

“SLEEP TIGHT, DON’T LET THE BED BUGS BITE”

*The Impact of Bed Bugs
on our Daily and Legal Lives*

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to be relied upon as legal advice.

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Introduction

**Good night, sleep tight; don't let the bed bugs bite
If they do, let them chew, because they need to eat too. - Anonymous**

When the author of this poem sarcastically advised the reader to *let them chew*, they certainly could not have anticipated the cataclysmic rise in today's bed bug population or the ensuing havoc and real turmoil that bed bugs are causing in our modern society. Unfortunately, there is no question that bed bugs are back and are now influencing the way we live, work and travel. With the stories of lives being turned upside by bed bugs and fueled by a willing and able media sharing disturbing bed bug related stories, bed bugs are getting all the attention these days and, perhaps, rightfully so. No one is safe from the bed bug epidemic that has invaded our daily and legal lives. In fact, even the methods used to kill bed bugs are causing devastating problems. There are reports that pesticides used to treat bedbugs overseas have killed tourists while high powered convection heaters used to kill bed bugs recently caused a house in Cincinnati to burn to the ground. Hence, this article is designed to provide factual information about bed bugs in order to protect our families, colleagues and clients from these pesky little creatures and the devastation they leave behind.

In Part I, we provide an overview of how bed bugs have entered our society as well as outline pertinent information that everyone should know about this pest. In Part II, we highlight how bed bugs have impacted the hotel industry. We also discuss a problem that each employer must face, how to keep the workplace safe in order to keep productivity up and liability claims down. Part III provides an overview of the growing field of bed bug litigation. We also discuss the relevant statutes and case law that impact and protect an employee from bed bugs in the workplace environment.

As a result of the increased number of claims made by bed bug victims, new questions have arisen about whether claims related to bed bugs are covered by insurance. A discussion of first party and third party claims is provided in Part IV. Finally, as it is clear that the bedbug epidemic is here to stay, we conclude in Part V with a discussion of how you can find and eliminate bed bugs. This section of “best practices” will help you detect bed bugs at an early stage in order to avoid complete infestation as well as the costly methods associated with eradicating them. As there are several different methods for alleviating bed bugs, each with their own varying rates of success, we provide for our readers, a thorough list of different ways to treat bed bugs.

PART I **Bed Bugs Are Everywhere**

Initially, bed bugs were thought to be a non-issue after the 1940’s when dichlorodiphenyltrichloroethane (“DDT”), a well-known synthetic pesticide was introduced as a method to eliminate bed bugs.¹ However, bed bugs have reemerged throughout the country, including New York City, Las Vegas and New Orleans. Bed bugs have found their way to hotels,² offices,³ movie theaters⁴ as well as residential and city housing.⁵ As a result of the

¹ Jerry Adler, *2010 Conservatives Blame Environmentalists for Bedbugs*, Newsweek, September 8, 2010 available at <http://www.newsweek.com/2010/09/08/conservatives-blame-environmentalists-for-bedbugs.html>

² Bed bug complaints in hotels include the Waldorf Astoria in NY, NY. Bill Sanderson, *Guest Complains of Bed Bugs at the Waldorf*, N.Y. Times, October 7, 2010, available at http://www.nypost.com/p/news/local/manhattan/hotel_really_bites_Euvr5OhEEYsXKElmNYK07O.

³ Bed bugs in offices include the Wall Street Journal Office and the offices of Elle Magazine. Melanie Grayce West, *Bedbugs Suspected Inside Wall Street Journal’s Office*, Wall Street Journal, Oct. 4, 2010 available at <http://blogs.wsj.com/metropolis/2010/10/04/bedbugs-strike-inside-wall-street-journals-office>. Caroline Howard, *Office Memo: Bed Bugs are Back*, Forbes, Aug. 2010 available at <http://www.forbes.com/2010/08/19/bed-bugs-germs-office-forbes-woman-well-being-illness.html>.

⁴ It was reported that bed bugs were found at the AMC Empire 25 Theater, Times Square, NY, NY. Emily B. Hager, *What Spreads Faster Than Bedbugs – Stigma*, New York Times, Aug. 20, 2010, available at <http://www.nytimes.com/2010/08/21/nyregion/21bedbugs.html>.

⁵ Bed bugs have been reported in the Blayton Building, Williamsburg, Virginia. Brian Farrell, *Finding, fighting bed bugs*, WVEC Television, Inc., Sept. 22, 2010 available at <http://www.wvec.com/news/Finding-fighting-bed-bugs-103528619.html>. Additionally, residential complaints of bed bugs increased in New York City by 7% during 2010.

outbreak, websites have been created to provide information about bed bugs⁶, exterminators have enlarged their practice to include the elimination of bed bugs⁷ and new methods to stop bed bugs have been introduced⁸. In fact, the bed bug epidemic has become such a problem that the Federal Government, through a grant from the Environmental Protection Agency (“EPA”), has undertaken an outreach and education project to provide information about bed bugs. To that end, a National Bed Bug Summit took place on April 14-15, 2009 in Arlington, Virginia, hosted by the EPA to develop recommendations on how to address the many problems posed by the bed bug resurgence. A follow up conference occurred on February 1-2, 2011 in Washington, D.C. to follow up on the recommendations resulting from the 2009 summit as well as to discuss the efforts made to control bed bugs in structured settings such as schools and public housing. The conference also examined how governments can facilitate and encourage effective bed bug prevention and control as well as how elderly, disabled and hoarding residents can be educated on bed bugs.⁹ In order to determine how the bed bug epidemic became a problem, we now take a look at their origins.

A. *From Caves to Hotels – The History and Biology of Bed Bugs*

Bed bugs, also known as *Cimex Lectularius*, are part of the family of insects called Cimicidae, which are a group of insects that feed exclusively on blood. It is believed that bed

Melanie Grayce West, *City’s Problem with Bedbugs Getting Itchier*, Wall Street Journal, Jan. 11, 2011, available at <http://online.wsj.com/article/SB10001424052748703779704576074262282569164.html>.

⁶ Various websites that address bed bugs include bedbugger.com, bedbugregistry.com, bedbugreports.com and bedbugs.org to name a few. [Bedbugregistry.com](http://bedbugregistry.com) provides guests with a forum to voice their complaints.

⁷ Bed bug exterminators made \$258 million on last year on bed bug treatments according to the National Pest Management Association. Steven Hargreaves, *Why we can’t kill bedbugs*, CnnMoney.Com, Nov. 6, 2010, available at http://money.cnn.com/2010/11/05/news/economy/bed_bug_cure/index.htm.

⁸ See, *infra* Part IV. Additionally, the Iphone now has an app which shows reported infestations of bed bugs. Additional information regarding this app may be found at <http://itunes.apple.com/us/app/bed-bug-alert/id397206377?mt=8>

⁹ Additional information regarding the National Bed Bug summits may be found at <http://www.epa.gov/oppfead1/cb/ppdc/bedbug-summit/2011/2nd-bedbug-summit.html>

bugs started as cave dwelling bugs that originally dined on bat blood.¹⁰ As humans began to evolve, it is believed that during the cave dwelling era that humans first met bed bugs. The relationship evolved as bed bugs switched from bat blood to human blood and eventually the bed bugs moved alongside humans as we began to form the civilized cultures that are in existence today.¹¹

The bed bug that has been found throughout the United States has five developmental stages with each one requiring a blood meal to graduate to the next stage. The change from egg to adult takes approximately 37 days.¹² Once an adult, the average bed bug lives for one year depending on how often they feast as well as the temperature in which they live. Recent laboratory studies have shown that starvation will decrease bed bug survival. On average, a bed bug deprived of a blood meal will die within 70 days, although it is actually dehydration, rather than starvation, which is the cause of death.¹³

Bed bugs most commonly feed between midnight and 5:00 a.m., which is generally the time when a human is enjoying their deepest sleep. Bed bugs find human beings based on the heat given off as well as the carbon dioxide (“CO₂”) that is produced while we breathe.¹⁴ Bed bugs are only known to detect their hosts from approximately three feet away so it is not uncommon for a bed bug to travel great distances until they detect a human.¹⁵

Once a potential host is located, a bed bug will use their mouthparts to find a human capillary.¹⁶ As the first bite is usually not successful, a bed bug will take several bites before they find a capillary to their liking. As a result, an individual bitten by a bed bug will have

¹⁰ Dini M. Miller and Andrea Polanco, *Bed Bug Biology and Behavior*, Virginia Department of Agriculture and Consumer Services, available at <http://www.vdacs.virginia.gov/pesticides/pdf/files/bb-biology1.pdf>

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at p. 1.

¹⁶ *Id.*

several bites in the same area. Once a bed bug has found a proper feeding area, they will spend five to ten minutes on their meal.¹⁷ Upon returning to the crack or crevice where they live, bed bugs will digest the meal. It is common that after eating, a bed bug will have the urge to mate. Since bed bugs eat once every 3-7 days, the majority of their lives are spent digesting and excreting their latest meal.¹⁸ While a bed bug's excretion can often be detected by a human, it is the mating which causes more of a problem. After a female has mated with a male, she can produce between 5 to 20 eggs from a single meal and under the proper conditions, 97% of the bed bug eggs hatch successfully.¹⁹ Even more problematic is a female, after mating with a male, can continue to lay eggs without the presence of a male as long as she is able to feed. This equals more bed bugs in one area and the potential for a greater nuisance to those humans that live nearby.

