

BED BUG HYSTERIA

“Good Night, Sleep Tight, Don’t Let the Bed Bugs Bite”

Folklore, right? Nope. Bed bugs are real! Even more troubling, they do bite and infestations are increasing at an alarming rate. Complaints of bed bugs in hotels, apartments, hospitals, dormitories, theaters and nursing homes are becoming commonplace. Not surprisingly, lawsuits arising from such complaints are also increasing.



This article will describe the bed bug problem, explain the legal exposure arising from the problem and recommend measures to limit potential exposure from an infestation.

I. The Bed Bug

Cimex lectularius (Cimicidae), otherwise known as the “bed bug”, is a parasite, which feeds on human blood. They are usually no more than a quarter-inch in length and one-eighth inch wide in their adult state. Bed bugs are mostly nocturnal and hide in dark concealed places. They typically emerge at night or when lights are turned off creating a dark environment. Once they emerge, they begin to feed. Bed bugs are highly mobile and can be transported by attaching themselves to clothing, luggage or upholstery.

Bed bugs can live up to 18 months and can survive up to one year without a food source. A female bed bug can lay up to five eggs per day and up to 500 eggs in her lifetime. If a single impregnated female is transported into a residence, an infestation can form and rapidly spread throughout a building. Infestations spread to adjoining rooms through vents, ducts, wall voids and electrical and plumbing conduits.

II. The Return of Bed Bugs

After World War II, bed bug infestations were nearly eradicated in the United States. In recent years, however, reports of bed bugs have dramatically increased. According to the Department of Housing, Preservation & Development in New York City, bed bug complaints increased 400% from 2005 to 2008. The New Jersey legislature recently introduced Assembly Bill 3203, which cites a 500% nationwide increase in bed bug infestations. There is little dispute bed bugs are fast becoming a significant problem in the United States.

There are several reasons cited for the recent and dramatic increase in bed bugs in North America. The most common reason cited, however, is the manner in which extermination procedures are being performed. The banning of the pesticide DDT as a pest control measure with no suitable replacement is the most often cited cause for the escalation of bed bug infestations. Other contributors include a society wide decrease in the use of chemical pesticides in general, decreased use of prophylactic pesticides to prevent insect infestations and the use of baiting traps, as opposed to pesticides, to eliminate insect infestations. Because bed bugs are blood feeding parasites, they are not drawn to baiting traps containing components used to attract other types of insects.

Thus, recent changes in pesticide extermination techniques have allowed bed bugs to thrive, after more than 50 years of dormancy. Other causes associated with the increased bed bug population over the last decade include an expansion of the second-hand furniture industry and an increase in international travel.

III. Bed Bug Litigation

In 2003, the Seventh Circuit of the United States Court of Appeals upheld a verdict of \$377,000 in favor of the plaintiffs, who were attacked by bed bugs while guests at a Motel 6. In 2004, Helmsley Enterprises reportedly paid a guest \$150,000 to resolve a bed bug claim. Finally, in 2004, a judge in New York ruled in favor of a frustrated tenant, who refused to pay rent for six months because of persistent bed bug problems.

The media exposure surrounding these cases is causing a ripple effect throughout the United States. Aggressive plaintiffs' lawyers are sensing a lucrative opportunity. Attorneys are installing websites and sending unsolicited mailers focused on bed bug litigation. A dramatic increase in bed bug litigation is almost a certainty over the next few years.

Given relatively limited damage claims, which will be discussed below, individual bed bug claims will not receive much attention. Instead, plaintiffs' attorneys are focusing on group housing, such as hotels, apartment complexes, hospitals, dormitories and nursing homes. As the number of plaintiffs increase, so does the potential damage claim. Class action suits or suits filed by multiple residents of the same facility will result in sufficient financial exposure to attract lawyers seeking a payday.

IV. Bed Bug Law

For the most part, plaintiffs' attorneys are citing two causes of action in filing bed bug claims: a standard negligence claim and a statutory claim under a state's landlord tenant act. Other potential claims include claims of nuisance and fraud.

