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Cite as: 62 FED'N DEF. & CORP. COUNS. Q. ___ (2011).

The Federation of Defense & Corporate Counsel Quarterly is published quarterly by the Federation of Defense & Corporate Counsel, Inc., 11812 North 56th Street, Tampa, FL 33617.

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“Sleep Tight, Don’t Let the Bed Bugs Bite” The Impact of Bed Bugs On Our Daily and Legal Lives[†]

David E. Cassidy
Christopher Elko
Robert Christie
Peter M. Di Eduardo
Michael Glascott
Elizabeth M. Lorell

I. INTRODUCTION

“Good night, sleep tight; don’t let the bed bugs bite; If they do, let them chew, because they need to eat too.” When the anonymous author of this poem sarcastically advised the reader to “let them chew,” that poet 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, bed bugs are back and influencing the way we live, work, and travel. With the stories of lives turned upside-down by bed bugs—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 chemicals used to treat bed bugs overseas have killed tourists, while high-powered convection heaters used to kill bed bugs recently burned to the ground a house in Ohio. Hence, this Article is designed to provide factual information about bed bugs to protect our families, colleagues, and clients from these pesky little creatures and the devastation they leave behind.

[†] Submitted by the authors on behalf of the FDCC Employment Practices and Workplace Liability, Civil Rights and Public Entity, Premises and Security Liability, and International Practice and Law Sections.



David E. Cassidy is a member of Norris McLaughlin & Norris, PA and practices in its New Jersey and New York offices. He has extensive experience representing companies in labor and employment matters. He regularly litigates employment claims brought under Title VII, ADA, ADEA, FMLA, WARN, NJLAD, CEPA, NYHRL, and other employment-related statutes. He handles claims in state and federal court and before the American Arbitration Association. Mr. Cassidy has experience with claims involving commissions and bonuses, misappropriation of trade secrets, breach of non-compete covenants, breach of contract, defamation, and privacy in the workplace. He has successfully brought to verdict several

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Part II provides an overview of how bed bugs have re-entered our society and outlines information that everyone should know about this pest. Part III explains the history and biology of bed bugs. Part IV highlights how bed bugs have impacted the hotel industry and addresses how to keep the workplace safe to keep productivity up and liability claims down. Part V provides an overview of the growing field of bed bug litigation. Part VI discusses the relevant statutes and regulations that impact employers and protect employees 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- and third-party claims is provided in Part VII. Finally, as it is clear that the bed bug epidemic is here to stay, Part VIII concludes with a discussion of how to find and eliminate bed bugs. This section of “best practices” will help to detect bed bugs at an early stage to help 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 its own varying rates of success, a thorough list of different ways to treat bed bugs is provided.



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Bar Association and the Employment Section of the Morris County Bar Association, and he is an active member in the New York City Inn of Court.

II.

THE RESURGENCE OF BED BUGS: PUBLIC AND PRIVATE RESPONSES

For decades, bed bugs were thought to be a non-issue after the introduction in the 1940s of dichlorodiphenyltrichloroethane (DDT), a well-known synthetic pesticide effective on bed bugs.¹ That harmful pesticide has since been banned, and now bed bugs have reemerged throughout the country. Bed bugs have found their way to hotels,² offices,³ and movie theaters⁴ as well as residential and city housing.⁵ As a result of the outbreak, websites have been cre-

¹ See Jerry Adler, *The Politics of Bedbugs: Conservatives Say That the Ban on DDT Is To Blame for the Recent Resurgence in Bedbugs*, THE DAILY BEAST (Sept. 8, 2010, 11:00 AM), <http://www.thedailybeast.com/newsweek/2010/09/08/conservatives-blame-environmentalists-for-bedbugs.html>.

² Bed bug complaints in hotels include the Waldorf-Astoria in New York City. See Bill Sanderson, *Guest Complains of Bed Bugs at the Waldorf*, N.Y. POST (Oct. 7, 2010, 10:48 AM), http://www.nypost.com/p/news/local/manhattan/hotel_really_bites_Euvr50hEEYsXKEImNYK070.

³ Bed bugs have been found in the offices of the Wall Street Journal and Elle Magazine. See Caroline Howard, *Office Memo: Bed Bugs Are Back*, FORBES.COM (Aug. 19, 2010, 7:00 PM), <http://www.forbes.com/2010/08/19/bed-bugs-germs-office-forbes-woman-well-being-illness.html>; Melanie Grayce West, *Bedbugs Suspected Inside Wall Street Journal's Office*, WALL ST. J. (Oct. 4, 2010, 2:48 PM), <http://blogs.wsj.com/metropolis/2010/10/04/bedbugs-strike-inside-wall-street-journals-office>.

⁴ Bed bugs were reported to have been found at a movie theater in Times Square, New York City. See Emily B. Hager, *What Spreads Faster Than Bedbugs? Fear and Social Stigma*, N.Y. TIMES, Aug. 21, 2010, at A1.

⁵ Bed bugs also have been reported by people living in the Blayton Building, Williamsburg, Va. Brian Farrell, *Finding, Fighting Bed Bugs*, WVEC.COM (Sept. 22, 2010, 12:40PM), <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. Melanie Grayce West, *City's Problem with Bedbugs Getting Itchier*, WALL ST. J., Jan. 11, 2011, at A21.



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ated to provide information about bed bugs,⁶ exterminators have enlarged their practices to include bed bug eradication,⁷ and new methods to stop bed bugs have emerged.⁸ In fact, the bed bug epidemic has become such a problem that the federal government has undertaken an outreach and education project on bed bugs. The Environmental Protection Agency (EPA) hosted the National Bed Bug Summit in April 2009 in Arlington, Va., to develop recommendations on how to address the many problems posed by the bed bug resurgence. A follow-up conference was held in February 2011 in Washington, D.C. to discuss efforts made to control bed bugs in settings such as schools and public housing. The conference also examined how governments can promote effective bed bug prevention as well as how to educate elderly, disabled, and hoarding residents about bed bugs.⁹ In order to determine how the bed bug epidemic became a problem, a look at their origins is helpful.

⁶ Various websites that address bed bugs include bedbugger.com, bedbugregistry.com, bedbugreports.com, and bed-bugs.org. [Bedbugregistry.com](http://bedbugregistry.com) provides guests with a forum to voice their complaints. *See, e.g.*, Recent Bed Bug Reports for N.Y. City, Bed Bug Registry, <http://bedbugregistry.com/metro/nyc/recent/> (last visited Nov. 2, 2011).

⁷ Bed bug exterminators made \$258 million in 2009 from bed bug treatments, according to the National Pest Management Association. *See* Steve Hargreaves, *Why We Can't Kill Bedbugs*, CNNMoney.com (Nov. 6, 2010, 2:58 PM), http://money.cnn.com/2010/11/05/news/economy/bed_bug_cure/index.htm.

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

⁹ Additional information regarding the Second National Bed Bug Summit in February 2011 is available at <http://www.epa.gov/opppfead1/cb/ppdc/bedbug-summit/2011/2nd-bedbug-summit.html>.

Peter M. Di Eduardo is a Senior Manager with Bell Environmental Services, a full-service pest control company founded in 1963 in Parsippany, New Jersey. Bell Environmental is one of the largest providers of pest control services in the New York-Metro region and a pioneer in using environmentally-friendly methods to eliminate pests. Mr. Di Eduardo frequently presents before health care organizations, business associations, local government agencies, and not-for-profit groups on how to recognize, detect, and eliminate bed bugs at different stages of infestations. He is also the Vice Chairman of the Morristown Redevelopment Committee, which oversees multi-million dollar real estate projects, a position he has held since 2002. Prior to joining Bell Environmental in 2010, Mr. Di Eduardo had ten years of experience in commercial and residential real estate industries in New Jersey.

III.