Now that we know the evolution of these pests, we next address the impact of bed bugs on the hotel industry and in the workplace.

PART II **Bed Bugs In Today's World**

A. The Hotel Industry

As a result of the bed bug epidemic, one of the hardest hit industries is the hotel industry. Although hotels have become familiar with the surge of bed bug claims in recent years, it is widely expected that the volume and nature of such claims will continue to expand.²⁰ Bed bug infestations increased 300% between 2000 and 2001, 70% between 2001 and 2002 and 70%

¹⁷ Id.

¹⁸ Id.

¹⁹ Id.

²⁰ Jeff Casale, *As Bed Bug Concerns Grow, Will Insurers Feel The Bite?*, Business Insurance (Aug. 9, 2010) available at <http://www.businessinsurance.com/article/20100808/ISSUE01/308089979>

between 2002 and 2003.²¹ According to bedbugregistry.com, approximately 20,000 bed bug reports have been made since the Summer of 2010 for hotels throughout the United States.²²

The 2009 EPA National Bed Bug Summit requested that representatives of the hospitality industry attend in order to identify options and ideas for bed bug prevention, control, management and strategies for outreach and education.²³ Obviously, the negative consequences from bed bug infestation can be detrimental to a hotel for many reasons including the hotel's reputation. The stigma that bed bugs only reside in unclean areas, which is untrue, is one that lives on today. As a result, the hotel industries have resorted to bed bug action plans to avoid potential lawsuits and loss of profits. For the hotel industry, early detection is vital. It is suggested that hotel's train their employees to detect the signs of bed bugs as well as take preventive measures to find bed bugs including annual canine scent detection.²⁴ Additionally, a plan should be created before a guest finds or complains of bed bugs, so that the hotel's employers know how to respond if bed bugs are detected (including compensating guests for their inconvenience). At the 2011 Bed Bug Summit, it was stressed that hotel employees should be educated on bed bug control and prevention, as the benefits to the hotel and their guests is dramatically increased as a result of employees with a sufficient understanding of how to find and control bed bugs.

As a result of the problems that hotels face, new companies have emerged to create a variety of different methods to assist the hotel industry including mattress shields, bed bug sprays and a variety of different self help methods to stop infestation. Additional companies

²¹ S. Carl Morello, *The Bed Bugs are Coming! The Bed Bugs are Coming!*, The Insurance Journal (Aug. 20, 2007) available at <http://www.insurancejournal.com/magazines/mag-features/2007/08/20/83351.htm>

²² www.bedbugregistry.com/faq. Bedbugregistry.com is quick to point out that all bedbug reports submitted through their site have not been checked for accuracy.

²³ www.epa.gov/pesticides/ppdc/bedbug-summit/final-agenda.pdf

²⁴ Dini M. Miller, *Bed Bug Action Plan for Hotels* Virginia Department of Agriculture and Consumer Services, available at <http://www.vdacs.virginia.gov/pesticides/pdf/files/bb-hotels1.pdf>.

promise to display a shield at the front desk of participating hotels to alert guests that the hotel is checked for bed bugs on a regular basis. Whichever method those in the hotel industry choose, it is clear that hotels across the country are using a variety of different methods to fight bed bugs and are no longer turning a blind eye to the problem. As we discuss in Part III of our paper, lawsuits that could arise from bed bug infestation at a hotel includes claims for negligence, breach of the implied warranty of habitability, nuisance, battery and fraud.²⁵

B. The Workplace

The thought of bed bugs in the workplace is enough to make any employer (and employee) shudder, but the bigger issue for forward-thinking employers and their human resources (“HR”) personnel is the cloud of uncertainty that surrounds this explosive issue. Already sensing a potential tidal wave of complaints and alarms, observant employers aren’t just bracing for impact, they are fighting back. While the dearth of case law and bed bug-specific statutes leads to some guess work, some guidance does exist in the many existing federal regulations that govern employers. By reviewing the cornerstone of these policies and examining comparable HR issues, an employer can begin to assemble an effective bed bug policy that should provide some safe harbor from liability claims and costly drops in productivity.

Given the uncertain landscape of the law right now, several employers are questioning whether it makes sense to initiate a bed bug policy. The answer is a resounding “YES”! An effective bed bug policy starts with engaging and educating the workforce. Teaching employees about the basic science and habits of bed bugs is relatively easy²⁶, and once your employees

²⁵ Daniel W. Whitney and Melissa A. Graf , *The Prosecution and Defense of Bedbugs Lawsuits*, Toxics Law Reporter, 25 TXLR 37, Jan. 14, 2010.

²⁶ There are many different publications available from federal and state agencies looking to stem the tide of bedbug complaints. A good educational resource was assembled by the New York City Department of Health and Mental

know how to spot the bug and know where it hides, you will have an additional layer of protection that can help stop an infestation before it spreads. Also, by educating your employees, you will increase the chances that they will perform home inspections of their own, which is critical as many work-related infestations originate from an infestation in the employee's home. Finally, by dealing with the problem head on, you can avoid a sense of panic if the bed bugs do come to your work place. When employees know that bed bugs have limited mobility, reside in the same places and do not transmit disease, it will be easier for your employees to cope with the emotionally and financially charges issue.

After educating the workforce, employers should consider how they can solidify their reporting process. Make sure your employees feel comfortable reporting a bed bug incident, and attempt to lessen, if not remove, the stigma they may feel when acknowledging that they have a bed bug problem. If an employee claims that a co-worker has bedbugs, make sure that you are tactful in your handling of the complaint. Employers must walk a fine line between diligently following up on reports²⁷ and avoiding harassment. Also, employers need to consider how they might handle "repeat offenders". This issue looms large as diligent reporting and extermination cannot stop an employee from bringing bedbugs from their home back to the workplace, creating a vicious cycle. When considering options, it is not recommended that employers offer to exterminate the homes of their employees. Not only are such inspections and exterminations costly, but much like employers cannot guarantee that an employee will not return to work with bedbugs, neither can an employer know that their employees and/or their family won't unwittingly continue to bring bed bugs back to their home from other sources. However,

Hygiene, which provides a comprehensive educational website as well as a downloadable guide for *Preventing and Getting Rid of Bed Bugs Safely*, which is available in seven different languages. See <http://www.nyc.gov/html/doh/bedbugs/html/home/home.shtml>. Also see <http://www.cdc.gov/nceh/ehs/topics/bedbugs.htm>.

²⁷ Thoroughgood, Inc., D/B/A Azalea Court, 18 BNA OSHC 1899, (No. 97-0023 April 5, 1999).

employers must also avoid disciplining an employee who cannot afford to exterminate their home, as such adverse action could potentially lead to discrimination claims under the American with Disabilities Act (“ADA”) or even under a Title VII theory of disparate impact²⁸. Employers dealing with repeat offenders should seek counsel and identify the strategy that can most effectively bring an end to the cycle of extermination and re-infestation in the workplace.

Finally, employers should have in place a firm and detailed plan on how to handle an infestation if and when it comes to the workplace. Any plan should begin with soliciting the help of a professional to analyze and eliminate the problem. Following their advice on clearing the workplace of bedbugs is key, and seems to provide a “safe-harbor” for employers so far.²⁹ Keep in mind, there is no perfect solution to bed bugs in the work place, but a responsive and educated workforce is likely your best defense against a full-blown infestation.

PART III **Bed Bug Litigation**

Bed bug litigation is on the rise nationwide, with a greater concentration on the east coast and Chicago area where the infestation rates are highest. The communicable nature of the infestation distinguishes it from other pests, giving rise to claims that not only originate from damages caused by staying in an infested location, but also from secondary infestations.

There are a significant number of reported appellate decisions that fall into a few broad categories. Some of the cases in the media haven’t found their way through the court system,

²⁸ For employees that rent, landlords will have certain obligations to shoulder the cost of exterminations. Under New York Health Code §151.02, *Prevention and Pest Management Measures*, when a tenant issues a complaint and the state inspection verifies that bed bugs are on the premises, the landlord is required to retain the services of a pest management professional certified and registered by the New York State Department of Environmental Conservation to remove the infestation of all units, and inspect and treat all units adjacent to, above and below infested units as well as all common areas where bugs might spread.

²⁹ See e.g. Jacques Steinberg, *Bedbugs at Fox News*, New York Times, March 18, 2008; available at http://www.nytimes.com/2008/03/18/arts/18arts-BEDBUGSATFOX_BRF.html Russel Goldman, *Fox News Worker Files Bedbugs Lawsuit*, ABC News, May 30, 2008, available at <http://abcnews.go.com/Health/story?id=4959477&page=1>

and thus have not generated any published opinions. We address a survey of recent cases falling into four separate categories of claims.

A. Case Law Regarding Bed Bugs

1. Punitive Damage Award Upheld for Hotel Guests

A hotel owner who knows that the property has an infestation problem faces a public relations decision that has real legal consequence—do you warn your guests of the infestation and tell them what you are doing to solve it, or do you bury your head in the proverbial sand and ignore the problem, proclaiming surprise when a guest complains? A motel chain owner in downtown Chicago chose the later course of action, resulting in a relatively small \$5.00 verdict against it in favor of each guest for actual damages and a whopping \$186,000 in punitive damages for each guest under an Illinois statute that allows punitive damages where the conduct is willful and wanton rather than merely negligent.

