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The Bugs are Back in Town: Policy & Legislation in Light of the Bed Bug Resurgence

By Meredith Mona*

Part I: Introduction

With bed bug¹ outbreaks on the rise in cities from New York City to San Francisco, municipalities and states alike have been asking the same question: who pays for the daunting task of exterminating these little pests? Because of the bugs' clever hiding tactics, migratory habits and ability to live for months without food, extermination is costly, time-consuming, and aggressive.² The National Pest Management Association has received reports of bed bugs in 43 states, and the bed bug invasion is not likely to go away anytime soon, especially with the lack of research, education, and laws on how to address the issue.³ People are generally aware of the existence of bed bugs, thanks to internet registries and news reports, but there is very little guidance on how to prevent an infestation or what to do when one occurs.⁴ With just one bill pending in Congress, there has been little federal action, and only fourteen states have passed bed bug-related laws, addressing limited aspects of the problem.⁵ The U.S. Centers for Disease Control and Prevention ("CDC") and the U.S. Environmental Protection Agency ("EPA") are calling for an integrated approach to the bed bug resurgence – involving federal, state, tribal and

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¹ The term "bed bug" in this Note refers to the insect *Cimex Lectularius*, part of the family of insects Cimicidae – insects that feed solely on blood.

² Daniel W. Whitney & Melissa A. Graf, *The Prosecution and Defense of Bed Bug Lawsuits*, 25 TOXICS L. REP. 37, 37-38 (2010), available at http://www.whitneybogriss.com/images/wb/pdf_files/bedbuglawsuits.pdf.

³ H.R. Con. Res. 36, 23rd Leg., Reg. Sess. (Haw. 2006). See CENTERS FOR DISEASE CONTROL AND PREVENTION & U.S. ENVIRONMENTAL PROTECTION AGENCY, JOINT STATEMENT ON BED BUG CONTROL IN THE UNITED STATES FROM THE U.S. CENTERS FOR DISEASE CONTROL AND PREVENTION & THE U.S. ENVIRONMENTAL PROTECTION AGENCY, (2010) [hereinafter CDC & EPA Joint Statement].

⁴ See, e.g., THE BEDBUG REGISTRY, <http://www.bedbugregistry.com> (last visited Mar. 11, 2012); BADBEDBUGS.COM, <http://www.badbedbugs.com> (last visited Mar. 11, 2012).

⁵ H.R. 967, 112th Cong. (1st Sess. 2011) (introduced to amend the Food, Agriculture, and Trade Act of 1990 to help control and eradicate bed bugs). See Nat'l Pest Mgmt. Ass'n, *State Bed Bug Specific Laws & Rules as of August 26, 2011* (Aug. 26, 2011), http://www.pestworld.org/media/3309/statebedbuglawsasofaug262011_2_.pdf. Missouri Senator Kevin Engler has also introduced a bed bug bill addressing the responsibility of landlords and tenants. S.B. 846, 96th Gen. Assemb., 2d Reg. Sess. (Mo. 2012).

local public health professionals, together with pest management professionals, housing authorities and private citizens.⁶ Without action from legislators across the country, the bed bug problem will only worsen, resulting in more frequent and complicated legal challenges.⁷

There are various policy concerns relating to the bed bug resurgence.⁸ These include: determinations of who should pay for mitigating infestations and replacement of possessions; how the hospitality industry and tourism revenue can be protected; when there is a right to know or duty to disclose; and how to address sanitation-related concerns.⁹ Potential costs are vast and spreading.¹⁰ Traditionally, landlords, tenants, and hotel guests, as well as employers and employees of commercial buildings, have been among the most affected parties; however costs are spreading to retailers, movie theaters, and schools.¹¹ Costs may include remediation, replacement of destroyed property, loss of business, injury to employees, compensation to tenants or guests, litigation, and settlements.¹²

⁶ CDC & EPA Joint Statement, *supra* note 3.

⁷ *See, e.g.*, H.B. 2210, 49th Leg., 2nd Reg. Sess. (Ariz. 2010) (“The legislature finds that the public health threat posed by household pests, as defined in section 33-1310, constitutes a matter of statewide concern and that a uniform, statewide method for addressing household pests in multitenant housing would be significantly more effective than separate approaches by individual cities or towns.”).

⁸ Gene Harrington, *Overview of State & Local Bedbug Legislation, Second National Bed Bug Summit* (Feb. 1. 2011), available at <http://www.epa.gov/pesticides/ppdc/bedbug-summit/2011/2-gh-summittalk.pdf>.

⁹ *Id.*

¹⁰ Damage awards are just one example of the potential price of preventing an infestation. *See, e.g.*, Scott Dance, *Jury awards Severn woman \$225,000 for bedbug infestation*, BALT. SUN, Mar. 9, 2012, http://articles.baltimoresun.com/2012-03-09/news/bs-md-bed-bug-verdict-20120309_1_bedbug-infestation-bunk-beds-bed-wetting.

¹¹ *See, e.g.*, Marina Landis, *Bedbugs found at Times Square movie theater*, CNN (Aug. 18, 2010, 8:23 PM), http://articles.cnn.com/2010-08-18/us/new.york.bedbugs.amc_1_bedbug-infestation-movie-theater-pest?_s=PM:US; Annie McCormick, *Elementary school bed bug problem gives State Senator bill more ammo*, CBS NEWS (Mar. 5, 2012), <http://www.whptv.com/news/local/story/Elementary-school-bed-bug-problem-gives-State/mZMdyRaK1E-RLX2veb6P9A.csp>.

¹² Norris McLaughlin & Marcus, P.A., *Bed Bugs in the Workplace*, Presentation at Club 101 (June 14, 2011), available at <http://www.nmmlaw.com/ppt/Bed%20Bug%20NYC%20FINAL%20PPT.ppt> [hereinafter Norris Presentation].

This Note primarily argues that state legislation should (1) set forth duties of landlords and tenants, and (2) mandate the distribution of educational materials.¹³ Part II will provide general background information pertaining to the resurgence of bed bug infestations, as well as a brief look at common law duties of landlords, such as the covenant of quiet enjoyment and the implied warranty of habitability. Part III will include an overview of pertinent bed bug-related legislation and case law in the residential, commercial, and hotel industry context. Part IV will analyze the current laws and remedies available to plaintiffs as well as suggested methods of reducing litigation.

Part II: Background of the Bed Bug Resurgence

A bed bug infestation in a home, apartment or hotel can be a traumatic experience.¹⁴ Many people are generally unaware of the physical and emotional anguish that can result from bed bugs, and it is therefore important to note what an infestation entails.¹⁵ While the phrase “sleep tight, don’t let the bed bugs bite” has been a part of children’s bedtime routines for years, until the past decade, most in recent generations had never suffered a bed bug bite due to a

¹³ Because of the wide scope of legal ramifications of bed bug outbreaks, this Note introduces recent legislative trends and case law with a primary focus on landlord-tenant law and hotel premises liability.

¹⁴ Whitney & Graf, *supra* note 2, at 3 n.17 (citing Bonnie Friedman, *The Emotional Toll*, N.Y. TIMES ROOM FOR DEBATE BLOG (Aug. 23, 2009, 7:00 PM), <http://roomfordebate.blogs.nytimes.com/2009/08/23/bedbugs-itch-itch-scratch-scratch/#bonnie> (“Every crack in the plaster, every split in the ancient floorboards, every infinitesimal gap around light switches and radiator pipes became the object of anxiety. Insecticide and caulk never sated my suspicion that bed bugs were still lurking...For months, I sprayed, laundered, vacuumed, hauled to the curb—and lived on the verge of tears. To go to sleep knowing that bugs might emerge and bloat themselves on your blood or your partner’s blood during the night, to know from the online photos that the bugs release tiny revolting versions of themselves, to understand that you aren’t safe despite the Vaseline gobbled on the bedlegs, the special clothes you sleep in, coaxes you to the verge of a kind of madness.”).