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 that feed exclusively on the blood called Cimicidae. Bed bugs are believed to have started as cave-dwelling bugs that dined on bat blood,¹⁰ before they encountered human beings. The human-bed bug relationship then evolved with bed bugs switching from bat to human blood, and eventually the bed bugs followed humans out of the caves as we began to form today's civilized cultures.¹¹

The bed bug found in the United States has five developmental stages, each requiring a blood meal to graduate to the next stage. The change from egg to adult takes approximately thirty-seven days.¹² Once an adult, the average bed bug lives for one year, with its ultimate life span dependant on how often it feasts as well as the temperature in which it lives. Recent laboratory studies have shown that starvation decreases bed bug survival.¹³ On average, a bed bug deprived of a blood meal will die within seventy days, although dehydration rather than starvation is the actual cause of death.¹⁴

¹⁰ See DINI M. MILLER & ANDREA POLANCO, VA. COOP. EXTENSION & VA. DEP'T OF AGRIC. & CONSUMER SERVS., BED BUG BIOLOGY AND BEHAVIOR 1, available at <http://www.vdacs.virginia.gov/pesticides/pdf/files/bb-biology1.pdf> (last visited Oct. 12, 2011).

¹¹ See *id.*

¹² See *id.*

¹³ See *id.* at 4.

¹⁴ See *id.*



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Bed bugs commonly feed between midnight and 5 a.m.,¹⁵ which is generally the time when humans enjoy their deepest sleep. Bed bugs find humans based on body temperatures and carbon dioxide emitted while breathing.¹⁶ Bed bugs are known to detect their hosts from only about three feet away, so the insects might travel great distances before detecting a human.¹⁷

Once a potential host is located, a bed bug will use its mouth parts to find a human capillary.¹⁸ As the first bite usually is not successful, a bed bug might take several bites before it finds a capillary to its liking. As a result, someone bitten by a bed bug will often have several bites in the same area. Once a bed bug has found a proper feeding area, it will spend five to ten minutes feeding.¹⁹ Digestion then takes place in the crack or crevice where the bed bug lives. Commonly after eating, a bed bug will have the urge to mate. After a female has mated with a male, she can produce between five to twenty eggs from a single meal and, under the proper conditions, 97% of the bed bug eggs hatch successfully.²⁰ Even more problematic is that 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 ability equals more bed bugs in one area and the potential for a greater nuisance to those humans living nearby.

¹⁵ See *id.* at 1.

¹⁶ See *id.*

¹⁷ See *id.* at 1.

¹⁸ See *id.* at 2.

¹⁹ See *id.*

²⁰ See *id.* at 3.



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IV. THE IMPACT OF BED BUGS ON THE HOTEL INDUSTRY AND IN THE WORKPLACE

One of the industries hardest hit by the bed bug epidemic is the hotel industry. Although hotels have become familiar with the surge of bed bug claims in recent years, the volume and nature of such claims are expected to continue to grow.²¹ Bed bug infestations are reported to have increased 300% nationally between 2000 and 2001, 70% between 2001 and 2002, and 70% between 2002 and 2003.²² Approximately 20,000 bed bug reports have been made to bedbugregistry.com since summer 2010 for hotels throughout the United States.²³

The 2009 EPA National Bed Bug Summit requested that representatives of the hospitality industry attend to help identify options for bed bug prevention, control, management, and strategies for outreach and education.²⁴ Obviously, the negative consequences from bed bug infestation can be detrimental to a hotel for many reasons, including the hotel's repu-

²¹ See Jeff Casale, *As Bedbug Concerns Grow, Will Insurers Feel the Bite?*, BUS. INS. (Aug. 8, 2010, 6:00 AM), <http://www.businessinsurance.com/article/20100808/ISSUE01/308089979>.

²² See S. Carl Morello, *The Bed Bugs Are Coming! The Bed Bugs Are Coming!*, INS. J., Aug. 20, 2007, <http://www.insurancejournal.com/magazines/mag-features/2007/08/20/83351.htm> (last visited Nov. 4, 2011).

²³ See Bed Bug Registry, *Frequently Asked Questions*, www.bedbugregistry.com/faq. Bedbugregistry.com is quick to point out that the bed bug reports submitted through its site are not checked for accuracy.

²⁴ See Agenda, *EPA's Nat'l Bed Bug Summit*, Apr. 14–15, 2009, www.epa.gov/pesticides/ppdc/bedbug-summit/final-agenda.pdf (last visited Nov. 2, 2011).

tation. The stigma that bed bugs only reside in unclean areas, although untrue, is one that lives on today. As a result, the hotel industry has resorted to bed bug action plans to avoid potential lawsuits and loss of profits. Early detection is vital for this industry. Hotels have been encouraged to train their employees to detect the signs of bed bugs and take preventive measures to find bed bugs, including annual canine scent detection.²⁵ Additionally, hotels should have plans in place before their guests find or complain of bed bugs, so that hotel employees know how to respond if bed bugs are detected, including compensating guests for their inconvenience. The 2011 Bed Bug Summit stressed that hotel employees should be educated on bed bug control and prevention, as the benefits to the hotels and their guests is dramatically increased when employees have sufficient understanding of how to find and control bed bugs.

As a result of the bed bug problems facing hotels, new companies have created a variety of products, including mattress shields and bed bug sprays, in addition to different self-help methods to stop infestation. Additionally, clever marketers have offered hotels shields that they can display at their front desks to alert guests that their facilities are regularly checked for bed bugs. Such methods show the hotel industry's willingness to fight bed bugs and that it is no longer turning a blind eye to the problem. Hotel operators have good reason to take such an approach. As discussed in Part V of this Article, lawsuits that could arise from bed bug infestation at a hotel include claims for negligence, breach of the implied warranty of habitability, nuisance, battery, and fraud.²⁶

Other employers should take heed. 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 personnel is the cloud of uncertainty surrounding this explosive issue. Already sensing a potential tidal wave of complaints and alarms, observant employers are not just bracing for impact, they are fighting back. While the dearth of case law and bed bug-specific statutes leads to some guesswork, guidance exists in the many federal regulations governing employers. By reviewing the cornerstone of these policies and examining comparable HR issues, employers can begin to assemble effective bed bug policies that should provide some safe harbor from liability claims and costly drops in employee productivity.

Given the uncertain legal landscape right now, employers might question whether initiating bed bug policies makes sense. The answer is a resounding "YES"! An effective bed bug policy starts with engaging and educating the workforce. Teaching employees about the

²⁵ See DINI M. MILLER, VA. COOP. EXTENSION & VA. DEP'T OF AGRIC. & CONSUMER SERVS, BED BUG ACTION PLAN FOR HOTELS 1-2, available at <http://www.vdacs.virginia.gov/pesticides/pdf/files/bb-hotels1.pdf> (last visited Nov. 2, 2011).

²⁶ See also Daniel W. Whitney & Melissa A. Graf, *The Prosecution and Defense of Bedbugs Lawsuits*, 25 TOXICS L. REP. 37 (2010).

basic science and habits of bed bugs is relatively easy,²⁷ and once those employees know how to spot the bugs and know where they hide, the employer will have an additional layer of protection that can help stop an infestation before it spreads. Also, by educating employees, an employer will increase the chances that its employees will perform home inspections, which is critical, as many work-related infestations originate from an infestation in an employee's home. Finally, by dealing with the problem head on, an employer can avoid a sense of panic if bed bugs do come to the workplace. When employees know that bed bugs have limited mobility, reside in the same places, and do not transmit disease, they can cope more easily with this emotionally and financially charged issue.

