



by Bruce E. Gudin, Esquire

Property Owner Liability: Don't Let the Bed Bugs Bite

New Jersey property owners must now arm themselves with knowledge of a situation that is becoming a growing concern to everyone. *Cimex lectularius*, or bed bugs as they are commonly known, are becoming a problem within residences of all kinds, including multi-family housing, as the bugs population has resurged in recent years.

Bed bugs hide in small crevices and infest only a small proportion of residences, but they should be suspected if residents complain of bites that occurred while sleeping. As bed bugs can readily survive for over a year without feeding, bed bugs may be present in apparently 'vacant' and 'clean' apartments. Bed bugs can move between adjoining apartments through voids in walls and holes through which wires and pipes pass.

(See Page 39 for control measures, prevention and treatment provided by NJAA members Cooper Pest Solutions and S&M Exterminating.)

As property owners, we must act vigilantly and proactively to prevent infestations and if one is discovered, we must take remedial action immediately. Consultation with a qualified extermination contractor is advised, and equally important from a liability perspective, is to document your activities. Your pest control professional should provide you with a "plan of attack" since a single treatment will not likely eradicate the infestation. The plan from the pest control operator should detail the methods

and insecticides to be used by the pest control operator. You should maintain detailed records as to when you were notified of the problem, what steps were taken to investigate the situation, and what was done to remediate the condition. These records would be vital to the defense of a future claim.

What is your potential exposure?

In New Jersey, a property owner of residential premises impliedly covenants that at the inception of the lease there are no latent defects in facilities vital to the use of the premises because of faulty construction or deterioration from age or normal use, and further covenants that these facilities will remain in usable condition throughout the entire term of the lease. (*Marini v. Ireland*, 56 N.J. 130, 144, 265 A.2d 526 (1970); *Berzito v. Gambino*, 63 N.J. 460, 466, 308 A.2d 17 (1973). However, both of these opinions limit the residents remedy to cases where the owner failed to make necessary repairs within a reasonable time. In *Marini* the court held that before a resident can make necessary repairs and deduct the expense from subsequently accruing rent he/she must notify the owner of the defective condition and afford the owner the opportunity to repair. *Berzito* imposes the same requirement before a resident can recover damages for breach of the owner's implied covenant of habitability. As the court stated therein: "... As a prerequisite to maintaining such a suit, the tenant must give the landlord positive and seasonable notice of the alleged

defect, must request its correction and must allow the landlord a reasonable period of time to effect the repair or replacement. Such notice does not have to be in writing."

In the 1981 Appellate Division case of *Chess v. Muhammad*, 179 N.J. Super. 75, 430 A.2d 928, NJ Super.A.D., the court ruled that residents are not entitled to an abatement when the owner repairs the defective condition within a reasonable time after learning of its existence. The jurisdiction of the landlord/tenant courts is also generally limited to awarding residents' rent abatements based upon payments that have actually been withheld from the owner.

In New Jersey, property owners are faced with more than the possibility that their residents may receive a rent abatement or credit. A resident may also: (i) declare a constructive eviction and vacate the premises; (ii) repair and deduct the cost of the repairs from the rents; (iii) file an action to recover the rents paid; or (iv) seek the appointment of an administrator to collect the rents and make repairs pursuant to New Jersey Statute 2A:42-82.

The New Jersey courts have also permitted recovery by a resident against an owner on a theory of intentional infliction of emotional distress in cases involving egregious conduct, such as the case of *49 Prospect Street Tenants' Ass'n v. Sheva Gardens, Inc.*, 227 NJ Super. 449 (App.Div.1988) where an owner caused residents to live in apartments

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infested with vermin, invaded by squatters and without heat or water for a substantial period of time. In this case, the Court also permitted a recovery against the owner under the Consumer Fraud Act, N.J.S.A. 56:8-2. The Act provides that the use or employment by any person of any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing, concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise or real estate, or with the subsequent performance of such person as aforesaid, whether or not any person has in fact been misled, deceived or damaged thereby, is declared to be an unlawful practice entitling the aggrieved party to recover **triple damages plus attorneys fees.**

While as of the writing of this article there has not been a published decision in the courts of the State of New Jersey regarding a bed bug infestation claim against a property owner since the year 1922 (before the current legal protections were set in place for our residents,) other states including New York have had published cases, and these may be instructive to us.

In New York County's Civil Court, in the case of Ludlow Properties, LLC v. Young, 780 N.Y.S. 2d 853 (N.Y. City Civ. Ct. 2004) the resident was able to show through his graphic testimony how the presence of bed bugs affected his health, safety and welfare. The resident's testimony was that he had received hundreds of bites all over his body (the court at first indicates that these bites occurred over a three month period, but elsewhere

indicates that hundreds of bites might occur in a single night. The resident testified that he had undertaken various measures to avoid the situation, but that nothing seemed to work, and that he often was startled awake at night by the bites. The resident, however, did not move out and attempted in various ways to cope. Ultimately, he obtained a short steel mesh cot that was uncomfortable, but seemed to work with the bug problem. Meanwhile, the resident saw a notice in the hallway indicating that the owner was exterminating for bed bugs, and thereafter began withholding rent. The owner clearly had notice of the bed bug problem in resident's premises, but elected to undertake a gradual treatment program recommended by its exterminator rather than a building wide extermination that might have eradicated the problem more quickly in the resident's unit. The problem ultimately was resolved by extermination about five months after resident first complained.

The court acknowledged that the resident certainly could have claimed a constructive eviction had he vacated the premises. Since he didn't however, the court took into account that an apartment provides facilities for a variety of activities other than sleeping, and that the apartment remained useful for those other activities and indeed resident engaged in those activities during the rent period at issue.

