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PARASITES

In this Analysis & Perspective article, attorneys Daniel W. Whitney and Melissa A. Graf discuss liability issues related to bed bugs in the hotel industry. The authors say that theories of liability in these cases can include negligence, nuisance, breach of implied warranty of habitability, battery and fraud. If claimants can show actual losses, the authors say, they are likely to be awarded compensatory damages. But the authors note that punitive damages have also been awarded in cases where a hotel has knowingly rented a room that is infested with bed bugs.

The Prosecution and Defense of Bed Bug Lawsuits

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A nuisance thought to be eradicated after World War II, bed bugs (or *Cimex lectularius*) are reportedly back in full force, garnering a great deal of media coverage and bringing a host of lawsuits along with them. Increasingly, bed bug-bitten hotel guests who have unwittingly brought home the ravenous creatures in their luggage are pursuing claims related to bed bug infestation. Damages include medical bills, emotional distress, as well as costs associated with exterminating the problem and replacement of infested personal property. Of particular note to the hotel industry, punitive damages have been awarded for continuing to rent

rooms known to be infested.¹ This article addresses the legal liability ramifications of growing problem of bed bug infestation.

I. Background

A. The Scope of the Problem

1. The Nature of Infestation

Bed bugs start out as practically invisible creatures, microscopic in size and without any marked color by which to easily spot them. However, they can grow to roughly five millimeters in length (the size of a ladybug or apple seed, being the longest in size after feeding) and develop a brown hue that often darkens further with a reddish tint once they are engorged with blood. Bed bugs have an average life span of six months to a year, during which time a female bug can lay up to 500 eggs—sticky sacks of offspring that adhere easily to most surfaces—sometimes at a rate of five per day. The eggs will hatch in four to five days, presenting nymphs that begin feeding immediately.² Their general routine is to attack at night, with peak feeding time occurring just before dawn. The insects fill up on blood from a nearby host—drawn to humans' high body temperatures, sweat and exhalation of carbon dioxide—and then defecate most of it in the same vicinity. A typical feeding, which occurs about once a week, lasts three to twelve minutes and involves piercing the skin of the host with two hollow, tube-like appendages: one to inject its saliva, comprised of anesthetics and anticoagulants, and another to suck out the host's blood. Estimates vary, but the average span of time that the bugs can live without feeding ranges from one year to 18 months.³

Besides awakening with bug bites, early indicators of an infestation of bed bugs include tiny brownish or reddish dots on bedding, which are spots of the bugs' fecal matter; small blood stains on bed linens from bugs that were full of blood as they were crushed by a person's movements during sleep; and a distinctly sweet, pungent odor that is secreted from their glands—most likely the pheromones that the bugs use to communicate.⁴

2. Migration

In order to travel from one location to another, bed bugs typically use their human hosts as a source of transportation. This mode of migration involves piggy-backing on luggage or backpacks, clothing, bedding or other linens, or even the carts of housekeepers going from room to room in a hotel. But other favorite hiding places, such as the crevices of furniture and seams on

mattresses, provide good hiding spots for bed bugs; and when these items are moved from one area to another, the bugs are able to discreetly go along for the ride. Further, purchasing such items at yard sales or leasing them from a furniture rental company presents a prime opportunity for the insects to move into a new living space.

However, bed bugs do not always require this type of symbiotic dependence on their hosts. The insects have been known to spread among rooms and across localized areas on their own accord, traveling through holes in walls, such as those for running cable or other wiring between apartments or rooms, as well as rain gutters and water pipes.⁵ While they do not fly or jump, they are capable of crawling to various locations within a building, although the speed and distance they can traverse is not clear, being described only as "quick." (This differentiates them from seemingly similar blood-sucking household pests like fleas, which can jump.)⁶ Perhaps most disturbing is their skillful climbing ability; bed bugs have been known to climb up a wall and onto the ceiling for purposes of dropping onto their unsuspecting victims in a stealth-like maneuver.⁷