After educating the workforce, employers should consider how they can solidify their reporting process. Employers should make sure their employees feel comfortable reporting possible bed bug infestations and attempt to lessen, if not remove, the stigma those employees may feel. If an employee claims that a co-worker has bed bugs, employers need to be tactful in handling the complaint. Employers must walk a fine line between diligently following up on reports²⁸ and possible harassment. Additionally, 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 bed bugs from a home to the workplace, creating a vicious cycle. When considering options, employers should not offer to exterminate their employees' homes. Not only are such inspections and exterminations costly, but they will not guarantee that their employees or their families will not unwittingly continue to bring bed bugs back to their homes from other sources. Employers must also avoid disciplining employees who cannot afford to exterminate their homes, as such adverse action could potentially lead to discrimination claims under the Americans with Disabilities Act (ADA) or even under a Title VII theory of disparate impact if they somehow disproportionately affect employees of one gender.²⁹ Employers dealing with repeat offenders should seek counsel and identify a strategy that can most effectively bring an end to the cycle of extermination and re-infestation in the workplace.

²⁷ Many different publications are available from federal and state agencies looking to stem the tide of bed bug complaints. A good educational resource was assembled by the New York City Department of Health and Mental Hygiene, which provides a comprehensive educational website as well as a downloadable guide available in seven languages. See N.Y. City Dep't of Health & Mental Hygiene, Preventing and Getting Rid of Bed Bugs Safely, <http://www.nyc.gov/html/doh/downloads/pdf/vector/bed-bug-guide.pdf> (last visited Nov. 2, 2011). ; see also Ctrs. for Disease Control & Prevention, Env'tl. Health Servs., Bed Bugs, <http://www.cdc.gov/nceh/ehs/topics/bedbugs.htm> (last visited Nov. 2, 2011).

²⁸ See *Thoroughgood, Inc.*, 1999 Occupational Safety & Health Decisions (CCH) ¶ 31,805, at 46,683 (1999).

²⁹ For employees who rent, landlords have certain obligations to shoulder the cost of exterminations. Under New York City's health code, when a tenant issues a complaint and the state inspection verifies that bed bugs are on the premises, the landlord may be ordered to take steps to remove the pests by the city's Department of Health and Mental Hygiene. See RULES OF THE CITY OF N.Y., tit. 24, pt. B, § 151.02(d) (2011).

Finally, employers should have 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 such professional advice to clear the workplace of bed bugs is key, seemingly providing a legal “safe harbor” for employers so far.³⁰ Keep in mind, no perfect solution exists to eradicating bed bugs in the workplace, but a responsive and educated workforce is likely the best defense against a full-blown infestation.

V.

OWNERS AND OCCUPIERS: EMERGING BED BUG CASE LAW

Bed bug litigation is on the rise nationwide, although it is mostly concentrated on the East Coast and in the Chicago area. The communicable nature of bed bug 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.

A significant number of reported appellate decisions have been issued with regard to this growing problem, falling into a few broad categories: punitive damage awards, claims for breach of the warranty of habitability, premises liability claims pertaining to secondary infested locations, and buyers’ claims purportedly arising out of purchases of infested buildings. Additionally, some cases reported by the media have yet to find their way through the court system, and thus have not generated any published opinions.

A. *Punitive Damage Awards to Hotel Guests*

A hotel owner aware of an infestation problem faces a public relations decision with real legal consequence: warning guests of the infestation and what is being done to solve it or ignoring the problem and proclaiming surprise when a guest complains. A motel chain owner in Chicago chose the latter course of action, resulting in a relatively small \$5,000 verdict for actual damages to each guest 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.³¹

In *Mathias v. Accor Economy Lodging*, Judge Richard Posner wrote a decision upholding an award to a brother and sister bitten while spending the night in a \$100 per day room

³⁰ See *Clark v. Beacon Capital Partners, LLC*, No. 107455/2008 (N.Y. Sup. Ct. Apr. 12, 2011). While the suit did not name the employer as a defendant, the opinion lauds the efforts that the employer took to remedy the bed bug infestation. See *id.* at 10. The case gained notoriety because the employer was Fox News. See, e.g., Russell Goldman, *Fox News Worker Files Bedbugs Lawsuit*, ABC News (May 30, 2008), <http://abcnews.go.com/Health/story?id=4959477&page=1>; Jacques Steinberg, *Bedbugs at Fox News*, N.Y. TIMES, Mar. 18, 2008, at E2.

³¹ See *Mathias v. Accor Econ. Lodging*, 347 F.3d 672, 674 (7th Cir. 2003).

at a Motel 6.³² In that diversity case, the Seventh Circuit, applying Illinois law, affirmed the lower court's finding that the hotel owner's "failure either to warn guests or to take effective measures to eliminate the bedbugs amounted to fraud and probably to battery as well."³³ 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.³⁴

Judge Posner is a great writer, and this well-written opinion contained persuasive language about the need to make an example of an establishment that tried to cover up its infestation. Declining to listen to an extermination service that recommended every room be sprayed, hotel management instructed desk clerks to refer to the bed bugs as "ticks" and place "Do not rent, bugs in room" holds on certain infested rooms.³⁵ This method did not work. The infestation continued and began to reach farcical proportions. A guest who complained about being bitten repeatedly by insects while asleep in his room was moved to another room only to discover insects there as well. Within eighteen minutes of being moved to a third room, he discovered insects in that room and had to be moved yet again.³⁶ The plaintiffs in *Mathias* were checked into a room that the motel had designated should not be rented until it could be 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."³⁷

The balance of the *Mathias* 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.³⁸

³² See *id.* at 678. Judge Posner commented that bedbugs "are making a comeback in the U.S. as a consequence of more conservative use of pesticides." See *id.* at 673. He cited two newspaper articles for this statement See *id.*

³³ *Id.* at 675.

³⁴ See *id.* at 678. The defense relied heavily on the Supreme Court's decisions in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996) (the "BMW paint case") and *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003), where the Court suggested that "more than four times the amount of compensatory damages might be close to the line of constitutional impropriety." *Campbell*, 538 U.S. at 425.

³⁵ See *Mathias*, 347 F.3d at 675.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* at 677.

While the level of misconduct in this case might be viewed as extreme, it reflects the level of stigma perceived in 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 revocation of its license, without which it cannot operate. Here, Judge Posner noted that the court was “sure that the defendant would prefer to pay the punitive damages assessed in this case than to lose its license.”³⁹

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

Another group of cases arising out of the lower courts of a raft of eastern seaboard states involves disputes in landlord–tenant situations. Most arise from actions for unpaid rent withheld by a tenant because an apartment was infested with bedbugs.

In a 2004 decision by the Civil Court of New York City, *Ludlow Properties, LLC v. Young*,⁴⁰ the judge noted that whether bed bugs can form the basis for a breach of the warranty of habitability defense was a matter of first impression.⁴¹ That is no longer true. It is now well-established that an infestation, even if not initially caused by the landlord, can form the basis for a claim of rent abatement. The *Young* court predicted as much when it 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 condition may not be attributable to a landlord, and that the landlord may attempt multiple exterminations to little or no avail due the resiliency of bedbugs from eradication.⁴²

Landlords’ efforts at eradication detailed in these rent-dispute 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 landlords for failing to keep premises free from unsafe and unhealthy conditions.

³⁹ *Id.* at 678.

⁴⁰ 780 N.Y.S.2d 853 (Civ. Ct. 2004).

⁴¹ *See id.* at 856.

⁴² *Id.*

The landlord–tenant cases⁴³ are replete with snippets of expert testimony from exterminators. Some of the facts that have emerged include the following: (1) bed bug infestation does not vary seasonally; (2) if three weeks pass without an individual being bitten, the bedbug problem is likely resolved; and (3) 90% of men do not manifest bedbug bites, and women are more commonly bitten because of their higher body temperatures. As colorfully described in a New York Law Journal article from 2006, “[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.”⁴⁴ May the exterminators help us survive an infestation of this perfectly evolved pest.

