



GOOD NIGHT, SLEEP TIGHT, BUT THE BEDBUGS STILL BITE

By Brian J. Aull



Masked in the shadows of homes and hotels, bloodthirsty vermin wait for darkness to fall, so that they can prey on human flesh. What sounds like fodder for a Hollywood thriller is all too real. America is faced with a “recent plague”¹ that is “becoming an epidemic.”² Tiny parasitic insects that live in bedding, sheets, mattresses and furniture have been taking a bite out of the condominium and hotel businesses. Pests that once were mostly an afterthought, known more for their inclusion in a children’s rhyme than as a threat to sleeping family members, are back in the public consciousness in a big way. So much so, that *New York Magazine* has decreed that we are “living in the age of bedbugs.”³

The bedbug infestation has reached such a degree of proliferation that the first North American Bed Bug Summit was held in Rosemont, Illinois on September 21, 2010.⁴ With paranoia and stigma riding the coattails of the bedbugs into the spotlight, lawsuits too, have followed. Courts across the country have had to determine factual and legal thresholds for lawsuits involving bedbugs. Most of the recent cases have sounded in negligence.

Plaintiffs in Florida have sought damages under theories of both gross negligence and simple negligence.⁵ Under Florida law, to show gross negligence, a

plaintiff must demonstrate three elements: 1) a composite of circumstances exist which together constitute a clear and present danger; 2) awareness by the defendant of such danger; and 3) a conscious, voluntary act or omission by the defendant in the face thereof which is likely to result in injury.⁶ Florida courts have held that a swarm of bed bugs lying in wait under the covers can constitute a triable issue of fact concerning a “clear and present danger of insect attack.”⁷ Courts have looked to a variety of factors in determining whether a defendant is aware of the danger of lurking bed bugs, taking into consideration: prior recent tenant complaints of an insect infestation in the property,⁸ logs or records detailing complaints of bed bugs in units in the same building as the property,⁹ and complaints by the Plaintiff himself over the course of multiple days staying in the property.¹⁰ The third element is met when evidence can show that a manager or proprietor ignores the bedbugs and continues to put customers into contact with them.¹¹

Courts in Florida have also recognized that Plaintiffs can bring bedbug related claims under a theory of simple negligence.¹² Simple negligence consists of a duty of care owed by the defendant to the plaintiff, a breach of that duty, proof that the breach was the cause of the injury to the plaintiff, and proximately caused damages.¹³ A hotel owes its business invitees: 1) the duty to exercise reasonable care in maintaining its premises in a reasonably safe condition; and 2) the duty to warn of concealed perils that are or should be known to the landowner and that are unknown to the invitee and cannot be discovered through the exercise of due care.¹⁴ Tiny though they may be, a family of bedbugs tucked away in the nooks and crannies of a hotel room can qualify as a concealed peril that cannot be discovered through the exercise of due care by a patron.¹⁵

Through these two vehicles of liability, plaintiffs across the country have won some sizable verdicts and settlements after receiving bedbug bites and the occasional rash. In Alabama, a plaintiff negotiated a \$9,800 settlement award after a four year old child received insect bites on her arms, legs and torso while at the defendant day care facility.¹⁶ In Mississippi, \$4,000 was awarded by a jury to a plaintiff who suffered an allergic reaction to bedbug bites she received in her room at the defendant resort.¹⁷ While in New Jersey, two plaintiffs who suffered multiple injuries, including insect bites after sleeping on a bed purchased from the defendant’s store, received a total verdict of \$49,000.¹⁸

However, the risks to a hotel or resort can prove to be far greater than this sampling of verdicts and settlements. In a case cited throughout bedbug litigation, an Illinois court

held that evidence supported finding that a hotel chain’s conduct was willful and wanton in failing to avoid a known risk of bedbug infestation, and thus supported a finding of gross negligence and an award of punitive damages to the hotel guests who were bitten by bedbugs: where the hotel chain refused a recommendation of a hired exterminator to spray every room, where the hotel chain refused a hotel manager’s recommendation to close the hotel while every room was sprayed, and where the hotel chain placed guests in rooms known to be infested with bed bugs.¹⁹ The jury found \$5000 in general damages and \$186,000 in punitive damages. The judgments were upheld.²⁰

Bedbugs have taken a bite out of the retail market as well. In July 2010, Hollister, Abercrombie and Fitch and Victoria’s Secret were forced to close stores in New York City when the tiny bloodsuckers moved in.²¹ The stigma associated with an infestation can be particularly damaging with bedbugs. Dr. Susan Jones, an associate professor of entomology at Ohio State University explains why: “Ticks and mosquitoes bite us when we’re outside, in their world, but bedbugs invade the safety and sanctity of our homes. We see our homes as a sanctum. Bedbugs hide in our spaces and come out at night to feed on us. They are an insect that only consumes blood and prefers human blood.”²²

