

NOTE

Don't Let Them Bite: Defining the Responsibilities of Landlords and Tenants in the Event of a Bedbug Infestation

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ABSTRACT

Bedbug infestations are becoming a national crisis. The bugs are difficult to detect and inflict psychological, physical, and financial harm on their human victims. Infestations can quickly grow and spread to new areas, especially in the multiunit apartment setting. The common law doctrines of constructive eviction and the implied warranty of habitability do not satisfactorily resolve landlord-tenant disputes because both doctrines rely on fault, which is difficult to prove in the bedbug context. Moreover, neither doctrine has developed or been applied uniformly, which leaves landlords and tenants uncertain about their respective duties and discourages prompt treatment of infestations by pest control professionals. A recently enacted and comprehensive Maine statute allocates treatment costs to landlords without a showing of fault, but contains problematic inspection and disclosure provisions, among other defects. This Note draws on common law principles and builds on the Maine statute in proposing that states enact legislation that clearly defines tenants' and landlords' obligations regarding notification, inspection, access, compliance, disclosure, and treatment costs. Central to this model legislation is a no-

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fault cost-allocation regime that allows landlords to spread infestation-treatment costs among tenants over time.

TABLE OF CONTENTS

INTRODUCTION	244
I. A BEDBUG PRIMER	246
II. COMMON LAW RESPONSES TO LANDLORD-TENANT DISPUTES ARISING OUT OF BEDBUG INFESTATIONS.....	250
A. <i>Constructive Eviction</i>	252
B. <i>Implied Warranty of Habitability</i>	254
C. <i>Where the Common Law Falls Short</i>	256
III. A STATUTORY RESPONSE TO BEDBUGS: THE 2010 MAINE STATUTE	258
IV. PROPOSED MODEL STATUTE	263
A. <i>Provisions</i>	264
B. <i>Duties of Landlords and Tenants: Notification, Inspection, Access, and Compliance</i>	265
C. <i>No-Fault Cost Allocation on Landlords and Claim Preclusion</i>	266
D. <i>Mediation</i>	270
V. ALTERNATIVE SOLUTIONS ARE UNSATISFACTORY	270
CONCLUSION	272

INTRODUCTION

Ashlee Poole is a single mother living on a limited income in an apartment infested with bedbugs.¹ Bedbug victims such as Ms. Poole typically suffer from sleepless nights and constant scratching during the day, as the nocturnal bugs' bites engender stress and allergic reactions.² Ms. Poole was also forced to throw out infested mattresses and furniture.³ Pest control treatment for infestations is expensive, potentially adding up to tens or even hundreds of thousands of dollars.⁴ Unable to bear the treatment costs on her own, Ms. Poole sought help, but she discovered that bedbugs fall into a "legal gray area" in her hometown of Jacksonville, Illinois.⁵ Because neither statutory law nor

¹ Cody Bozarth, *Don't Let the Bedbugs Bite: Woman Finds Responsibility for Bedbugs Falls in Gray Area*, JACKSONVILLE J. COURIER (Ill.), Dec. 18, 2010, at 1.

² See *infra* Part I.

³ See Bozarth, *supra* note 1.

⁴ Kate Murphy, *Bedbugs Bad for Business? Depends on the Business*, N.Y. TIMES, Sept. 8, 2010, at B1.

⁵ Bozarth, *supra* note 1.

common law required her landlord to help her treat the infestation, the county Health Department and the municipal Code Enforcement Department lacked the authority under local ordinance to intervene and the resources to assist her with the treatment costs.⁶ Overwhelmed by the infestation, Ms. Poole attempted to move, although she could not be sure that she would not take the bugs with her to a new apartment.⁷

Ashlee Poole is a member of the fast-growing population of bedbug victims in the United States; this group is not limited to the working class, but also includes celebrities, such as radio talk-show host Howard Stern.⁸ Ms. Poole's story illustrates that the law has not developed an adequate response to the pests, which can inflict physical, psychological, and financial harm.⁹ The responsibilities of landlords and tenants in the face of a bedbug infestation are often unclear and vary across jurisdictions. This uncertainty and lack of uniformity fails to incentivize behavior that would promptly treat and prevent the spread of infestations, and does not fairly assign costs arising from the infestation.

In Ms. Poole's case, because she was unable to afford a professional pest control agent and her landlord was unwilling to pay for treatment, the infestation worsened, and her move may have even spread the bugs to her new building.¹⁰ Moreover, her move did nothing to ameliorate the initial infestation in her apartment, which could have expanded to other units through the walls or through her discarded furniture. A spreading infestation could have threatened to either make the entire building effectively unrentable or to give any new tenants a nasty surprise. Requiring payment from the party who introduced the bugs to the apartment was not an option because the bugs' origin was unclear, as is often the case due to bedbugs' small size and clandestine behavior.¹¹

To clearly define the duties of landlords and tenants when an infestation is discovered, this Note argues that states should adopt a statute that partially codifies the warranty of habitability and constructive eviction principles at common law by allocating treatment costs to landlords without a showing of fault. Part I provides back-

⁶ *Id.*

⁷ *Id.*

⁸ *Howard Stern's Studio Hit by Bedbugs*, CBSNews (Sept. 29, 2010), <http://www.cbsnews.com/stories/2010/09/29/entertainment/main6911165.shtml>.

⁹ See *infra* Part I.

¹⁰ Bozarth, *supra* note 1.

¹¹ See *infra* Part I.

ground information on bedbug biology, behavior, and the historical developments affecting their prevalence in North America. A survey of constructive eviction and implied warranty of habitability cases follows in Part II, which extracts legal principles reflecting assignments of responsibility, and critiques those doctrines' reliance on fault. Part III discusses statutory responses to bedbugs, with a primary focus on recent comprehensive legislation in Maine. Part IV introduces the proposed statutory provisions to define the responsibilities of landlords and tenants in the event of an infestation and a method to resolve any disputes. This Part argues for a no-fault allocation of treatment costs to landlords to take advantage of cost spreading, and makes an analogy to the workers' compensation system. Finally, Part V explores alternative solutions and explains their inadequacies.

I. A BEDBUG PRIMER

Bedbugs were common in the United States up until the late twentieth century, when widespread use of dichlorodiphenyl-trichloroethane ("DDT") and other pesticides virtually eradicated them in the country.¹² They survived abroad, however, and in the early twenty-first century made a resurgence in North America.¹³ This comeback has not been completely explained, but an increase in international travel, the bugs' development of resistance to pesticides (including DDT), and lack of public knowledge and pest control efforts due to the bugs' hiatus in the United States likely all played a role.¹⁴

This bedbug resurgence is quickly becoming a full-scale crisis. In New York, for instance, the municipal government received about 500 complaints of infestations in 2004 and nearly 11,000 in 2009.¹⁵ Although urban centers are bearing the brunt of the crisis, bedbug infestations are a national problem: beyond major cities, such as New York, Los Angeles, and Washington, D.C.,¹⁶ bedbugs have also estab-

¹² DEP'T OF HEALTH & HUMAN SERVS., CTR. FOR DISEASE CONTROL & PREVENTION & U.S. ENVTL. PROT. AGENCY, JOINT STATEMENT ON BED BUG CONTROL IN THE UNITED STATES FROM THE U.S. CENTERS FOR DISEASE CONTROL AND PREVENTION (CDC) AND THE U.S. ENVIRONMENTAL PROTECTION AGENCY (EPA) (2010) [hereinafter JOINT STATEMENT], available at http://www.cdc.gov/nceh/ehs/publications/bed_bugs_cdc-epa_statement.htm; Jerry Adler, *The Politics of Bedbugs*, NEWSWEEK (Sept. 8, 2010, 11:00 AM), <http://www.newsweek.com/2010/09/08/conservatives-blame-environmentalists-for-bedbugs.html>.