¹⁵ As one Judge explained, “[a]lthough bed bugs are classified as vermin, they are unlike the more common situation of vermin such as mice and roaches, which, although offensive, do not have the effect on one’s life as bedbugs do, feeding upon one’s blood in hoards nightly turning what is supposed to be bed rest or sleep into a hellish experience. Therefore, the cases involving abatement for ‘vermin’ (i.e., mice and roaches) are of limited precedential value for the court in fashioning an appropriate abatement.” *Ludlow Properties, L.L.C. v. Young*, 780 N.Y.S.2d 853, 856 (Civ. Ct. 2004).

massive eradication of bed bugs in the 1940s.¹⁶ Bed bugs are back on the scene now, arguably because of increased international travel and the use of less aggressive pesticides in homes.¹⁷ Unlike cockroaches and other household pests, bed bugs do not arrive because of unsanitary conditions – even the most pristine hotels can become infested.¹⁸ Rather, bed bugs are attracted to the premises’ occupants, as bed bugs feed exclusively on blood.¹⁹ The average adult bed bug will live for one year but has the ability to live four months to two years without a meal.²⁰ Even more problematic, a female can continue to lay eggs without a male.²¹ While adult bed bugs are visible to the naked eye and are said to be about the size of an apple seed, bed bugs are nocturnal and tend to hide in crevices and in box springs, making them difficult to detect.²² The resilience of bed bugs coupled with the general ineffectiveness of available methods of eradication suggests that the bed bug epidemic is only going to worsen.²³

Courts have historically looked to the common law doctrines of the covenant of quiet enjoyment and the implied warranty of habitability when addressing bed bug cases, which have traditionally arisen in the landlord-tenant law context. Beginning in the late 1960s, landlord-tenant laws came under scrutiny by state legislatures, courts and the federal government.²⁴ With

¹⁶ David E. Cassidy et al., “*Sleep Tight, Don’t Let the Bed Bugs Bite*”: *The Impact of Bed Bugs on our Daily and Legal Lives*, Federation of Defense and Corporate Counsel 2011 Annual Meeting, July 24-31, 2011, at 2, available at <http://www.thefederation.org/documents/19.Bed%20Bugs-Lorell1.pdf> [hereinafter Cassidy article].

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Joshua B. Benoit et al., *Resistance to Dehydration Between Bouts of Blood Feeding in the Bed Bug, Cimex Lectularius, is Enhanced by Water Conservation, Aggregation, and Quiescence*, 76(5) AM. J. TROP. MED. HYG. 987, 987-93 (2007).

²⁰ *Id.* (“The common bed bug, *Cimex lectularius*, has a remarkable ability to survive 4 months to 2 years without feeding, a feature that presumably accounts for their incredible capacity to persist for long periods in human bedding and other locations.”).

²¹ Cassidy article, *supra* note 16, at 5.

²² *Id.* at 34-35.

²³ *Id.* at 5-6 (“Bed bug infestations increased 300% between 2000 and 2001, 70% between 2001 and 2002 and 70% between 2002 and 2003. According to bedbugregistry.com, approximately 20,000 bed bug reports have been made since the summer of 2010 for hotels throughout the United States.”).

²⁴ Michael A. Brower, Note, *The “Backlash” of the Implied Warranty of Habitability: Theory vs. Analysis*, 60 DEPAUL L. REV. 849, 857-58 (2011).

increases in urban populations came greater concern for social welfare. As a result, affordability and habitability of housing became an important policy concern at the federal and state levels.²⁵

These issues led to a revolution in landlord-tenant law, which included the codification of common law duties and an increase in landlord responsibilities.²⁶

Recognizing the federal and state legislatures' newfound desire to provide adequate housing for all tenants, a majority of courts implied a warranty of habitability into residential leases throughout the 1960s and 1970s.²⁷ Due to the rise of complex modern housing and increased ignorance of the modern tenant, courts no longer expected a tenant, prior to signing a lease, to both understand defects and be able to repair them once discovered.²⁸ The courts found further support for adoption of the implied warranty in the unequal bargaining power of landlords and tenants confounded by scarcity of adequate housing and the rising expectation of habitable conditions.²⁹

Housing laws in a number of states require the landlord to maintain the leased premises in a fit and habitable condition, effectively adopting the implied warranty of habitability.³⁰

Today, every state but one has adopted some variation of the implied warranty of habitability.³¹

²⁵ *Id.* at 858.

²⁶ *Id.* at 856.

²⁷ *Id.* at 858-59.

²⁸ *Id.* at 858.

²⁹ *Id.*

³⁰ *See, e.g.*, CONN. GEN. STAT. § 47a-7 (2012); LA. CIV. CODE ANN. art. 2695 (2004); N.Y. REAL PROP. LAW § 235-b (Gould 2012); N.C. GEN. STAT. §§ 42-38 et seq. (2012); OHIO REV. CODE ANN. § 5321.04 (West 2012); OR. REV. STAT. § 90.320 (2012); UTAH CODE ANN. §§ 57-22-1–57-22-6 (West 2012); VT. STAT. ANN. tit. 9, § 4457 (2012).

³¹ The implied warranty of habitability has been codified in 49 states. Brower, *supra* note 24, at 894, n.95-96 (“*See* ALA. CODE § 35-9A-204 (2009); ALASKA STAT. § 34.03.100, .106 (2009); ARIZ. REV. STAT. ANN. § 33-1324, -1361 (2008); ARK. CODE ANN. § 18-17-601 (Supp. 2009); CAL. CIV. CODE §§ 1941, 1941.1, 1942 (West 2008); COLO. REV. STAT. § 38-12-503 (2008); CONN. GEN. STAT. § 47a-7 (2008); DEL. CODE ANN. tit. 25, § 5305 (2009); FLA. STAT. ANN. §§ 83.51, 83.56 (West 2009); GA. CODE ANN. § 44-7-13 (2009); HAW. REV. STAT. § 521-42, 521-61 to 66 (2008); IDAHO CODE ANN. § 6-320 (2008); IND. CODE ANN. § 32-31-8-5 (West 2009); KAN. STAT. ANN. § 58-2553 (2009); KY. REV. STAT. ANN. §§ 383.595, 383.625, 383.635 to .645 (West 2009); LA. REV. STAT. ANN. § 9:3221 (2008); ME. REV. STAT. ANN. tit. 14, § 6021 (2008); MD. CODE ANN., REAL PROP. § 8-211 (LexisNexis 2008); MASS. GEN. LAWS ANN. ch. 239, § 8A (2009); MICH. COMP. LAWS § 554.139 (2008); MINN. STAT. ANN. § 504B.161 (West 2008); MISS. CODE ANN. § 89-8-23 (2008); MONT. CODE ANN. § 70-24-303 (2007); NEB. REV.