Despite the recent media reports, a well prepared defense team can mount successful challenges to bedbug plaintiffs. There is not a presumption of negligence merely because bedbugs are found in a hotel or store.²³ Negligence must be proved. The nexus between duty and liability is proof of negligence.²⁴ Negligence in this context requires not only proof of the condition which caused the injury but that the condition was known or should have been known by the landlord prior to the occurrence, so that he had an opportunity to correct it.²⁵ Even knowledge of a prior bed bug infestation in another apartment or hotel room does not necessarily impute knowledge of a similar condition elsewhere on the property.²⁶ While the best defense to bedbug litigation is an aggressive policy of pest control prevention, and immediate remedial efforts upon the discovery of the vampiric visitors, the law does not impose strict liability on landlords, and the negligence standard places a seasoned defense team in a much more tenable position. The potential damage to a business from a bedbug claim could be staggering. As such, defense teams should place a strong emphasis on confidentiality agreements in settlement, and stiff penalties for violations of such an agreement.

These tiny insects are not known to carry any diseases, and their bite typically does not even rouse a sleeping person from their slum-

ber, yet they have certainly left a mark on the psyche of the nation and its juries. While a prompt and fair evaluation of a bedbug case can certainly mitigate the potential issues faced by hotels, resorts, retailers, multiunit buildings and their insurance providers, the bedbugs have announced their presence on the litigation scene, and they are ready to dine on sleeping invitees and unprepared litigants alike.

(Endnotes)

- 1 Hager, Emily (August 20, 2010). “What Spreads Faster Than Bedbugs? Stigma”. *The New York Times*.
- 2 Jacobs, Andrew (November 27, 2005). “Just Try to Sleep Tight. The Bedbugs Are Back”. *The New York Times*.
- 3 Robertson, Lindsay (August 21, 2009). “We Are Still Living in the Age of Bedbugs”. *New York Magazine*.
- 4 CTV.ca News Staff (November 27, 2010). “Landlords, tenants seek solutions in bed bug fight.” *CTV Toronto*.
- 5 *Livingston v. H. I. Family Suites, Inc.*, 2006 WL 1406587 (M. D. Fla. 2006).
- 6 *Dent v. Florida Power & Light Co.*, 633 So.2d 1132, 1134 (Fla. 4th DCA, 1994) (citing *Sullivan v. Streeter*, 485 So.2d 893,895 (Fla. 4th DCA 1986).
- 7 *See Livingston v. H. I. Family Suites, Inc.*, 2006 WL 1406587 (M. D. Fla. 2006).
- 8 *Id.*
- 9 *Id.*
- 10 *See Prell v. Columbia Sussex Corp.*, 2008 WL 4646099 (E. D. Pennsylvania 2008)
- 11 *See Livingston v. H. I. Family Suites, Inc.*, 2006 WL 1406587 (M. D. Fla. 2006).
- 12 *Id.*
- 13 *See Eppler v. Tarmac America, Inc.*, 752 So.2d 592, 594 (Fla.2000).
- 14 *See St. Joseph Hospital v. Cowart*, 891 So.2d 1039, 1040 (Fla. 2d DCA 2004).
- 15 *See Livingston v. H. I. Family Suites, Inc.*, 2006 WL 1406587 (M. D. Fla. 2006).
- 16 *Wyatt, Pro Ami, Slaton v. Heritage Christian Academy; Heritage Assembly*, 2003 WL 25693187 (Ala. 2003)
- 17 *Elgandy v. Boyd Mississippi, Inc.*, 2003 WL 24571854 (Miss. 2003).
- 18 *Huynh v. J.C. Penny Co., Inc.*, 2008 WL 4145883 (N.J. 2008).
- 19 *Matthias v. Accor Economy Lodging, Inc; Motel 6 Operating LP*, 2003 WL 25147946 (N.D. Ill. 2003).
- 20 *Id.*
- 21 Watson, Bruce (July 27, 2010). “Bedbugs Are Back and They’re Bleeding Us Dry.” *Daily Finance*.
- 22 *Id.*
- 23 *Mitchell v. Capitol Management Corp.*, 2010 WL 4074940 (N.J. Super. A.D. 2010).
- 24 *Dwyer v. Skiline Apartments*, 123 N.J. Super 48, 52 (App.Div.), *aff’d*, 63 N.J. 577 (1973).
- 25 *Mitchell v. Capitol Management Corp.*, 2010 WL 4074940 (N.J. Super. A.D. 2010).
- 26 *Id.*