3. Difficulties in Eradication

To make matters worse, bed bugs are known for being incredibly difficult to get rid of, even with the employment of a professional exterminator. In the hotel context, experts say that a proper approach to eradication requires inspecting all adjacent rooms to the main area being treated as well as rooms located on floors above and below that area of focus.⁸ Depending on the scope and intensity of the treatment, eradication efforts can cost several thousands of dollars, with an average rate being \$300 per room per treatment session.⁹ Among the recommended tactics is the repeated use of chemical sprays (usually some form of pesticide), which is the only preventative measure thought to address the possibility of larvae hatching later in the same area.¹⁰ However, current pesticides have yet to prove as effective as DDT, the powerful chemical banned in 1972, and it is possible that the bugs have since developed insecticide resistance.¹¹ Industry experts feel that this ban, combined with an increase in world travel and a growing mobility among the world's population overall, is a significant factor in the resurgence of bed bug infestations.¹²

⁵ Goddard, "Bed Bugs (*Cimex lectularius*) and Clinical Consequences of Their Bites," *supra*.

⁶ National Pest Management Association, "Flea," *Pest Guide* (available at <http://www.pestworld.org/for-consumers/Pest-Guide/Pest/Flea>).

⁷ "Do Bed Bugs Jump?," Pest Library (available at <http://www.orkin.com/other/bed-bugs/do-bedbugs-jump>).

⁸ See *Grogan v. Gamber Corp.*, 858 N.Y.S.2d 519 (N.Y. Sup. 2008).

⁹ Authors' review of available pricing for single room treatment. See also Jacobs, "Just Try to Sleep Tight. The Bedbugs Are Back," *supra*; "Health Department Announces Bed Bug Plan," Baltimore City Health Department, Apr. 20, 2009.

¹⁰ "Bedbugs making their home in the U.S. again," *The Orlando Sentinel* (as appearing in *The Baltimore Sun*), Sept. 7, 2009.

¹¹ Schwartz, "Bedbug Bites," *supra*.

¹² "Frequently Asked Questions: Bedbugs," Learning Center, <http://www.arrowexterminators.com/arrows-learning-center/frequently-asked-questions>.

¹ *Mathias v. Accor Economy Lodging Inc.*, 347 F.3d. 672 (7th Cir. (Ill.) 2003).

² Schwartz, Robert A., "Bedbug Bites," *eMedicine Dermatology* (available at emedicine.com).

³ Goddard, Jerome and Richard deShazo, "Bed Bugs (*Cimex lectularius*) and Clinical Consequences of Their Bites," *Journal of the American Medical Association*, Vol. 301, No. 13 (Apr. 1, 2009), pp. 1358-1366. See also "Frequently Asked Questions: Bedbugs," Learning Center, <http://www.arrowexterminators.com/arrows-learning-center/frequently-asked-questions>.

⁴ Schwartz, "Bedbug Bites," *supra*. See also Jacobs, Andrew, "Just Try to Sleep Tight. The Bedbugs Are Back," *The New York Times*, Nov. 27, 2005 (available at <http://www.nytimes.com/2005/11/27/nyregion/27bugs.html>).

In the consumer context, individuals are also told to vacuum affected areas and items thoroughly and often; to wash clothes and linens in hot water of the highest temperature possible; and to freeze items, if possible, for 48 hours. These measures alone will not sufficiently address the problem, however; a professional exterminator will still be required. Moreover, the use of at-home chemical remedies is likely to have the opposite effect of the desired result; for instance, the use of “bug bombs” will simply spread the bugs out further, sending them scampering into new areas rather than stopping them in their tracks.¹³

4. Medical and Health Effects

While the most “common” clinical response to bed bug bites is yet undetermined, there is no question that there can be wide-ranging health effects from interaction with the insects. Bites are typically found in itchy groupings of three; the presence of multiple groupings is generally indicative of more than one bug feeding on the host. Reactions to bites vary, presenting in either cutaneous (skin-related) or systemic forms; moreover, the body’s response to being bitten is not always immediate, taking up to two weeks in some instances. Although not all individuals bitten by a bed bug will have a visible welt or lesion, some people can experience severe or complex reactions that go beyond a simple itchy spot. Secondary bacterial infection, such as cellulitis or folliculitis, is also possible, which can exponentially increase the distress associated with a bite. From a systemic standpoint, bed bug bites can cause reactions ranging from slightly distressing to serious, including anaphylaxis (a severe, whole-body allergic reaction, generally brought on in response to the insect’s saliva), asthma and generalized urticaria (hives). Treatment generally involves the application of topical agents, although antibiotics may be indicated if a bite has resulted in infection. Similarly, epinephrine, antihistamines or other typical allergy treatments may be called for in the event of anaphylaxis.¹⁴