C. *Damages from a Premises 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 bed bug infestation that he unknowingly shared with his wife and their minor son. The resulting District Court opinion in *Prell v. Columbia Sussex Corp.*⁴⁵ is an example of a premises liability suit where the plaintiff became infested at a hotel and then created a secondary infestation in his family home. His damages included personal injury damages and property damage to his own residence from the transported infestation.

In its denial of the defendant’s summary judgment motion, one issue concerned whether expert testimony was necessary to support the infestation claim. The court ruling rejected a requirement for expert testimony. Citing the doctrine of *res ipsa loquitur*, the court instead 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; an exterminator came twice to his home and confirmed the insects were bed bugs.⁴⁶

⁴³ Other cases in this group include *Valoma v. G-Way Mgmt.*, No. SCK 3545/10-1,2,3, 2010 N.Y. Misc. LEXIS 5521 (Civ. Ct. Nov. 3, 2010), *Bender v. Green*, 874 N.Y.S.2d 786, 790–91 (Civ. Ct. 2009), *Zayas v. Franklin Plaza*, No. 3316/2008, 2009 N.Y. Misc. LEXIS 698 (Civ. Ct. Apr. 6, 2009), and *Lewis v. 525-527 Main St. EH. LLC*, No. HCH562, 2009 Conn. Super. LEXIS 3097 (Super. Ct. Nov. 13, 2009).

⁴⁴ Timothy M. Wenk & Howard S. Shafer, *Outside Counsel: Good Night, Sleep Tight, Don't Let the Cimex Lectularis Bite*, N.Y. L. J., Jan. 26, 2006, at 24.

⁴⁵ Civil No. 07-2189, 2008 U.S. Dist. LEXIS 84536 (D. Pa. Oct. 20, 2008).

⁴⁶ *Id.* at *23.

The case also contains a good discussion on the issue of whether the hotel 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.⁴⁷

Constructive notice to the hotel has now become a matter of public knowledge through such websites as bedbugregistry.com. Property owners may rely on this same website to argue that Mr. Prell should have been on notice that its property was infested—truly a last resort.

D. *Caveat Emptor Protects Seller of an Apartment Building*

Bed bugs are considered a latent defect that does not provide a basis for a purchaser of an apartment building to rescind the transaction after discovering an infestation. That was the recent holding of the New York Supreme Court in *85-87 Pitt Street LLC v. 85-87 Pitt Street Realty Corp.*⁴⁸ That court rejected the buyer’s claim “that the infestation is a latent defect not reasonably discoverable with due diligence.”⁴⁹ It also rejected the buyer’s alternative claim for compensatory, punitive, and loss of reputation damages.⁵⁰ 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 court stated,

The fact that Buyer is unsatisfied with the presence of bedbugs 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 bedbugs to Buyer.⁵¹

⁴⁷ *Id.* at *16–18.

⁴⁸ No. 601341/09, 2010 N.Y. Misc. LEXIS 1692 (Sup. Ct. Apr. 6, 2010).

⁴⁹ *Id.* at *3.

⁵⁰ *Id.* at *15.

⁵¹ *Id.* at *9.

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

VI.

EMPLOYERS AND EMPLOYEES: FEDERAL EMPLOYMENT LAWS

While the hotel industry has the benefit of case law to determine what not to do as it relates to bed bug claims, employees and employers in other industries and professions have statutes and regulations that can provide similar guidance.

A. *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).⁵² OSHA broadly requires an employer 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.”⁵³ That “general duty clause” provides a broad requirement that is narrowed and defined by the many regulations left for the Secretary of Labor to promulgate.⁵⁴ These voluminous regulations create comprehensive safety standards for a variety of workplace hazards, including a regulation on vermin control as well as a regulation that protects the rights of whistleblowers.

1. The General Duty Clause

Before addressing the specific regulations, employers should ask whether their responsibilities under OSHA's general duty clause are triggered by the mere presence of bedbugs in the workplace. Put another way: Can 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 hazard.⁵⁵ In fact, not only are employers responsible for hazards they know about,⁵⁶ but employers who are unaware of hazards are also required to take reasonable precautions to avoid hazards generally recognized in the industry.⁵⁷

⁵² See U.S. Dep't of Labor, About OSHA, <http://www.osha.gov/about.html> (last visited Nov. 2, 2011).

⁵³ Occupational Health & Safety Act of 1970 § 5(a)(1), 29 U.S.C. § 654(a)(1) (2006).

⁵⁴ See *id.* § 6, 29 U.S.C. § 655(a).

⁵⁵ See *Am. Smelting & Refining Co. v. Occupational Safety & Health Review Comm'n*, 501 F.2d 504, 511 (8th Cir. 1974) (stating that a “recognized hazard” is not limited to one that can be recognized directly by human senses without assistance of any technical instruments).

⁵⁶ See *Usery v. Marquette Cement Mfg. Co.*, 568 F.2d 902, 910 (2d Cir. 1977).

⁵⁷ See *Nat'l Realty & Constr. Co. v. Occupational Safety & Health Review Comm'n*, 489 F.2d 1257, 1265 n.32 (D.C. Cir. 1973).

Nevertheless, bed bugs still 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.”⁵⁸ The general duty clause’s requirement that a hazard be likely to cause death or serious physical harm to employees also should disqualify bed bugs. 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.”⁵⁹ The impact of bed bugs on one’s body is normally a red welt, suggesting that to assert the loss of an entire body part would be a stretch. Although employers should remain watchful for trends as the spike in bed bug reporting continues, on its face it appears the general duty clause of the OSHA will not apply in the bed bug context.

2. The Vermin Control Clause

In addition to the general duty clause, several regulations promulgated by the Secretary of Labor 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.”

Even though bed bugs do not transmit disease or cause serious physical damage, the Occupational Safety and Health Review Commission (OSHRC)⁶⁰ is likely to consider this regulatory clause as governing bed bug occurrences in the workplace. Indeed, given the regulation’s broad reference to “insects, and other vermin” as well as bed bugs’ propensity to multiply at rapid rates,⁶¹ an OSHA violation may be upheld if an employer fails to properly address an ongoing infestation.⁶² That said, the mere existence of bed bugs is probably insufficient to violate OSHA.⁶³ In deciding a challenge to a citation in *Thoroughgood Inc.*,

⁵⁸ See *Pratt & Whitney Aircraft v. Sec’y of Labor*, 649 F.2d 96, 98 (2d Cir. 1981).

⁵⁹ See U.S. Dep’t of Labor, Occupational Safety & Health Admin., *Imminent Danger Requirements*, <http://www.osha.gov/as/opa/worker/danger.html> (last visited Nov. 2, 2011).

⁶⁰ The OSHRC is an independent federal agency that resolves disputes over citations or penalties from OSHA inspections of American workplaces. The Review Commission, therefore, functions as an administrative court, with established procedures for conducting hearings, receiving evidence, and rendering decisions through its Administrative Law Judges (ALJs). See Occupational Safety & Health Review Comm’n, *About the Commission*, <http://www.oshrc.gov> (last visited Nov. 2, 2011).

⁶¹ See *supra* notes 23, 24.

⁶² See *Thoroughgood, Inc.*, 1999 Occupational Safety & Health Decisions (CCH) ¶31,805, at 46,683–84 (1999)

⁶³ See *id.* at 46,683 (noting that “it may not always be reasonable for . . . an older facility to be completely vermin free where food is prepared and where numbers of people live in close quarters”).

the OSHRC focused more on how the employer reacted to an infestation and less on the presence of vermin. In that case, the Azalea Court residential care home hired a pest control specialist, SAB Environmental Services, to inspect the grounds and offer opinions on how to handle the infestation. The employer ignored the expert's advice, and the OSHRC ruled that

[i]t 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.⁶⁴

Hence, ultimately, the question is not *whether* an employer has an infestation, but rather how the employer *addresses* and *combats* the infestation.⁶⁵ Employers can find safe harbor from OSHA claims if they remain responsive to signs of infestations and follow the advice of professionals.⁶⁶

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.”⁶⁷ Given the prevalence of the bed bug resurgence, good faith can go a long way in determining whether a violation has occurred. If a violation is substantiated, the likelihood of infection will be a major consideration when determining the gravity of the claim.