¹³ See JOINT STATEMENT, *supra* note 12.

¹⁴ *Id.*

¹⁵ Marshall Sella, *Bedbugs in the Duvet*, N.Y. MAG., May 10, 2010, at 36, 38.

¹⁶ *New York the Most Bedbug Infested City in America*, HUFFPOST N.Y., Aug. 24, 2010, http://www.huffingtonpost.com/2010/08/24/new-york-the-most-bedbug-_n_692677.html.

lished themselves in such rural areas as Vermont,¹⁷ New Hampshire,¹⁸ and Maine.¹⁹ Nationally, calls to pest-management companies have increased by eighty-one percent since 2000.²⁰ A national survey conducted in August 2010 found that nearly one in ten adults reported that they or someone they knew had a “recent problem with bedbugs.”²¹ Without an effective and efficient method to exterminate the bugs, the bedbug problem is only likely to worsen.²²

Bedbugs are “experts at hiding.”²³ They are as thin as a credit card and no longer than a pencil eraser.²⁴ During the day, they conceal themselves in mattress seams, bed frames, cracks and crevices, clutter, wallpaper, or anywhere their small flat bodies can fit.²⁵ At night, they emerge to feed: they puncture their human victims’ skin, inject an anesthetic to prevent the victims from waking up, and suck the victims’ blood.²⁶

Reactions to bites vary widely: some people react to these bites immediately, whereas others do not react until weeks later, and still others never react at all.²⁷ Those who do react develop slightly swollen, red, itchy bite marks, resembling flea or mosquito bites.²⁸ These marks sometimes appear in lines of three along a vein—a pattern

¹⁷ Melinda Davenport, *Bedbugs Reported at Hilton*, WCAX.COM (Jan. 10, 2011), <http://www.wcax.com/story/13817969/bedbugs-spotted-at-hilton>.

¹⁸ *NH Rep Wants Commission to Study Bed Bugs*, BOSTON.COM (Jan. 9, 2011), http://www.boston.com/news/local/new_hampshire/articles/2011/01/09/nh_rep_wants_commission_to_study_bed_bugs/.

¹⁹ See generally WORKING GRP. TO STUDY LANDLORD & TENANT ISSUES, REPORT TO THE JOINT STANDING COMMITTEE ON LEGAL AND VETERANS AFFAIRS, 124th Leg., 2d Reg. Sess. (Me. 2010).

²⁰ Eric Fiegel, *Bedbug Forum Draws Crowd to Capitol*, CNN (Nov. 18, 2010), http://articles.cnn.com/2010-11-18/politics/house.bedbug.forum_1_bedbug-infestations-bedbug-expert-national-pest-management-association?_s=PM:POLITICS.

²¹ *20% Say News of Bedbugs Has Caused Them to Change Their Plans*, RASMUSSEN REP. (Sept. 2, 2010), http://www.rasmussenreports.com/public_content/lifestyle/general_lifestyle/august_2010/20_say_news_of_bedbugs_has_caused_them_to_change_their_plans [hereinafter *Survey*].

²² Steve Hargreaves, *Why We Can't Kill Bedbugs*, CNNMONEY (Nov. 6, 2010, 2:58 PM), http://money.cnn.com/2010/11/05/news/economy/bed_bug_cure/.

²³ JOINT STATEMENT, *supra* note 12. Bedbugs range from one to seven millimeters in length, *id.*; a typical pencil eraser is approximately seven millimeters long.

²⁴ *Bed Bug Information*, U.S. ENVTL. PROTECTION AGENCY, <http://www.epa.gov/pesticides/bedbugs/> (last updated Apr. 27, 2011).

²⁵ *Id.*

²⁶ JOINT STATEMENT, *supra* note 12.

²⁷ *Id.*

²⁸ *Id.*

known among bedbug survivors as “breakfast, lunch and dinner.”²⁹ In rare cases, victims experience anaphylaxis, a severe allergic reaction that affects the whole body.³⁰ The inconsistency of human reactions to bites, coupled with the bugs’ small size and expertise at hiding, make confirming the origin, extent, or even existence of an infestation quite difficult;³¹ this in turn can create evidentiary problems in legal proceedings.³²

Bedbugs typically live for months but can live for as long as a year without a meal.³³ Bedbugs breed quickly, with females laying eggs daily; a community can thus complete three to four generation cycles per year.³⁴ Bedbugs’ fast-breeding nature allows them to develop new resistances to pesticides quickly,³⁵ and means that just a few bugs can become a full-blown infestation in a matter of weeks.³⁶

Infestations are typically spread by human travel: when a traveler visits an infested location, bedbugs can hide in the traveler’s luggage, clothes, or any other belongings in which they can conceal themselves. The traveler then brings the bugs with her to the bugs’ new home.³⁷ Even used furniture can serve as transport for bedbugs concealed in upholstery or joints.³⁸ Bugs can also travel between rooms in a building through cracks or crevices in the wall;³⁹ multiunit apartment buildings thus provide a particularly fertile environment for infestations to

²⁹ E.g., Jasmine Moy, *How I Fought Bedbugs and Won*, THE AWL (Aug. 19, 2010), <http://www.theawl.com/2010/08/how-i-fought-bedbugs-and-won>.

³⁰ JOINT STATEMENT, *supra* note 12.

³¹ Inspections involve searching for the bugs themselves, shed exoskeletons, blood stains, and fecal spots on sheets and mattresses. *Id.*; see also NAT’L PEST MGMT. ASS’N, BEST MANAGEMENT PRACTICES FOR BED BUGS 6 (consumer ed. 2011), available at http://bedbugbmps.org/PDF/bed_bug_bmps_for_consumers_FINAL.pdf; Cara Buckley, *As the Dogs Sniff for Bedbugs, Some Homeowners Smell a Rat*, N.Y. TIMES, Nov. 12, 2010, at A1 (“Physical evidence is especially hard to see. A newly hatched bedbug is the size of a pen tip, and fecal droppings are the size of an ink dot.”). Pest control agents often train dogs to sniff for bedbugs, which some claim can detect infestations with ninety-eight percent accuracy, but that claim is the subject of controversy. Buckley, *supra*.

³² See *infra* Part II.C.

³³ JOINT STATEMENT, *supra* note 12.

³⁴ MICHAEL F. POTTER, UNIV. OF KY. COLL. OF AGRIC., BED BUGS (2008), available at <http://www.ca.uky.edu/entomology/entfacts/entfactpdf/ef636.pdf>.

³⁵ See Adler, *supra* note 12.

³⁶ Lisa Cheng, *How to Avoid Bedbugs While Home or Away*, FOX 12 OR. (Apr. 15, 2011, 3:28 PM), <http://www.kptv.com/story/14455469/how-to-avoid-bedbugs-while-home-or-away?clienttype=printable>.

³⁷ JOINT STATEMENT, *supra* note 12.

³⁸ Elizabeth Weise, *Portions of Bedbug Genome Sequenced*, USA TODAY (Jan. 23, 2011, 2:36 PM), <http://content.usatoday.com/communities/sciencefair/post/2011/01/bedbug-genome-sequenced/1>.