Further, while bed bugs have been linked to over 40 human diseases, there is little scientific evidence to support labeling them as a mechanism of transmission for infectious agents. The ability to acquire, maintain and transmit such diseases, known as “vector competence,” has yet to be shown.¹⁵ Whether or not bed bugs are capable of this type of transfer, some scholars label the increase in infestations across the country as a “public health threat,” the significance of which they allege public health officials have failed to address.¹⁶ Finally, in addition to all of the more directly physical effects, there is the potential for significant mental distress

¹³ Jacobs, “Just Try to Sleep Tight. The Bedbugs Are Back,” *supra*.

¹⁴ Goddard, “Bed Bugs (*Cimex lectularius*) and Clinical Consequences of Their Bites,” *supra*. See also Schwartz, “Bedbug Bites,” *supra*.

¹⁵ *Id.* See also “Bedbugs making their home in the U.S. again,” *supra*.

¹⁶ Jones, Susan C., “The Public Health Threat,” *Bedbugs (Itch, Itch, Scratch, Scratch)!*, The New York Times (online edition), Aug. 23, 2009 (available at <http://roomfordebate.blogs.nytimes.com/2009/08/23/bedbugs-itch-itch-scratch-scratch/>).

caused by awareness (or, in some cases, merely the residual fear) of bed bug infestation.¹⁷

B. The Focus of the Problem

The most commonly thought of locales for bed bug-related issues are hotels and similar lodging facilities. There is a problem of high traffic: The sheer daily volume of guests coming in and going out of these facilities presents the greatest opportunity for bed bugs to be carried in on luggage, clothing and other personal belongings.

However, wherever people gather, bringing themselves and other items in from the outside, there is the potential for introducing a few additional guests into the environment. Other places that are ripe for bed bug infestation include apartments or condominiums (as evidenced by the increase of infestation reports over the last few years in New York City), dormitories, hospitals, movie theaters, homeless shelters, summer camps, cruise ships and dry cleaners. In one case, a claim was even brought by an alleged victim of bed bug bites against the landlord of her employer’s office building. The employee claimed to have been bitten at work, leading to an inability to perform her job duties and the development of post-traumatic stress disorder, as well as nightmares and a fear of bringing the bugs back to her home where they could bite her baby.¹⁸

A common misconception about the presence of bed bugs has led to a stigma about their typical hide-outs. Unlike other vermin, they are not associated with filth or unclean environments. The discovery of the insects in a number of “swanky” luxury hotels indicates that the relative cleanliness of a place is not the deciding factor in where they will choose to take up residence. Put differently, where there are human hosts available for feeding, there can be bed bugs.

II. Theories of Liability

A. Negligence

Generally speaking, owners of premises have a duty to maintain their properties in a reasonably safe condition as well as a duty to warn of any unsafe conditions. Insect or other pest-related infestation is by and large considered “unsafe,” being both unsanitary and poten-

¹⁷ See, e.g., Friedman, Bonnie, “The Emotional Toll,” *Bedbugs (Itch, Itch, Scratch, Scratch)!* (“Every crack in the plaster, every split in the ancient floorboards, every infinitesimal gap around light switches and radiator pipes became the object of anxiety. Insecticide and caulk never sated my suspicion that bed bugs were still lurking. . . . For months, I sprayed, laundered, vacuumed, hauled to the curb—and lived on the verge of tears. To go to sleep knowing that bugs might emerge and bloat themselves on your blood or your partner’s blood during the night, to know from the online photos that the bugs release tiny revolting versions of themselves, to understand that you aren’t safe despite the Vaseline gobbled on the bed-legs, the special clothes you sleep in, coaxes you to the verge of a kind of madness.”). See also “Fox News employee sues over workplace bedbug bites,” *LawyersUSA*, June 16, 2008; “Fox News worker sues over bedbugs in office,” *Reuters News Service*, May 30, 2008. See also “Bed bug suit alleges embarrassing injury,” *LegalNewsline*, July 30, 2007 (available at <http://www.legalnewsline.com/news/198586-bed-bug-bite-suit-alleges-embarrassing-injury>).