The principal requirement of the modern implied warranty is that the premises remain in a “habitable state.”³² As this is typically measured by reference to code violations, the general effect of the implied warranty in all states is to provide tenants with statutory rights in the event of a landlord's noncompliance with local housing codes.³³ Beyond the requirement that the premises remain habitable, a landlord's obligations are limited in some states and broad in others.³⁴ Typically, tenants are entitled to rent abatement on the basis of a landlord's breach, which is the tenants' usual remedy for a bed bug infestation.³⁵

Residential tenants are the only plaintiffs in bed bug cases who can seek relief under these common law doctrines. Courts generally do not accept an implied warranty of fitness or suitability in commercial leases, reasoning that the factors justifying the implied warranty of habitability in residential leases simply do not apply in the commercial context.³⁶ Further, the implied warranty of habitability does not extend to hotel guests, who have been increasingly

STAT. §§ 76-1419, 76-1425 (2009); NEV. REV. STAT. § 118A.290 (2009); N.H. REV. STAT. ANN. §§ 540:13-d, 48-A:14 (2008); N.J. STAT. § 2A:42-96 (West 2009); N.M. STAT. ANN. § 47-8-1 TO -51 (2008); N.Y. REAL PROP. LAW § 235-b (McKinney 2009); N.C. GEN. STAT. § 42-42 (2008); N.M. STAT. ANN. § 47-8-20 (1978); N.D. CENT. CODE § 47-16-13.1 (2009); OHIO REV. CODE ANN. § 5321.04, .07 (2009); OKLA. STAT. ANN. tit. 41, § 108 (2009); OR. REV. STAT. §§ 90.320, 90.360-.375 (2007); S.C. CODE ANN. § 27-40-440 (2008); S.D. COMP. LAWS ANN. § 43-32-8 (Supp. 2009); TENN. CODE ANN. § 64-2824 (2009); TEX. REV. CIV. STAT. ANN. Art. 5236f (Vernon 2010); UTAH CODE ANN. § 57-22-3 (2008); VT. STAT. ANN. tit. 9, §§ 4457-4458 (2009); VA. CODE ANN. § 55-248.13, .25 (2010); WASH. REV. CODE ANN. § 59.18.060 (West 2010); W. VA. CODE § 37-6-30 (2008); WIS. STAT. ANN. § 704.07 (West 2009); WYO. STAT. ANN. § 1-21-1202 (2009). *See also* Jack Spring, Inc. v. Little, 280 N.E.2d 208, 213-17 (Ill. 1972) (recognizing an implied warranty of habitability in Illinois common law); Rutledge v. Dodenhoff, 254 S.C. 407 (S.C. 1970) (recognizing an implied warranty of habitability in South Carolina dwellings). The Arkansas code requires that tenants “[c]omply with all obligations primarily imposed upon tenants by applicable provisions of building and housing codes materially affecting health and safety.”)

³² Brower, *supra* note 24, at 857.

³³ *Id.* at 857-58.

³⁴ *Id.* at 856-58.

³⁵ *See* discussion *infra* Part III.B.1.

³⁶ Fred William Bopp III, Note, *The Unwarranted Implication of a Warranty of Fitness in Commercial Leases – An Alternative Approach*, 41 VANDERBILT L. REV. 1057, 1080-1083 (Oct. 1988) (offering the following arguments against adopting an implied warranty of suitability for commercial purposes: “(1) commercial tenants are usually in a better position to inspect the premises or to hire knowledgeable persons to do so than residential tenants; (2) commercial tenants have greater bargaining power with their landlords than residential tenants, because commercial tenants have greater economic resources and commercial space is more readily available; (3) commercial landlords have a greater economic incentive to attract and retain successful commercial tenants to produce steady rental income; and (4) commercial tenants can pass along the cost of inspection or remedying defects to their customers.”).

seeking relief for bed bug infestations.³⁷ Thus, while the implied warranty of habitability is a potential avenue for relief from bed bug outbreaks, it is limited in the sense that only residential tenants can recover.

Part III: Bed Bug Related Laws Since the Resurgence

With the help of local news, the Internet, and other media outlets, bed bugs have received considerable attention in the last few years. People in houses, apartments, commercial buildings, hotels, schools, movie theaters, and even local courthouses, have fallen victim to these pests. As a result, concerns about public safety and welfare, tourism revenue, and liability have sparked political and legal action on the local, state, and national levels. This section will outline the pertinent legislative action and court decisions arising from various aspects of the bed bug problem.

A. Proposed and Enacted Legislation in Response to Bed Bug Outbreaks

With the bed bug problem escalating, the Bed Bug Management, Prevention, and Research Act was introduced in the House of Representatives in 2011.³⁸ Most of the action is occurring at the state level however, with fourteen states adopting bed bug-related laws, while at least two other states have proposed legislation.³⁹ Certain municipalities, including Jersey City, New York City and Detroit have also addressed the issue.⁴⁰ The legislation tends to fall into categories of landlord-tenant duties, hotel extermination requirements, disclosure and sanitation. Seven states address extermination in food and lodging establishments, while two others address,

³⁷ Such a limitation does not preclude hotel guests from receiving significant damages awards under other legal theories, however. *See* discussion *infra* Part III.B.2.

³⁸ H.R. 967, 112th Cong. (1st Sess. 2011).

³⁹ Alabama, Arizona, Florida, Illinois, Iowa, Kansas, Maine, Minnesota, Nevada, New York, Ohio, South Dakota, Texas, and West Virginia all have passed bed bug related laws. *See* Nat'l Pest Mgmt. Ass'n, *supra* note 5. Connecticut, New Hampshire, New Jersey, Pennsylvania and South Carolina have all considered legislation. Harrington, *supra* note 8; Mo. S.B. 846, *supra* note 5. Further, Missouri and Hawaii both have proposed legislation. H. Con. Res. 36, 23rd Leg., Reg. Sess. (Haw. 2006); S.B. 846, 96th Gen. Assemb., 2d Reg. Sess. (Mo. 2012).

⁴⁰ San Francisco, Boston, Cincinnati, Yonkers, New York; Ocean City, Maryland; and Bellevue, Kentucky have also addressed the issue. Harrington, *supra* note 8.

respectively, the removal of bed bugs on railroads and in migrant labor camps.⁴¹ Other jurisdictions focus on disclosure and sanitation. For example, the New York City Administrative Code requires residential landlords to disclose any history of bed bug infestations in their buildings.⁴² In 2010, New York City also passed a law governing bedding disposal and collection in response to the rising number of bed bug incidents.⁴³ The rule requires all mattresses infested with bed bugs to be enclosed in plastic bags, and a fine of up to \$100 will be issued for noncompliance of first offenders.⁴⁴

Very few bed bug-related laws address various duties and responsibilities of landlords, tenants and pest control agents. Therefore, addressing bed bug issues has become a serious problem for landlords and tenants, and has recently become a common source of litigation. For example, Florida legislation requires that landlords make “reasonable provisions” for the extermination of bed bugs and allows rent abatement if extermination requires a landlord to evacuate the premises; however, there is no definition of “reasonable provisions,” nor is there any clearly defined remedy in the event of a breach or cost allocation.⁴⁵ On the other hand, Maine’s legislation, which notifies the parties of their respective rights and will likely result in a decrease in litigation, clearly identifies the duties of landlords and tenants.

Under Maine’s legislation, the following duties are assigned to the landlord: within five days of being notified by a tenant of a possible infestation, the landlord must inspect the unit for bed bugs; if the landlord determines there is an infestation, the landlord must contact a “pest

⁴¹ See Nat’l Pest Mgmt. Ass’n, *supra* note 5.

⁴² N.Y.C. Admin. Code § 27-2018.1.

⁴³ New York City, N.Y., Sanitation Notice, The City Record 3075 (Nov. 1, 2010), *available at* http://www.nyc.gov/html/dsny/downloads/pdf/rules/proprules/Notice_Bedbug.pdf.

⁴⁴ *Id.* See also N.Y.C. Admin. Code § 16-120 (providing for the \$100 fine).

⁴⁵ FLA. STAT. ANN. § 83.51 (West 2012).

control agent⁴⁶ within ten days; the landlord must take reasonable measures to effectively identify and treat a bed bug infestation as determined by the pest control agent; and the landlord must employ a pest control agent that carries current liability insurance.⁴⁷ Further, the landlord is bound by a duty to disclose to prospective tenants if an adjacent unit is infested or being treated.⁴⁸ If requested, the landlord must inform the prospective tenant of the last date the unit was inspected for and found to be free of bed bugs.⁴⁹ Finally, if the landlord knows or suspects a bed bug infestation, he or she may not rent the dwelling.⁵⁰

The landlord is not the only party with duties when an infestation is suspected. If the tenant suspects an infestation, he or she must promptly notify the landlord.⁵¹ While the landlord is attempting to fulfill his or her own duties, the tenant must grant both the landlord and pest control agent access to the premises and comply with reasonable measures to eliminate and control the bed bug situation.⁵² If the tenant fails to comply with such reasonable measures, he or she risks financial responsibility for all treatment of the dwelling arising from such failure.⁵³

The Maine legislation also outlines what the pest control agent may have access to in the course of an inspection. The pest control agent will be expected to perform a visual and manual inspection of bedding and upholstered furniture upon the initial visit.⁵⁴ When the pest control agent believes it to be reasonable, items other than bedding and furniture may be inspected.⁵⁵ If

⁴⁶ *Id.* (defining "pest control agent" as a commercial applicator of pesticides certified pursuant to title 22, section 1471-D of the Maine Statute).