In Mathias v. Accor Economy Lodging and Motel 6, 347 F.3d 672 (7th Cir. 2003), Judge Posner authored the decision upholding the award to a brother and sister who were bitten while spending the night in a \$100 per day room at a Motel 6.³⁰ A diversity case applying Illinois law, the Court of Appeals affirmed a finding that the hotel owners “failure either to warn guests or to take effective measures to eliminate the bedbugs amounted to fraud and probably to battery as well.” The hotel’s conduct was so egregious that the court upheld an award of punitive damages in a ratio of 37.2 to 1 over the award of general damage. Id. at 675.³¹

³⁰ Judge Posner commented that bedbugs “. . . are making a comeback in the U.S. as a consequence of more conservative use of pesticides.” He cites as scientific authority for this statement two newspaper articles: Kirsten Scharnberg, *You’ll Be Itching to Read This: Bedbugs Are Making a Comeback; Blame World Travelers and a Ban on Certain Pesticides*. Chi. Tribune, Sept. 28, 2003, p. 1; Mary Otto, “Bloodthirsty Pests make Comeback; Bug Infestations Raising Welts, Ire.” Wash. Post, Sept. 2, p. B2.” Id. at 773-74.

³¹ The defense relied heavily on the Supreme Court’s decisions in State Farm Mutual Automobile Insurance Co. v. Campbell, 538 U.S. 408, 123 S. Ct. 1513 (2003) and BMW of North American, Inc. v. Gore, 517 U.S. 559 (1996) (the “BMW paint case”) where the court suggested that “four times the amount of compensatory damages might be close to the line of constitutional impropriety.” Campbell, 123 S. Ct. at 1524.

Judge Posner is a great writer and this well written opinion contained persuasive language about the need to make an example of this establishment given the way they tried to cover up their infestation. Declining to listen to EcoLab (the extermination service that the motel used) that recommended every room needed to be sprayed, the management instead instructed desk clerks to call the “bedbugs” “ticks” and place “Do Not Rent, Bugs in Room” holds on certain infested rooms. This didn’t work. The infestation continued and began to reach farcical proportions. When a guest, after complaining of having been bitten repeatedly by insects while asleep in his room in the hotel was moved to another room only to discover insects there. Within 18 minutes of being moved to a third room, he discovered insects in that room as well and had to be moved yet again. *Id.* at 675. The plaintiffs were checked into room 504, even though the motel had classified the room as “DO NOT RENT UNTIL TREATED”. Needless to say, the room had not been treated. “Indeed, that night 190 of the hotel’s 191 rooms were occupied even though a number of them had been placed on the same don’t-rent status as Room 504.” *Id.* at 675.

The balance of the opinion contains an excellent discussion of the jurisprudence of punitive damage awards, including whether the award in this case violated fundamental rights of due process. One factor in the court’s decision to uphold the award was the tenacity of the defense mounted against a relatively modest claim: “In other words, the defendant is investing in developing a reputation intended to deter plaintiffs. It is difficult otherwise to explain the great stubbornness with which it has defended this case, making a host of frivolous evidentiary arguments despite the very modest stakes even when the punitive damages awarded by the jury are included.” *Id.* at 677.

While the level of misconduct in this case might be viewed as extreme, it is a reflection

of the level of perceived stigma that can come from being branded publicly as the “Bed Bug Inn.” The court noted that under Chicago’s municipal code, a hotel that permits unsanitary conditions to exist is subject to license revocation, without which it cannot operate. Here, the Judge Posner noted that “[w]e are sure that the defendant would prefer to pay the punitive damages assessed in this case than to lose its license.” *Id.* at 678.

2. ***Bed Bug Infestation in an Apartment Constitutes a Breach of Warranty of Habitability***

Another group of cases arising out of the lower courts of New York, Connecticut, New Jersey, and the eastern seaboard states, involved disputes in landlord/tenant situations. Procedurally, they are in the context of actions for unpaid rent that the tenant withheld because the apartment was infested with bedbugs.

In a 2004 decision by the Civil Court of New York City, Ludlow Properties, LLC v. Young, 780 N.Y.S.2d 853, 2004 N.Y. Misc. LEXIS 712 (2004), the judge noted that “bedbugs as a basis for a breach of warranty of habitability defense was a matter of first impression.” That is no longer true. It has become well established from these cases that an infestation, even if not initially caused by the landlord, can form the basis for a claim of rent abatement. This court noted that the “prevalence of cases in which bedbugs are involved is sure to increase to an epidemic, as the foothold that bedbugs have obtained in the urban setting of the City of New York grows ever larger. However, in fixing what is a proper abatement, the court is also mindful that the landlord may attempt multiple exterminations to little or no avail due the resiliency of bedbugs from eradication.” *Id.* at 856.

The landlord’s efforts at eradication detailed in these opinions are the stuff of legends. So too are the efforts on the part of tenants to avoid getting bitten while attempting to sleep in their infested units. The courts struggle in these cases to find a balance between these two

concerns, but generally rule in favor of the tenant based on statutory language imposing near strict liability on the landlord for failing to keep premises free from unsafe and unhealthy conditions.

The cases³² are replete with snippets of expert testimony from exterminators. For example, did you know, according to one expert, that bedbug infestation does not vary seasonally?; that if three weeks pass without an individual being bitten, the bedbug problem is likely resolved—subsequent bites indicating a new infestation?; ninety percent of men don't manifest bedbug bites, and women are more commonly bitten because of their higher body temperatures? According to Went and Shafer, in a New York Law Journal article entitled *Good Night, Sleep Tight, Don't Let the Cimex Lectularis Bite*³³, “[t]hese opportunistic parasites are known as proficient hitchhikers. They travel from one place to another in luggage and clothing, jumping off at homes and hotels. What is worse is that these resilient pests have been known to survive 500 days without feeding.” May the exterminators help us survive an infestation of this perfectly evolved pest.

3. *Damages from a Premise Liability Claim may Extend to a Secondarily Infested Location*

Following a four-day business trip to the Radisson Lake Buena Vista Hotel in Florida, Mr. Prell brought home a bedbug infestation that he unknowingly shared with his wife and their minor son. The District Court opinion in Prell v. Columbia Sussex Corp, 2008 U.S. Dist. LEXIS 84536 (2008) is an example of a premise liability suit where the Plaintiff became infested at a hotel stay and then created a secondary infestation in his family home. His damages included

³² Other cases in this group include Estate of Gottlieb v. Shapiro, 874 N.Y.S.2d 786 (2009); Zayas v. Franklin Plaza, 881 N.Y.S.2d 368 (2009); Valoma v. G-Way Management, 2010 N.Y. Misc. LEXIS 5521 (2010); Lewis v. 525-527 Main St., 2009 Conn. Super. LEXIS 3097 (2009);

³³ Timothy M. Wenk and Howard S. Shafter, *Good Night, Sleep Tight, Don't Let the Cimex Lectularis Bite*, New York Law Journal, Jan. 26, 2006, at 4, co. 4.

personal injury and property damage to his own residence from the transported infestation.

Procedurally, the district court was ruling on the defendant's summary judgment motion, which was denied. One issue was whether expert testimony was necessary to support the infestation claim, with the court ruling that expert testimony was not necessary. Citing to the doctrine of *res ipsa loquitur*, the court held that there was adequate evidence of damages from a secondary infestation to survive summary judgment: “[Mr. Prell] repeatedly observed small, reddish-brown, tick-like insects in the hotel of defendant in Florida; he repeatedly saw identical insects in Pennsylvania within a few weeks of returning from Florida; he had never seen such insects before seeing them in the hotel; he had never before seen such insects in his home. He researched the insects and came to believe they were bed bugs; and exterminator came twice to his home and confirmed the insects were bed bugs . . .” *Id.* at 17.

The case also contains a good discussion on the issue of whether the premises owner should have been on notice of its infestation problem. “Defendant contends that here, it had mere “general,” nonspecific notice of “bugs” in Mr. Prell’s room—not enough to alert it to the presence of the dangerous condition at issue, bed bugs . . . A juror could reasonably find defendant had actual notice of the condition if he or she inferred that the Hotel’s cleaning crew or other staff looked into the complained-of problem as promised and observed the same insects seen daily by Mr. Prell. A reasonable juror could likewise find that defendant had constructive notice of the bedbugs in the room by finding that after Mr. Prell reported the insects, defendant had a duty to make reasonable inquiry by examining Mr. Prell’s room (whether or not it actually did so), and that such inquiry would have revealed the condition at issue and obligated defendant to take steps to identify and remedy it.” *Id.* at 17. Constructive notice to the hotel has now become a matter of public knowledge through such web sites as <http://bedbugregistry.com>. We

may see property owners relying on this same website to argue that the plaintiff (Prell) should have been on notice that its property was infested—truly a last resort.

4. *Caveat Emptor Protects Seller of Apartment Building from Buyer's Claim that Bed Bug Infestation History Damages Reputation of Apartment Building*

Bed bugs are a patent defect, the later discovery of which will not serve as a basis for a purchaser of an apartment building to rescind the transaction. That was the recent holding in a New York Supreme Court decision, Pitt Street LLC v. Pitt Street Realty, 2010 N.Y. Misc. LEXIS 1692 (2010). This court rejected the buyer's claim "that the infestation is a latent defect not reasonably discoverable with due diligence." It also rejected the buyer's alternative claim for compensatory, punitive, and loss of reputation damages. *Id.* at 1693. The contract of sale at issue established unequivocally that the building was being sold "as is" and that the buyer had engaged in a full inspection. "The fact that Buyer is dissatisfied with the presence of bed bugs in the Building, that Buyer is losing tenants, and that Buyer is spending unanticipated amounts of money to remediate the problem, is not sufficient to demonstrate a breach of contract because defendants failed to disclose the presence of bed bugs to Buyer." *Id.* at 1694.

