



# LODGING LAW

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## GUARDING AGAINST BEDBUGS

**As well as an issue of cleanliness and guest service, bedbugs also can be the source of legal woes for hoteliers. Thorough knowledge of the current situation is an essential starting point when refining a prevention plan.**

...by **TIMOTHY M. WENK**

THEY'RE BACK. BEDBUGS, those once-defeated pests, have been staging a comeback across the United States. Blame it on increased international travel, the banning of insecticides, careless hotel housekeeping, or a combination of these factors, and more. The bottom line is these unwelcome parasites have returned to the scene with a vengeance. Without careful planning and detection, there can be draconian legal implications for innkeepers, landlords, common carriers, furniture dealers, theater owners, and exterminators, to name but a few.

Three years ago, Federal Judge Richard A. Posner upheld a startling award of \$382,000 in the case of *Mathias v. Accor Economy Lodging Inc. and Motel 6 Operating L.P.* In this case, a brother and sister were attacked by bedbugs while staying in a Motel 6 in Chicago. They sued. A jury awarded them each \$186,000 in punitive damages and \$5,000 in compensatory damages. The legal ramifications of the resurgence of bedbugs have yet to be completely realized; however, several court rulings should have landlords, building management companies, and hotel owners concerned.

There are several theories as to why bedbugs are instigating a comeback. Some suggest that the problem is related to the switch from the use of insecticides to bait gels. Others attribute the rise in bedbugs to larger numbers of foreign travelers. The world is not only a smaller place for humans; it has become increasingly smaller for bedbugs as well. These opportunistic parasites are proficient hitchhikers. They travel from one place to another in luggage and clothing, jumping off at homes, hotels, dorms, hospitals and even police precincts. What is worse is that these resilient pests have been known to survive 500 days without feeding. That means that a bedbug can crawl into luggage, live there for a year and a half without eating, and then crawl out of the luggage and into a home or hotel room, infesting the place with its offspring. It only takes one female bedbug to lead to a local infestation. A well-fed female can lay up to 500 eggs in a lifetime. Those eggs will hatch within 6 to 28 days depending on the weather.

Bedbugs are small, brownish, flattened insects that feed solely on the blood of animals. After a feeding, their color changes from brown to a reddish rusty hue. They are known to hide in crevices during the day and come out for food at night. Bedbugs are commonly found in molding, behind wallpaper, and in cracks in hardwood floors. Despite their worldly traveling, bedbugs are not known to crawl long distances. They conveniently live close to their food sources.

Being bitten by a bedbug has been described as being similar to that of a mosquito bite. While an allergic reaction is possible, usually a bedbug bite leaves only a small welt (less than one centimeter), accompanied by irritation and

itching. At feeding time, a bedbug will pierce the skin with its elongated beak; inject saliva, which includes an anticoagulant (a substance that inhibits blood clot formation); and suck blood out of its victim. This usually lasts only 4 to 12 minutes. Typically, the adverse reaction that one has after being bitten by these bloodthirsty bugs is a result of the saliva that is injected into the system by the parasite.

For the last decade, the Courts of the State of New York have been pestered with litigation concerning bedbugs. Judicial decisions have varied. At times, the Courts have ruled that tenants have to learn to live with these annoying bloodsuckers. However, in a case recently decided, the court held that the dreadful nightmare of living with bedbugs rises to the level of a constructive eviction, which relieves the tenant of their common law obligations to pay rent.

In 1908, the Supreme Court, Appellate Term found in *Jacobs v. Morand*, that a tenant is not relieved of their obligations to pay rent when an apartment is overrun with vermin. The Court reasoned that the bedbug infestation in question could have been abated by the tenant. Therefore, the tenant was not relieved of his common law duty to pay rent because he could have remedied the situation.

