

BEDBUG PROBLEMS ILLUSTRATE THE IMPORTANCE OF CAREFULLY ANALYZING RESIDENT DEMANDS

You took over a new property, and you discover that it is infested with bedbugs. You do everything possible to get rid of the pests. Over the ensuing months, the property spends tens of thousands to turn the tide against the pests. Progress is slow, but steady. Still some residents aren't happy with the progress. You offer to let them out of their lease. They want more. You offer to refund all of their money. They want more. You offer to rent a washer and dryer just for them so they can wash their clothes. They want more. You offer them some money. They want more. You want them out, but you don't want to give away the store. Where do you draw the line? How should you analyze the problem to formulate your response to the resident? This pesky problem seems unique. However, it is no different than countless other resident demands.

First, you must evaluate your potential legal liability. Residents have many potential legal arguments why you should be responsible for bedbugs. Your lease may make you responsible. If you can't get rid of bedbugs, you may be in breach of your lease with the resident. If you fail to adequately respond to a bedbug problem, the resident can argue that you breached the resident's implied covenant of quiet enjoyment because the premises are now unfit as a residential premises. Colorado statutes may also make you liable to residents for bedbugs. The Colorado Premises Liability Act holds you responsible for bedbugs if you fail to exercise reasonable care to protect residents against bedbugs. The new Warranty of Habitability statute makes you responsible for bedbugs if you fail to have an appropriate extermination response to bedbug infestations.

Regardless of the legal theory, your liability to residents for bedbugs is largely determined by your actions or lack of actions. If you have ignored the problem or taken inadequate action, a court is much more likely to hold you responsible. If you have done everything possible to deal with the problem, a court is not likely to find you responsible. If you have spent substantial money to develop and implement a professional extermination plan, you shouldn't be responsible under the Premises Liability Act or under the Warranty of Habitability law. Both of these statutes impose liability for failing to reasonably act. If

you have done what a reasonable person would have done under the circumstances, you shouldn't be responsible.

Second, you should evaluate the potential monetary downside. It's not enough to know whether it's likely that you will be held responsible. You should measure that responsibility in dollars. If a unit has bedbugs, residents can claim damages for rent abatements, destruction or cleaning of personal property, and moving expenses. While not likely to be successful, a resident could claim medical damages for bedbugs. Rent abatement damages equal the difference between the fair market rent, and what the unit is worth with the bedbugs. For example, without bedbug problems, the fair market rent for the unit is a \$1,000 per month. If you lost in court, the key question is how much is the unit worth with the bedbug problem? Determining this figure is not an exact science. However, in a case with fairly bad facts for the landlord, a New York court still held that the unit was worth 55% of the market rent because the resident still used the apartment for shelter, eating, bathing, and sleeping. Damages other than rent abatement have to be evaluated on a case-by-case basis.

The financial downside also includes litigation costs. You should evaluate how much it will cost to defend a bedbug claim. Defending a bedbug case in county court could easily run \$2500 to \$4000. Theoretically, you can recover these fees from the resident. But having the judge award you your attorneys' fees, and the resident paying them are two different things. When determining potential litigation costs, you should determine if the property will have to pay the resident's attorney fees if you lose. The risk of having to pay a resident's attorney fees is frequently undervalued when evaluating resident claims. It probably doesn't make sense to litigate a resident's demand for \$300, when the property would have to spend \$4,000.00 to defend, and risk losing another \$4,000 to the resident's attorney.

Similarly, the advantage of a resident not being able to recover attorneys' fees and costs from you is also undervalued when evaluating claims. Residents are much less likely to hire an attorney and sue, if they have to pay the attorney. Along this same vein, the amount of time and effort to litigate is heavily undervalued, especially by upper management because frequently they don't spend the time required to deal with all of the

details of the litigation. Onsite staff is there to run the property and lease units. When onsite management is dealing with the attorney or spending its time in court, onsite management is not running the property or leasing units. If the onsite team is going to spend countless hours on a small dollar claim, the property will probably be financially ahead by quickly settling the claim regardless of merit, especially if the resident is a problem, and the settlement includes the resident moving out.

Regardless if it's a bedbug problem or any other resident demand, determining when to settle and on what terms involves the same considerations. To evaluate resident demands, first determine whether you are potentially responsible. If the lease requires you to spray for bedbugs, you don't need a lawyer to tell you that you will have a problem if you don't spray. If it's possible that you could be responsible, evaluate your chances based on the facts. You know what actions were or were not taken. If you did what a reasonable person would, the resident will have a harder time proving you're responsible. This means that you can take a tougher position in resolving the resident's demand.

Even though you did everything right and you shouldn't lose in court, anything is possible. For this reason, determine how bad it could be if you lose. The larger the potential financial loss in court, the more you should be willing to compromise with a resident. If the potential downside isn't significant, especially when you're probably not responsible, then you should be much less willing to compromise with residents. Always remember to consider attorneys' fees and lost staff time when calculating financial costs of resident disputes. Sure, it's our job to evaluate these problems for you, and we are always available to assist you. But we can never decide how much risk or cost you or the owner is willing to accept. When you understand litigation analysis, you are in a much stronger position to make sound decisions about applicable risks and costs.