For sophisticated parties in commercial transactions, an undisclosed bedbug infestation will not likely undo a sale. Given the growing infestation problem, any sound purchaser (and their counsel) should consider including a bedbug inspection as a routine part of pre-closing due diligence.

B. *Relevant Federal Employment Laws*

While the hotel industry has the benefits of case law to determine what *not to do* as it relates to bed bug claims, employees and employers (in all industries, professions and the like) also have cases and statutes that can provide similar guidance.

1. Occupational Safety and Health Act of 1970

The Occupational Safety and Health Administration is the federal agency charged with administering and enforcing the Occupational Safety and Health Act of 1970 (“OSHA”)³⁴. OSHA broadly requires employers to “furnish to each of his employees...a place of employment...free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees”³⁵. That “general duty clause” provides a broad requirement that is narrowed and defined by the many regulations promulgated by the Secretary of Labor³⁶. These voluminous regulations create comprehensive safety standards for a wide variety of workplace hazards, including a regulation on vermin control, as well as a regulation that protects the rights of whistleblowers.

a. The General Duty Clause

Before addressing the specific regulations, employers should query whether an employer’s responsibilities under OSHA’s general duty clause are triggered by the mere presence of bedbugs in the workplace. Put another way, can the mere presence of bed bugs in the workplace be classified as a “recognized hazard” that could cause “serious physical harm” to employees? First, the fact that bed bugs can go undetected by employees and employers does not preclude their classification as a recognized hazard³⁷. In fact, not only is an employer responsible for hazards s/he knows about³⁸, but an employer that is unaware of the existence of a

³⁴ <http://www.osha.gov/about.html>

³⁵ 29 U.S.C. §654(a)(1)

³⁶ 29 USCA §655(a)

³⁷ American Smelting & Refining Co. v. Occupational Safety and Health Review Com’n, 501 F.2d 504 (8th Cir. 1974)(A “recognized hazard” is not limited to one which can be recognized directly by human senses without assistance of any technical instruments)

³⁸ Usery v. Marquette Cement Mfg. Co., 568 F.2d 902 (2d Cir. 1977)

hazard is also required to take reasonable precautions to avoid hazard generally recognized in the industry.³⁹

Nevertheless, bed bugs may not trigger employer obligations under the general duty clause because they would need to pose more of a threat than the mere potential for injury to qualify as a “recognized hazard”.⁴⁰ Under the General Duty Clause, a hazard “must be something that is likely to cause death or serious physical harm to employees.”⁴¹ This requirement should disqualify bed bugs as a hazard under the General Duty Clause, simply because “serious physical harm” is limited to injuries where “a part of the body is damaged so severely that it cannot be used or cannot be used very well.”⁴² The impact of bed bugs to one’s body, which is normally a red welt, suggests that the loss of an entire body part would be a stretch. Employers should remain watchful for trends as the spike in bed bug reporting continues, but on its face, it appears as though the General Duty Clause will not apply in the bed bug context.

b. The Vermin Control Clause

In addition to the General Duty Clause, the Secretary of Labor has promulgated several regulations that address specific threats to the health and physical well-being of employees. Most relevant to the bed bug epidemic is 29 C.F.R. §1910.141(a)(5), which states:

Every enclosed workplace shall be so constructed, equipped, and maintained, so far as reasonably practicable, as to prevent the entrance or harborage of rodents, insects, and other vermin. A continuing and effective extermination program shall be instituted where their presence is detected.

Despite the fact that bed bugs do not transmit disease or cause serious physical damage, it

³⁹ See generally, National Realty & Construction Co. v. OSHRC, 489 F.2d 1257, 1265 and n.32 (1973).

⁴⁰ Pratt & Whitney Aircraft, Div. of United Technologies Corp. v. Secretary of Labor, 649 F.2d 96 (2d Cir. 1981).

⁴¹ Southern Ohio Bldg Systems, Inc. v. Occupational Safety and Health Review Com’n, 649 F.2d 456 (6th Cir. 1981).

⁴² <http://www.osha.gov/as/opa/worker/danger.html>

is likely that the Occupational Safety and Health Review Commission (“OSHRC”)⁴³ will consider this clause to govern bedbug occurrences in the workplace. Indeed, given the broad reference to “insects, and other vermin”, and the propensity for bed bugs to multiply at a rapid rate⁴⁴, an OSHA violation may be upheld if an employer fails to properly address an ongoing infestation.⁴⁵ That said, the mere existence of bed bugs is not sufficient to cause an OSHA violation.⁴⁶ In Thoroughgood Inc., D/B/A Azalea Court, 18 BNA OSHC 1899, (No. 97-0023 April 5, 1999), the OSHRC focused more on how the employer reacted to the infestation and was less concerned about the fact that vermin were present. In that case, the employer hired a pest control specialist to inspect the grounds and offer opinions on how to handle the infestation. The employer ignored the expert’s advice and the OSHRC then specifically ruled that:

It was reasonably practicable for Azalea to follow SAB's recommendations on how to lessen its vermin infestation. Because Azalea repeatedly ignored the recommendations of its own vermin control contractor, and because vermin were continually observed during the period at issue, it is concluded that Azalea neither prevented the harborage of vermin nor instituted an effective vermin control program. Azalea violated the terms of the standard.⁴⁷

Hence, we believe that ultimately, the question is not whether an employer has an infestation, but rather how the employer addresses and combats the infestation.⁴⁸ Employers will be able to find safe harbor from OSHA claims if they remain responsive to signs of an infestation

⁴³ <http://www.oshrc.gov> The Occupational Safety and Health Review Commission (OSHRC) is an independent Federal agency created to decide contests of citations or penalties resulting from OSHA inspections of American work places. The Review Commission, therefore, functions as an administrative court, with established procedures for conducting hearings, receiving evidence and rendering decisions by its Administrative Law Judges (ALJs).

⁴⁴ See, Note 24, *supra*.

⁴⁵ Thoroughgood, Inc., D/B/A Azalea Court, 18 BNA OSHC 1899, (No. 97-0023 April 5, 1999)

⁴⁶ Id.

⁴⁷ Id. at *3.

⁴⁸ See, Clark v. Beacon Capital Partners, LLC, 2011 NY Slip Op 30920(u) (April 12, 2011). This recent decision gained notoriety, both because it was one of the first instances of an employee bringing suit against a commercial landlord, and also because the employer in this case was Fox News. See, e.g. “Bedbugs at Fox News,” New York Times, March 18, 2008; “Fox News Worker Files Bedbugs Lawsuit,” ABC News, May 30, 2008. While the suit did not name the employer as a defendant, the opinion lauds the efforts Fox News took to remedy the bedbug infestation. Ultimately, the Court dismissed the claims against defendants, based largely on the fact that, in the Court’s estimation, “the property defendants could not have taken any measures beyond those taken by [the employer].”

and engage and follow the advice of professionals⁴⁹.

If the OSHRC does find a violation, the Commission must give “due consideration” to the size of the employer's business, the gravity of the violation, the employer's good faith, and history of past violations in determining an appropriate penalty.”⁵⁰ Given the prevalence of the bed bug resurgence, good faith will likely go a long way in determining whether a violation has occurred, and if a violation is present, the likelihood of infection is a major consideration when determining the gravity of the claim.⁵¹

c. The Whistleblower Clause

If bed bugs do make their way into the workplace, it is critical for employers to remain calm and avoid alienating employees that may have brought the infestation into the workplace, discovered the infestation, or flagged the issue as a concern. OSHA’s whistleblower clause provides certain protections for employees who report what they believe to be violations of OSHA. Thus, employer’s must handle delicately complaints and reports, especially self-reporting scenarios, balancing the need to maintain a safe and productive workplace with the legal requirement to treat the reporting party fairly and in a non-discriminatory manner.

To bring a successful whistleblower claim, an employee need only prove that 1) s/he participated in protected activity, 2) there was subsequent adverse action by the employer, and 3) there was casual connection between that action and the protected activity.⁵² An internal complaint is “protected” under section 11(c) of OSHA if it arises under or is related to a health or

⁴⁹ Not discussed at length in this section, but worthy of note, is the fact that, under OSHA, an employer can be their own worst enemy when attempting to combat an infestation. Chemical treatments are considered by some to be ineffective by professional exterminators, see, Part V. *infra*, and if those chemicals create hazards to employees, either under the general duty clause or under the more specific “hazardous chemicals” section of OSHA, then their presence in the workplace will only exacerbate an employer’s OSHA liability. Always contact a professional when exterminating.

⁵⁰ Thoroughgood, Inc., D/B/A Azalea Court, 18 BNA OSHC 1899, (No. 97-0023 April 5, 1999) quoting J.A. Jones Constr. Co., 15 BNA OSHC 2201, 2213-14 (No. 87-2059, 1993).

⁵¹ See, e.g. Bethlehem Steel Corp v. OSHRC, 607 F.2d 1069 (3d Cir. 1979).