³⁹ POTTER, *supra* note 34.

spread.⁴⁰ Infestations also commonly occur in single-family homes and hotels due to the opportunities those places provide for access to sleeping warm-blooded victims, but infestations are not limited to places where people sleep⁴¹: bedbugs can infest any area in which humans spend time, and have also been found in office buildings, movie theaters, clothing stores, factories, and even airplanes,⁴² as well as iconic landmarks such as the Empire State Building and Lincoln Center for the Performing Arts.⁴³

There are a number of different approaches to eliminating infestations, including the use of pesticides, high-heat treatments, steam treatments, targeted vacuuming, and disposal of infested objects.⁴⁴ Pest control agents may ask tenants to reduce clutter and wash bed linens at high heats; landlords may be asked to seal cracks and crevices in walls.⁴⁵ No single method is universally effective, so pest control agents typically coordinate integrated treatment plans, which usually involve multiple visits by the agent and can span months.⁴⁶

Although bedbugs are not believed to transmit diseases, the negative effects of an infestation include physical harm (allergic reaction to bites), mental health problems (anxiety and insomnia), and economic costs (healthcare expenses, lost wages, reduced productivity, and exterminator costs).⁴⁷ Pest control bills alone can range from several hundred dollars for smaller infestations, to tens of thousands of dollars for extensive infestations.⁴⁸ Broader societal costs include potential impacts to the tourism, retail, and entertainment industries: tourists shy away from cities with reputations as bedbug hotspots, and members of the general public think twice about visiting public places such as department stores and movie theaters where they fear a bedbug left by someone else may crawl into the merchandise or the clothing they are wearing.⁴⁹

⁴⁰ Weise, *supra* note 38 (citing the Environmental Protection Agency and National Pest Association for the proposition that the majority of complaints in the past decade involved multiunit apartment buildings).

⁴¹ Murphy, *supra* note 4.

⁴² *Id.*

⁴³ Sara Kugler Frazier, *As Bedbugs Creep Out NYC, Tourists Crawl Away*, MSNBC.COM (Oct. 25, 2010, 9:09 AM), <http://www.msnbc.msn.com/id/39829901/ns/travel-news/>.

⁴⁴ NAT'L PEST MGMT. ASS'N, *supra* note 31, at 4, 10–13.

⁴⁵ *Id.* at 10.

⁴⁶ *See id.*

⁴⁷ JOINT STATEMENT, *supra* note 12.

⁴⁸ Murphy, *supra* note 4.

⁴⁹ *See* Frazier, *supra* note 43 (discussing the concern that fear of bedbugs will deter some tourists from visiting New York City and impact shopping and moviegoing); *Survey*, *supra* note

In the residential lease context, landlords and tenants often dispute who should bear the costs associated with an infestation because it is usually difficult to determine whether an infestation exists and where the bugs came from—and thus who is at “fault.”⁵⁰ These disputes have sometimes resulted in litigation under the common law doctrines of constructive eviction and implied warranty of habitability, and relevant state statutes.⁵¹

II. COMMON LAW RESPONSES TO LANDLORD-TENANT DISPUTES ARISING OUT OF BEDBUG INFESTATIONS

Although bedbugs can infest virtually any location where there are humans, multiunit apartment buildings provide particularly fertile environments due to the opportunities to spread to adjacent units and the frequent moves occasioned by temporary leases and tenant turnover.⁵² As a result, much of the litigation arising out of bedbug infestations has come in the landlord-tenant context.⁵³ In resolving suits between landlords and tenants involving bedbugs, courts applying the common law have employed the constructive eviction and implied warranty of habitability doctrines.⁵⁴ Although both doctrines recognize that tenants expect habitable premises when they enter into a lease, both also focus on fault when determining liability,⁵⁵ which is problematic in the bedbug context due to the evidentiary problems created by the bugs’ small size and clandestine nature.

In the early twentieth century, tenants sought to invoke constructive eviction as a defense against landlords’ actions for withheld rent.⁵⁶ An intermission in bedbug litigation followed in the latter part of the twentieth century, which coincided with bedbugs’ virtual disappear-

21 (finding that twenty percent of respondents had changed their plans about going to public places due to bedbug concerns). The fear that bedbugs will harm tourism is not unique to New York: concerns have been raised in rural areas such as New Hampshire and Vermont. *See supra* notes 17–18.

⁵⁰ *See infra* text accompanying note 101.

⁵¹ *See infra* Parts II, III.

⁵² *See* Murphy, *supra* note 4; Weise, *supra* note 38.

⁵³ Guests suing hotels is another common scenario. *See, e.g.,* Mathias v. Accor Econ. Lodging, Inc., 347 F.3d 672, 675 (7th Cir. 2003) (sustaining guest’s personal injury verdict for compensatory and punitive damages arising from hotel’s negligent handling of bedbug infestation, and noting potential battery claim).

⁵⁴ *E.g.,* Bender v. Green, 874 N.Y.S.2d 786, 791 (Civ. Ct. 2009) (applying the warranty of habitability doctrine); Streep v. Simpson, 141 N.Y.S. 863, 864 (App. Term 1913) (applying the constructive eviction doctrine).

⁵⁵ *See* Bender, 874 N.Y.S.2d at 791–92 (warranty of habitability); J. W. Cushman & Co. v. Rohl, 153 N.Y.S. 94, 95 (App. Term 1915) (constructive eviction).

⁵⁶ *See, e.g.,* Streep, 141 N.Y.S. at 863.

ance in the United States.⁵⁷ During that time, landlord-tenant law developed the implied warranty of habitability doctrine;⁵⁸ in the early twenty-first century, the typical pattern of litigation has been tenants using that doctrine as a defense against landlord suits for unpaid rent.⁵⁹

Both the constructive eviction doctrine and warranty of habitability doctrine incorporate contractual principles⁶⁰ and depart from the *caveat lessee* property law rule that limited tenants to suing for breaches of explicit terms in the lease.⁶¹ Rather than holding the tenant responsible for examining property and extracting express warranties from the landlord, as the *caveat lessee* principle did,⁶² the two doctrines both recognize that tenants expect habitable premises when they enter into residential leases.⁶³ These expectations create mutually dependent covenants—on the part of the landlord, to provide habitable premises; on the part of the tenant, to pay rent.⁶⁴ Such an approach recognizes that the historical, agrarian-based rationales behind the *caveat lessee* principle are inapplicable to the reality of the modern urban setting of most contemporary residential leases. Urban tenants are less likely to be able to repair defects in the unit than were self-sufficient farmers at the time that the *caveat lessee* doctrine was

⁵⁷ See *supra* notes 12–14 and accompanying text.

⁵⁸ See *infra* Part II.B.

⁵⁹ See, e.g., *Bender*, 874 N.Y.S.2d at 787. The majority of both constructive eviction and implied warranty of habitability cases come from New York, which—as the largest city in the country—is the epicenter of the bedbug crisis. See Jon Hurdle, *New York Most Bedbug Infested U.S. City: Survey*, REUTERS, Aug. 24, 2010, available at <http://www.reuters.com/article/idUSTRE67N5OI20100824>.

⁶⁰ See Tom G. Geurts, *The Historical Development of the Lease in Residential Real Estate*, 32 REAL EST. L.J. 356, 371 (2004).

⁶¹ See JESSE DUKEMINIER ET AL., PROPERTY 421 (6th ed. 2006); Barbara Jo Smith, Note, *Tenants in Search of Parity with Consumers: Creating a Reasonable Expectations Warranty*, 72 WASH. U. L.Q. 475, 477–78 (1994). “*Caveat lessee*” means “lessee beware,” and stands for the proposition that the tenant must take the property “as is,” effectively requiring the tenant to inspect the premises before signing the lease, and then repair and maintain the premises herself thereafter. See Smith, *supra*, at 477–78.

⁶² Smith, *supra* note 61, at 477–78.

⁶³ See *id.* at 477–78, 484.