¹⁸ See “Fox News employee sues over workplace bedbug bites,” *LawyersUSA*, *supra*; “Fox News worker sues over bedbugs in office,” *Reuters News Service*, *supra*.

tially harmful. However, few states have proffered regulations directing compliance with standards in this regard when it comes to bed bugs specifically, although the introduction of legislation over the past few years aimed at including bed bugs among the same grouping of pests as rats and cockroaches indicates a possible developing trend toward express regulatory recognition of these insects.¹⁹

Regardless, premises liability claims typically focus on a negligence theory; that is, by allowing the condition to exist or failing to warn of the associated danger, owners of the premises at issue have failed to meet the standard created by the duty of care that they owe to their tenants or guests. A claimant can recover on this theory when an owner's breach of its duty leads to some injury on the claimant's part—whether it is to their person or to their property. Additionally, a recent lawsuit out of New York presented a question of an exterminator's liability.²⁰ If the problem is not eliminated, an exterminator may face claims based on breach of contract and/or negligence.

B. Breach of the Implied Warranty of Habitability

Similar to the duty associated with a negligence-based theory, there is another legal doctrine that focuses on a property owner's responsibility to maintain its property in a certain condition: the implied warranty of habitability. The basic premise behind the doctrine is that a landlord warrants that the dwelling at issue is fit for its intended purpose—that is, it sets a minimum standard by requiring that the areas in which its tenants will live are suitable for human inhabitation.

The presence of bed bugs has been considered to diminish the habitability of a dwelling.²¹ For instance, in the 2004 case of *Ludlow Properties LLC v. Young*, a landlord instituted proceedings against its tenant for nonpayment of six months of rent.²² In his defense, the tenant claimed that the landlord had breached the implied warranty of habitability by failing to address a severe bed bug infestation that resulted in hundreds of bites and significant disruptions to his sleeping arrangements. In its opinion, the court touched on the more disturbing aspects of infestation, explaining that “[a]lthough bed bugs are classified as vermin, they are unlike the more common situation of vermin such as mice and roaches, which although offensive do not have the effect on one's life as bed bugs do, feeding upon one's blood in hoards nightly turning what is supposed to be rest or sleep into a hellish experience. . . . In this case the bed bugs did not constitute mere annoyance, but constituted an intolerable condition.”²³ However, the court then noted that although the condition was disruptive to the tenant's sleep, he was still able to use the apartment for other purposes, such as eating, bath-

ing, working and shelter; therefore, he was not entitled to avoid paying rent *completely*. In the end, the tenant was granted a 45-percent abatement in the back-rent owed, but a larger point was made: that bed bug infestation is considered a detriment to the overall habitability of a dwelling, even if the severity of that detriment must be determined on a case-by-case basis.

C. Nuisance

Also on the theme of interference with one's living space is the notion of nuisance. This legal concept focuses on the right to quiet enjoyment—that is, the right to undisturbed use of certain property, which can include a right to sanitary conditions. When this right is disrupted, the law regards a tort as having been committed. Traditionally, a nuisance is found when a condition exists that is either harmful or annoying to a certain party (here, a tenant). It is often an additional theory thrown in with the others that are typical to a lawsuit based on bed bug infestation, as it was in a case filed in 2006 against a luxury hotel in London.²⁴