Now, after almost 100 years, the judiciary's view of these red-coated ramblers has changed. In 2004, Judge Bedford of New York's Civil Court ruled that a bedbug infestation is an intolerable condition that breaches the Warranty of Habitability. In the case of *Ludlow Properties v. Young*, the plaintiff commenced nonpayment proceedings against a tenant. In response, the defendant asserted a breach of Warranty of Habitability defense based on the presence of bedbugs in his apartment. The court found that the tenant was entitled to an abatement based upon the Implied Warranty of Habitability pursuant to the Real Property Law 235-b, which protects against conditions that materially affect the health and safety of tenants.

In *Ludlow Properties*, the tenant was able to show through his graphic testimony how the presence of bedbugs affected his health, safety, and welfare. Notably, the court distinguished between bedbugs and other vermin, like mice and roaches. The Court found that the presence of roaches and mice, while offensive, does not constitute constructive eviction. Bedbugs, on the other hand "feed upon one's blood in hoards while one is sleeping, thus turning a night's sleep into a hellish experience," thus providing the grounds for constructive eviction.

This problem is not isolated to landlord-tenant disputes; as seen in the media, there have been a number of bedbug-related personal injury lawsuits filed in the Courts of the State of New York. In July 2005, Leslie Fox stayed at a Catskills, New York resort. She allegedly suffered over 500 bedbug bites during her stay. She recently sued the hotel for \$20 million, claiming that her "body and mind were scarred" because of the bites which she never felt. This case is still pending. In 2003, Reuejo Ventura claimed that he was mauled by bedbugs while staying at New York City's Helmsley Park Lane Hotel. This case settled a year later for \$150,000.00.

In response to the resurgence of bedbugs, law makers in Hawaii, Boston, and San Francisco have either passed laws or have pending legislation to address the issue. In Hawaii, State Senator Rosalyn Baker and State Representative Marilyn Lee proposed Concurrent Resolution 69 and House Concurrent Resolution 36 in response to the growing bedbug population, incidents reported in the media, and the negative impact infestations have on the hospitality and tourism industries. This bill is still pending.

In Boston, the Housing Authority enforced regulations of the Massachusetts Department of Public Health. These regulations spell out what measures are required by owner-occupants, tenants, or agents of properties in dealing with insects. When bedbugs are spotted, reports by residents may initiate a visit by Boston Inspectional Services. If those inspectors detect an infestation, the discovery is then documented. The property owner or building manager is then required to file an integrated pest management plan with the city. This plan must detail the actions that are to be performed by licensed pest management professionals, property managers, and tenants. Follow-up inspections may be performed until the case has been closed.

Recently, San Francisco passed guidelines to cope with these nocturnal nuisances. Article 11, Sec. 581 of the San Francisco Health Code states the requirements for owners and operators of hotels and other multi-unit dwellings in dealing with the pests. Requirements under this statute include: training of staff in identifying bedbugs; procedures for reporting and responding to complaints about bedbugs; treatment and control of bedbugs in hotel rooms; management of furnishings and materials infested with bedbugs; required record keeping; guidance for pest control companies; and the responsibilities of tenants for the prevention and control of bedbugs.

The bottom line: bedbugs are back, and vigilant prevention is the only appropriate response. The National Pest Management Association reported a 71% increase in bedbug-related calls from 2000 to 2005. This resurgence has had — and will continue to have — detrimental legal implications for hotels, landlords, management companies, and for the unfortunate victims of a bedbug feeding. >>

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## LOSS PREVENTION

### THREE R's FOR THE LODGING INDUSTRY

**With so many potential risks in our businesses these days, we must be fully prepared. A useful summary of key concepts may be found in the three R's: RESPONSE, REDUNDANCY, and RECOVERY.**

...by RAY ELLIS, JR.

RESPONSE IS A FREQUENT topic of discussion in this column. This is such a critical concept in the effective management of emergencies within the lodging industry that we shall again review the need for it, adding the concepts of *redundancy and recovery*.

The record of inadequate response to emergencies is long and litigious. A call was made from a guest with the concern that a guest in the adjacent room was being assaulted. The front desk staff became involved in an administrative task and did not call security or 911. A second call from the concerned guest finally brought a response, but it was too late as a rape had occurred and the rapist had fled. By that time, the victim had also called. Finally 911 and the property's security were alerted. You do not try to defend in such a scenario. You settle.