⁶⁴ See DUKEMINIER ET AL., *supra* note 61, at 427; see also *Hancock Constr. Co. v. Basinger*, 198 N.Y.S. 614, 616 (App. Term 1923) (“The defendant hired this apartment to live in as a home, and he had every right to expect that he would be able to live there in peace and quiet, and not be subjected to the disgusting experience of being overwhelmed by an army of vermin, which made it impossible for him and his family to sleep. . . . Surely an innocent tenant has a right to presume that, when he enters into a lease, he will get a dwelling fit to live in, and that he will not have to live in a place infested with vermin so numerous that they cannot be exterminated.”); *Katz v. Comisar*, 28 Ohio N.P. (n.s.) 10, 11 (Ct. C.P., Hamilton Cnty. 1930) (approving *Hancock* language).

developed, and owners of typical multiunit apartment buildings today have more bargaining power in comparison to individual renters than landlords did over tenant farmers in the past.⁶⁵ These considerations led courts to place more responsibility on landlords to maintain the leased premises and provided tenants with greater judicial protection.⁶⁶

A. *Constructive Eviction*

Under the constructive eviction doctrine, a landlord's failure to abate substantial nuisances can result in the constructive eviction of the tenant, which would terminate the lease and liberate the tenant from paying rent for the remainder of the lease term.⁶⁷ To successfully advance a constructive eviction theory, some jurisdictions require the tenant to physically abandon the premises within a reasonable time after the defect manifests itself.⁶⁸

Some courts have held that bedbug infestations amounted to such a substantial nuisance, but the availability of a constructive eviction defense depends on a number of factors: whether the tenant notified the landlord of the infestation,⁶⁹ whether either party attempted to deal with the infestation and whether the other party cooperated,⁷⁰ whether the extent of the infestation had an effect on the tenant's use

⁶⁵ See Smith, *supra* note 61, at 483–84.

⁶⁶ See *id.*

⁶⁷ DUKEMINIER ET AL., *supra* note 61, at 427–28.

⁶⁸ See *id.* at 429; see also, e.g., Bass v. Wollitz, 384 So. 2d 704, 705, 708–09 (Fla. Dist. Ct. App. 1980). This can place a substantial burden on the tenant in moving all her possessions and finding alternative accommodations, and is particularly problematic in the bedbug context when an abandoning tenant can take the infestation with her.

⁶⁹ See Wainwright v. Helmer, 193 N.Y.S. 653, 654 (App. Term 1922) (tenant only made complaint when leaving premises); J. W. Cushman & Co. v. Rohl, 153 N.Y.S. 94, 94–95 (App. Term 1915) (tenant did not “seriously . . . note[]” the infestation until three months after he had left); Streep v. Simpson, 141 N.Y.S. 863, 864 (App. Term 1913) (tenant notified landlord “[s]hortly after having first observed” the bugs).

⁷⁰ Delamater v. Foreman, 239 N.W. 148, 149 (Minn. 1931) (tenants’ “vigilant efforts” included using twenty gallons of gasoline to combat the bugs); Hancock Constr. Co. v. Bassinger, 198 N.Y.S. 614, 615 (App. Term 1923) (landlord employed exterminators who made “numerous attempts” to eradicate the bugs, and tenants applied pesticides themselves in between visits); Michtom v. Miller, 178 N.Y.S. 395, 395–96 (App. Term 1919) (landlord employed exterminator but infestation persisted); Streep, 141 N.Y.S. at 864–65 (landlord, tenants, exterminator, and “painters and decorators” all tried to eradicate the bugs).

of the premises,⁷¹ and which party was responsible for the infestation.⁷²

For example, in *Streep v. Simpson*,⁷³ a New York court found that the tenant was constructively evicted when a bedbug infestation apparently spread from an adjacent apartment to the tenant's bedroom, dining room, parlor, bathroom, and closets.⁷⁴ The tenant notified the landlord shortly after he first discovered the bugs, and the landlord employed an exterminator whose efforts proved unsuccessful; thereafter the tenant abandoned the premises.⁷⁵ In ruling that the landlord's failure to eliminate the infestation constructively evicted the tenant, the *Streep* court emphasized the tenant's lack of control over the adjacent unit from which the bugs originated.⁷⁶

By contrast, another panel of the same court did not find constructive eviction in *Michtom v. Miller*.⁷⁷ When the tenant notified the landlord that he had found two bugs, the landlord attempted treatment, but the tenant continued to find bedbug larvae and blood stains on his sheets.⁷⁸ Calling the infestation a mere "annoyance," the court ruled in favor of the landlord and ordered the tenant to pay outstanding back rent.⁷⁹

⁷¹ *Delamater*, 239 N.W. at 149 (the "large numbers" of bedbugs "caused the greatest discomfort and distress to plaintiff and his family"); *Hancock*, 198 N.Y.S. at 615–16 (bedbugs "so numerous they [could not] be exterminated"); *Michtom*, 178 N.Y.S. at 396 (presence of bedbugs amounted to mere "annoyance" when tenant only found two bugs and landlord only found bloodstains and larva after tenant vacated); *Rohl*, 153 N.Y.S. at 95 (tenant remained in apartment despite infestation); *Streep*, 141 N.Y.S. at 864 (bedbugs were an "insufferable nuisance"); *Jacobs v. Morand*, 110 N.Y.S. 208, 208–09 (App. Term 1908) (premises "overrun" by bedbugs).

⁷² *Delamater*, 239 N.W. at 149 (landlord at fault when infestation apparently originated in another apartment); *Rohl*, 153 N.Y.S. at 94 ("It does not appear in the case that the presence of this vermin was due to any act of the landlord, or that it originated in any part of the premises under control of the landlord."); *Streep*, 141 N.Y.S. at 864–65 (bedbugs spread from the apartment below).

⁷³ *Streep v. Simpson*, 141 N.Y.S. 863 (App. Term 1913).

⁷⁴ *See id.* at 863–65.

⁷⁵ *See id.* at 863–64.

⁷⁶ *See id.* at 864–65. In the words of a Minnesota court making the same point:

There is much in and about such an apartment building far beyond the control of a tenant in one of the apartments. He cannot interfere with the walls, partitions, floors, and ceilings wherein the verminous enemy may propagate, nor can he interfere with the cracks and openings affording an opportunity of access from such walls, partitions, floors, and ceilings into the apartment.

Delamater, 239 N.W. at 149.

⁷⁷ *Michtom v. Miller*, 178 N.Y.S. 395 (App. Term 1919).

⁷⁸ *See id.* at 395–96.

⁷⁹ *Id.* at 396.

Although in the same jurisdiction and faced with the same basic scenario—an apartment infested with bedbugs which treatment efforts proved unable to eliminate—the *Streep* and *Michtom* courts reached opposite results. In doing so, the courts emphasized different factors: in *Streep*, the court relied on the tenant's prompt notification of the landlord and the infestation's apparent origin in an adjacent unit;⁸⁰ in *Michtom*, the court focused on the extent of the infestation.⁸¹ The contrast between the two cases illustrates the unpredictability of applying the constructive eviction doctrine, even in the same jurisdiction. Without a firm rule, courts are free to weigh the various factors as they see fit, and landlords and tenants are left with little guidance in ordering their affairs to avoid liability for infestations. This uncertainty is magnified by the different constructive eviction rules across jurisdictions.⁸²

B. *Implied Warranty of Habitability*

The implied warranty of habitability doctrine shares constructive eviction's emphasis on the tenant's expectations when entering into a lease: courts applying the former doctrine interpret residential leases to contain an implied warranty that the premises will be habitable.⁸³ When the conditions in the residential unit jeopardize the tenant's health and safety, the unit is uninhabitable and the landlord is in breach, and the tenant may either use the breach as a defense in the landlord's action to recover back rent, affirmatively attempt to recover damages, or rescind or reform the lease.⁸⁴ Parallel to the common law development of the implied warranty of habitability, many local governments passed housing codes that codified the implied warranty in explicit terms.⁸⁵ In such jurisdictions, a violation of a local housing code is relevant to but not necessarily dispositive of the breach of warranty issue.⁸⁶ Some jurisdictions have gone a step further and codified the implied warranty of habitability itself.⁸⁷

The implied warranty of habitability has not developed uniformly across the country. For example, some jurisdictions require the tenant

⁸⁰ *Streep*, 141 N.Y.S. at 864–65.

⁸¹ *Michtom*, 178 N.Y.S. at 396.

