself by following the statutory procedure required by the two sections of the Act following a lease termination or else risk unnecessary exposure to claims by a former tenant that otherwise would be extinguished.

The Rhode Island Landlord Tenant Act is full of possibilities based on its inherent public policy of protecting the tenant as a consumer. In this regard, the Act is very much a consumer protection statute. To unleash the Act’s full potential, a former tenant and a landlord should be mindful of the consequences of having a public policy in place in the form of a statutory scheme and what other causes of action that may potentially trigger. Even if negligence or the RIDPTA may not be available in a particular situation, other causes of action may be available simply by the landlord taking arbitrary self-help action against the former tenant for self-help recovery of damages. Remember: the Rhode Island Supreme Court has stated that there is “no set formula”⁸⁹ for finding a legal duty of care, but that same duty of care is the key to unlock so many potential claims and defenses. That does not, however, mean that any claim or defense survives in a post-lease termination scenario. It simply means that former tenants should stay mindful, and landlords should refrain from “going rogue.”

89. *Brown v. Stanley*, 84 A.3d 1157, 1162 (R.I. 2014) (quoting *Willis v. Omar*, 954 A.2d 126, 130 (R.I. 2008)).