⁶⁴ *Id.* at 46,683.

⁶⁵ See *Clark v. Beacon Capital Partners, LLC*, No. 107455/2008, at 3–5 (N.Y. Sup. Ct. Apr. 12, 2011) (describing the various approaches undertaken by an employer to combat a bedbug infestation in the workplace, including calling in an exterminator, employing a bed bug-sniffing dog, hiring a board-certified entomologist, and visiting an employee’s home). 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 was Fox News. See Goldman, *supra* note 30; Steinberg, *supra* note 30. Ultimately, the court dismissed the claims against defendants, based largely on the fact that “the property defendants could not have taken any measures beyond those taken by [the employer].” *Clark*, No. 107455/2008, at 10.

⁶⁶ Worthy of note is that, under OSHA, employers can be their own worst enemies when attempting to combat infestations. Chemical treatments are considered by some to be ineffective by professional exterminators. See *infra* Part VII.B.2. If those chemicals are still used and create hazards to employees, either under the general duty clause or under the more specific “hazardous chemicals” section of OSHA, their presence in the workplace will only exacerbate an employer’s OSHA liability. See Occupational Safety & Health Act of 1970 § 6(b)(7), U.S.C. § 655(b)(7) (2006) (“hazardous chemical” section). Employers should always contact professionals when exterminating.

⁶⁷ *Thoroughgood, Inc.*, 1999 Occupational Safety & Health Decisions (CCH) ¶31,805, at 46,684 (1999) (quoting *J.A. Jones Constr. Co.*, 1993 Occupational Safety & Health Decisions (CCH) ¶29,964, at 41,033 (1993)).

3. The Whistleblower Clause

If bed bugs make their way into the workplace, employers must remain calm and avoid alienating employees who may have brought the infestation there, 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 the law.⁶⁸ Thus, employers must be delicate in their handling of complaints and reports, especially in self-reporting scenarios, by 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) the employee participated in protected activity; (2) the employer took subsequent adverse action; and (3) a causal connection tied the employer's action to the protected activity.⁶⁹ An internal complaint is "protected" under section 11(c) of OSHA if it arises under or is related to a health or safety hazard and if it is made in good faith.⁷⁰ An employee can establish the requisite causal connection by showing that a protected activity was a substantial reason for an adverse employment action.⁷¹

The OSHA whistleblower statute creates a dilemma for employers. When employees report they have discovered bed bugs in their home, office, or on their bodies, how should their employers act? At the outset, employers must focus on being sensitive and discreet. Employers should avoid any actions that could be considered intimidation,⁷² including pressure to have a home extermination completed quickly or other actions that could be considered discipline, such as reassignment, reduced pay, or fewer hours.⁷³ Balancing those 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.

B. *The National Labor Relations Act*

Most employers are aware of the National Labor Relations Act (NLRA)⁷⁴ but believe it applies only to situations involving labor organizations. In reality, the NLRA covers much more ground, protecting employees' "rights to join together to improve their wages and work-

⁶⁸ See Occupational Safety & Health Act of 1970 § 11(c), 29 U.S.C. 660(c).

⁶⁹ See *Schweiss v. Chrysler Motors Corp.*, 987 F.2d 548, 549 (8th Cir. 1993).

⁷⁰ See 29 C.F.R. § 1977.9(c) (2010).

⁷¹ *Id.* § 1977.6.

⁷² See, e.g., *Conn. Dep't of Env'tl. Prot. v. Occupational Safety & Health Admin.*, 356 F.3d 226, 229 (2d Cir. 2004) (employee alleged her employer committed violations of OSHA whistleblower provisions by taking away her job and duties because she had engaged in protected activity).

⁷³ See Occupational Safety & Health Admin., Whistleblower Prot. Program, <http://www.whistleblowers.gov/index.html> (last visited Nov. 5, 2011).

⁷⁴ 29 U.S.C. §§ 151–167 (2006).

ing conditions, with or without a union.”⁷⁵ Put another way, the NLRA protects “concerted activity,” which the statute defines 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 bargaining or other mutual aid or protection.”⁷⁶ Notably, these protections extend to all employees, regardless of whether they are in a union.⁷⁷ The salient inquiry is not whether a union is present, but 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.”⁷⁸ The National Labor Relations Board has repeatedly struck down policies that prohibit the spreading of rumors by employees⁷⁹ under the belief that such action threatens to chill employees’ rights to concerted activity.⁸⁰ Employers should train their managers to be open and transparent about 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 who is outspoken about the presence, or the potential presence, of bed bugs.

For employers operating under collective bargaining agreements, awareness of the threats presented by bed bugs and having policies in place are even more critical. At least one union has already warned its members about the potential of bed bugs in the workplace and advised seeking union assistance in the absence of management action.⁸¹ In addition to providing valuable tips on how to avoid bringing bed bugs home, the safety guide from

⁷⁵ See Nat’l Labor Relations Bd., Rights We Protect, Employee Rights, <http://www.nlr.gov/rights-we-protect/employee-rights> (last visited Nov. 2, 2011).

⁷⁶ Nat’l Labor Relations Act § 7, 29 U.S.C. § 157.

⁷⁷ See Nat’l Labor Relations Bd. v. Phoenix Mut. Life Ins. Co., 167 F.2d 983, 988 (7th Cir. 1948) (“A proper construction is that the employees shall have the right to engage in concerted activities for their mutual aid or protection even though no union activity be involved, or collective bargaining be contemplated.”).

⁷⁸ See *Meyers Indus., Inc.*, 281 N.L.R.B. 882, 887 (1986) (finding that a conversation involving an employee can constitute “concerted activity” if it at least has some relation to possible group action for the employees’ interest); see also *Elston Elecs. Corp.*, 292 N.L.R.B. 510, 511 (1989).

⁷⁹ See *Lafayette Park Hotel*, 326 N.L.R.B. 824, 833 (1998) (striking down hotel policy against “making false, vicious, profane, or malicious statements toward or concerning the [hotel] or any of its employees”); *Great Lakes Steel*, 236 N.L.R.B. 1033, 1037 (1978) (striking down company policy against handing out literature that was “libelous, defamatory, scurrilous, abusive or insulting or any literature which would tend to disrupt order, discipline or production”).

⁸⁰ See *Fiesta Hotel Corp.*, 344 N.L.R.B. 1363, 1369–70 (2005) (dissent, Liebman, member).

⁸¹ See TEAMSTERS LOCAL 237, KEEPING OUR MEMBERS SAFE, A SAFETY & HEALTH GUIDE FOR TEAMSTERS LOCAL 237, at 19–20 (June 2009).

Teamsters Local 230 specifically cites to the vermin control clause of OSHA.⁸² The guide tells 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.”⁸³ While no law specifically requires employers to maintain bed bug policies, OSHA regulations implicate vermin and insect infestations, and employers would be hard-pressed to claim ignorance or justify a lack of a policy.

C. FMLA and ADA Concerns

Thus far, this Article has focused on employment concerns directly raised by the existence of bed bugs in the workplace. But employers also should be aware of the impact bed bugs have on employees—such as loss of sleep, the bites, and psychological effects—and possible requests for leave or other accommodations under federal statutes. In many of these instances, employees will need to go undergo medical evaluations, and employers will need to determine whether the effect of the bed bugs entitles employees to leave or to legal protections.