⁸² For instance, some jurisdictions require the tenant to physically abandon the premises. See *supra* notes 67–68 and accompanying text.

⁸³ See Geurts, *supra* note 60, at 366–67.

⁸⁴ DUKEMINIER ET AL., *supra* note 61, at 437–38.

⁸⁵ Geurts, *supra* note 60, at 371–72 & n.106.

⁸⁶ DUKEMINIER ET AL., *supra* note 61, at 437.

⁸⁷ See, e.g., ME. REV. STAT. ANN. tit. 14, § 6021 (Supp. 2010).

to adhere to particular notification requirements before claiming the benefits of the warranty;⁸⁸ others limit the warranty's applicability to areas with high population densities;⁸⁹ still others allow the warranty to be waived for multiple-family buildings.⁹⁰ Many jurisdictions limit the warranty's coverage to conditions affecting the life, health, or safety of the tenants, but not all do.⁹¹ A small number of jurisdictions do not even recognize the warranty at all.⁹²

In cases in which a tenant raises a landlord's breach of the implied warranty of habitability as a defense to a landlord's suit for unpaid rent, jurisdictions are further divided over how the reduction in rent should be calculated: some award the difference between the "fair rental value as warranted" and the unit's actual value in its uninhabitable state;⁹³ others calculate the difference between the rent agreed upon in the lease and the fair rental value;⁹⁴ still others reduce the agreed rent by the percentage of the "lease-value lost."⁹⁵

In recent years, courts applying the implied warranty of habitability doctrine to bedbug cases have looked to many of the same factors that determine whether a constructive eviction has occurred. In order to establish whether an infestation renders a unit uninhabitable and amounts to a breach of the warranty, courts have considered whether the tenant gave the landlord reasonable notice,⁹⁶ which party is at fault,⁹⁷ the extent of the infestation and its effect on the tenant's use of the premises,⁹⁸ and the efforts of landlords to eliminate the infestation.⁹⁹

For instance, one court awarded a partial rent abatement under the implied warranty of habitability when the infestation seemed to

⁸⁸ See, e.g., UTAH CODE ANN. § 57-22-6(2) (LexisNexis 2010).

⁸⁹ See, e.g., TENN. CODE ANN. § 66-28-102(a) (2004).

⁹⁰ See, e.g., MONT. CODE ANN. § 70-24-303(4) (2009); see also Smith, *supra* note 61, at 485–90 (discussing implied warranties of habitability across jurisdictions).

⁹¹ Smith, *supra* note 61, at 489.

⁹² Alabama, Arkansas, Colorado, and Wyoming still follow the rule of *caveat lessee*. *Id.* at 486–87; see also DUKEMINIER ET AL., *supra* note 61, at 437.

⁹³ See *Hilder v. St. Peter*, 478 A.2d 202, 209 (Vt. 1984).

⁹⁴ See *Kline v. Burns*, 276 A.2d 248, 252 (N.H. 1971).

⁹⁵ DUKEMINIER ET AL., *supra* note 61, at 438.

⁹⁶ *Kolb v. DeVille I Props., LLC*, 326 S.W.3d 896, 901 (Mo. Ct. App. 2010).

⁹⁷ *Bender v. Green*, 874 N.Y.S.2d 786, 791–92 (Civ. Ct. 2009) (discussing but declining to rely on fault as a determinative factor).

⁹⁸ *Ludlow Props., LLC v. Young*, 780 N.Y.S.2d 853, 857 (Civ. Ct. 2004) (“[T]he Court looks to what essential functions or uses [the tenant] still used the Premises notwithstanding the bed bugs.”).

⁹⁹ *Kolb*, 326 S.W.3d at 902 (landlord only had apartment sprayed with pesticides once); *Ludlow*, 780 N.Y.S.2d at 855–56 (landlord tried repeatedly to exterminate).

have originated elsewhere in a multiunit building, the tenant was bit hundreds of times and had difficulty sleeping, but continued to eat, work, and bathe on the premises, and the landlord employed an exterminator who sprayed pesticides and sealed cracks but did not treat the entire building.¹⁰⁰ As in the *Streep* constructive eviction case, the court noted that the infestation likely originated in an adjacent unit. Also, like the *Michtom* court, the court evaluated the extent of the infestation. Thus, although the implied warranty of habitability rests on distinct rationales and created new remedies for tenants, the application of the doctrine to bedbug infestations substantially mirrored that of the earlier constructive eviction doctrine, with many of the same virtues and defects.

C. *Where the Common Law Falls Short*

Although both the constructive eviction and implied warranty of habitability doctrines recognize that tenants have expectations when they enter into a lease that include a living environment not made uninhabitable by bedbugs, and that landlords have control over parts of the building external to the premises, both doctrines are problematic to the extent that they impose liability according to a determination of fault. Bedbugs' small size and ability to conceal themselves make it very difficult to detect infestations, let alone determine where they originated or who is responsible.¹⁰¹ Due to bedbugs' national and even global prevalence,¹⁰² everyone who leaves their home bears the risk of unwittingly picking bedbugs up while traveling or entertaining visitors, without being negligent in the slightest.

In *Bender v. Green*,¹⁰³ a New York trial court recognized this reality and refused to allocate costs arising from an infestation on the basis of fault.¹⁰⁴ The court held that the landlord breached the warranty of habitability despite finding that the tenants likely introduced the bedbugs themselves (as their previous apartment was infested and they frequently traveled).¹⁰⁵ This did not amount to "misconduct" and did not excuse the landlord's failure to maintain the premises in a habitable condition, because "any individual venturing out into the world

¹⁰⁰ *Ludlow*, 780 N.Y.S.2d at 856–57.

¹⁰¹ See *supra* note 31 and accompanying text.

¹⁰² Lynn Bruno, *A Real Nightmare: Bedbugs Biting All Over U.S.*, MSNBC.COM (July 27, 2010, 7:18 PM), http://www.msnbc.msn.com/id/38382427/ns/health-health_care/t/real-nightmare-bedbugs-biting-all-over-us/.

¹⁰³ *Bender v. Green*, 874 N.Y.S.2d 786 (Civ. Ct. 2009).

¹⁰⁴ *Id.* at 791–92.

¹⁰⁵ *Id.*

today, particularly an individual that travels, risks bringing bedbugs home.”¹⁰⁶ The *Bender* court also appreciated the unique evidentiary difficulties posed by bedbugs when it noted the lack of evidence on this point beyond the tenant’s own testimony.¹⁰⁷ Courts will often be left with little more than testimony in bedbug cases as the bugs are difficult to capture themselves, leave behind few traces, and their human victims’ reactions to bite marks vary.¹⁰⁸

The *Bender* court is an outlier, unfortunately. The traditional application of both doctrines suffers from an impractical focus on fault that has the potential to prolong litigation, thus allowing infestations to worsen or spread. Focusing on the extent of the infestation is similarly problematic, as it is also hard to prove.¹⁰⁹ Furthermore, the extent of an infestation is not static and can change significantly during the course of litigation due to bedbugs’ short breeding cycle.¹¹⁰ As a result, landlords and tenants with no recourse other than the common law must bring their bedbug dispute before courts faced with the often futile task of making factual findings based on almost no evidence beyond the testimony of interested parties.¹¹¹

In addition, the varied development of both doctrines across jurisdictions—particularly the uneven application of the implied warranty of habitability—reduces certainty as to what the responsibilities of landlords and tenants are with respect to bedbug infestations. Uncertainty breeds both conflict and inaction: conflict because the parties argue over who is responsible, and inaction because neither party knows for certain who will be held liable. Beyond the varied development of the two doctrines, the inherent unpredictability of a common law approach determined primarily by case-specific facts further contributes to the uncertainty and discourages prompt treatment of infestations. When fast-breeding bedbugs can quickly overrun an apartment or entire building if left undisturbed, infestations are likely to grow while the parties fight over liability in court. As a result, the bedbug problem will worsen, more people will be exposed to infesta-

¹⁰⁶ *Id.* at 792.

