

PUBLICATION

Revived Threat Bites Hotels

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January 6, 2011

After more than 50 years of dormancy, cases of bed bugs are on the rise at an alarming rate. The hysteria has caught the attention of the Centers for Disease Control and Prevention (CDC) and the Environmental Protection Agency (EPA), which recently released a Joint Statement on Bed Bug Control in the United States.¹

Bed bugs have infested hotels across the country. They are natural hitchhikers who latch on to travelers and their luggage and make new homes wherever people sleep. The resurgence is linked to a number of causes, including an increased resistance to pesticides; increased domestic and international travel; the banning of pesticides proven to be effective against them, such as DDT, in favor of less environmentally impactful chemicals; and ineffective pest management programs.

Bed bugs are small, flat insects belonging to the Cimicidae family that are reddish-brown, wingless and about the size of a watermelon seed. Bed bugs feed on blood, but they can go several months without food. They create habitats near where people sleep and hide practically anywhere such as box springs, clothing and curtains; they travel with ease in folds of luggage, overnight bags and clothes.

Bed bug bites are similar to mosquito bites, but unlike mosquitoes or other pests, bed bugs are not known to transmit disease. They inject an anesthetic and anticoagulant so that the person does not feel the bite, but the bite may take as long as two weeks to manifest. People may suffer allergic reactions to bed bug bites, inflammation or secondary infections to the skin; but the primary symptom from the bite is itching. For most people, bites require no treatment. Discomfort is treated with antiseptic lotion or antibiotic cream, or in more significant inflammation and irritation, corticosteroids and oral antihistamines.²

Psychologically, however, affected claimants often argue that bed bugs present a greater threat of maladies such as insomnia and anxiety. While bed bugs do not present the same health hazard as many other disease carrying pests, they are the current sensational news story. Regardless of the truth that these pests are relatively innocuous, the stigma of being bitten over 100 times in a night without knowing about it is strong.

Hotel operators have seen a spike in litigation related to bed bug bites and infestations. Most state laws provide for some sort of implied warranty of habitability between the hotel and its guests, and claimants have founded their causes of action against hotels for a breach of this warranty or general negligence.³ Some states are enacting bed bug legislation to clarify the duty of the landowner, to prevent and solve bed bug issues and to penalize those who breach that duty.⁴

For the most part, the general damage awards have been relatively minimal and range from \$4,000 to \$24,500.⁵ The small damage awards may limit the number of individual claims against hoteliers, as the value of the claim may not be high enough for an attorney to take the case. Nevertheless, the potential for much higher damage amounts related to emotional distress and mental anguish, and the perceived fear of adverse publicity in this era of unverified consumer outrage using public forums like Trip Advisor, provides an incentive to continue aggressive pursuit of the cases.

Hotel operators should not treat bed bug infestations lightly, as some courts have assessed significant punitive damages in bed bug cases when the hotel demonstrates little or no willingness to solve the problem. For example, guests at a Chicago hotel who suffered bed bug bites were given only \$5,000 in compensatory damages but another \$372,000 in punitive damages for the hotel's "willful and wanton conduct."⁶

Hotels with effective pest control programs for other insects that respond to such programs remain vulnerable to bed bug infestations simply because each new guest represents a risk of contamination that cannot be avoided. There is little that can be done to prevent bed bugs. Unlike many other pests, bed bugs are not attracted to bait traps because they feed on blood. An infestation of many other pests and vermin can be avoided by maintaining a clean environment, but sanitation has little to do with bed bugs. Hotels can take some limited measures to prevent bed bugs such as reducing the number of hiding places, limiting fabric surfaces where appropriate (for example, luggage racks), vacuuming and sealing cracks and crevices. Otherwise, proactive measures to prevent bed bugs are few.

The greater threat on the horizon is potential for expensive and time-consuming class action litigation. A multi-unit operator's failure to institute a comprehensive plan to prevent and manage bed bug infestations at a corporate level could result in significant exposure for a class action defendant.

Most franchised hotel chains allocate responsibility for pest control to the local operator, much like security. In the franchise context, this approach manifests in operations manual language that alerts the franchisee to this responsibility. More specific language runs the risk of crossing the threshold into "control" that will offer claimants the chance to take the franchisor, as well as the operator-franchisee, to trial.⁷ But at the same time, franchisors can generally protect the franchise by setting out standards governing their franchisees' operations and reserving their right to inspect, monitor or evaluate the franchisees' compliance with such standards.⁸ Context remains important to delineating between franchisor and franchisee responsibilities. Given the public image crisis that has the potential to affect all locations when the blunder of a single franchisee is cast into the spotlight,⁹ franchisors will wish to address the issue of "control" with the utmost care.

Likewise, in the management arena, owners will likely rely on the professional manager to deal with a bed bug issue aggressively and quickly. The fragility of operating budgets can be readily exacerbated by rooms out of service for pest eradication, particularly if a few rooms of infestation are not quickly addressed, so a larger section of the hotel is affected by the eradication process once it has begun.