⁵² Schweiss v. Chrysler Motors Corp., 987 F.2d 548, 549 (8th Cir. 1993).

safety hazard⁵³, and if it is made in good faith⁵⁴. The employee can establish the requisite causal connection by showing that the protected activity was a substantial reason for the adverse employment action⁵⁵.

The OSHA whistleblower statute creates a true dilemma for employers. When your employee reports that s/he has discovered bed bugs in their home, office, or on their person, how should an employer act? At the outset, an employer must focus on being sensitive and discreet. Employers should avoid any action that could be considered intimidation⁵⁶ (including pressure to have a home extermination completed quickly) or other actions that that could be considered discipline, such as reassignment or reduction in pay or hours.⁵⁷ Balancing those legal obligations against the desire to isolate and contain the infestation is not easy and, while a “perfect” protocol has not yet been established, an employer that has a published policy in place will certainly be better prepared to deal with this potential issue should the need arise.

2. The National Labor Relations Act

Most employers are aware of the National Labor Relations Act⁵⁸ (“NLRA”) but believe that it only applies in the labor setting. In reality, the NLRA covers much more ground, protecting “the rights of most private-sector employees to join together, with or without a union, to improve their wages and working conditions.”⁵⁹ Put another way, the NLRA protects “concerted activity”, which is discussed under the NLRA as “the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective

⁵³ 29 C.F.R. §1977.9

⁵⁴ *Id.* at §1977.9(c).

⁵⁵ 29 C.F.R. §1977.6.

⁵⁶ Connecticut Dept. of Environmental Protection v. OSHA, 356 F.3d 226, 229 (2d Cir. 2004).

⁵⁷ Donovan v. Commercial Sewing, Inc., 562 F.Supp. 548, 554 (D.Conn. 1982).

⁵⁸ 29 U.S.C. §§151-167.

⁵⁹ <http://www.nlr.gov/rights-we-protect/employee-rights>

bargaining or other mutual aid or protection.”⁶⁰ Notably, these protections extend to all covered employees, regardless of whether a union is present.⁶¹ The salient inquiry is not whether a union is present, but rather whether the employees are engaged in concerted activities.

Thus, even non-union employers must carefully craft a bed bug policy that does not infringe on their employees’ right to “concerted activity”. Again, an employer that is attempting to avoid a panic is placed in a difficult position, as the NLRA frequently blurs, if not erases, the line between rumor-mongering and “concerted activity”⁶². The NLRA has repeatedly struck down policies that prohibit the spreading of rumors⁶³ under the belief that such action threatens to chill employee’s rights to concerted activity⁶⁴. Employers should train their managers to be open and transparent when it comes to bed bug issues and avoid attempts to stifle communication between the employees about outbreaks, whether real or imagined. Such a transparent approach is the best method for dealing with an employee that is outspoken about the presence, or the potential presence, of bed bugs.

For employers already operating under a collective bargaining agreement, it is even more critical that they be aware of the threats bed bugs present and have a policy in place. At least one union has already issued specific notice regarding the existence of bedbugs in the workplace.⁶⁵ In addition to providing valuable tips on how to avoid bringing bed bugs home, the materials

⁶⁰ 29 U.S.C. §157

⁶¹ NLRB v. Phoenix Mutual Life Insurance Co., 167 F.2d 983, 22 LRRM 2089 (7th Cir 1948), cert. denied, 335 US 845 (1948).

⁶² Mevers Industries, 281 NLRB 882 (1986, enfd. 835 F.2d 1481 (D.C. Cir. 1987)). See also Elston Electronics Corp., 292 NLRB 510, 511 (1989).

⁶³ Lafayette Park Hotel, 326 NLRB 824, 848 (1998) (Board struck hotel policy against “making false, vicious, profane, or malicious statements toward or concerning the [hotel] or any of its employees”); Cincinnati Suburban Press, 289 NLRB 966 (1988) (Board struck company policy against “false, vicious, or malicious statements concerning any employee, supervisor, the company, or its product”); and Great Lakes Steel, 236 NLRB 1033 (1978) (Board struck policy against handing out literature that was “libelous, defamatory, scurrilous, abusive or insulting or”).

⁶⁴ Fiesta Hotel Corporation d/b/a Palms Hotel and Casino and Local Joint Executive Board of Las Vegas, 344 N.L.R.B. 159 (Aug. 15, 2005).

⁶⁵ Safety and Health Guide for Teamsters, IBT, Local 237, June 2009.

specifically cite to the Vermin Control clause of OSHA.⁶⁶ The materials tell union members that “the law says your employer must have a good clean-up and extermination program if you have bed bugs in your workplace.”⁶⁷ While there is no law on the books that specifically requires employer to maintain a bed bug policy, the OSHA regulations do implicate vermin and insect infestations, and employers would be hard pressed to claim ignorance or justify a lack of a policy in light of the continued attention bed bug issues have received in the media and in every day life.

3. FMLA and ADA Concerns

Up to this point our analysis focused on employment concerns that are directly raised by the existence of bed bugs in the workplace, but employers should also be aware that the impact bed bugs have on employees (i.e. the loss of sleep, the bites, the psychological impact) may lead to requests for leave or other accommodations under other federal statutes. In many of these instances, employees will need to go undergo a medical evaluation and employers will need to determine whether the effect of the bed bugs on an employee creates eligibility for leave or otherwise entitles the employee to protections under these laws.

By now, most employers are familiar with the various federal laws that protect sick or injured employees. The Family and Medical Leave Act (“FMLA”) provides up to twelve workweeks of job-protected leave for eligible employees.⁶⁸ To be eligible, the employee must have a “serious health condition”, which is defined as an illness, injury, impairment, or physical or mental condition that involves (A) inpatient care in a hospital, hospice, or residential medical

⁶⁶ The materials technically cite to a New York State analog of the OSHA vermin clause (“PESH 29 CFR 1910.141(a)(5)”) which parrots the federal language. Id.

⁶⁷ Id.

⁶⁸ 29 U.S.C. §2601, et. al.

care facility; or (B) continuing treatment by a health care provider.⁶⁹ There is no summary answer as to whether a bed bug infestation can justify leave under the FMLA, but based on the language of the regulation and the treatment of recent epidemics⁷⁰, it appears as though simply claiming an infestation would not create a “serious health condition” among employees or their families suitable to justify leave.

Employees are also protected under the Americans with Disabilities Act (ADA), which provides leave and accommodations for disabled employees, as defined by the statute.⁷¹ The ADA defines “disability” as (1) a physical or mental impairment that substantially limits one or more of the major life activities of an individual; (2) a record of such an impairment; or (3) being regarded as having such an impairment.⁷² The major life activities identified under the ADA include sleeping⁷³ and working. An employee’s ability to work has been substantially limited under the ADA when they are “significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities.”⁷⁴ As of May 24, 2011, three more “major life

⁶⁹ 29 U.S.C. § 2611(11)

⁷⁰ Despite its contagious nature, FMLA’s treatment of seasonal flu does not permit leave under the Act absent a showing that the elements of a “serious health condition” are met. 29 C.F.R. § 825.113(c) (“Ordinarily, unless complications arise, the common cold, the flu, ear aches, upset stomach, minor ulcers, headaches other than migraine, ... etc., are examples of conditions that do not meet the definition of a serious health condition”). However, during the H1N1 outbreak in 2009, the U.S. Department of Health and Human Services’ Center for Disease Control and Prevention (CDC), issued guidance to employers that strongly recommended that employers adopt leave policies that would stem the outbreak by permitting employees to stay home when an H1N1 issue arose within their family. See <http://pandemicflu.gov/professional/business/#employer>. Similar guidance regarding bed bugs may be forthcoming. See <http://www.cdc.gov/nceh/ehs/topics/bedbugs.htm>.

⁷¹ 42 U.S.C. §§12101-12213

⁷² Id.

⁷³ 42 U.S.C. §§12102(2)(A). See also Colwell v. Suffolk County Police Dept., 158 F.3d 635, 643 (2d Cir. 1998) (sleeping is a major life activity). Particularly instructive is the case of Haynes v. Williams, 392 F.3d 478 (D.C. Cir. 2004), where the Court considered whether an employee’s claim of idiopathic pruritus (“severely incapacitating skin itching”) sufficiently limited his ability to sleep. Because the claimant alleged that the condition was brought on by his surroundings, and exacerbated by his particular office, the Court found that a change in location could resolve the issue and found no limitation of a major life activity under the ADA. Haynes 392 at 485.

⁷⁴ 29 C.F.R. §1630.2(j)(3). But see Id. and Giordano v. City of New York, 274 F.3d 740, 747-48 (2d Cir. 2001) (if an employee cannot perform a particular task, that does not necessarily constitute a substantial limitation of their ability to work).

activities” will join the list of major life activities: sitting, reaching and interacting with others.⁷⁵ There is no blanket answer as to whether the fallout from bed bug infestation will trigger ADA protections; this will be a case-sensitive determination and employers will need to conduct an independent analysis under the ADA to determine whether their employee qualifies for ADA protections and, if eligible, work with the employee to accommodate their disability⁷⁶. It is questionable whether an infestation will constitute a “physical or mental impairment” under the statute, but employees that can prove an infestation will likely allege that their sleep habits, work habits and even their ability to interact with co-workers have all be compromised. With the growing exposure of liability claims rising from bed bugs, let us now turn to a discussion on insurance coverage for claims coverage arising out of bed bugs.