¹⁰⁷ *Id.*

¹⁰⁸ *See supra* notes 23–31 and accompanying text.

¹⁰⁹ *See supra* notes 23–31 and accompanying text.

¹¹⁰ *See supra* note 34 and accompanying text.

¹¹¹ *See supra* note 31 and accompanying text; *see also* *Delamater v. Foreman*, 239 N.W. 148, 149 (Minn. 1931) (characterizing evidence of source of bedbugs as “unsatisfactory”); *J. W. Cushman & Co. v. Rohl*, 153 N.Y.S. 94, 95 (App. Term 1915) (noting “sharp conflict in evidence as to the actual conditions existing in the apartment”).

tions and the attendant negative health, psychological, and financial effects, and society as a whole will suffer.

III. A STATUTORY RESPONSE TO BEDBUGS: THE 2010 MAINE STATUTE

States have taken a number of different statutory approaches to address the problem of bedbug infestations. Some laws place an affirmative duty on hotels to exterminate bugs;¹¹² others include bedbugs in definitions of “public health nuisances.”¹¹³ As for residential leases, a Florida statute requires landlords to make “reasonable provisions” to exterminate bedbugs (without further defining what constitutes such a provision),¹¹⁴ and a recently passed New York City municipal rule requires landlords to provide the building’s bedbug infestation history covering the previous year.¹¹⁵

The Maine Legislature enacted the most comprehensive bedbug statute to date in 2010.¹¹⁶ The statute incorporates the state’s statutory implied warranty of habitability¹¹⁷ and further defines landlord and tenant duties when a bedbug infestation is discovered.¹¹⁸ It requires landlords to pay the cost of pest control treatments without a showing of fault, which promotes the efficient resolution of disputes and prompt treatment of infestations.¹¹⁹ However, a provision requir-

¹¹² See NEV. REV. STAT. § 447.030 (2009) (“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.”); OHIO REV. CODE ANN. § 3731.13 (LexisNexis 2005) (“All bedding used in any hotel must be thoroughly aired, disinfected, and kept clean. No bedding which is infested with vermin or bedbugs shall be used on any bed in any hotel. All floors, carpets, and equipment in hotels, and all walls and ceilings shall be kept in sanitary condition.”); W. VA. CODE ANN. § 16-6-16 (LexisNexis 2006) (“In every hotel, any room infected with vermin or bedbugs shall be fumigated, disinfected and renovated until said vermin or bedbugs are extirpated.”).

¹¹³ ARIZ. REV. STAT. ANN. § 36-601(A)(7) (2009) (identifying the “presence of ectoparasites such as bedbugs, lice, mites and others in any place where sleeping accommodations are offered to the public” as one of the “specifically declared public nuisances dangerous to the public health”); TEX. HEALTH & SAFETY CODE ANN. § 341.011(10) (West 2010) (identifying “the presence of ectoparasites, including bedbugs, lice, and mites, suspected to be disease carriers in a place in which sleeping accommodations are offered to the public” as a “public health nuisance”). Still other laws address the presence of bedbugs in work camps, IOWA CODE § 138.13(10) (2007), and railroad cars, 610 ILL. COMP. STAT. 85/2-3 (2006).

¹¹⁴ FLA. STAT. ANN. § 83.51(2) (West 2004).

¹¹⁵ N.Y. CITY ADMIN. CODE § 27-2018.1 (Supp. I 2011).

¹¹⁶ ME. REV. STAT. tit. 14, § 6021-A (Supp. 2010).

¹¹⁷ *Id.* § 6021(2).

¹¹⁸ *Id.* § 6021-A.

¹¹⁹ *Id.* § 6021-A(2)(C).

ing landlords to inspect the premises themselves¹²⁰ and a provision absolutely prohibiting the rental of infested apartments¹²¹ leave room for improvement, as explained below.

The result of the recommendations of a working group charged by the legislature to examine landlord-tenant issues,¹²² the Maine bedbug statute reflects a consensus among tenant advocates, landlord organization representatives, and state government agencies on how best to define tenants' and landlords' "responsibilities so that the problem can be addressed as quickly and as thoroughly as possible."¹²³ The bedbug language was in fact initially drafted jointly by an apartment organization representative and a tenant advocate.¹²⁴

The working group identified and sought to address a number of issues specific to bedbug infestations in the context of multiunit apartment buildings. The group specifically recognized the difficulty in determining fault and allocating responsibility for infestations.¹²⁵ It also noted the problems created by tenant noncompliance with treatment, such as not reporting the discovery of an infestation, not cleaning clutter away (in which the bugs can hide), or not doing laundry at high temperatures to kill bugs and eggs in sheets.¹²⁶ Similarly, the group noted potential landlord stonewalling, including refusing to pay for treatment or only treating one unit in a multiunit building.¹²⁷ The working group also appreciated the need for quick resolution of any disputes arising out of an infestation, so that inaction would not exacerbate the problem.¹²⁸ The group's resulting recommendations were introduced intact in the Maine Legislature,¹²⁹ and the bedbug language was passed with only minor amendments.¹³⁰

¹²⁰ *Id.* § 6021-A(2)(A).

¹²¹ *Id.* § 6021-A(2)(E).

¹²² To Create a Working Group to Study Landlord and Tenant Issues, ch. 137, 2009 Me. Acts 1464.

¹²³ WORKING GRP. TO STUDY LANDLORD AND TENANT ISSUES, *supra* note 19, at 2, 5, 7.

¹²⁴ *Id.* at 37.

¹²⁵ *Id.* at 7.

¹²⁶ *Id.* at 33.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ H.R. 1278, 124th Leg., 2d Reg. Sess. (Me. 2010) (as referred to H. Comm. on Legal & Veterans Affairs, Feb. 23, 2010).

¹³⁰ *Id.* (enacted). Amendments clarified marginal issues: that the pest control agent contacted by the landlord must have liability insurance, that the landlord must disclose the tenant's cost of compliance for inspection and treatment, and that the landlord must notify the tenant of the reasons for and scope of the requested access to the premises. *See id.* (as amended, Mar. 18, 2010). Another postenactment amendment limited the "reasonable assistance" landlords are

The statute contains three main provisions: landlord duties, tenant duties, and remedies.¹³¹ Under the statute, landlords are required to inspect the unit if notified by the tenant of a potential infestation, to employ a pest control agent if an infestation exists, and to “take reasonable measures to effectively identify and treat the bedbug infestation as determined by [the] pest control agent.”¹³² Similar to the New York City law, the Maine bedbug statute mandates that landlords disclose the existence of an infestation in adjacent units; or, upon request by potential or current tenants, the landlord must disclose the last date a unit was inspected for infestations.¹³³ But the Maine statute goes further by absolutely prohibiting a landlord from offering to rent a unit that the landlord “knows or suspects is infested with bedbugs.”¹³⁴

If a landlord fails to comply, the statute declares her to have failed to “repair or remedy a condition that endangers or materially impairs the health or safety of a tenant” and allows the tenant to assert a claim under Maine’s implied warranty of habitability statute.¹³⁵ This makes failure to comply with the bedbug statute a per se violation of the warranty.¹³⁶ Under Maine’s implied warranty of habitability statute, the court is then empowered to exercise its discretion and issue an injunction mandating that the landlord treat the infestation, or to order that the tenant receive a rebate for payments made in excess of the fair use value of the premises in light of the infestation.¹³⁷ Independently, the bedbug statute renders noncompliant landlords liable for the greater of \$250 or “actual damages.”¹³⁸

Tenants are obligated to “promptly notify” landlords of a suspected infestation,¹³⁹ to allow landlords and pest control agents access to the unit for inspection and treatment with certain limitations,¹⁴⁰ and

required to give tenants in complying with the statute. H.R. 889, 125th Leg., 1st Reg. Sess. (Me. 2011).