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 work weeks of job-protected leave for eligible employees.⁸⁴ For an employee to be eligible due to that employee’s own illness, the employee must have a “serious health condition” that makes the employee unable to perform the functions of the job.⁸⁵ 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 enacting regulation and the treatment of recent epidemics,⁸⁶ an infestation alone probably would not create a “serious health condition” among employees or their families suitable to justify leave.

⁸² See *id.* at 20. The materials technically cite to a New York State analog of the OSHA vermin clause, 29 C.F.R. § 1910.141(a)(5), which parrots the federal language.

⁸³ See TEAMSTERS LOCAL 237, *supra* note 81, at 20.

⁸⁴ See 29 U.S.C. §§ 2601–19 (2006).

⁸⁵ Family & Medical Leave Act of 1993 § 102, 29 U.S.C. § 2612(a)(1)(D). The law defines “serious health condition” as “an illness, injury, impairment, or physical or mental condition that involves (A) inpatient care in a hospital, hospice, or residential medical care facility; or (B) continuing treatment by a health care provider.” *Id.* § 101(11), 29 U.S.C. § 2611(11).

⁸⁶ Despite its contagious nature, seasonal flu will not permit leave under FMLA absent a showing that the elements of a “serious health condition” are met. 29 C.F.R. § 825.113(d) (2010) (“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 and do not qualify for FMLA leave.”). However, during the H1N1 outbreak in 2009, the U.S. Department of Health and Human Services’ Centers for Disease Control and Prevention (CDC), issued guidance to employers that strongly recommended leave policies that would stem the outbreak by permitting employees to stay home when an H1N1 issue arose within their families. See Ctrs. for Disease Control & Prevention, H1N1 Flu, Guidance for Businesses and Employers to Plan and Respond to the 2009–2010 Influenza Season (Feb. 2, 2010, 1:00 PM), <http://www.cdc.gov/h1n1flu/business/guidance/>. Similar guidance regarding bed bugs may be forthcoming. See *generally* Ctrs. for Disease Control & Prevention, *supra* note 27.

Employees are also protected under the ADA, which provides leave and accommodations for disabled employees as defined by the statute.⁸⁷ The ADA defines “disability” as “(A) a physical or mental impairment that substantially limits one or more of the major life activities of an individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment.”⁸⁸ Major life activities protected by the ADA include sleeping⁸⁹ and working. Under the ADA, employees’ ability to work is substantially limited 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.”⁹⁰ Three more “major life activities” joined the list of major life activities in May 2011: sitting, reaching, and interacting with others.⁹¹ There is no blanket answer as to whether the fallout from bed bug infestations will trigger ADA protections. This likely will be a case-sensitive determination. Employers will need to conduct independent analyses to determine whether their employees qualify for ADA protections and work with any eligible employees to accommodate their disabilities.⁹² Although questions remain about whether infestations constitute either “physical or mental impairment” under the statute, employees who can prove such infestations might allege that their sleep habits, work habits, and even their ability to interact with co-workers have all been compromised.

VII. INSURANCE COVERAGE FOR BED BUG CLAIMS

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

⁸⁷ 42 U.S.C. §§ 12101–12213 (2006).

⁸⁸ Americans with Disabilities Act of 1990 § 3(2), 42 U.S.C. § 12102(2).

⁸⁹ See *Colwell v. Suffolk County Police Dep’t*, 158 F.3d 635, 643 (2d Cir. 1998) (stating that sleeping is “undoubtedly” 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. See *id.* at 485.

⁹⁰ 29 C.F.R. § 1630.2(j)(3)(i). But see *Giordano v. City of New York*, 274 F.3d 740, 748 (2d Cir. 2001) (distinguishing between being able to work and being able to perform certain duties in a particular job).

⁹¹ See 29 C.F.R. § 1630.2(i)(1)(i) (2011).

⁹² Employers should also be aware that the new ADA regulations require employers to focus on providing accommodations, as opposed to questioning whether someone is disabled. See 76 Fed. Reg. 16,978, 17,000 (Mar. 25, 2011). This regulatory change may require a shift in the approach employers take when processing ADA 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 health care sectors.⁹³ The costs associated with removing bed bugs can be significant, and owners of businesses and homes will surely seek coverage under insurance policies, which they maintain to limit exposure and to control costs. Unfortunately for some policyholders, such claims may not fall within the coverage of most homeowner or liability policies.⁹⁴

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 and attempt to stave off the rising tide of claims, insurance coverage could be the focus of future battles.

A. *First-Party Claims*

Most standard commercial property insurance policies have specific vermin exclusions for loss due to insects.⁹⁵ 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 part of home maintenance and, therefore, should not be covered by standard homeowners' and renters' insurance policies.⁹⁶ A standard homeowners' insurance policy may include the following provision: "We do not insure . . . for a loss . . . [c]aused by . . . [b]irds, vermin, rodents, or insects."⁹⁷

The insurance industry may rely on this language in asserting that bed bug claims are excluded. Although some decisional authority favors the industry view, the term "vermin" is notably not defined in most homeowners' policies. Moreover, a court has not yet considered the specific issue of whether a bed bug claim falls within the vermin exclusion.

Generally, where a policy of insurance is worded as to leave room for two constructions, the terms will be interpreted against the insurer.⁹⁸ 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.⁹⁹ Although a

⁹³ See *Don't Let the Bed Bugs Bite: An Insurance and Risk Management Perspective*, WHITE PAPER (Beecher Carlson), Oct. 2010, at 1.

⁹⁴ See *Home Insurance and Bedbug Invasions*, N.Y. TIMES (May 6, 2011, 1:09 PM), <http://bucks.blogs.nytimes.com/2010/05/06/home-insurance-and-bedbug-invasions/>.

⁹⁵ See Casale, *supra* note 21.

⁹⁶ See Alistair Barr, *Bed Bugs May Bite Insurers, But Won't Dog Industry*, MARKETWATCH (Sept. 2, 2010, 7:27 PM), <http://www.marketwatch.com/story/bed-bugs-may-bite-insurers-but-wont-dog-industry-2010-09-02>.

⁹⁷ Homeowners 3–Special Form, No. HO 00 03 10 00, Ins. Servs. Office, Inc., 1999, at 8–9.

⁹⁸ See BARRY R. OSTRAGER & THOMAS R. NEWMAN, HANDBOOK ON INSURANCE COVERAGE DISPUTES, §1.03[b] [1] (11th ed. 2002).

⁹⁹ See *id.*

court has not yet considered this issue with regard to a bed bug claim, one court conducted a potentially illustrative analysis of the vermin exclusion from a homeowner's policy in a case involving carpet beetles.

Policyholders brought an action seeking coverage under an "all risk" personal property insurance policy in *Sincoff v. Liberty Mutual Fire Insurance Co.*,¹⁰⁰ upon discovering that carpet beetles damaged a pair of antique armchairs, an eighteenth century Aubusson tapestry, and an expanse of imported broadloom carpeting. The insurer denied coverage on the ground that damage from carpet beetles fell within the vermin exclusion.¹⁰¹

During the trial, experts testified about the meaning of the term "vermin," relying on several dictionary sources. One expert testified that, while carpet beetles and moths are members of the insect world, only certain categories of insects are vermin.¹⁰² 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 ... dictionaries contain varying connotations, some indicating that vermin includes all bothersome insects, others limiting the term to parasitic insects."¹⁰³

Although the parasitic/non-parasitic distinction in this analysis would favor a finding that a bed bug claim falls within the vermin exclusion, the *Sincoff* court's observation regarding the uncertainty over 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

[t]he 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 "insects" 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."¹⁰⁴

Ultimately, the court denied application of the exclusion by focusing on the "all risk" nature of the policy, which provides coverage for any risk that is not excluded, and the burden of the insurer to show that an exclusion applies to a particular claim. The court explained,

¹⁰⁰ 230 N.Y.S.2d 13 (Ct. App. 1962).