D. Battery

Another potential avenue for pursuing damages related to bed bug infestation focuses on battery, the tort that addresses intentional, unpermitted acts that result in the harmful or offensive contact with another person. There is an argument to be made that awareness of a condition that is known to cause harm in such a manner, absent any effort to stop such contact from occurring, constitutes battery. In fact, at least one court has indicated an inclination to view unabated bed bug infestation in this fashion. In the decision of *Mathias v. Accor Economy Lodging, Inc.*, the court wrote: “The infestation continued and began to reach farcical proportions. . . . Desk clerks were instructed to call the bedbugs ‘ticks,’ apparently on the theory that customers would be less alarmed. . . . Motel 6 could not have rented any rooms at the prices it charged had it informed guests that the risk of being bitten by bedbugs was appreciable. *Its failure either to warn guests or to take effective measures to eliminate the bedbugs amounted to fraud and probably to battery as well.*”²⁵

E. Fraud

As noted above, in the case of a hotel that continues to rent rooms out to guests despite an awareness of bed bug infestation, such deception can amount to fraud. In *Mathias*, the court regarded the hotel's failure to inform guests of the problem and make efforts to eradicate the problem as fraudulent conduct, particularly as the hotel may have profited from its concealment in the way of continued room rentals.²⁶

F. Statutory/Regulatory Approaches

The standards imposed by statutes and regulations could provide a jumping-off point for claims related to the bed bug infestations as well as a measure against which to evaluate the actions of property owners in a negligence setting. A few cities and states have specifically listed bed bugs among regulations dealing with

¹⁹ See Section II.E., *infra*, on statutes and regulations.

²⁰ See *Grogan v. Gamber Corp.*, *infra*, Section III.C.; see also *Bender v. Green*, 874 N.Y.S.2d 786, 791 (N.Y. City Civ. Ct. 2009) (citing *Park W. Mgt. Corp. v. Mitchell*, 47 N.Y.2d 316, 327 (N.Y. 1979)) (“It has been well established that insect infestation is a condition which is considered to adversely impact upon the health and safety of the occupants of a residential premises.”).

²¹ See *Zayas v. Franklin Plaza*, 881 N.Y.S.2d 368 (N.Y. City Civ. Ct. 2009).

²² *Ludlow Properties LLC v. Young*, 780 N.Y.S. 2d 853 (N.Y. City Civ. Ct. 2004).

²³ *Id.* at 856.

²⁴ *Bluming et al v. Mandarin Oriental Hotel Group Limited et al*, No. 1:06-cv-15354-RMB-HBP (S.D.N.Y. filed Dec. 21, 2006).

²⁵ See *Mathias* at 675.

²⁶ *Id.*

nuisances involving pests and housing codes; others are taking notice of the problem, as evidenced by recently introduced legislation.²⁷ Further, hotels and other lodging facilities may be at risk of administrative penalties or having their licenses revoked for violations of code provisions dealing with the health and safety of occupants.²⁸ Finally, owners of such premises could be subject to claims alleging unfair or deceptive trade practices under state consumer protection laws, exposing them not only to damages related to the claimant's loss, but also attorneys' fees.²⁹

Attempts have also been made at the federal level to put into place laws that address this developing issue by instituting measures such as adding bed bugs to the public housing-related programs administered by the Department of Health and Human Services for the prevention and management of cockroach and rodent infestations, changing inspection plans, and funding research by the Centers for Disease Control regarding the impact of bed bugs upon mental health.³⁰ The Environmental Protection Agency also held a two-day summit in April, bringing together multiple task forces to address the problem, and thereby reinforcing the notion that bed bug resurgence is an issue of concern.³¹

III. Remedies

A. Presenting a Prima Facie Case and Potential Evidentiary Issues

One of the main problems with bed bug-related litigation focuses on potential evidentiary issues. The most notable among these difficulties is proving which party is actually responsible for introducing the insects into the situation at issue: the property owner or manager, who may have failed to adequately address a possible infestation, or the guest or tenant who may have brought the bed bugs in with them or even acquired the bites somewhere else. Complicating matters is the reality that some people will have delayed reactions to bites, which makes it hard to determine with any degree of certainty when the interaction occurred.³² Representative of such issues is the case of *Bolshakov v. Borok*, in which the court determined that the plaintiff had failed to show that the bites from which she suffered were inflicted in the defendant's hotel.³³ Notably, the medical records that she provided during discovery indicated that she had suffered other bites while camping, thus making it difficult to know with the requisite cer-