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ § 6021-A.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

bed bugs are discovered in a unit or adjoining unit, the pest control agent may have additional access to the tenant's personal belongings.⁵⁶

Remedies under the Maine statute are available to both landlords and tenants.⁵⁷ First, the statute holds a landlord responsible for taking measures to effectively identify and treat the infestation.⁵⁸ Failure to comply imposes liability on the landlord in the form of a penalty in the amount of \$250 or actual damages, whichever is greater.⁵⁹ Reasonable attorney's fees are also available.⁶⁰ The statute further provides a cause of action for landlords in the event of a tenant's breach.⁶¹ If the tenant fails to allow reasonable access to the premises for inspection or otherwise unreasonably fails to cooperate with bed bug control measures made by the landlord or pest control agent, the landlord is entitled to relief.⁶²

Arizona recently passed very specific guidelines and even banned cities and towns from adopting bed bug control requirements for landlords or tenants.⁶³ However, Arizona does allow municipalities to pass laws related to the disposal of bed bug-infested items.⁶⁴ Like Maine, Arizona disallows landlords from renting when there is knowledge of a current infestation.⁶⁵ However, Arizona explicitly declares that this section does not create a cause of action against a landlord or landlord's agents by a tenant or a tenant's guests, or against a tenant by a landlord, for any damages caused by bed bugs.⁶⁶ Arizona also imposed a further requirement on landlords not seen in the Maine statute: a landlord must provide educational materials to tenants including

⁵⁶ *Id.*

⁵⁷ *See* § 6021-A.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *See* ARIZ. REV. STAT. ANN. §§ 33-1319, 9-500.31 (2011).

⁶⁴ *Id.*

⁶⁵ ARIZ. REV. STAT. ANN. § 33-1319 (2011).

⁶⁶ *Id.*

information about bed bugs, preventive measures that could be taken, and risk factors associated with attracting bed bugs.⁶⁷ Arizona goes beyond the landlord-tenant context, declaring “the presence of ectoparasites such as bedbugs, lice, mites and others in any place where sleeping accommodations are offered to the public” to be a public nuisance.⁶⁸

Proposed Pennsylvania legislation goes beyond landlord-tenant obligations by imposing duties on hotel owners in an effort not only to address public health concerns, but also to protect the tourism industry.⁶⁹ Other states have taken similar approaches by adding extermination requirements to their respective administrative codes.⁷⁰

B. Causes of Action for Bed Bug Infestations

The cases discussed in this section suggest that determining whether a bed bug infestation will amount to liability is a fact-specific inquiry depending on factors including, but not limited to, the severity of the infestation and the measures taken to prevent, warn, or eliminate the problem. In a negligence claim, the most problematic factor will likely be causation. For example, a hotel guest injured by bed bugs must show that bed bugs were in the room and may need to have an expert affidavit to recover, depending on the jurisdiction.⁷¹ Causes of action will most frequently sound in premises liability, personal injury as a form of negligence, and statutory violations.

1) The Implied Warranty of Habitability

Bed bug litigation generally arises in the context of residential tenants seeking relief based on common law duties such as constructive eviction and the implied warranty of

⁶⁷ *Id.*

⁶⁸ ARIZ. REV. STAT. ANN. § 36-601 (2011).

⁶⁹ See S.B. 908, 2011-12 Gen. Assemb., Reg. Sess. (Pa. 2011).

⁷⁰ See Nat'l Pest Mgmt. Ass'n, *supra* note 5.

⁷¹ See *Mills v. Best Western Springdale*, No. 08AP-1022, 2009 WL 1710765, at *6 (Ohio Ct. App. June 18, 2009) (citing *Grogan v. Gamber Corp.*, 858 N.Y.S.2d 519, 526 (2008)).

habitability.⁷² These cases turn on whether the infestation materially affected the tenant's wellbeing.⁷³ Courts have found no constructive eviction where there was mere inconvenience or where the tenant caused the infestation.⁷⁴ Due to the eradication of bed bugs in the early 1940s by a now-prohibited insecticide, litigation ceased until the reemergence of bed bugs in recent years.⁷⁵ Thus, there is little case law or statutory guidance available for purposes of assessing bed bug-related claims. Under the theory of implied warranty of habitability, rent abatement is an available option for tenants in unlivable conditions.⁷⁶ Florida has codified rent abatement as a remedy for tenants forced to leave due to a bed bug infestation.⁷⁷

A series of New York cases confirms that rent abatement is available to tenants injured by bed bugs.⁷⁸ However, the presence of bed bugs alone may not constitute a breach of the implied warranty of habitability, and a fact inquiry will likely be required to determine rent abatement.⁷⁹ For example, in *Ludlow Properties v. Young*, the New York Civil Court determined that tenants were entitled to forty-five percent rent abatement

⁷² *Zayas v. Franklin Plaza*, No. 3316/2008, 2009 WL 909664, at *1 (N.Y. Civ. Ct. Apr. 6, 2009).

⁷³ *See Delamater v. Foreman*, 239 N.W. 148, 149 (Minn. 1931) (citing early 1900s cases where the presence of bed bugs constituted a constructive eviction).

⁷⁴ *See id.* (stating that where the source of the bedbugs came from cracks in the floor, the bed bug problem was “within the jurisdiction of the landlord” and as such constituted a constructive eviction); *see also Ludlow Properties, L.L.C. v. Young*, 780 N.Y.S.2d 853, 857 n.2 (Civ. Ct. 2004) (citing *Jacobs v. Morand*, 110 N.Y.S. 208 (App. Term 1908) (holding that premises overrun by bedbugs making it inconvenient and untenable does not constitute a constructive eviction); *Streep v. Simpson*, 141 N.Y.S. 863 (App. Term 1913) (finding that where bedbugs constituted an insufferable nuisance, whose presence is nowise attributable to the tenant, causing substantial discomfort and severe inconvenience amounting to an intolerable state, the tenant was constructively evicted); *Michtom v. Miller*, 178 N.Y.S. 395 (App. Term 1919) (holding that the presence of bedbugs constituted mere annoyance); *Hancock Constr. Co. v. Bassinger*, 198 N.Y.S. 614 (App. Term 1923) (holding that aggravated condition of bedbugs, so numerous they could not be exterminated, constituted constructive eviction).

⁷⁵ Cassidy Article, *supra* note 16, at 2.

⁷⁶ *See, e.g., Ludlow Properties, L.L.C. v. Young*, 780 N.Y.S.2d 853, 856 (Civ. Ct. 2004); *Bender v. Green*, 874 N.Y.S.2d 786, 794 (Civ. Ct. 2009); *Zayas*, 2009 WL 909664, at *1.

⁷⁷ FLA. STAT. ANN. § 83.51 (West 2012) (“The extermination of rats, mice, roaches, ants, wood-destroying organisms, and *bedbugs* [emphasis added]. When vacation of the premises is required for such extermination, the landlord shall not be liable for damages but shall abate the rent. The tenant shall be required to temporarily vacate the premises for a period of time not to exceed 4 days, on 7 days' written notice, if necessary, for extermination pursuant to this subparagraph.”).

⁷⁸ *See supra* note 74.