¹⁰¹ *See id.* at 14.

¹⁰² *See id.*

¹⁰³ *Id.* at 15.

¹⁰⁴ *Id.* at 16.

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.¹⁰⁵

Although insurers may wish to rely, perhaps reasonably, upon the parasitic/non-parasitic distinction within the vermin exclusion, insurers should be wary of the court’s observation in *Sincoff* about the conflicting definitions of the term “vermin.” Notably, the court observed that specific mention of “moths” in the exclusion conflicted with the insurer’s broader interpretation of the vermin exclusion.

The standard homeowner’s policy exclusion noted above refers to both vermin and insects, which is especially interesting in light of the court’s discussion in *Sincoff* that only certain categories of insects are vermin. Such inconsistency in the use and interpretation of the term “vermin” may invite policyholders to challenge the application of a vermin exclusion, especially when a significant loss is claimed.

Another court considered the term “vermin” in an “all risks” policy, albeit with respect to damage caused by squirrels, in *Jones v. American Economy Insurance Co.*¹⁰⁶ There, the court stated that

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 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.¹⁰⁷

¹⁰⁵ *Id.* at 15–16.

¹⁰⁶ 672 S.W.2d 879 (Tex. Ct. App. 1984).

¹⁰⁷ *Id.* at 880 (alteration in original).

Therefore, although insurers may have a compelling argument that the parasitic/non-parasitic distinction favors application of the vermin exclusion for bed bug claims, policyholders can point to decisional authority in other jurisdictions finding the term “vermin” to be ambiguous.

In addition to loss claims due to bed bugs, businesses also might seek insurance coverage for other types of losses. For example, insurance coverage for business interruption could be triggered if a business is forced to close due to bed bug infestation and cannot reopen until after a fumigation.¹⁰⁸ For hotels, “loss of attraction” coverage could help make up for money lost from customer cancellations or lost bookings due to such infestations.¹⁰⁹ 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.¹¹⁰ As its name implies, business interruption coverage indemnifies an insured for losses caused by the inability to continue to use covered premises.¹¹¹ Under the circumstances, such coverage would likely be available unless the perils set forth in the policy do not include such infestation claims.

B. *Third-Party Claims*

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

Bed bug bites leave itchy red welts and, depending on possible allergic reactions, some resulting injuries may be worse than others. Although causation issues are likely to be key, determining whether a claim falls within the insuring clause of a liability policy also is likely to be at issue. If a complaint alleges that a plaintiff suffered bites and red welts due to a business owner’s negligence, a claim can likely be alleged for bodily injury as that term is defined in most general liability policies.

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

- 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:

¹⁰⁸ See Casale, *supra* note 21.

¹⁰⁹ See *id.*

¹¹⁰ See *Polymer Plastics Corp., v. Hartford Cas. Ins. Co.*, 389 F. App’x. 703, 705 (9th Cir. 2010).

¹¹¹ See *Keetch v. Mut. of Enumclaw Ins. Co.*, 831 P.2d 784, 786 (Wash. Ct. App. 1992).

- (1) The “bodily injury” or “property damage” is caused by an “occurrence” that takes place in the “coverage territory”¹¹²

Applicable definitions for such a clause include the following:

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

...

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

...

“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.¹¹³

Most commercial liability policies do not contain a “vermin” exclusion; however, 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: “‘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 property.”¹¹⁴

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” because the exposure is not likely to be deemed accidental. Even if a plaintiff does not allege initially that a policyholder knew of an infestation problem, discovery could reveal prior incidents or that the policyholder knew of the infestation. For example, evidence of prior knowledge of an infestation at a hotel could be shown if employees or guests report (1) receiving bites; (2) observing bloodstains on the sheets or mattress of a hotel; or (3) finding bed bug fecal matter on a mattress, box spring, or headboard.¹¹⁵

¹¹² Commercial General Liability Coverage Form, No. CG 00 01 10 01, Ins. Servs. Office, Inc., 2000.

¹¹³ *Id.* at 13–15.

¹¹⁴ *Id.* at 2.

¹¹⁵ See JEFF EISENBERG, *THE BED BUG SURVIVAL GUIDE: THE ONLY BOOK YOU NEED TO ELIMINATE OR AVOID THIS PEST NOW* 26 (2011).

Although hotel guests could be bitten without their knowledge, because not all bed bug victims are aware when they have been bitten,¹¹⁶ hotel or business staff may be trained to recognize the signs of bed bugs. Such prior knowledge could form the basis for declining coverage.

The same analysis would apply to businesses such as offices, theaters, restaurants, doctors' offices, gyms, and shopping malls.¹¹⁷ For example, large corporations have been forced to close their offices to clean up bed bug infestations.¹¹⁸

The otherwise limited compensatory damages resulting from a bed bug claim could be significantly enhanced if the plaintiff also alleges a claim for punitive damages. If a policyholder failed to act responsibly toward a business invitee, for example, that policyholder could face claims alleging more than negligence, which would be the expected claim for most bed bug problems. As discussed in Part V.A, in *Mathias v. ACCOR Economy Lodging, Inc.*, the Seventh Circuit upheld a jury award to each plaintiff for compensatory damages of \$5,000 and punitive damages in the amount of \$186,000.¹¹⁹ In holding that the award was not excessive, the court accepted without argument that "deliberate exposure of hotel guests to the health risks created by [bed bug] infestations exposes the hotel's owner to sanctions under Illinois and Chicago law that in the aggregate are comparable in severity to the punitive damages award in this case."¹²⁰

In *Livingston v. H.I. Family Suites, Inc.*, plaintiffs alleged the defendants knew that a 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 Plaintiffs."¹²¹ The plaintiffs sought punitive damages based on the intentional nature of the alleged claims for intentional infliction of emotional distress, fraudulent concealment, and gross negligence against the defendants.¹²² In addition to the other coverage defenses, which are self-evident from the knowing conduct alleged by plaintiffs that traditionally would not be covered by an insurance policy, an insurer might also disclaim coverage for the punitive damages sought by the plaintiffs through standard exclusion clauses for punitive damages.¹²³

¹¹⁶ See *id.* at 28.

¹¹⁷ See *id.* at 101–109.

¹¹⁸ See Barr, *supra* note 96 (noting that Abercrombie & Fitch closed its store in Soho for extermination efforts).

¹¹⁹ 347 F.3d 672, 678 (7th Cir. 2003).

¹²⁰ *Id.*

¹²¹ No. 6:05-cv-860-Orl-19KRS, 2005 U.S. Dist. LEXIS 41435, at *4 (M.D. Fla. Aug. 29, 2005) (upholding plaintiffs' claim for gross negligence toward a business invitee and denying defendants' motion to dismiss).

¹²² Complaint ¶¶ 4, 22, 26, 33, 38 *Livingston v. H.I. Family Suites, Inc.*, No. 6:05-cv-860-Orl-19KRS, 2005 U.S. Dist. LEXIS 41435 (M.D. Fla. Aug. 29, 2005), 2005 U.S. Dist. Ct. Pleadings LEXIS 13659.

¹²³ See OSTRAGER & NEWMAN, *supra* note 98, at § 14.02[a].

VIII. BED BUGS BEST PRACTICES

While the scourge of bed bugs has led to new types of litigation and raised novel insurance coverage issues that attorneys may encounter in their daily practice, the most common way a bed bug will impact daily life is when a bed bug invades a home or office. Therefore, this Article concludes 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 its own rate 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.¹²⁴ Because human reaction to bites varies, an individual may be bitten without manifesting a reaction for days. By the time the bite is apparent, the individual may have returned home, bringing the bug there too, or 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.