While hotel operators have little choice but to approach bed bug problems with a more reactive approach, they can be proactive about mitigating the damages and limiting or avoiding liability. First, hotel operators should instruct and train housekeepers to look for and spot bed bugs as a part of the daily routine. Having a checklist for each day's or checkout inspection is a good idea, as it both reinforces the housekeeping staff's instructions and serves as evidence of a hotel's diligence in limiting the risk. Second, hotels should have an integrated pest management system in place that takes into account the life cycles of bed bugs and other pests and their interaction with the environment. This includes using appropriate pesticides according to the manufacturer's directions, which among other things prevents the likelihood that bed bugs will develop a resistance to such pesticides. The EPA has a list of over 200 EPA-registered bed bug products¹⁰ and offers a search tool to help identify the appropriate product.¹¹ Other environmentally friendly solutions are also available, such as using extreme heat treatments or deep freezing. Third, hotels should have a written plan for dealing with bed bugs and should execute the plan immediately following the first report. Finally, hotels should have a licensed pest management company respond in the event of a bed bug report as anecdotal evidence shows that home grown solutions are inconsistent and ineffective.

As travel for business and leisure is improving, prudent operators will prepare for this new threat to returning demand. A comprehensive plan to respond to bed bug reports and to take effective, responsive and protective measures demonstrates the level of care demanded by the law and the well-informed traveling public.

¹ http://www.cdc.gov/nceh/ehs/Publications/Bed_Bugs_CDC-EPA_Statement.htm

² www.biteremedy.com/BedBug-Bites.html

³ Similar landlord and tenant laws provide the foundation for a cause of action against landlords in a lease context, where it can be more challenging for the landlord to solve the bed bug problem when he does not have complete control of the premises as a hotel owner does.

⁴ See New Jersey Assembly Bill No. 3203 (2008)

⁵ See generally *Stuerhoff v. Cort Business Services Corporation*, 2009 WL 4906548 (M.D. La. 2009). See also *Matthias v. Accor Economy Lodging, Inc.; Motel 6 Operating LP*, 2003 WL 25147946 (N.D.Ill.2003) (\$5,000 in general damages); *Wyatt, Pro Ami, Slaton v. Heritage Christian Academy; Heritage Assembly*, 2003 WL 25693187 (Ala. Dist. Ct. 2003) (\$9,800 settlement award for four-year-old who suffered ant bites at a day care facility); *Elgandy v. Boyd Mississippi, Inc.*, 2003 WL 24571854 (Unknown State Miss. Dist. Ct. 2003) (\$4,000 awarded where plaintiff suffered an allergic reaction to insect bites she received in her room at the defendant resort where she was a guest); *Huynh v. J.C. Penney Co., Inc.*, 2008 WL 4145883 (N.J. Dist. Ct. 2008), JVR No. 492575) (\$49,000 award for two plaintiffs who suffered insect bites after sleeping on a bed purchased at the defendants' store).

⁶ The hotel in this case had the opportunity to spray every room for only \$500, but it declined to do so. When the hotel discovered bed bugs the following year, the hotel asked the pest control company to spray just the affected room. Later, the hotel's manager discovered bed bugs in other rooms after investigating refunds being given by desk clerks and reports from guests that there were ticks in the rooms. The judgment was affirmed on appeal by Judge Richard Posner in *Mathias v. Accor Economy Lodging, Inc.*, 347 F.3d 672 (2003). Judge Posner reasoned that the quantum of punitive damages was appropriate to achieve deterrence: "The award of punitive damages in this case thus serves the additional purpose of limiting the defendant's ability to profit from its fraud by escaping detection and (private) prosecution. If a tortfeasor is 'caught' only half the time he commits torts, then when he is caught he should be punished twice as heavily in order to make up for the times he gets away." *Id.* at 677. See also Steven Shavell, *On the Proper Magnitude of Punitive Damages: Mathias v. Accor Economy Lodging, Inc.*, 120 HARV. L. REV. 1223 (2007).

⁷ Exhibiting too much "control" may render a franchisor liable for claims against the franchisee under three theories: (1) the "joint employer" theory; (2) the "agency" theory or (3) the "apparent or ostensible employer" theory. Consider the case of *Myers v. Garfield & Johnson Enterprises, Inc.*, 679 F.Supp.2d 598 (E.D. Pa. Jan. 14, 2010), a case in which a franchise employee sued the tax preparation services franchise, franchise supervisors and the franchisor for sexual harassment. The employee cited various actions by the franchisor in adopting a systemwide code of conduct and training of its franchisees' employees to establish liability for the franchisor. Regarding the "joint employer" theory, whereby the franchisee and franchisor are both considered the "joint employer" of the employee, the court considered three factors: (1) the authority to hire and fire employees, promulgate work rules and assignments and set conditions of employment, including compensation, benefits and hours; (2) day-to-day supervision of employees, including employee discipline and (3) control of employee records, including payroll, insurance, taxes and the like. *Myers*, 679 F.Supp.2d at 607. Similarly, in support of the "agency" theory, the *Myers* court looked to the franchisor's degree of "control" over

the franchisee's day-to-day decisions. *Myers*, 679 F.Supp.2d at 611. Regarding the "apparent or ostensible employer" theory, the court looked to statements made by the principal (the franchisor) to the employee. *Myers*, 679 F.Supp.2d at 613.

⁸ See generally *Schlotsky's, Inc. v. Hyde*, 538 S.E.2d 561, 563 (Ga. App. Aug. 25, 2000).

⁹ See *Jessica Dickler, Franchise Nightmare, the "Rat Effect,"* at http://money.cnn.com/2007/03/19/smbusiness/franchisee_problems/index.htm

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http://cfpub.epa.gov/oppref/bedbug/search_results.cfm?mattress=1&ProductName=&ingSearch=null&company=null&Registration=&Submit=Search

¹¹ <http://cfpub.epa.gov/oppref/bedbug/>