⁷⁹ *Ludlow Properties*, 780 N.Y.S.2d at 856.

based upon the small size of the Premises, the severity of the bedbug infestation, the effect the infestation had on Respondent, the lack of showing Petitioner's efforts to eradicate the bedbugs on a building-wide scale, Petitioner's diligent efforts to eradicate the bedbugs, and the use Respondent continued to make of the Premises....⁸⁰

In determining the proper abatement, the court recognized that bed bugs are "sure to increase to an epidemic as the foothold the bedbugs have obtained in the urban setting of the City of New York grows ever larger" and that there will be cases where the infestation is not attributable to the landlord.⁸¹

Tenants in Connecticut are also entitled to rent abatement, as well as damages, in the case of a bed bug infestation.⁸² For example, in *Lewis v. 525-527 Main St. EH, LLC*,⁸³ where the habitability of a tenant's apartment was seriously impacted by a bed bug infestation and the landlord failed to cooperate with remediation, the tenant was entitled to statutory damages for hotel lodging, reasonable replacement of destroyed furniture, and a five-month reduction in rent.⁸⁴

2) OSHA Violations

While landlord-tenant law remains largely in the dominion of state legislatures and state courts, cases in the employment context may also give rise to breaches of federal law. For example, bed bug infestations can potentially result in Occupational Safety and Health Administration (OSHA) violations.⁸⁵ OSHA requires that:

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.⁸⁶

⁸⁰ *Id.* at 857.

⁸¹ *Id.* at 856.

⁸² CONN. GEN. STAT. § 47a-14h (2010).

⁸³ No. HCH562, 2009 WL 5184251 (Conn. Super. Ct. Dec. 1, 2009).

⁸⁴ *Id.* at *1-2.

⁸⁵ *See, e.g.*, *Thoroughgood, Inc.*, 18 BNA OSHC 1899 at *3 (No. 97-0023, 1999).

⁸⁶ Occupational Safety and Health Act of 1970, 29 U.S.C.A. § 1910.141(a)(5) (West 2012).

As in the residential context, a fact-based inquiry is required to determine whether the employer is liable.⁸⁷ Considerations include the size of the business, severity of the violation, past violations, and good faith efforts to address the problem.⁸⁸ For example, in *Thoroughgood Inc.*,⁸⁹ the Occupational Safety and Health Review Commission (OSHRC) held that the employer, Azalea, did not have a continuing and effective extermination program. The fact that the employer hired a pest control specialist was insufficient to absolve the employer of liability where it failed to implement the specialist's recommendations.⁹⁰ As Azalea ignored the recommendations on multiple occasions, and due to the fact that "vermin were continually observed during the period at issue," OSHRC concluded that Azalea violated the terms of the standard.⁹¹ OSHA violations will result in a fine to the employer, the amount of which varies depending on the circumstances. In *Thoroughgood*, for example, the fine for failure to have an effective extermination method was \$800.⁹² Thus, employers should be aware of OSHA regulations when determining how to handle an infestation.

3) Intentional Torts and Negligence Actions

Bed bug-related cases have been trickling through legal systems across the U.S., reaching as far as the Seventh Circuit.⁹³ In *Mathias v. Accor Economy Lodging*, the severity of a bed bug infestation at a hotel and reckless disregard of the guests' safety led Judge Posner to conclude that the failure to warn the guests constituted "a fraud and probably a battery as well."⁹⁴ There,

⁸⁷ For an example of the fact-based inquiry, see *Thoroughgood, Inc.*, 18 BNA OSHC 1899, at *3 (No. 97-0023, 1999).

⁸⁸ Casidy article, *supra* note 16 (quoting *J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2213-14 (No. 87-2059, 1993)).

⁸⁹ *Thoroughgood, Inc.*, 18 BNA OSHC 1899, at *3 (No. 97-0023, 1999).

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Mathias v. Accor Econ. Lodging, Inc.*, 347 F.3d 672 (7th Cir. 2003).

⁹⁴ *Id.* at 675.

multiple rooms were under “do not rent” status, including the first room given to the plaintiffs, which was classified as “DO NOT RENT UNTIL TREATED.”⁹⁵ It was later determined that 190 out of 191 rooms were rented that night, despite the “do not rent” status of more than one room.⁹⁶ The plaintiffs were entitled to punitive damages because “deliberate exposure of hotel guests to the health risks created by insect infestations expose[d] the hotel’s owner to sanctions under Illinois and Chicago law. . . .”⁹⁷

Other courts have not granted punitive damages where the conduct was less egregious. For example, in *Grogan v. Gamber Corporation*,⁹⁸ a mother and daughter brought a premises liability case against Milford Plaza after discovering bed bugs in their room.⁹⁹ The court found that the parties had a lessor-lessee relationship and that factual issues existed regarding the hotel and exterminator’s duty of care, but dismissed the punitive damages claim for want of egregious conduct as was found in *Mathias v. Economy Lodging, Inc.*¹⁰⁰ Additionally, the court relied on the defendant’s compliance with the New York City Department of Health and Mental Hygiene publication that recommends “anyone with bedbugs hire a pest control professional” in determining that the hotel’s conduct did not justify a punitive damages award.¹⁰¹ The Southern District of New York followed *Grogan* in a similar case where the plaintiff discovered bed bugs in her hotel in midtown Manhattan.¹⁰² There, the court held that punitive damages were not

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.* at 678 (referring to 720 ILL. COMP. STAT. 5/12-5 (a), (b), 730 ILL. COMP. STAT. 5/5-8-3 (a)(1); 5/5-9-1 (a)(2) and Chicago Mun. Code §§ 4-4-280).

⁹⁸ 858 N.Y.S.2d 519 (Sup. Ct. 2008).

⁹⁹ *Id.* at 520.

¹⁰⁰ *Id.* at 524-25, 527.

¹⁰¹ *Id.* at 527.

¹⁰² *Light v. Metro. Hotel Realty L.L.C.*, No. 10 Civ. 4449(SAS), 2011 WL 2175778, at *1-5 (S.D.N.Y. June 2, 2011).

justified because the hotel had treated the room three months prior to the plaintiff's stay and there had been no complaints or sightings since that time.¹⁰³

Actions involving bed bug infestations in hotel rooms where the plaintiff did not prevail may have resulted differently in jurisdictions with state laws imposing regulations on hotel exterminations.¹⁰⁴ Alabama, Kansas, Nevada, Minnesota, and West Virginia have passed laws requiring hotels to exterminate any infestation thoroughly, suggesting that hotels will be held liable unless extensive means are utilized to completely eradicate the problem.¹⁰⁵ Where hotels have actual or constructive notice of an infestation, they could also be held liable under a negligence theory for a secondarily infested location.¹⁰⁶ In *Prell v. Columbia Sussex Corp.*, Mr. Prell found brownish bugs each morning of his four-night stay at the Radisson Lake Buena Vista Hotel in Florida.¹⁰⁷ He had never seen that type of bug before and reported them to a hotel employee each morning who assured him that the rooms were exterminated on a regular basis.¹⁰⁸ He later discovered a bed bug infestation in his Pennsylvania home causing injury to him, his wife, and their five-year-old son.¹⁰⁹ On a motion for summary judgment, the defendants argued that reports of unspecified bugs did not satisfy the notice requirement for a negligence claim and that failure to obtain an expert opinion is fatal to the negligence claim.¹¹⁰ Although the personal injury claim was dismissed for lack of expert testimony, the court found that summary judgment was precluded as to the notice issue because factual issues existed based on the hotel staff's duty

¹⁰³ *Id.* at *4.

¹⁰⁴ See Nat'l Pest Mgmt. Ass'n, *supra* note 5.

¹⁰⁵ ALA. ADMIN. CODE r. 420-3-11.12 (2009); 2A Kan. Reg. 349-57 (Date and Month required 2009); MINN. R. 4626.1700 (2000); NEV. REV. STAT. ANN. § 447.030 (2011) ("Any room in any hotel in this state which is or shall be infested with vermin or bedbugs or similar things shall be thoroughly fumigated, disinfected and renovated until such vermin or bedbugs or other similar things are entirely exterminated."); W. VA. CODE R. § 16-6-16 (2012). Compare with Ohio and South Dakota laws which may arguably be less stringent.