In Michigan, MCL § 125.474 requires, "The owner of every dwelling shall be responsible for keeping the entire building free from vermin." This statute is part of the Housing Law of Michigan, a penal statute, violation of which is a crime. *Grossman v Lambrecht*, 54 Mich App 641; 221 NW2d 424 (1974). Several Michigan cases have held that violation of MCL § 125.474 constitutes "negligence per se." See, e.g., *Grossman, supra* (holding that "[a]lthough this section does not expressly create civil liability, a violation has been held to be negligence *per se*...").

Subsequent cases, however, make it clear that violation of a penal statute merely makes out a rebuttable presumption of negligence, and the violation is not conclusive in and of itself:

Zeni v Anderson, 397 Mich 117; 243 NW2d 270 (1975) (holding that "the real Michigan rule as to the effect of violation of a penal statute in a negligence action is that such violation creates only a *prima facie* case from which the jury may draw an inference of negligence");

Klanseck v Anderson Sales & Service, Inc, 426 Mich 78; 393 NW2d 356 (1986) (holding that “[i]n Michigan...the rule is that evidence of violation of a penal statute creates a rebuttable presumption of negligence”); and

Klinke v Mitsubishi Motors Corp, 458 Mich 582; 581 NW2d 272 (1998) (holding that violation of a safety or penal statute creates a rebuttable presumption of negligence”).

Furthermore, the clear language of MCL § 125.532 (applicable to enforcement of violations of the Michigan Housing Law) seems to incorporate a “reasonableness” standard where a landowner is found to be in violation of the housing law. To defend against such a claim, therefore, a premises owner may have to overcome a presumption of negligence.

In addition, Michigan’s Landlord-Tenant Act, MCL § 554.139, provides that:

- (1) In every lease or license of residential premises, the lessor or licensor covenants:
 - (a) That the premises and all common areas are fit for the use intended by the parties.
 - (b) To keep the premises in reasonable repair during the term of the lease or license, and to comply with the applicable health and safety laws of the state and of the local unit of government where the premises are located, except when the disrepair or violation of the applicable health or safety laws has been caused by the tenants willful or irresponsible conduct or lack of conduct.

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In *Redmann v Leete*, unpublished opinion per curiam of the Michigan Court of Appeals, issued July 30, 2009 (Docket No. 284381), the Court of Appeals addressed whether the presence of spiders violates the Landlord-Tenant Act. In addressing the plaintiff’s first argument (that the premises were not fit for the intended purpose), the court held that the plaintiff could not “prevail on this statutory claim as a matter of law.” In doing so, the court reasoned, “Though a spider infestation may not be an “ideal condition,” plaintiff failed to establish that it rendered the premises unfit as a dwelling house.”

Likewise, in addressing the plaintiff’s second argument (that the premises were not kept in reasonable repair), the court held that the “[p]laintiff [did] not identify any defect in the premises that defendant could have ‘mended’ to eliminate the spiders.” Accordingly:

Because plaintiff has not established there was any damage to the premises caused by the spiders or contributing to the presence of the spiders, plaintiff has failed to establish there was a genuine issue of material fact that defendant breached the duty to keep the premises reasonably repaired as required by MCL 554.169(1)(b).

Plaintiffs could, conceivably, allege a cause of action under § (1)(b) of the Landlord-Tenant Act for failing to abide by applicable health and safety laws. However, whether Plaintiffs have a

cause of action under this section will depend on whether or not defendant violated MCL § 125.532 as discussed in the preceding section.

There is no case law in Michigan with regard to bed bug litigation and the standard of care of a premises owner. To complicate matters, this parasite is unique and different from other vermin, which often wreak havoc on a property owner. Rats and cockroach infestations are often created by unclean conditions, while bed bugs can infest even the most pristine properties. Furthermore, they are often transported onto premises by the residents themselves. Finally, at least in the apartment complex scenario, the tenant is responsible for keeping portions of the property clean and in good repair.

There is simply no prophylactic measure to prevent infestation. However, it is unclear whether Michigan Courts will recognize this concept. At least one reading of Michigan statutes creates strict liability on behalf of a landowner for bed bug infestations. However, such a conclusion is unlikely.