PART IV **Insurance Coverage For Bed Bug Claims**

As homeowners and business owners continue to deal with bed bug claims, one consideration for all victims of bed bug infestation will be whether insurance coverage exists for first and third-party claims.

Bed bugs are on the list of emerging issues facing the insurance industry, not only for hotels, but also for retail, apartment, and residential healthcare sectors.⁷⁷ The costs associated with removal of bed bugs can be significant and owners of businesses and homes will surely seek coverage under insurance policies which they maintain in order to limit exposure and control

⁷⁵ 29 C.F.R. §1630.2(j)(3).

⁷⁶ Employers should also be aware that the new ADA regulations also require that “employers should focus on accommodations, as opposed to questioning whether someone is disabled.” See 76 FR 16978 (March 25, 2011). This may necessitate a shift in the approach employers take when processing ADA claims.

⁷⁷ Marci Steiding, “*Don’t Let the Bed Bugs Bite: An Insurance and Risk Management Perspective*”, Beecher Carlson (Oct. 11, 2010), available at <http://www.beechercarloson.com/information/news.asp?m=d&id=205>

costs. Unfortunately for some policyholders, such claims may not fall within the coverage of most homeowners or liability policies.⁷⁸

There are compelling reasons to expect that coverage litigation will develop with regard to bed bug claims. Indeed, as industry experts and business owners continue to study the bed bug issue in order to develop means by which to stave off the rising tide of claims, insurance coverage could be the focus of future battles as the exposure from such claims increases.

A. *First-Party Claims*

Most standard commercial property policies have specific vermin exclusions for loss due to insects.⁷⁹ Similarly, most standard homeowner and renter insurance policies exclude losses pertaining to vermin, but will such exclusions preclude coverage for bed bug claims? The insurance industry perspective is that the cost of getting rid of bed bugs is, like other vermin, considered part of the maintenance associated with owning a home and is not covered by standard homeowners' and renters' insurance policies.⁸⁰ A standard homeowners' insurance policy may include the following provision:

SECTION I – PERILS INSURED AGAINST

A. Coverage A – dwelling and Coverage B – other structures

- (1) We insure against the risk of direct physical loss to property described in coverages A and B.
- (2) We do not insure, however, for a loss:
 - a. Excluded under Section I – Exclusions;
 - b. Involving collapse, except as provided in E.8. Collapse under Section I – Property Coverages; or

⁷⁸ Hiroko Masuike, “*Home Insurance and Bed Bug Invasions*”, New York Times, Apr. 12, 2011, available at <http://bucks.blogs.nytimes.com/2010/05/06/home-insurance-and-bedbug-invasions/>

⁷⁹ See, Casale, *As Bed Bug Concerns Grow, Will Insurers Feel The Bite*, *supra*.

⁸⁰ Alistair Barr, *Bed Bugs May Bite Insurers, But Won't Dog Industry*, MarketWatch (Sept. 2, 2010) available at <http://www.marketwatch.com/story/bed-bugs-may-bite-insurers-but-wont-dog-industry-2010-09-02>

c. Caused by:

(6) Any of the following:

(g) Birds, vermin, rodents, or insects;⁸¹

This is the type of exclusion which the industry may rely upon in asserting that bed bug claims are excluded. Although decisional authority exists which favors the industry view, it is noteworthy that the term “vermin” is not defined in most homeowners’ policies. Moreover, a court has not yet considered the specific issue whether a bed bug claim falls within the vermin exclusion.

Generally, where a policy of insurance is so framed as to leave room for two constructions, the words used will be interpreted against the insurer.⁸² A court’s willingness to construe ambiguity in a policy provision against an insurer is especially true with respect to exclusions because it is the insurer’s burden to show that a particular exclusion applies.⁸³ Although a court has not yet considered this issue with regard to a bed bug claim, one court has analyzed the vermin exclusion in a homeowner’s policy with regard to carpet beetles, and that analysis may suggest how the vermin exclusion might eventually be construed with respect to bed bug claims.

In Sincoff v. Liberty Mutual Fire Insurance Company, 11 N.Y. 2d 386, 230 N.Y.S.2d 13 (1962), upon discovering that carpet beetles damaged a pair of antique armchairs, an 18th Century Aubusson tapestry, and an expanse of imported broadloom carpeting, policyholders brought an action seeking coverage under an “all risk” personal property insurance policy. The

⁸¹ ISO Form Number HO 00 03 10 00, Insurance Services Office, Inc., 1999.

⁸² Barry R. Ostrager and Thomas R. Newman, “Handbook On Insurance Coverage Disputes”, Fourteenth Edition §1.03[b][1] (14th Edition 2008)

⁸³ Id.

insurer denied coverage on the ground that damage from carpet beetles fell within the vermin exclusion.

During the trial, experts testified as to the meaning of the term vermin as provided by several dictionary sources. One expert testified that carpet beetles and moths are members of the insect world, but only certain categories of insects are vermin.⁸⁴ Significantly, the court observed there were conflicting opinions as to what constituted vermin and that “experts well versed in entomology disagree as to the meaning of the word and that dictionaries contain varying connotations, some indicating that vermin includes all bothersome insects, while others limit the term to parasitic insects.”⁸⁵

Although the parasitic/non-parasitic distinction in this analysis favors a finding that a bed bug claim falls within the vermin exclusion, the court’s observation that there is uncertainty as to the meaning of the term “vermin” raises some question as to whether the parasitic/non-parasitic distinction will suffice for all courts that consider the vermin exclusion. Significantly, the court also noted that:

The risk, presumably known to the insurer, could have been excluded by a less vague term, as for example, damage by 'moths' specifically was excluded. Direct reference to 'carpet beetles' would have been preferable but even a simple statement excluding 'insect' or 'household pests' would have sufficed. It should be noted that moths were treated separately, and such a separate treatment would have been unnecessary under the construction the insurer seeks to place upon the word 'vermin'.⁸⁶

Ultimately, the court denied application of the exclusion by focusing on the “all risk” nature of the policy and the burden of the insurer to show that an exclusion applies to a particular claim. The Court explained:

⁸⁴ *Id.* at 389.

⁸⁵ *Id.* at 390.

⁸⁶ *Id.* at 391.

It was not sufficient for the defendant to demonstrate that a purchaser of the policy involved herein might have construed 'vermin' to include carpet beetles. Defendant, to derive any benefit from the exclusory clause, was obliged to show (1) that it would be unreasonable for the average man reading the policy to conclude that nonparasitic carpet beetles were not vermin and (2) that its own construction was the only one that fairly could be placed on the policy. This the defendant was unable to do.⁸⁷

Although insurers may wish to rely, perhaps reasonably, upon the parasitic/non-parasitic distinction discussed with regard to the vermin exclusion, insurers should be wary of the court's observation in Sincoff that there exist conflicting definitions of the term vermin. Notably, the court's further observation that specific mention of "moths" in the exclusion conflicts with the insurer's broader interpretation of the term vermin.

In ISO Form Number HO 00 03 10 00 noted above, the exclusion refers to both vermin and insects, which is especially interesting in light of the expert testimony in Sincoff that certain categories of insects are vermin. Such inconsistency in the use and interpretation of the term vermin may invite a policyholder to challenge the application of a vermin exclusion in the future, especially if confronted with a declination of coverage for a significant loss.

Another court which considered the term vermin in an "all risks" policy, albeit with respect to damage caused by squirrels, is Jones v. American Economy Insurance Co. 672 S.W. 2d 879, 1984 Tex. App. LEXIS 5666 (Tex.5th Dist. 1984). There, the court held:

Webster's New Collegiate Dictionary, 1301 (1974) defines 'vermin' as 'small common harmful or objectionable animals (as lice or fleas) that are difficult to control... birds and mammals that prey on game... an offensive person.' The word is derived from, or related to, the Latin word, 'vermis', for 'worm.' Squirrel is defined, Webster, 1130, as 'any of small or medium-sized rodents...as... any of numerous new or old World arboreal forms having long bushy tails and strong hind legs.' The Joneses maintain that 'vermin' is not a particular class of animals, such as rodents, to which squirrels belong. It is apparent that the definition of 'vermin' is very broad, covering entities as diverse as insects, animals, and persons. The

⁸⁷ Id. at 901.

few cases we have found in other jurisdictions are divided on this question. We conclude that the term does not have a simple, plain, and generally accepted meaning and that it is susceptible of more than one reasonable interpretation; therefore, we hold that the term is ambiguous.⁸⁸

Therefore, although insurers may have a compelling argument that the parasitic/non-parasitic distinction discussed in Sincoff favors application of the vermin exclusion for bed bug claims, policyholders can point to decisional authority in some jurisdictions which has found that the term “vermin” is ambiguous.

B. Third-Party Claims

If a tenant, guest, or other third party is bitten by bed bugs, it is possible that a third-party liability claim may be brought against the party deemed responsible. Although the limited opportunity to allege damages may prevent most incidents from evolving into a suit, as we discussed in Part III, *infra.*, such suits have been brought and will surely continue.