¹³¹ ME. REV. STAT. tit. 14, § 6021-A (Supp. 2010).

¹³² *Id.* § 6021-A(2)(A)–(C).

¹³³ Compare *id.* § 6021-A(2)(D), with N.Y. CITY ADMIN. CODE § 27-2018.1 (Supp. I 2011).

¹³⁴ ME. REV. STAT. tit. 14, § 6021-A(2)(E).

¹³⁵ *Id.* § 6021-A(4)(A). The statutory warranty of habitability is codified at section 6021 of title 14.

¹³⁶ See *id.* § 6021-A(4)(A).

¹³⁷ See *id.* § 6021(4)(A)–(B).

¹³⁸ *Id.* § 6021-A(4)(B).

¹³⁹ *Id.* § 6021-A(3)(A).

¹⁴⁰ Section 6021-A(3)(B) provides:

Upon receiving reasonable notice as set forth in section 6025, including reasons for and scope of the request for access to the premises, a tenant shall grant the landlord of the dwelling unit, the landlord’s agent or the landlord’s pest control agent and its

to cooperate and assist with the “reasonable measures” to exterminate and control the infestation, as determined by the landlord and pest control agent.¹⁴¹ Landlords must offer to provide “reasonable assistance” to tenants who are unable to comply, subject to a “reasonable repayment schedule.”¹⁴² If a tenant nevertheless “unreasonably” fails to comply or provide access, a landlord may request a temporary order granting the landlord access or requiring the tenant to comply.¹⁴³

The Maine statute is by far the most comprehensive attempt to establish a legal standard for allocating liability for bedbug infestations, in any context. As such, it goes a long way toward establishing certain and specific duties upon landlords and tenants, which will inform their actions. Moreover, the participation of both landlord and tenant advocates in its drafting lends the statute legitimacy: representatives of both stakeholder groups were satisfied enough to recommend it to the Maine Legislature.¹⁴⁴

Most important, the Maine bedbug statute allocates the costs of treatment primarily to landlords without a showing of fault. This avoids costly and time-consuming litigation that threatens to allow infestations to grow, and enables the landlord to spread the treatment costs over tenants and time, as is discussed in more detail below.¹⁴⁵

The statute is not perfect, however. Landlords should not be the ones determining whether an infestation exists in the first instance.¹⁴⁶ Landlords are not entomologists and have an incentive to conclude that no infestation exists so that they can avoid paying for treatment. Once either the tenant or landlord suspects an infestation, a pest control agent should be contacted immediately, as a prompt and professional inspection makes treatment of the fast-breeding bugs significantly easier. Pest control agents—although they also have

employees access to the unit for purposes of an inspection for or control of the infestation of bedbugs. The initial inspection may include only a visual inspection and manual inspection of the tenant's bedding and upholstered furniture. Employees of the pest control agent may inspect items other than bedding and upholstered furniture when such an inspection is considered reasonable by the pest control agent. If the pest control agent finds bedbugs in the dwelling unit or in an adjoining unit, the pest control agent may have additional access to the tenant's personal belongings as determined reasonable by the pest control agent.

Id. § 6021-A(3)(B).

¹⁴¹ *Id.* § 6021-A(3)(C).

¹⁴² *Id.* § 6021-A(2)(F).

¹⁴³ *Id.* § 6021-A(4)(C).

¹⁴⁴ See *supra* notes 122–30 and accompanying text.

¹⁴⁵ See *infra* Part IV.C.

¹⁴⁶ See ME. REV. STAT. tit. 14, § 6021-A(2)(A).

some financial stake in finding an infestation as they will be paid for their services if one exists—are the most knowledgeable about bedbug biology and behavior and should be the ones to determine whether a unit is infested.

Furthermore, absolutely prohibiting landlords from renting an infested unit¹⁴⁷ is an extreme and unnecessary provision. It could potentially cripple a landlord if the infestation spreads throughout the building and she cannot rent out any unit. A landlord may employ a pest control agent and fully follow the statutory requirements, yet the infestation may not be eliminated for some time. Landlords should not be deprived of rental income, nor willing tenants of a lease, in such a situation. If tenants are informed of an infestation and decide to enter into the lease anyway, they have assumed the risk. If they decide that the apartment will be habitable even with bedbugs, then their expectations of renting a habitable apartment cannot be frustrated. Tenants can only assume the risk of living in an infested apartment if they are aware of the infestation, however, so landlords should have to provide infestation history even if the tenants did not request one. Furthermore, when an infestation is discovered, the landlord should be required to notify the tenants in adjacent units so that they may take precautions to prevent the bugs from entering their home (e.g., sealing cracks).¹⁴⁸

Completely barring landlords from renting infested units does not significantly prevent the spread of infestations, in any event. Once the old tenant has made the move—which the Maine statute does not prohibit—new tenants are not necessarily any more likely to further spread the infestation than the previous tenants would have been had they remained in the unit. Because bedbugs generally spread through human travel,¹⁴⁹ the primary risk of the infestation spreading due to tenant turnover comes when the old tenant leaves the infested unit with her potentially infested belongings. Furthermore, keeping the unit vacant will not help control the infestation because the bugs can live for up to a year without food¹⁵⁰ and could travel to another part of the building through the apartment's walls at any point.¹⁵¹

Finally, the law does not prohibit landlords or tenants from bringing subsequent suits under different legal theories. Although the stat-

¹⁴⁷ *Id.* § 6021-A(2)(E).

¹⁴⁸ See NAT'L PEST MGMT. ASS'N, *supra* note 31, at 10.

¹⁴⁹ See *supra* notes 37–38 and accompanying text.

¹⁵⁰ See *supra* note 33 and accompanying text.

¹⁵¹ See *supra* note 39 and accompanying text.

ute's no-fault allocation of costs on the landlord¹⁵² helps to avoid costly and time-consuming litigation, the statute could accomplish this goal even more effectively if it limited the number of suits arising from the same infestation. On the whole, the Maine bedbug law is laudable for its comprehensiveness, but it could be improved.

IV. PROPOSED MODEL STATUTE

The bedbug crisis demands a statutory solution. Although the constructive eviction and implied warranty of habitability doctrines provide some guidance to courts, tenants, and landlords, the doctrines are not sufficiently tailored to meet the peculiar issues presented by bedbug infestations. Bedbugs are unique among pests and vermin in their ability to lay siege to the most intimate area of a person's home—the bedroom—and turn “sleep into a hellish experience.”¹⁵³ Furthermore, as bedbugs overwhelm cities and spread across the nation, the scope of the ever-worsening problem renders it inappropriate for case-by-case resolution by our often-sluggish judicial system, especially when prolonged landlord-tenant conflict merely allows the infestation to grow and potentially spread.

A statute can specifically address the special issues created by bedbugs and clearly establish the duties of landlords and tenants. Defining duties and responsibilities consistently in statutory language avoids variations in the local resolution of bedbug disputes created by uneven development of the implied warranty of habitability.¹⁵⁴ Uniform statutory language also provides a more certain standard for property owners and renters to rely and act upon than case-by-case adjudication under common law rules; this facilitates prompt and effective treatment and prevents the spread of infestations. The Maine statute accomplishes many of these goals and also avoids the evidentiary problems that plague the common law by allocating costs without a determination of fault.¹⁵⁵ However, the Maine statute's inappropriate inspection provision, unnecessary ban on renting infested units, and failure to preclude future suits leave room for improvement.

¹⁵² ME. REV. STAT. tit. 14, § 6021-A(4)(B).

¹⁵³ *Ludlow Props., LLC v. Young*, 780 N.Y.S.2d 853, 856 (Civ. Ct. 2004) (“[Bedbugs are unique in] 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 abatements for ‘vermin’ (i.e. mice and roaches) are of limited precedential value.”).