tainty where and from what source she sustained the bites.³⁴

Further, documenting the problem and any resulting loss is of critical importance for evidentiary purposes. Should a claimant's case be strong enough to warrant recovery, the court will require sufficient proof of the extent of the damage suffered in order to aid in the determination of what should be awarded.³⁵ Collecting bugs and photographing their presence on furniture or personal possessions as well as evidence of bite marks is ideal. In a case in which the plaintiffs claimed to have suffered from a severe bed bug infestation for nearly three years, the court noted that their testimony would have been more credible had the claimants been able to provide more physical evidence of the problem, as they only offered their testimony and relatively few bugs saved in ziplock bags.³⁶

B. Compensatory Damages

Recent cases indicate that to the extent that claimants can demonstrate actual losses related to infestation, they will be awarded compensatory damages.³⁷ Such recovery is intended to address the costs associated with eradicating bed bugs and treating their bites, as well as replacing personal property that was damaged or needed to be disposed of along the way. Although more difficult to prove, there may also be an argument that the stigma associated with a previously infested property could affect an owner's ability to sell or rent the premises, whether warranted or not, thereby resulting in further economic loss due to an infestation.

A general scenario could play out very much like this: You awaken one day in your apartment to the feeling that you were just bitten by something. Upon moving back the sheets, you notice a few small spots of blood, followed by a few bugs. You pull the sheets back further, down to the mattress, only to find that the seams of your mattress are swarming with tiny little insects. A phone call to your landlord results in a disagreement over who could be responsible for the presence of the bed bugs: the landlord, another tenant, or even yourself. But there is no question that something needs to be done in the meantime, so you call an exterminator, who will most likely charge \$300 to treat the bedroom.³⁸ And he has a surprise for you: The little bugs have made their way out to your sofa, too. In fact, the only way to ensure that they have not and will not spread throughout the rest of your apartment—or even the rest of the building—is to treat all other areas reasonably susceptible to infestation. In addition, you will have to bag all

²⁷ See, e.g., New York Housing Maintenance Code, section 27-2018; N.J. Senate Bill 2257.

²⁸ See, e.g., Baltimore City Code, Art. 13, § 5-15; San Francisco Health Code, Art. 11, §§ 581(a), 581(b)(8).

²⁹ See, e.g., Md. Code Ann., Com. Law §§ 13-301, 13-303, 13-408(b).

³⁰ See H.R. 2248, The "Don't Let the Bed Bugs Bite" Act of 2009 (available at <http://thomas.loc.gov/cgi-bin/query/z?c111:H.R.2248.IH>).

³¹ "EPA's National Bed Bug Summit," Mar. 18, 2009 (available at http://www.epa.gov/oppfeed1/cb/csb_page/updates/2009/bed-bug-summit.html).

³² See Pfiester, Margie, et al., "Ability of Bed Bug-Detecting Canines to Locate Live Bed Bugs and Viable Bed Bug Eggs," *Journal of Economic Entomology*, Vol. 101, No. 4, pp. 1389-1396 (2008).

³³ *Bolshakov v. Borok*, 2009 WL 425934 (N.J. Super. Ct. Feb. 20, 2009).

³⁴ *Id.*

³⁵ See, e.g., *Bender v. Green*, 874 N.Y.S.2d at 792 ("[T]he Court finds that the presence of bedbugs in the Subject Premises did constitute a breach of the warranty of habitability. The more difficult determination is what, if any, damages Respondents are entitled to as a result of said breach. Once a breach has been established the parties must come forward with evidence concerning the extensiveness of the breach, the manner in which it impacted upon the health, safety or welfare of the tenants and the measures taken by the landlord to alleviate the violation.") (internal citations omitted).

³⁶ *Id.* at 793 ("Other corroborating evidence could have been photographs of stained sheets, or photographs exhibiting the typical bedbug bites in groups of three.")

³⁷ See *Zayas v. Franklin Plaza*, 881 N.Y.S.2d 368 (N.Y. City Civ. Ct. 2009).