¹⁰⁶ *Prell v. Columbia Sussex Corp.*, Civil No. 07-CV-2189, 2008 WL 4646099 (E.D. Pa. Oct. 20, 2008).

¹⁰⁷ *Id.* at *1-2.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at *2.

¹¹⁰ *Id.* at *4.

to inquire after the plaintiff complained.¹¹¹ The lack of an expert opinion was *not* fatal to the injury to personal property, however, where expert opinion is not required to determine causation.¹¹² Thus, if a plaintiff can obtain an expert to determine the source of the bed bugs, and the hotel staff breached its duty of care, a plaintiff may be able to recover.

The Supreme Court of New York, New York County decided the first bed bug-related negligence action brought against a commercial landlord and its agents in *Clark v. Beacon Capital Partners*.¹¹³ The case received media attention, as it involved bed bugs found at a Fox News studio in Manhattan.¹¹⁴ The plaintiff, who allegedly suffered physical and emotional injuries resulting in post-traumatic stress disorder after being bit by bed bugs on several occasions, sued the commercial landlord and its agents for negligence.¹¹⁵ It is important to note that the source of the bed bug problem was uncontested, as another Fox News employee, Burns, was discovered to have had several thousand bed bugs in his apartment.¹¹⁶ This explains why Fox News' efforts to eradicate the problem were futile – once the building was treated, Burns brought in new bed bugs.¹¹⁷

The court's finding in *Clark* highlights a significant problem in holding employers and landlords liable for infestations. Fox News undertook significant measures to eradicate the problem, including chemical treatments, bug-sniffing dogs, applying freezing agents, and steam-treating the carpeting.¹¹⁸ However, the bugs would never go away so long as Burns remained

¹¹¹ *Prell*, at *5, 7.

¹¹² *Id.* at *7.

¹¹³ *Clark v. Beacon Capital Partners*, No. 30920U, slip op. at 6 (N.Y. Sup. Ct. Apr. 12, 2011).

¹¹⁴ *Id.* at 1 (citing Russell Goldman, *Fox News Worker Files Bedbugs Lawsuit*, ABC NEWS (May 30, 2008), <http://abcnews.go.com/Health/story?id=4959477&page=1>) and Jacques Sternberg, *Bedbugs at Fox News*, N.Y. TIMES (Mar. 18, 2008), http://www.nytimes.com/2008/03/18/arts/18arts-BEDBUGSATFOX_BRF.html.

¹¹⁵ *Id.*

¹¹⁶ For a bone-chilling account of the infested apartment, *see id.* at 5-6.

¹¹⁷ *Id.* at 8.

¹¹⁸ *Id.* at 5.

unaware of the bed bugs all over his house and even crawling on his own body.¹¹⁹ So the question becomes: who should be held responsible when another employee gets bit, or brings the bugs from work back to his or her home? While legislation seems like a good idea to protect both landlords and tenants, *Clark* highlights the unique problem of imposing liability on one party or another, not only in the commercial context, but in other contexts as well, where a third party is responsible for the infestation.

In *Clark*, the Supreme Court of New York did not find the commercial landlord liable.¹²⁰ The plaintiff claimed negligence as a result of the defendant's failure to warn, failure to remedy the infestation, and allowance of the condition to exist.¹²¹ The court quickly dismissed this claim because out-of-possession landlords are not liable for injuries sustained on leased premises that are open to the public unless the "liability is based on a significant structural or design defect that is contrary to a specific statutory safety provision."¹²² Clearly, bed bug bites are not a structural or design defect for purposes of liability.

Next, the court contemplated several statutes invoked by the plaintiff. The first is a local regulation, "which requires 'the person in control' of the premises to 'take such measures as may be necessary to prevent and control the harborage and free movement of rodents, insects and other pests....'"¹²³ The court declared that it is impossible to comply with this provision as applied to bed bugs, and therefore defendants did not violate it.¹²⁴ The court reasoned: "...bed bugs are different from other vermin in that they are not attracted by unsanitary conditions but rather brought into otherwise clean and sanitary premises by people in their clothing and

¹¹⁹ *Clark*, No. 30920U, slip op. at 6-7.

¹²⁰ *Id.* at 6.

¹²¹ *Id.* at 7.

¹²² *Id.* at 6. (citing *Reyes v. Morton Williams Associated Supermarkets, Inc.*, 858 N.Y.S.2d 107 (App. Div. 2008)).

¹²³ *Clark*, No. 30920U, slip op. at 10 (quoting N.Y.C Health Code § 151.03).

¹²⁴ *Id.*

belongings, and there is no product available for purchase capable of preventing bed bug infestations.”¹²⁵ Holding that complying with a regulation is *impossible* in the bed bug context seems a little drastic and is bad news for tenants. Residential tenants may be saved by Section 27-2018 of the city’s Housing Maintenance Code, but as the court in *Clark* points out, commercial tenants are out of luck since a commercial building is not a “dwelling.”¹²⁶ The court distinguishes other cases where property owners were held liable for bed bug infestations, concluding:

In short, the plaintiffs in the foregoing cases were either tenants or hotel guests who had a direct contractual relationship to the owners of property subject to various protective laws. By contrast, plaintiff herein had no contractual relationship with the property defendants or property interest in the building, and the only statute which specifically protected her is the Workers Compensation Law, the remedy provided under our system of laws for injuries suffered in the workplace.¹²⁷

Therefore, an employee, tenant, or hotel guest can recover for bed bug-related injuries if a direct contractual relationship exists.

In New York, the doctrine of *caveat emptor* protects defendants who sell apartment buildings “as is” with bed bugs.¹²⁸ “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.”¹²⁹ The court notes the importance of the “as is” clause and that the Buyer had a reasonable opportunity to investigate

¹²⁵ *Id.*

¹²⁶ *Id.* at 11.

¹²⁷ *Id.* at 13.

¹²⁸ 85-87 Pitt St., LLC v 85-87 Pitt St. Realty Corp., No. 601341, slip op. at 4 (N.Y. Sup. Ct. Mar. 31, 2010).

¹²⁹ *Id.* at 7.

the property for bed bugs.¹³⁰ Additionally, nothing in the contract made any reference to bed bugs on the premises.¹³¹

Selling furniture, however, infested with bed bugs could result in a violation of a state's consumer protection laws. For example, in *Downey v. Bob's Discount Furniture Holdings*,¹³² the court found that expert testimony was not required for a jury to determine that the store breached its standard of care when it allegedly sold furniture to plaintiff infested with bed bugs.¹³³ More recently, a furniture store was found liable for bed bugs found in a mattress purchased from its store.¹³⁴ The plaintiff was awarded \$225,000 in damages, one of the biggest awards ever granted in a bed bug case.¹³⁵

Part IV: Recommended Government Action & Available Remedies

A. The Need for Government Action in Handling the Bed Bug Problem

The U.S. Centers for Disease Control and Prevention (CDC) and the EPA call for an integrated approach involving all levels of government in managing and controlling the bed bug problem as well as preventing future infestations.¹³⁶ They also stress that “[r]esearch, training and public education are critical to an effective strategy for reducing public health issues associated with the resurgence of bed bug populations.”¹³⁷ The EPA held its Second National Bed Bug Summit on February 1, 2011, to address the growing concern of bed bug outbreaks.

The EPA recommended authorizing a federal bed bug research funding program, approving new

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² 633 F.3d 1, 11 (1st Cir. 2011).

¹³³ *Id.* (“This evidence could plausibly permit the jury to find in favor of the plaintiffs on their claims for violation of Massachusetts consumer protection law and for breach of warranty.” (citing *Iannacchino v. Ford Motor Co.*, 888 N.E.2d 879, 889 (Mass. 2008))).