Bed bug bites leave itchy red welts and, depending on the allergic reaction which could differ with each victim, some resulting injuries may be worse than others. Although there may be a causation issue which must be resolved in the defense of the underlying liability case, it is the allegations of the underlying complaint which must be considered in determining whether a claim falls within the insuring clause of a liability policy. If a complaint alleges that a plaintiff suffered bites and red welts due to the negligence of a business owner, it is likely that a claim has been alleged for bodily injury as that term is defined in most general liability policies.

Most commercial general liability coverage forms contain an insuring clause similar to the following:

SECTION I – COVERAGES

COVERAGE A BODILY INJURY AND PROPERTY DAMAGE LIABILITY

⁸⁸ *Id.* at 880.

1. Insuring Agreement

- a. We will pay those sums that the insured becomes legally obligated to pay as damages because of “bodily injury” or “property damage” to which this insurance applies.
- b. This insurance applies to “bodily injury” and “property damage” only if:
 - (1) The “bodily injury” or “property damage” is caused by an “occurrence” that takes place in the “coverage territory”;⁸⁹

ISO Form CG 00 01 10 01 also contains the following definitions:

“Bodily injury” means bodily injury, sickness or disease sustained by a person, including death resulting for many of these at any time.

“Property Damage” means:

- (a) Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or
- (b) Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the “occurrence” that caused it.

“Occurrence” means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.⁹⁰

Most commercial liability policies do not contain a “vermin” exclusion; however, it is possible that other exclusions might apply to some or all such claims, depending on the particular allegations of the plaintiff. The “Expected Or Intended Injury” exclusion contained in a standard commercial general liability coverage policy bars coverage pursuant to the following terms:

Expected or Intended Injury

“Bodily injury” or “property damage” expected or intended from the standpoint of the insured. This exclusion does not apply to “bodily injury” resulting from the use of reasonable force to protect persons or a property.⁹¹

⁸⁹ ISO Form Number CG 00 01 10 01, Insurance Services Office, Inc., 1999.

⁹⁰ Id.

This exclusion would bar coverage if a policyholder knew of a bed bug infestation before a plaintiff was injured. Of course, if the policyholder knew or expected that a business invitee would be subjected to bed bug bites, such a claim would not have been caused by an occurrence. Even if a plaintiff does not allege a policyholder knew of an infestation problem, a reservation of rights would be appropriate to the extent that discovery in the underlying case could reveal prior incidents or that the policyholders knew of the infestation.

Absent a prior claim, prior knowledge of an infestation problem by employees could be revealed in discovery. For example, evidence of prior knowledge of an infestation at a hotel could be shown if employees or guests report:

- (1) receiving bites [but a “claim” is not made];
- (2) observing bloodstains on the sheets or mattress of a hotel; or
- (3) fecal matter on the mattress, box spring or headboard.⁹²

Although it is possible that hotel guests could be bitten without knowing because not all victims of bed bug bites are aware that they have been bitten, staff of the hotel and/or business may be trained with regard to the signs of a bed bug problem and such prior knowledge could be the basis of a declination of coverage.⁹³

We have considered these coverage issues in the context of a hotel operation because that industry has experienced a higher volume of claims, but the same analysis would apply to other business locations such as offices, theaters, restaurants, doctors’ offices, gyms, and shopping

⁹¹ Id.

⁹² Jeff Eisenberg, *The Bed Bug Survival Guide*, Grand Central Publishing - Hachette Book Group (Apr. 2011).

⁹³ Id. at 28.

malls.⁹⁴ For example, large corporations have been forced to close their offices in order to clean up bed bug infestations.⁹⁵

Limited compensatory damages which a plaintiff can demonstrate in a bed bug claim could be significantly enhanced if the plaintiff also alleges a claim for punitive damages. Depending on the particular circumstances of the plaintiff's exposure to bed bugs, a claim could be alleged for more than negligence if a policyholder failed to act responsibly toward a business invitee. As discussed in Part III, in Mathias v. ACCOR Economy Lodging, Inc. et. al.,⁹⁶ the court upheld a jury award to each plaintiff for compensatory damages of \$5,000 and punitive damages in the amount of \$186,000. In holding that the award was not excessive, the Seventh Circuit took judicial notice that “. . . deliberate exposure of hotel guests to the health risks created by insect infestations [bed bug] exposes the hotel's owner to sanctions under Illinois and Chicago law that in the aggregate are comparable in severity to that of the punitive damages award in this case.”⁹⁷

In Livingston v. H.I. Family Suites, Inc.,⁹⁸ plaintiffs alleged the defendants knew before renting a hotel room that the hotel was infested with bed bugs, “yet concealed this information despite the fact that they had a duty to disclose such information due to their position of influence and superiority over the plaintiffs.”⁹⁹ Amid claims that the defendants' conduct was extreme and outrageous, the plaintiffs alleged claims for intentional infliction of emotional distress, fraudulent concealment, and gross negligence. In light of the intentional nature of the

⁹⁴ Id. at pages 101–109.

⁹⁵ Alistair Barr, *Bed Bugs May Bite Insurers, but Won't Dog Industry*, MarketWatch, (September 2, 2010) <http://www.marketwatch.com/story/bed-bugs-may-bite-insurers-but-wont-dog-industry-2010-09-02>

⁹⁶ 347 F.3d 672 (7th Cir. 2003)

⁹⁷ Id. at 16.

⁹⁸ 2005 U.S. Dist. LEXIS 41435 (M.D.Fla. 2005) (The court upheld the plaintiffs' claim for gross negligence toward a business invitee and the defendants' motion to dismiss was denied.)

⁹⁹ Id.

defendants' alleged conduct, the plaintiffs sought punitive damages. In addition to the other coverage defenses which are self evident from the intentional, knowing conduct alleged by plaintiffs, an insurer might also disclaim coverage for the punitive damages sought by the plaintiffs. Policy exclusions for punitive damages which are included in most liability policies would exclude coverage for such claims in most states.¹⁰⁰

Business interruption coverage could be triggered if a business is forced to close due to bed bug infestation and cannot reopen until after a fumigation.¹⁰¹ For hotels, loss of attraction coverage could be applied for actual losses sustained due to cancellations or the inability to accept bookings for rooms due to such infestations.¹⁰² Although the specific terms of a business interruption policy must be analyzed to determine if coverage applies, the essential purpose of such coverage is to place the insured in the position it would have occupied if the interruption had not occurred.¹⁰³ Business interruption coverage indemnifies an insured for losses sustained caused by the inability to continue to use specified premises.¹⁰⁴ Under the circumstances, such coverage would likely be available unless the perils set forth in the policy do not include such infestation claims.

PART V

Bed Bugs Best Practices

While the scourge of bed bugs has led to new types of litigation and raised novel insurance coverage issues which the reader may come across in their daily practice, the most common way a bedbug will impact one's daily life is when a bed bug invades a home or office.

¹⁰⁰ Barry R. Ostrager and Thomas R. Newman, *Handbook On Insurance Coverage Disputes*, Fourteenth Edition §14.01 (14th ed. 2008)

¹⁰¹ Elmquist & Zitzloff, *A Rash of Bed Bug Infestations may Take a Bite out of Insurers*, Elmquist & Zitzloff Insurance Agency Incorporated (Aug. 18, 2010) available at [http://www.eandzagency.com/blog/A_Rash_of_Bed bug_Infestations_May_Take_a_Bite_Out_of_Insurers.aspx](http://www.eandzagency.com/blog/A_Rash_of_Bed_bug_Infestations_May_Take_a_Bite_Out_of_Insurers.aspx)

¹⁰² Id.

¹⁰³ Polymer Plastics Corp., v. Hartford Cas. Ins. Co., 389 Fed. Appx. 703 (9th Cir. 2010)

¹⁰⁴ Keetch v. Mut. Of Enumclaw Ins. Co., 831 P.2d 784, 1992 Wash. App. LEXIS 266 (3rd Div. App.Ct. 1992)

Therefore, we conclude our paper with practical advice about how to detect bed bugs and if they are found, how to eliminate them. There are several different methods to eliminate bed bugs, each with their own rates of success as well as certain limitations based on the type of area to be treated.

A. *How do you Detect a Bed Bug?*

There is a common belief that the best way to determine if you are sharing space with a bed bug is if you wake up with an unexplained bite. However, studies have shown that while bites may be the first sign of a bed bug, it is not the best way to identify a potential bed bug infestation.¹⁰⁵ As humans vary in the way their skin reacts to bites, it is possible that an individual may be bitten but their skin may not react for days. By the time the bite is apparent, they have either returned to their home bringing the bug with them or have spread the bug to others. Additionally, a bed bug bite does not always equal home infestation. Rather, it could be an isolated exposure while at a movie theater or friend's home. In some rare cases, an individual may not even show signs of a bed bug bite. Since a bed bug bite is not the best way to identify a bed bug infestation, there are ways to determine if bed bugs are sharing your bed. As early detection can help reduce the bed bug population in your home before it becomes too costly and difficult to control, being able to find bed bugs is a critical component of having a good offence to eradicate this growing problem.

In order to find bed bugs, one must know what they look like. Fortunately, humans can see adult bed bugs. When an adult bed bug has eaten, they blow up like a blimp and elongate into a torpedo shaped bug. If they had not fed in awhile, they appear as a flat disc.¹⁰⁶ Adults are reddish brown in color, without wings and are about the size of an apple seed. Humans can also

¹⁰⁵ Dini M. Miller, "How to Identify a Bed Bug Infestation", Virginia Department of Agriculture and Consumer Services, *available at* <http://www.vdacs.virginia.gov/pesticides/pdf/files/bb-identify1.pdf>.