The court concluded that even though the owner had followed a professional exterminator's advice in undertaking a gradual extermination program, this left the resident's premises infested for almost six months and, as such, the owner was liable for failure to provide resident with a habitable premises. Strangely, the court seemed to be of the view that the owner's

good faith efforts to address the problem was a factor that it should take into account in assessing the percentage rent reduction that the resident could claim. The court said that there was no published authority dealing with the implied warranty and bed bug infestation, and established 45% as the degree of interference with habitability in the apparent belief that it was making precedent that other courts might take into account. Notably, the court distinguished between bed bugs and other vermin, like mice and roaches. The Court found that the presence of roaches and mice, while offensive, does not constitute constructive eviction. The court distinguished between bed bugs and other types of vermin - noting that "bed bugs feed upon one's blood in hoards while one is sleeping, thus turning a night's sleep into a hellish experience." – and ruled that a bed bug infestation is an intolerable condition that breaches the Warranty of Habitability. The court characterized this as a case of first impression and indicated that bed bug infestation is reaching epidemic proportions in New York City and is likely to affect many other residential rentals over the next few years.

Once a property owner has notice of a habitability defect, the owner has a duty to remedy it. Although typically the owner is allowed a reasonable time to affect a cure, it appears from what the NY trial court said that it could have undertaken more dramatic extermination efforts, likely at higher cost, and chose not to do so. Other courts in NY will likely follow suit if faced with a similar case.

What should you do?

Legal Preparations and Precautions

It is *always* best to prepare for potential situations with residents

who refuse inspection/treatment by including a section on bed bugs in your lease agreement. If possible, hire a lawyer to help draft the agreement. There are several things that should be included in a lease addendum, though you may decide to include some things in a separate agreement to be signed by the resident later in the event that an infestation is discovered. Things you may want to include in your lease agreement include:

1. The owner must be given access to a rental unit upon reasonable (24 hour) notice to perform inspections.
2. Why it is necessary for management to perform inspections. (Although inspections are an invasion on privacy, they are necessary for everyone's health and safety, and that inspectors will respect the resident's belongings.)
3. How, and with what frequency, inspections may be carried out.
4. What sort of cooperation is required of the resident (storage of belongings? allowing the use of sticky traps? etc.)
5. Preventive treatments that have been or may be used in the unit.
6. Procedures and possible treatment methods that would be used in the case of an infestation.
7. That certain treatments may damage personal belongings (though beware of scaring residents away from coming forward in the event of an infestation) and that personal belongings may have to be discarded if deemed necessary by a professional exterminator.

Working with Residents

With a signed lease addendum or other agreement in place providing for appropriate inspection and treatment procedures, residents are

legally obligated to cooperate with building staff. You should of course decide how you prefer to work with your building's residents, but in general it is best to begin with some sort of warning letter to the resident. With a recalcitrant resident, an owner may also call the local Department of Public Health to schedule an inspection. If the inspector finds an infestation, the resident will be legally required to cooperate with treatment. The inspector may also have the ability to issue the resident a summons to appear in municipal court. There, an owner can obtain a court order for access to a unit if necessary. Lastly, an owner may move to evict a non-complying resident. Even an experienced owner is well advised to consult competent counsel when seeking to properly terminate a tenancy.

Property owners who fail to take the necessary steps to eradicate bed bugs from an apartment can expect that the bed bugs will move throughout the building, causing massive breach of warranty of habitability, exposing the owner to rent abatement, damages and a highly unpopular building.

The information you obtain in this article is not, nor is it intended to be legal advice. You should consult an attorney for individual advice regarding your own situation. ■

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WHAT THE EXTERMINATORS HAVE TO SAY

"There are no magic wands when it comes to the products that work on bed bugs and not enough data exists regarding the efficacy of the pesticides that are commercially available. It is for this reason that control efforts should not rely solely on chemical methods for control. Instead non chemical measures such as the physical removal or destruction of bed bugs through the use of vacuums or steam generating machines may be one of the most effective measures available for eliminating the majority of the bugs. Detailed chemical applications are also important to manage bed bugs living in areas that are not accessible. A well designed program will provide immediate reduction in numbers on the initial visit but it is the follow-ups that are necessary to achieve elimination. In many cases bugs will infest surrounding units. In other cases the bugs that you are attempting to control may be originating from an adjoining unit. While expanding the program to other units is a very sensitive and sometimes difficult proposition, the reality is that failure to do so may cost more in the long run. Bed bugs are clearly back and the problem is likely to become much worse before it gets better. The real question is not, will my apartment complex experience a problem? Rather it is how long will it be before we experience a problem? If bed bugs have not yet been an issue, now is the time to prepare so that you are not caught off guard."

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"Control measures for bed bugs can sometimes be difficult in rooms with many cracks, crevices, loose wallpaper, etc. The bugs are fast moving and usually found near the host. Look for dark spots of fecal material, bloody spots on sheets or pillowcases, cast skins, eggs, eggshells and an offensive odor. Each female bed bug can lay about 200 eggs under favorable conditions of 70°F and with regular feeding. Often eggs and eggshells are seen singly or in clusters in crevices where bed bugs hide. Eggs hatch in 6 to 17 days or 28 days under lower temperatures. Newly hatched bed bugs feed, when possible, and molt five times before maturity. In one year, there may be three or more generations. Adult bugs may go two to eight weeks without food, or even up to one year. Prevention of bed bugs can be done by practicing sanitation methods such as laundering bedding routinely, repairing cracks in plasters, rearranging furniture, and inspecting secondhand beds, bedding and furniture. Licensed professional pest control operators are your best option to provide treatment and repeat applications."

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