¹³⁴ *Dance*, *supra* note 10.

¹³⁵ *Id.*

¹³⁶ CDC & EPA Joint Statement, *supra* note 3.

¹³⁷ *Id.*

products into the marketplace to protect consumers, and scrutinizing claims more closely. Congress has also begun looking into the issue.¹³⁸

In March 2011, the House introduced the Bed Bug Management, Prevention and Research Act “to support efforts to control and eradicate bed bugs with respect to public health, and for other purposes.”¹³⁹ The bill, which would amend the Food, Agriculture, Conservation & Trade Act of 1990 and the Federal Insecticide, Fungicide & Rodenticide Act, is primarily aimed at establishing a research program to control and eradicate bed bugs through a federal grant program.¹⁴⁰ Grants would be awarded by both the Secretary and a “bed bug taskforce” composed of various industries significantly impacted by bed bugs.¹⁴¹ If enacted, this bill would effectively create the integrated approach called for by the CDC and EPA and greatly alleviate the bed bug problem.

Since a bed bug problem that goes unnoticed will inevitably lead to an infestation that will be difficult to treat and will probably spread, an integral part of eliminating, or at least mitigating, the problem is early detection and prevention. In order to achieve these aims, education and research are of paramount importance. Arizona’s legislature, for example, has addressed the education issue by requiring landlords to provide educational materials to both existing and new tenants.¹⁴² The statute lists educational materials, including:

- (a) A description of measures that may be taken to prevent and control bedbugs.
- (b) Information about bedbugs, including a description of their appearance.
- (c) A description of behaviors that are risk factors for attracting bed bugs such as purchasing renovated mattresses, using discarded mattresses and furniture, using used or leased furniture, purchasing pre-owned clothing and traveling without proper precautions.

¹³⁸ Congressional Bed Bug Forum (Nov. 18, 2010); Don’t Let the Bed Bugs Bite Act, H.R. 2248, 111th Cong. (2009); Bed Bug Prevention & Mitigation Pilot Program Act, H.R. 6383, 111th Cong. (2010).

¹³⁹ H.R. 967, 112th Cong. (1st Sess. 2011).

¹⁴⁰ *Id.* at § 2(a), (j).

¹⁴¹ *Id.* at § 2(j).

¹⁴² ARIZ. REV. STAT. ANN. § 33-1319 (2011).

(d) Information provided by the United States centers for disease control and prevention and other federal, state or local health agencies.¹⁴³

Imputing a duty on the landlord to provide educational materials is not something usually found in housing codes and is a helpful way to address a unique problem. However, the Arizona statute fails to provide guidance on what duties a landlord owes a tenant once an infestation is discovered. In fact, the statute explicitly disallows tenants from bringing a cause of action against the landlord for any damages caused by bed bugs.¹⁴⁴ Arizona law also prohibits towns and cities from passing any legislation regarding the control of bed bugs aside from sanitation laws, recognizing that the bed bug resurgence is a problem of statewide concern.¹⁴⁵ Arizona seems to intend to allocate responsibility for bed bug outbreaks between both landlords and tenants, alleviating landlords of much of the cost.¹⁴⁶ Arizona's proposed House Bill resembled Maine's legislation,¹⁴⁷ and outlined the duties and responsibilities of landlords that simply are not present in the Arizona statute.¹⁴⁸ As the Arizona statute currently stands, the landlord's only duties are to provide educational materials and to not rent a dwelling that the landlord knows is currently infested with bed bugs.¹⁴⁹ Further, the Arizona statute does not create a private cause of action for tenants, essentially protecting landlords from liability even when there is an affirmative duty to act.¹⁵⁰ While expressly prohibiting a cause of action under the statute will decrease the docket, the tenants are inequitably left without recourse.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* § 9-500.31 (2011); *see also* H.B. 2210, 49th Leg., 2nd Reg. Sess. (Ariz. 2010) ("The legislature finds that the public health threat posed by household pests, as defined in section 33-1310, constitutes a matter of statewide concern and that a uniform, statewide method for addressing household pests in multitenant housing would be significantly more effective than separate approaches by individual cities or towns.").

¹⁴⁶ *See* ARIZ. REV. STAT. ANN. § 33-1319 (2011).

¹⁴⁷ *See* discussion *supra* Part III.

¹⁴⁸ *See* H.B. 2210, 49th Leg., 2nd Reg. Sess. (Ariz. 2010).

¹⁴⁹ ARIZ. REV. STAT. ANN. § 33-1319 (2011).

¹⁵⁰ *Id.*

The Arizona House Bill provides a much clearer picture for landlords and tenants to understand their responsibilities. It suggests that “the landlord and tenant may agree in writing that it may be impractical or impossible to determine the cause of a household pest infestation of the premises and that, except for a material misrepresentation by either the landlord or the tenant, the parties agree to conduct mutual actions to address any household pest infestation without regard to the original cause of the infestation.”¹⁵¹ A provision addressing how to deal with the cause of the infestation is an extremely important point because it is a source of contention between the parties. Courts should hold a landlord responsible when a tenant in a multi-dwelling unit gets bed bugs from an adjacent unit, but a tenant should bear costs when the tenant brings the bed bugs in from somewhere else. These competing policy concerns ought to be addressed by the legislature.

While the Maine statute is more comprehensive than the Arizona statute, it too does not fully clarify the legal consequences of an infestation. The Maine statute clearly identifies landlord and tenant duties, but it fails to address any preventive measures such as education.¹⁵² The Maine statute is also unclear on which party should bear the cost of extermination.¹⁵³ Such ambiguities may result in parties still resorting to litigation, despite the legislature’s intent.

While the Maine and Arizona statutes leave gaps in addressing legal challenges involving bed bugs, these states have at least taken a step in the right direction. In order to avoid litigation surrounding an already costly problem, as well as to minimize the growth of the bed bug epidemic, governmental action beyond the local level is necessary.¹⁵⁴ Local public health

¹⁵¹ H.B. 2210, 49th Leg., 2nd Reg. Sess. (Ariz. 2010).

¹⁵² See generally ME. REV. STAT. ANN. tit.14, § 6021-A (2011); See discussion *supra* Part III.

¹⁵³ ME. REV. STAT. ANN. tit.14, § 6021-A (2011)

¹⁵⁴ CDC & EPA Joint Statement, *supra* note 3 (“State, tribal, and local government agencies and health departments play a critical role in protecting the public from bed bugs. Public health departments serve on the front lines, providing information on prevention and control of bed bugs through various programs to the public and private sector.”).

departments are limited in their means of controlling the issue, and municipal codes simply fail to assign responsibility.¹⁵⁵ Therefore, as the CDC and EPA suggest, an integrated governmental approach is necessary to adequately control infestations.

B. Remedies Available to Victims of Bed Bug Infestations

Because of the wide array of potential plaintiffs in bed bug-related lawsuits, lawmakers should ensure that legislation encompasses the variety of concerns that have been and will be addressed in litigation.

The most prevalent requests for relief occur in the residential leasehold context. Because the common remedy for residential tenants will likely be rent abatement, and because the amount of rent that can be withheld will depend on the totality of the circumstances of the individual case, it is critical for legislators to outline the legal obligations of landlords and tenants.¹⁵⁶ Factors relevant to abatement decisions include the landlord's actions to eradicate the problem, whether the tenant reasonably complied with the landlord's attempts to address the issue, the seriousness of the infestation, the size of the premises, and how the tenant continued to use the premises.¹⁵⁷ Without clear guidance from the law, landlords may not be aware of the duty to reasonably attempt extermination, and tenants similarly may not allow access to landlords, precluding relief for both parties. An easily avoidable problem then becomes a messy landlord-tenant dispute on an already busy docket and a continuing bed bug infestation at a cost to both parties. The enacted statutes addressing landlord and tenant duties do not adequately address the problem. Maine's

¹⁵⁵ *Id.*

¹⁵⁶ Depending on the jurisdiction and the factual circumstances, damages for property injury may also be available. *Compare Zayas v. Plaza*, No. 3316/2008, 2009 WL 909664, at *1 (N.Y. Civ. Ct. Apr. 6, 2009) (awarding damages to tenant for loss of personal property and medical treatment but denied cost of exterminators hired by tenant where residential co-op landlord was on notice but took no steps to remedy building-wide bed bug infestation) *with Bender v. Green*, 874 N.Y.S.2d 786 (Civ. Ct. 2009) (finding a breach of warranty of habitability where bed bugs were present in rent stabilized apartment, residential tenant entitled to 12% rent abatement for infestation) *and Ludlow Properties, L.L.C. v. Young*, 780 N.Y.S.2d 853 (Civ. Ct. 2004) (holding that bed bugs in rent stabilized apartment constituted breach of warranty of habitability and awarding tenants a 45% rent abatement).