³⁸ Jacobs, "Just Try to Sleep Tight. The Bedbugs Are Back," *supra*.

of your personal items and either wash everything that can be laundered at a very high temperature, freeze those items, or replace them altogether. If you choose not to dispose of your furniture as well, you will have to disassemble your bed frame, dresser drawers, bookcases, and any other structure where the bugs could hide so that four different chemicals can be applied to their surfaces. But, worst of all, there is a possibility that all of this could be insufficient to eradicate the infestation; The process might need to be repeated. And to add insult to injury, you may have trouble ever feeling comfortable in your own bed again.

Now imagine that you were merely a hotel guest when bitten. The situation is not necessarily smaller in scope just because your interaction with the bugs did not first occur in your home. For instance, the grappling over extermination costs is not avoided; if you and your personal belongings have been in an infested hotel room, you may have brought a few bed bugs home with you in your luggage or on your clothing. Moreover, you are still left with the other expenses: disposal and replacement of those clothes and luggage pieces, as well as any costs associated with the treatment of the bites (medical bills or medications, for example), not to mention the mental toll—seemingly incalculable, but warranting recovery nonetheless. On top of all of this, you may also be left to face the social implications of bed bug infestation: Once your friends and relatives hear about your problem, you might not find yourself entertaining guests anymore . . . and invitations to join them in their own homes might not be as readily forthcoming.

C. Punitive Damages

Under the laws of most states, punitive damages are a mechanism by which to address the willful and wanton misconduct of a person or entity. In essence, they comprise some appreciable amount beyond that needed to address a claimant's actual losses (which are covered by compensatory damages) as a measure of punishment for the defendant's outrageous conduct and a means of deterring such activity in the future.

Of the few reported cases involving punitive damages, the results have gone both ways. Last year, a request for punitive damages was denied in a case involving two tourists who acquired a number of bites during a two-night stay in a Manhattan hotel.³⁹ The claimants, a woman and her daughter, were awakened in the middle of the night when one of them was bitten, at which point they noticed scores of bugs in the bed, some crawling up the wall, and a live bug on the younger woman's hand. While the negligence claim related to these events was allowed to go forward, the judge ruled out punitive damages by distinguishing the case at hand from the most notable case in which such damages were awarded: *Mathias v. Accor Economy Lodging Inc.*⁴⁰ The critical factor that led to the award of \$372,000 in punitive damages in *Mathias* was that the defendant hotel had chosen not to take even minimal steps toward addressing a known bed bug infestation, opting instead to offer a refund to guests who complained of bites rather than spend \$500 deemed necessary to treat the problem. In *Grogan*, however, the hotel involved an extermination service upon discovering the

infestation—a response that was deemed less egregious than that of the hotel in *Mathias* due to its proactive nature and therefore not warranting punitive damages, even though a question still remained as to the sufficiency of the actions taken by the hotel and the exterminator.

IV. Defenses

Every case will present factual hurdles. Plaintiffs may not be able to prove one or more key facts: that the hotel or landlord is responsible for the presence of the bugs (Did the guest bring them, or were they already present?); prior awareness of their duty to eradicate the problem; and, if they were so aware and took steps to treat the infestation, insufficient efforts to eliminate the problem. After all, bed bugs are pesky in their resilience; numerous approaches to getting rid of them may have proven futile despite the property owner's attempts.⁴¹ Related questions focus on the more temporal aspects of infestation. When did the bed bugs arrive? Where did they start out, and did they spread? When was the defendant first put on notice of a problem?

Some defendants have asserted contributory negligence and assumption of the risk as defenses to bed bug-related claims, but it is unclear whether or not these approaches were positively received.⁴² In essence, these affirmative defenses look at the potential responsibility of the claimant, arguing either that the acts of that individual also contributed to the resulting harm or that the claimant was aware of the risk involved in renting the room or continuing to live in the allegedly infested conditions but chose to do so anyway. Whether or not these assertions could be effective tools in the property owner's defense, claimants should at least be prepared for the evidentiary battle that could ensue on their behalf.