Training must establish a staff reaction of *immediate response*. During the decade of the 1980's the lodging industry was the focus of arsonists. All too often, there were delays in reporting a fire and many properties were incapable of providing an effective fire protection response. The lodging industry suffered adverse publicity after over 400 individuals lost their lives in hotel fires during the 80's. Following the tragic fire at the Hotel Dupont Plaza in San Juan, Puerto Rico on December 31, 1986, the government became involved, ultimately enacting the Hotel and Motel Fire Safety Act of 1990.

The industry *response* was immediate and effective. By 1994, the National Fire Protection Association (NFPA) dropped the lodging industry from its reporting on residential fires. With 85% of the lodging establishments sprinklered and equipped with full smoke and fire detection systems, the statistical instrument used by NFPA would have reported fires and deaths that had never occurred. In the event of a serious fire, it will now be noted under an asterisk to the residential fire and death statistics. Proof positive that adequate and appropriate response works!

The R for *redundancy* has especial significance in a nation living under the threat of terrorism. Two aspects of redundancy warrant close attention. One relates to operations and logistics. For example, all properties will have a primary source of electric power. A management determination will be made as to the auxiliary generating capacity to be provided for the facility. As an illustration, the-then Hilton at Times Square had 85% co-generation capacity. During the 2003 blackout, when 50 million homes and businesses were without electricity in New England and sections of Eastern Canada, that property continued to operate at 85% of electrical needs through a *redundant* system.

Usually the fuel supply for an auxiliary system will be limited. When the auxiliary system shuts down, what is the next level of redundancy? Battery packs become the third level of temporary response. They may be developed to support emergency lighting and alarm systems. It would be wise to design such a system to support fire system pumps so the automatic sprinkler system could operate in a fire emergency. A final level of redundancy might be flashlights provided to staff and guests. Battery-life and replacement batteries support this level for only a limited time.

*Recovery* is the final R. Senior management must dedicate time and effort to this very important aspect of operational planning. A major decision must be made concerning business interruption insurance. How many management and key staff members should continue to be compensated during a time when the property is being physically recovered? What bank and financial resources, building contractors, equipment supply sources, utility contacts, government agency liaison, and contract security sources are in your data bank? Have you backed up

those sources off-site? Is HR equipped to contact and persuade those employees who did not receive support under the business interruption insurance to return to their former jobs?

Is a plan formulated to interview and hire for those positions where former employees opt not to return? Are there mission-critical personnel with off-site computer capability and secured access to your major databases who can contact guests and clients holding contracts for future events? Do they have the authority to find alternate accommodations in case the event date is before full recovery and operations have resumed? Do you have arrangements (preferably with a site under your same flag) to move such business or guest reservations? Are marketing plans in place to announce that you are back in business?

Careful attention to the three R's will almost assuredly mean the difference between business failure and business success. In these uncertain times, when everyone everywhere has to ponder new risks and contingencies, the lodging industry must not fall behind. We must strive to be an example of preparedness and foresight, enabling us to provide our guests and our communities with our very best in a time of need. >>

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## HOSPITALITY LAW CONFERENCE

The 5th Annual Hospitality Law Conference, held February 8-9 at the Hilton Post Oak in Houston, Texas, offers in-depth sessions focused on lodging, food & beverage, HR, labor relations, safety, security, and risk management. Issues up for discussion include the condo bubble, immigration reform, closed circuit television, protecting keywords online, and minors and alcohol. The conference includes seminars dealing with the aftermath of Katrina and other disasters, with the relationship between general counsel and outside counsel, and with the prevention of wage and hour class action lawsuits.

To register and for more information, visit [www.HospitalityLawyer.com](http://www.HospitalityLawyer.com) or call 713-963-8800. The cost, which includes a Thursday night wine tasting and product showcase, is \$375 for those who register before January 22 (\$425 after). The cost for educators, students, and restaurant and lodging associations is \$325. For attorneys, up to 12.25 CLE credits are available at no extra cost.



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