More likely, both the negligence and statutory claims will turn on whether the property owner acted reasonably. In other words, did the property owner perform proper inspections to obtain early recognition the problem exists, and, once discovered, took steps to proactively remediate the problem. Obviously, the strength of such a defense will turn on whether a proper pest management program was created by the owner and whether the program was followed.

V. Bed Bug Prevention

Unfortunately, there is no known way a premises owner can completely prevent an infestation of bed bugs. Unlike other vermin like cockroaches and rats, the presence of bed bugs is not a hygiene issue. Thus, a proper pest management plan should be focused on thorough and regular inspections, not prevention. A proper inspection will ensure early detection and allow for a prompt pest management plan to be put in place with the highest likelihood for success.

VI. The Pest Management Plan

Regular and thorough inspections will allow for prompt detection. But, what do you do once a bed bug is discovered? First, confirm you are dealing with Cimicidae and formulate a bed bug specific management plan.

There are many methods to resolving a bed bug problem. In a single family residence, it is often recommended that self-help be the first tool. However, a more aggressive plan is recommended for commercial housing units. In those circumstances, a qualified exterminator should be hired at the outset, who can assist by creating a proper pest management plan.

Any bed bug management plan in a commercial environment will include chemical treatment and thorough cleaning. A qualified, experienced exterminator is aware that simply spraying a single infested room is not sufficient to solve the problem. All adjacent rooms, including those above and below the infested area, should also be sprayed. The infested room, and all surrounding rooms, should also be inspected in the weeks following the pesticide application to ensure successful eradication.

In addition to the extermination process, the areas must be thoroughly cleaned. All clothing should be washed, preferably commercially in extremely hot water, and bagged to ensure bed bugs do not survive. Mattresses should be thoroughly cleaned and vacuumed. Encasing mattresses with protective covers will assist with preventing any surviving bed bugs from exiting the mattress and/or future bed bugs from entering. Floors, carpets and baseboards should be vacuumed to collect all existing bed bug eggs, which may be resistant to pesticide application. Any vacuumed debris should be immediately removed from the residence and placed in an outdoor trash receptacle. Finally, all furniture should be broken down, to the extent possible, and thoroughly cleaned. Obviously, surfaces such as leather, vinyl, glass, plastic and metal are much easier to clean than upholstery, carpeting and drapes. As such, these types of furnishings are preferable. An aggressive remediation program, along with intensive follow-up, should allow the owner to rid the premises of bed bugs.

Obviously, proper remediation is easier in hotels, hospitals, nursing homes, etc., where the owner has complete control of the premises. These types of facilities can often vacate infested rooms to allow thorough and complete cleanup. A successful bed bug management program is more difficult in apartment complexes, where vacating the premises is not possible. To complicate matters, owners of apartment complexes have limited access to the rooms, do not own the mattresses and furniture which may need to be destroyed and must rely on the resident to perform many of the inspection activities. Tenants must also properly prepare the apartment for pesticide application and properly clean and maintain all bedding and clothing.

Often, residents refuse to; dispose of infested mattresses, prepare the apartment for a thorough pesticide application, allow access to the room for proper inspection or properly treat and/or destroy infested clothing and furniture. Refusing to comply with these procedures creates a significant hurdle in ridding the apartment complex of an infestation. Meanwhile, the infestation is not only impacting the non-compliant resident, but also fellow residents.

In the most extreme circumstances, it may be necessary to commence eviction proceedings to rid the complex of a non-compliant resident. In doing so, it is recommended an apartment complex provide adequate warning to the tenant with regard to his non-compliance, document all attempts to gain compliance and cite the health hazards and lease violations being committed by the resident.

More aggressive methods available to a property owner attempting to rid its property of bed bug infestations include Thermapure (intensive heat treatment over the course of days to kill the bed bugs) and Cryonite (a deep freeze which has a similar effect as heat). In fact, there are also bed-bug-sniffing dogs, which can assist in performing thorough inspections. Obviously, these solutions are more intense and expensive than the use of qualified exterminators and self-help.

Bed bugs offer a unique and significant problem to premises owners, which seems to be exploding. Fortunately, prompt recognition of the problem and an aggressive remediation program, including intensive follow-up, allow premises owners an opportunity to successfully remediate the bed bug problem before it escalates.