¹⁰⁶ *Id.*

see younger bed bugs. They are mostly a translucent whitish-yellow. Unfortunately, it is difficult to find the nymph, which is a bed bug at its youngest stage. A nymph is pale white or yellowish and turns bright red after it has ingested its latest meal.¹⁰⁷ Equally as difficult to find is a bed bug egg as such an egg is the size of the head of a pin.

Another way to find a bed bug is to look for their exoskeleton, which is often shed as a bed bug goes through the five stages of its life. The molting process, which occurs when a bed bug sheds, leaves behind a translucent shell that can be detected by the naked eye. The shell can be in different sizes depending on which stage the bed bug is in. It is suggested that one looks along mattress seams, behind head boards, in ceiling junctions, in wall junctions, along baseboards and attached to personal belongings.¹⁰⁸

As discussed in Part I, after bed bugs eat, they spend a majority of their time digesting and excreting their meal, which results in excess liquid being left behind. The liquid is black in color and is often seen in groups of ten or more unless the bed bug was just passing through the area.¹⁰⁹ The best place to look for fecal spots are along mattress seams, on the tag of the mattress, on the wood frame of the box spring, behind the head board, along the top of a baseboard, near the edge of carpeting, behind pictures hanging on the wall, near ceiling/wall junctions, at electrical outlets and in curtain seams located closest to the rod.¹¹⁰

Yet another way to find bed bugs is by looking for bed bug aggregations, i.e. locations where bed bugs live together. The most frequent place for such aggregations are under mattress tags, along mattress seams, behind the headboard, the holes for set-in screws, along a bed frame, near creases in the bed springs, the area where the box spring fabric is stapled to the frame,

¹⁰⁷ Id.
¹⁰⁸ Id.
¹⁰⁹ Id.
¹¹⁰ Id.

behind loose wallpaper, under the base of an air conditioner, behind chipped paint, along the interior of closet doors, inside and behind baseboard heaters, inside curtain rods and on top of pleated curtains.¹¹¹

B. *Methods to Kill Bed Bugs*

If you have found bed bugs, you need to promptly address the issue. Additionally, you need to make sure that the treatment you use is not only effective, but also safe as recent examples of improper treatments have led to disastrous consequences. In Cincinnati, Ohio, homeowners hired an exterminator to kill bedbugs which had taken over the home. Six propane powered convection heaters, which were designed to heat the home to 135 degrees to kill the bedbugs, caught the living room carpet on fire. The home where the fire began was a complete loss.¹¹² Sadly, in Thailand, seven tourists including an American women were killed between January and March 2011.¹¹³ All seven tourists either stayed or used facilities at the Downtown Inn in Chiang Mai, Thailand. The hotel was investigated and traces of an insecticide called chlorpyrifos (CY) and pyrophus were found in the hotel. The insecticide chlorpyrifos is a chemical used to eliminate bed bugs and pyrophus is a potentially lethal toxin which has been banned from indoor use in many countries.¹¹⁴

¹¹¹ *Id.*

¹¹² *Carthage Home Destroyed by Bed Bug Treatment*, Ohio Standard.Com, May 16, 2011, available at <http://story.ohiostandard.com/index.php/ct/9/cid/90d24f4ad98a2793/id/45448253/>

¹¹³ It should be noted that bed bugs are not known to transmit disease and there are no reported deaths linked from a bed bug transmitting disease. *See* Centers for Disease Control and Prevention and U.S. Environmental Protection Agency. *Joint statement on bed bug control in the United States from the U.S. Centers for Disease Control and Prevention (CDC) and the U.S. Environmental Protection Agency (EPA)*. Atlanta: U.S. Department of Health and Human Services; 2010. However, a recent study has shown that Methicillin-resistant *Staphylococcus aureus* (MRSA), a bacterial infection that is highly resistant to some antibiotics, has been detected in bed bugs. However, there is no evidence to show that bed bugs themselves actually carry MRSA. Dan Bowens, *Study: Bed Bugs Could Carry MRSA*, MyFoxNy, available at <http://www.myfoxny.com/dpp/health/study-bed-bugs-could-carry-MRSA-20110511>.

¹¹⁴ Daily Mail Reporter, *Bed Bug pesticide poisoning killed Californian woman and six other tourists in Thailand*, Daily Mail, May 10, 2011, available at <http://www.dailymail.co.uk/news/article-1385518/Bed-bug-pesticide-poisoning-caused-death-California-woman-tourists-Thailand.html>

In order to avoid any problems with improper treatment, we list several different methods which are currently being used to eliminate bed bugs. We recommend that if you have to select a treatment, you select the one that best matches your level of infestation as well as the area that you treating.

Heat treatments - Heat used at high temperatures can be a very effective method in killing bed bugs and their eggs. However, heat treatments pose inherent limitations due to the damage heat may cause and the need to ensure that all areas are raised to a temperature necessary to kill the bugs.

Steam heat - Many pest control companies use steam as part of their services. Steam can also be effective, but this method may be unable to treat electronics, computers, fine furnishings and art work due to the damage steam could cause to these items. As bed bugs often hid in wall hangings and are attracted to electronics, due to the heat they emit, the effectiveness of steam treatment may be limited to the areas that it can be used.

Radiant fry heat - To treat bed bugs with radiant heat, the service provider needs to raise the temperature of the room to 140 degrees for 0-2 hours, 130 degrees for at 1-3 hours for a slower kill, or above a minimum 113 degrees for 2-7 hours. This type of treatment takes more than eight hours to complete and often times must be done on a room to room basis which may make it difficult to treat large residences at once.

Conventional pesticide treatments - Due to bedbug's inherent resistances to pesticides as well as their ability to mutate quickly to become immune to the lasting effects of these materials, some commentators assert that pesticide treatments have began to have limited value against bed bugs. Often times, bed bug treatments that use pesticides are sold at stores and do not require the need for a trained professional to effectuate the treatment. While the treatments are less

expensive, improper use of pesticides could harm people more than the actual bedbug. For example, children whose mothers are exposed to high amounts of certain pesticides while pregnant appear to have lower IQs than their peers when they reach school age, according to three recent government-funded studies.¹¹⁵ Therefore, one must be cautious when using this type of treatment.

HEPA vacuum treatments – A HEPA vacuum is a viable method to eliminate large scale visible infestations. They are also useful in the pre-treatment preparation process.

That may be less effective for low level infestations or for treatment of bed bugs in hard to reach areas.

Spot treatments – In residences, spot treating in only the areas where bed bugs are found is another method to eliminate bedbugs. As bed bug treatments require detailed preparation which could involve laundering items, dismantling furniture, and getting rid of excess clutter and debris, it is common for bedbugs to be disturbed by this process and sent looking for new hiding spots, thereby reducing the effectiveness of a spot treatment where the bed bug was initially found.

Bed Bug Sniffing Dogs – Entomology researchers at the University of Florida report that well trained dogs can detect a single live bug or egg with 96 percent accuracy.¹¹⁶ Bed bug dogs are being used more often due to their ability to find bed bugs in hidden areas. However, the price for a bed bug sniffing dog to inspect your home may be in the four figure range.

Carbon Dioxide “dry ice” snow - This method freezes the bedbugs without the need for chemicals or pesticides. When using carbon dioxide, treatment of a room often is completed

¹¹⁵ See, *Pesticides During Pregnancy May Hurt IQ*, Huffington Post, available at http://www.huffingtonpost.com/2011/04/23/pesticides-pregnancy_n_852785.html

¹¹⁶ Penelope Green, *A New Breed of Guard Dog Attacks Bedbugs*, N.Y. Times, Mar. 10, 2010, available at www.nytimes.com/2010/03/11/garden/11bedbug.html

within hours and does not require evacuation. This method also circumvents a bed bugs resistance to pesticides.¹¹⁷

CONCLUSION

The reemergence of bed bugs presents a complex set of challenges that impacts all of our daily and legal lives. The threat of bed bugs in our workplace, the places we travel to and bringing them into our homes is very real. While the possibility of being exposed to a bed bug can never be eliminated, one can follow the best practices provided in this paper to protect their homes and families. By knowing what to look for and where to look, you can reduce the chance of infestation and the costly cleanup that follows. As the case law and statutes discussed in this paper are sure to be just the start of a rapidly evolving new field of litigation, one must continually stay updated as to new court decisions to see which way the trends are forming and the additional responsibilities that are placed on those that have the ability to control bed bugs. As attorneys, litigation relating to bed bugs is clearly on the rise and your next file could be related to the catastrophic damage caused by these pests.

Finally, we advise that you do not dismiss the bed bug problem as *an issue that will happen to someone else* or a problem only for those who *live and work in unsanitary conditions*. Bed bugs affect every one of all socioeconomic means including our families, our clients, our colleagues, our neighbors and even ourselves! As new issues, trends and knowledge about bed bugs are disseminated by those who recognize the growing problems associated with bed bugs, we all now have the ability to properly educate ourselves. So, do so! In closing, let us disregard the poet's advice to let the bed bugs “chew”, and instead: let’s focus our efforts, as Shrek would say, on keeping the bed bugs “far, far away”!

¹¹⁷ Peter DiEduardo, a contributor to this article, is employed by Bell Environmental, Inc. which uses carbon dioxide as their primary method for treating bed bug infestation.