VI. Proactive Measures

Generally speaking, the treatment of bed bug problems is a multi-step process requiring a multi-faceted approach. The basic course of action recommended by experts includes:

- Through the use of an experienced exterminator or a forensic entomologist, properly identifying any bugs that are found to ensure that they are in fact bed bugs, as opposed to other insects that commonly infest livings spaces;
- Educating any involved parties on the attendant risks of infestation and required procedures;
- Thoroughly inspecting on a recurring basis all areas of known and suspected infestation, as well as all adjacent areas, which can be accomplished through the use of either a professional exterminator or specially-trained dogs (reportedly 98 percent accurate in locating live bed bugs);⁴³
- Implementing control measures, both chemical (such as the repeated use of various pesticide sprays considered to be somewhat effective

³⁹ See *Grogan v. Gambler Corp.*, *supra*.

⁴⁰ See *Mathias*, *supra*.

⁴¹ See *Ludlow Properties LLC v. Young*, *supra*, 780 N.Y.S.2d at 856.

⁴² "Bed bug suit alleges embarrassing injury," *Legal-Newsline*, *supra*.

⁴³ See Pfiester, Margie, et al., "Ability of Bed Bug-Detecting Canines to Locate Live Bed Bugs and Viable Bed Bug Eggs," *supra*.

against bed bug infestation) and non-chemical (such as concentrating extreme temperatures on affected items, encasing mattresses in a plastic covering designed to trap and seclude current bugs to prevent them from biting, reproducing and migrating, vacuuming thoroughly, and caulking openings around windowsills and baseboards);

- Disposing of personal property known or reasonably suspected of being infested; or, at the very least, treating such items by freezing or subjecting them to high temperatures (which may rid them of some but most likely not all of the bugs, and which in turn subjects plaintiffs to a failure to mitigate defense in that their decision not to dispose of the affected items may be deemed an insufficient attempt at eradicating the infestation in order to prevent further loss); and
- Following up to appraise the efficacy of any control methods used.⁴⁴

There is no known repellent of consequence for this species of insect, like that which helps with keeping away other bugs like mosquitoes. Experts say that the only way to make sure one does not come into contact with the bugs is to take evasive measures, avoiding areas of probable infestation.⁴⁵

When it comes to detection efforts, issues of importance are the requisite frequency and depth of detection measures. How often is it necessary to inspect probable areas of infestation for the presence of bed bugs? And how far should one go with the inspection? Can prop-

⁴⁴ Goddard, "Bed Bugs (*Cimex lectularius*) and Clinical Consequences of Their Bites," *supra*. See also "Director's Rules and Regulations: How to Control Bed Bug Infestation," San Francisco Department of Public Health, Dec. 2, 2008 (available at <http://www.sfdph.org/dph/files/EHSdocs/ehsHoteldocs/BedBugRegs.pdf>).

⁴⁵ *Id.*

erty owners and managers be expected to adhere to any strict guidelines in this regard, or would vigilant detection procedures of a given frequency become cost-prohibitive and disruptive to business? A lack of consensus over appropriate standards makes such a determination difficult, as there is mixed information on even the most basic of considerations, such as when it is safe to assume that live bugs in a given area have been eradicated (which some say is after three weeks have passed with no new episodes of biting). Further, how is the associated cost to be handled? Is that something passed on to consumers, tenants, and guests by way of increased rates, or, considering the regard of freedom from infestation to be part of the habitability that is impliedly warranted in dwelling places, should it be deemed an inherent part of whatever fees (rent, hotel rates, etc.) are already charged? A landlord or hotel owner's duties in this regard cannot be adequately anticipated and prepared for short of the development of an overarching industry consensus or sufficient regulatory standards at the state level.

Conclusion

It turns out that the old axiom "You get what you pay for" is not always true. In the case of paying handsomely for a high-end hotel room only to find yourself the victim of biting, blood-sucking insects that are teeming under the sheets of the bed, that most certainly is not the case. But the reality is that bed bug infestation can be a problem virtually anywhere, and oftentimes, there is no way of knowing how severe the problem is—or how severe its effect will be—until someone has been bitten. The resulting costs—financial, physical or emotional—can grow quickly. As many claimants have realized, the best route to recovery for these costs is through legal action.