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, it blows up like a blimp and elongates into a torpedo-shaped bug. If the bug has not fed in a while, it appears as a flat disc.¹²⁵ Adults are reddish brown in color, without wings, and are about the size of an apple seed. Humans can also 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.¹²⁶ Equally difficult to find is a bed bug egg, given that the egg is the size of the head of a pin.

Another way to find a bed bug is to look for its exoskeleton, which is often shed as a bed bug goes through the five stages of its life. The molting process results in a translucent shell that can be detected by the naked eye. The shell can be 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.¹²⁷

¹²⁴ DINI M. MILLER, VA. COOP. EXTENSION & VA. DEP'T OF AGRIC. & CONSUMER SERVS., HOW TO IDENTIFY A BED BUG INFESTATION 1 *available at* <http://www.vdacs.virginia.gov/pesticides/pdf/files/bb-identify1.pdf> (last visited Nov. 2, 2011).

¹²⁵ *Id.* at 2.

¹²⁶ *Id.*

¹²⁷ *Id.*

After bed bugs eat, they spend a majority of their time digesting and excreting their meal, which results in excess liquid being left behind.¹²⁸ The liquid is black and spots of it are often found in groups of ten or more.¹²⁹ The best place to look for fecal spots are along mattress seams and tags, 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 and wall junctions, at electrical outlets, and in curtain seams located closest to the rod.¹³⁰

Yet another way to find bed bugs is by looking for bed bug aggregations, that is, locations where bed bugs live together. The most frequent place for such aggregations are under mattress tags, along mattress seams, behind the headboard, in the holes for set-in screws, along a bed frame, near creases in the bed springs, in the area where the box spring fabric is stapled to the frame, 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.¹³¹

B. *Methods to Kill Bed Bugs*

Prompt action is needed after discovering bed bugs. Additionally, the treatment employed should not only be effective but also safe, as recent examples of improper treatments have led to disastrous consequences. In Cincinnati, Ohio, homeowners hired an exterminator to kill bed bugs that had taken over their home. Six propane powered convection heaters, which were designed to heat the home to 135 degrees to kill the bed bugs, caught the living room carpet on fire. The home was a complete loss.¹³² Sadly, the deaths of seven tourists, including an American woman, were linked to the Downtown Inn in Chiang Mai, Thailand, between January and March 2011.¹³³ Traces of *cholrpyrifos* and *pyrophus* were found in

¹²⁸ *See id.* at 2.

¹²⁹ *Id.* at 3.

¹³⁰ *Id.*

¹³¹ *Id.* at 4.

¹³² *See Carthage Home Destroyed by Bed Bug Treatment*, OhioStandard.Com, May 16, 2011, <http://story.ohiostandard.com/index.php/ct/9/cid/90d24f4ad98a2793/id/45448253/>.

¹³³ *See 'Bed Bug pesticide poisoning' Killed Californian Woman and Six Other Tourists in Thailand*, Mail Online (May 10, 2011, 5:18 PM), <http://www.dailymail.co.uk/news/article-1385518/Bed-bug-pesticide-poisoning-caused-death-California-woman-tourists-Thailand.html>. 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* Ctrs. for Disease Control & Prevention, U.S. Envl. Prot. 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) (2010). However, a recent study found that Methicillin-resistant *Staphylococcus aureus* (MRSA), an antibiotic-resistant bacterial infection, in bed bugs. *See* Dan Bowens, *Study: Bed Bugs Could Carry MRSA*, MyFoxNY.com (May 11, 2011, 11:05 PM), <http://www.myfoxny.com/dpp/health/study-bed-bugs-could-carry-MRSA-20110511>.

the hotel.¹³⁴ Cholorpyrifos is an insecticide used on bed bugs while pyrophos is a potentially lethal toxin that has been banned from indoor use in many countries.¹³⁵

Improper treatment can be avoided by instead employing several different methods to eliminate bed bugs. A treatment should be selected that best matches the level of infestation as well as the area of treatment. Recommended treatments include:

1. 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 that heat may cause and the need to ensure that all areas are raised to a temperature necessary to kill the bugs.

Many pest control companies use steam heat 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 potential damage. As bed bugs often hide in wall hangings and are attracted to heat emitted by electronics, the effectiveness of steam treatment may be limited to certain areas.

To treat bed bugs with radiant fry heat, the service provider needs to raise the temperature of the room to 140 degrees for up to two hours, 130 degrees for one to three hours for a slower kill, or above a minimum 113 degrees for two to seven 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 large residences more difficult to treat.

2. Conventional Pesticide Treatments

Due to bed bugs' 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 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 bed bugs. For example, studies have found that children whose mothers are exposed to high amounts of certain pesticides while pregnant appear to have lower IQs than their school-age peers.¹³⁶ Therefore, one must be cautious when using this type of treatment.

¹³⁴ See MAIL ONLINE, *supra* note 133.

¹³⁵ See *id.*

¹³⁶ See *Pesticides During Pregnancy May Hurt IQ*, HUFFINGTON POST (Apr. 23, 2011, 10:56 AM, updated June 23, 2011, 5:12 a.m.),

http://www.huffingtonpost.com/2011/04/23/pesticides-pregnancy_n_852785.html.

3. HEPA Vacuum Treatments

A High-Efficiency Particulate Air (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.

4. Spot Treatments

In residences, spot treating in areas where bed bugs are found is another method to eliminate bedbugs. As bed bug treatments require detailed preparation that could involve laundering items, dismantling furniture, and getting rid of excess clutter and debris, it is common for bed bugs 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.

5. Bed Bug Sniffing Dogs

Well-trained dogs can detect bed bugs or their eggs with near-perfect accuracy, researchers have found.¹³⁷ Bed bug dogs are being used more often due to their ability to find bed bugs in hidden areas. However, the price for an inspection by a bed bug-sniffing dog may be in the four-figure range.

6. Carbon Dioxide “Dry Ice” Snow

This method freezes the bed bugs without the need for chemicals or pesticides. When using carbon dioxide, treatment of a room often is completed within hours and does not require evacuation. This method also circumvents a bed bug’s resistance to pesticides.¹³⁸

IX. CONCLUSION

The re-emergence of bed bugs presents a complex set of challenges that impacts our daily and legal lives. The threat of encountering bed bugs in the workplace or at travel spots and bringing them into our homes is very real. While the possibility of being exposed to a bed bug can never be eliminated, following the best practices provided in this Article can protect homes and families. By knowing what to look for and where to look, one can reduce the chance of infestation and the costly cleanup that follows. As the case law and statutes discussed in this Article are just the start of a rapidly evolving field of litigation, one must continually stay updated as to new court decisions to identify trends and the additional

¹³⁷ Penelope Green, *He'll Scratch Your Itch*, N.Y. TIMES, Mar. 11, 2010, at D1.

¹³⁸ 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.

responsibilities placed on those with the ability to control bed bugs. Litigation relating to bed bugs is clearly on the rise and the next case could be related to the catastrophic damage caused by these pests.

Finally, the bed bug problem should not be dismissed 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 people 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 us focus our efforts, as Shrek would say, on keeping the bed bugs "far, far away."

The Federation of Insurance Counsel was organized in 1936 for the purpose of bringing together insurance attorneys and company representatives in order to assist in establishing a standard efficiency and competency in rendering legal service to insurance companies, and to disseminate information on insurance legal topics to its membership. In 1985, the name was changed to Federation of Insurance and Corporate Counsel, thereby reflecting the changing character of the law practice of its members and the increased role of corporate counsel in the defense of claims. In 2001, the name was again changed to Federation of Defense & Corporate Counsel to further reflect changes in the character of the law practice of its members.

The FEDERATION OF DEFENSE & CORPORATE COUNSEL QUARTERLY, published quarterly through the office of publication by the Federation of Defense & Corporate Counsel, Inc., 11812 North 56th Street, Tampa, FL 33617.

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