¹⁵⁷ *Ludlow Properties*, 780 N.Y.S.2d at 857.

statute addresses the issue of outlining duties of landlords and tenants, but it does not address prevention, as Arizona's statute requires. An ideal statute would include a prevention clause, a clear statement of the responsibilities of landlords and tenants, as well as a description of available remedies to both parties.

Legislators should also consider whether the landlord ought to be directly or indirectly responsible for extermination. Typically, landlord-tenant laws allow tenants to take affirmative steps when the landlord fails to act within a reasonable period of time and then charge the landlord for the cost of the repair. However, this usual recourse for tenants is not a viable option in multi-unit dwellings. Because of the bed bugs' transient behavior, any action a tenant takes to eradicate the bugs in his or her own apartment will be ineffective as long as bed bugs are in the building. Thus, it is necessary for legislators to impose direct liability on landlords and require them to undergo the inspection and extermination themselves, within a reasonable time.¹⁵⁸

Employers, like landlords, also need to be educated on potential legal obligations and how they can protect themselves from liability. The New York court in *Clark* suggested that a commercial landlord can never be liable for failing to prevent an infestation; however it did not rule on the employer-tenant's liability.¹⁵⁹ In that particular case, the tenant, Fox News, did an exemplary job at trying to eliminate the bed bug problem.¹⁶⁰ A board-certified entomologist who specializes in bed bug detection and eradication found that the utilized treatments were working, but the problem persisted because as soon as the premises were made "bed-bug free," new ones were brought in by another employee "who was apparently unaware of the massive bed bug

¹⁵⁸ For example, the Maine statute gives a landlord 5 days to conduct an inspection and 10 days to contact a pest control agent if an infestation exists. *See* ME. REV. STAT. ANN. tit. 14, § 6021-A (2011).

¹⁵⁹ *Clark*, No. 30920U, slip op. at 6.

¹⁶⁰ *See* discussion *supra* Part III.

infestation that existed alongside the roaches in his home.”¹⁶¹ In *Clark*, the source of the problem was clear; the plaintiffs did not even dispute that an employee was the source of the bed bugs in the office.¹⁶² It is doubtful that in other cases the source will be as easily determinable, so it is important for both employers and employees to understand potential liability.

Clark made clear that a commercial landlord cannot be held liable for a bed bug infestation, but injured employees can obtain relief through other avenues. For example, injured employees can receive Worker’s Compensation for their injuries.¹⁶³ Workers compensation is an exclusive remedy available to an employee injured in the course of his employment under Worker’s Compensation Law §11.¹⁶⁴ Employees can also seek redress through OSHA.¹⁶⁵ But, an employer can avoid OSHA liability by enacting “a continuing and effective extermination program.”¹⁶⁶

Another possible remedy for injured parties may be insurance, but coverage against bed bug infestations could be problematic, according to some insurance experts.¹⁶⁷ Homeowner’s insurance and commercial property policies typically exclude coverage for loss caused by vermin, rodents, or insects, reasoning that the cost of getting rid of pests is routine maintenance associated with owning a home or apartment building.¹⁶⁸ However, provisions for optional coverage for treatment of bed bugs may be available.¹⁶⁹ Coverage for third party claims also may be presently available to protect against lawsuits by tenants, employees, relatives, or hotel guests,

¹⁶¹ *Clark*, No. 30920U, slip op. at 6.

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *DiSpigna v. Lutheran Medical Center Parking*, 567 N.Y.S.2d 69 (App. Div. 1991) (“**”citing” to Workers’ Compensation needed**”)

¹⁶⁵ OSHA General Environmental Regulation, The Vermin Control Clause, 29 C.F.R. 1910.141(a)(5).

¹⁶⁶ *Id.*

¹⁶⁷ *Casale*, *supra* note 16.

¹⁶⁸ *Norris Presentation*, *supra* note 12.

¹⁶⁹ *Id.* at 59 (stating, for example, that Senator Jeffrey D. Klein of New York proposed legislation in the 2011 session mandating that property/casualty insurance policies for homeowners, renters, and condo/co-op units provide a provision for optional coverage for treatment of bedbugs).

damage to property by others, defense costs for lawsuits, and settlements or judgments.¹⁷⁰

Retailers, hotels, and even college fraternities may now be able to purchase protection against infestation from some insurers.¹⁷¹

Hotel guests can generally bring personal injury claims as long as the complaining party obtains expert testimony.¹⁷² They can also bring a punitive damages claim if the hotel's conduct is particularly egregious.¹⁷³ Where a hotel knowingly rents out a room infested with bed bugs, its conduct can amount to fraud and battery.¹⁷⁴ Hotel guests will have to overcome some evidentiary thresholds, however, which may make it difficult to succeed in litigation.¹⁷⁵ For example, bed bug bites often do not appear until days after the victim is bitten, so it will be necessary to find an expert to determine the cause of the bite.¹⁷⁶ Another issue will be showing that the bite occurred in the hotel room.¹⁷⁷ If hotel guests can overcome these evidentiary burdens and show that the hotel knowingly rented an infested room, plaintiffs can receive compensatory and punitive damages.¹⁷⁸

Part V. Conclusion

The recent resurgence of bed bugs has led to a series of new challenges for both legal and political bodies.¹⁷⁹ While vermin infestations in an apartment building may seem like a routine problem of urban living, bed bugs present problems distinct from other types of vermin

¹⁷⁰ Casale, *supra* note 16.

¹⁷¹ Megan Palera, *Fraternity buys insurance for bed bug protection*, ABC NEWS (Feb. 15, 2012), <http://www.klknv.com/story/16946674/fraternity-buys-insurance-for-bed-bug-protection> (reporting that Willis Global Insurance offers insurance for places such as hotels and Greek houses and that Sigma Phi Epsilon of the University of Nebraska-Lincoln purchased a plan).

¹⁷² Depending on the jurisdiction.

¹⁷³ *See Mathias v. Accor Econ. Lodging, Inc.*, 347 F.3d 672 (7th Cir. 2003).

¹⁷⁴ *See id.*

¹⁷⁵ Whitney & Graf, *supra* note 2.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *See Mathias v. Accor Econ. Lodging, Inc.*, 347 F.3d 672 (7th Cir. 2003).

¹⁷⁹ *See* CDC & EPA Joint Statement, *supra* note 3.

infestations.¹⁸⁰ While governments at the federal, state, and local level have begun looking at the issue, it is of paramount importance that a continued movement towards uniformity is achieved.¹⁸¹ This will not only protect the immediate victims of bed bug infestations, but also the landlords, employers, and hotel owners who have to deal with the financial and reputational costs. The federal government should follow the EPA's recommendations and engage in research and education programs so people can sleep tight and not let the bed bugs bite.¹⁸²

¹⁸⁰ Ludlow Properties, L.L.C. v. Young, 780 N.Y.S.2d 853, 856 (Civ. Ct. 2004).

¹⁸¹ See CDC & EPA Joint Statement, *supra* note 3.

¹⁸² Harrington, *supra* note 8.