VII. Bed Bug Exposure

So, what happens if a premises owner is sued over bed bugs? Individual cases are unlikely to have significant exposure. As the number of perspective plaintiffs increases, however, so does the financial exposure.

The basic bed bug claim consists of three elements: property damage, physical pain and suffering and emotional pain and suffering. If properly treated, most personal property can be salvaged. Personal property claims, therefore, tend to be more an issue of proper mitigation than complete reimbursement.

Regarding physical pain, bed bug bites leave red welts on the skin, which often itch. Obviously, this does not cause significant discomfort. Bed bug bites, much like mosquito bites, can also lead to infections and scarring. However, these types of claims are rare and, once again, are usually an issue of mitigation.

The real issue in these cases, therefore, lies in the sheer number of potential plaintiffs and their emotional damage claims. The thought of blood-sucking parasites scattering through one's apartment or hotel room is enough to make one's...well...skin crawl. Depending on the owner's reaction to the infestation, a jury, legally or not, may render an award punitive in nature. Regardless, bed bug cases have the potential for explosive exposure.

For instance, a motivated plaintiff may be unable to sleep under constant worry of bugs crawling across their body. The lack of sleep could cause emotional problems and necessitate psychological treatment. Ultimately, medication is prescribed. The plaintiff could be disabled from work. Plaintiffs' children may also be impacted, creating very sympathetic plaintiffs and parents who feel inadequate. Soon, plaintiffs may be diagnosed with clinical depression, which is disabling in nature. Retained experts could potentially conclude plaintiffs' prognosis is guarded and their futures unknown. Couple a well manufactured damage claim with an unresponsive landowner who ignores complaints for the sake of bottom line profits, a defendant's exposure can get out of hand quickly.

Although most cases are thought to have nuisance value, this is likely to change. As plaintiffs' attorneys organize their abilities to manufacture increased damage claims and lump multiple claims into one suit, the settlement value of these cases will dramatically increase.

In addition to financial exposure, most premises owners are equally worried about the potential negative impact to their reputation. Business income could immediately and dramatically be reduced by rumors of an infestation. Media coverage can also be catastrophic. After all, would you want to book a room in a luxury hotel after hearing it had an infestation? An internet site, www.bedbugregistry.com, allows individuals to document personal hotel experiences and/or research names of hotels with former and/or existing complaints of bed bugs. A single complaint, therefore, can become internet fodder overnight and dramatically damage one's reputation.

VIII. Bed Bug Claims Handling

If a claim is filed, the early pest management plan likely failed. However, a claims handler can still perform an important function in maximizing liability defenses and minimizing potential exposure. Regardless, it is imperative that the problem be promptly and properly addressed.

Upon receipt of a claim, the claims handler must encourage the insured to institute an aggressive pest management plan. In doing so, the claims handler should ensure proper documentation is maintained by the insured. Proper documentation includes preventative inspections, initial complaints, remediation attempts, follow-up inspections and all continuing complaints. In addition to limiting the potential damages caused by a continuing bed bug problem, these actions will assist the property owner in defending itself against claims it failed to take reasonable steps in responding to the bed bug infestation.

Because bed bugs create unique situations in apartment complexes, insurance companies may encourage apartment owners to create an addendum to their leases. In Michigan, leases should be at least one year long, allowing the landowner to modify the statutory requirements of the Landlord Tenant Act. As long as the Landlord Tenant Act does not apply, an apartment complex can modify the lease to create immunity from any liability arising from insect infestations, including bed bugs. Although this may not completely alleviate the landowner of its duty to keep the premises reasonably free of bed bugs, it certainly offers a strong defense which, in all likelihood, would be upheld in Michigan courts. Obviously, another solution to this potential problem is to simply create an exclusion for bed bugs in the insurance policy.

IX. Conclusion

Bed bugs are not going away. In fact, complaints are increasing at an alarming rate and related litigation is sure to follow. Prompt and thorough inspections and a well conceived and executed remediation program can dramatically decrease a landowner's potential for a bed bug problem. It will certainly assist in the defense of related lawsuits.

A bed bug litigation webinar is scheduled for Wednesday, November 18, 2009. If you are interested in attending, please contact Michael Crow at mcrow@secrestwardle.com.