¹⁵⁴ See *DUKEMINIER ET AL.*, *supra* note 61, at 437; *Smith*, *supra* note 61, at 476, 486–87.

¹⁵⁵ See *supra* notes 101–08 and accompanying text.

Although the proposed model provisions below provide clear statutory responsibilities that avoid the uncertainty and inappropriate reliance on fault of the constructive eviction and implied warranty of habitability doctrines, the proposed statute does not radically depart from existing common law rules. In fact, it arguably codifies constructive eviction and implied warranty of habitability principles in its core provision that allocates the treatment costs to landlords. This provision comports with modern property law's rejection of *caveat lessee* and recognizes that landlords have control over the premises to an extent that tenants do not. It also recognizes that tenants have expectations when entering into a lease that create an implied warranty on the part of landlords to take steps to maintain the premises in a habitable condition.¹⁵⁶ These common law principles cut in favor of requiring landlords to pay costs arising from bedbug infestations.

A. *Provisions*

Accordingly, states should adopt legislation consistent with the following provisions:

Duties of Landlords and Tenants:

Notification. Tenants must promptly notify landlords of suspected infestations. Landlords must in turn notify tenants in adjacent units.

Inspection. Upon receiving notification from tenants, landlords must promptly arrange for a pest control agent to inspect the premises.

Access. Tenants must provide access to landlords and pest control agents for inspections and treatments, and landlords must provide forty-eight hour advanced notice to tenants when access will be required.

Compliance. Tenants must comply with reasonable measures to assist in extermination efforts as determined by the pest control agent.

Disclosure. Landlords must provide an infestation history for the past year if there has been an infestation during that period, without the tenant affirmatively requesting one. Landlords are not barred from renting currently or recently infested units if they provide the full infestation history and the tenant signs a document affirmatively assuming the risk. A tenant signing such a document does

¹⁵⁶ See *supra* notes 60–66 and accompanying text.

not excuse a landlord from complying with the other provisions herein.

Allocation of Costs. Landlords must pay treatment costs without a finding of fault. This provision does not apply to rent-controlled buildings.

Claim Preclusion:

Parties seeking remedies under the statute are precluded from bringing claims under different causes of action in the future, with an exception for gross negligence suits.

Mediation:

Landlord-tenant disputes arising from one party's principled refusal to use pesticides or employ other pest control methods should be resolved through court-facilitated mediation.

B. Duties of Landlords and Tenants: Notification, Inspection, Access, and Compliance

As bedbugs can breed quickly and their population can grow exponentially,¹⁵⁷ efficient and effective treatment of infestations demands that steps be taken to control the bugs as quickly as possible. Tenants who live on the premises are the most likely to discover signs of bedbugs and therefore should be required to promptly notify the landlord when they suspect an infestation so that the landlord may contact a pest control agent. Landlords should in turn notify other tenants when an infestation is suspected so that they may take precautionary steps, such as sealing cracks and clearing clutter.

Just as prompt notice is essential, inspection by a professional pest control agent is also necessary to control infestations. As discussed above, landlords are unlikely to be either competent or disinterested when it comes to determining whether a bedbug infestation exists.¹⁵⁸ Landlords should therefore contact pest control agents promptly upon notification from a tenant.

After inspecting the premises and concluding that there is indeed an infestation, pest control agents must be able to enter the premises in order to treat the infestation. The proposed forty-eight hour advance notice provision assuages tenant privacy concerns by preventing landlords or pest control agents from barging into a private residence unannounced.

¹⁵⁷ See *supra* note 34 and accompanying text.

¹⁵⁸ See *supra* note 146 and accompanying text.

Once the pest control agent begins executing a treatment plan, tenants need to comply with reasonable measures to ensure its success. Such reasonable measures include, but are not limited to, washing laundry, reducing clutter, and rearranging furniture. Echoing the Maine statute,¹⁵⁹ this standard should be left flexible enough to cover other activities that are “reasonable,” in recognition that there is no single fool-proof method to combat the bugs, that different situations may call for different treatment methods, and that these methods may change over time.

C. No-Fault Cost Allocation on Landlords and Claim Preclusion

Although landlords must bear the initial burden of treatment costs, which can be significant,¹⁶⁰ they are able to spread these costs in a way that tenants cannot. If a landlord owns multiple units or multiple buildings, she could marginally raise the rent of all of her tenants to pay for the treatments, in accordance with the lease and local law. In such cases, even though landlords would bear the initial cost, that cost could be distributed among tenants and over a longer period of time.

Further cost spreading may be possible in the form of insurance. Historically, renters’ and property owners’ insurance policies have not covered bedbug infestations,¹⁶¹ but several companies recently announced that they will offer bedbug coverage, marketed toward real estate owners.¹⁶² The likely growth of this insurance market would

¹⁵⁹ ME. REV. STAT. tit. 14, § 6021-A(3)(C) (Supp. 2010).

¹⁶⁰ See Murphy, *supra* note 4.

¹⁶¹ Claire Wilkinson, *Bedbug Disclosure*, INS. INFO. INST. (Aug. 31, 2010), <http://www.iii.org/insuranceindustryblog/?p=1513> (“[T]he cost of getting rid of bedbugs, like other vermin, is considered part of the maintenance associated with owning a home and generally is *not* covered by standard homeowners’ and renters insurance policies.”). Most insurance policies contain a “vermin exclusion” that classifies extermination of bedbugs as “part of the maintenance associated with [owning or renting residential property].” *Id.* Although the biological and behavioral traits of bedbugs that cause evidentiary problems make calculating risk and setting insurance rates difficult, *Home Insurance and Bedbug Invasions*, N.Y. TIMES BUCKS BLOG (May 6, 2010, 1:09 PM), <http://bucks.blogs.nytimes.com/2010/05/06/home-insurance-and-bedbug-invasions/>, bedbug treatment costs are relatively minor in comparison to other damages insurance does cover, and the insurance industry is dynamic and adaptable, and thus capable of accommodating bedbugs in policy terms and rates, see Alistair Barr, *Bed Bugs May Bite Insurers, But Won't Dog Industry*, MARKETWATCH (Sept. 2, 2010, 7:27 PM), <http://www.marketwatch.com/story/bed-bugs-may-bite-insurers-but-wont-dog-industry-2010-09-02>.

¹⁶² Matthew Sturdevant, *Bedbugs? There's Insurance for That*, HARTFORD COURANT, July 16, 2011, at A1. Driven in part by rising demand and in part by expectations that state lawmakers may mandate insurers to provide bedbug coverage, Willis North America and Aon Risk Solutions have begun selling packages that will reimburse policyholders for pest control

allow landlords to further spread the costs of infestations across insurance premium payments. In the absence of renters' insurance for bedbugs, tenants do not have a similar ability to spread costs. If required to pay for treatment, tenants probably could not successfully ask landlords to lower rents to reflect the risk of bedbug infestations, due to the typical asymmetry in bargaining power in the residential lease context.¹⁶³

Admittedly, such cost spreading works best in the urban multi-unit apartment building, where there is a pool of tenants among whom the costs can be distributed; nevertheless single-unit landlords can raise rent and thus spread costs over time. In addition, single-unit and rural landlords face lower risks of infestation: although bedbugs are truly a national problem, the opportunities for spreading to adjacent units provided by a multiunit complex and the high population density of urban centers render infestations most problematic in those settings.¹⁶⁴ Moreover, as insurance companies begin offering coverage for infestations, bedbug-related costs can be further spread across both single-unit and multiunit landowners and urban and rural communities, based on the insurer-calculated risk.

Because rent-controlled buildings do not offer any possibility of cost spreading, they are exempt from the provision's coverage. Tenants with rent-controlled leases are not completely bereft of recourse, however, as they are not subject to the statute's claim preclusion provision, and may still bring a claim under the implied warranty of habitability doctrine (if available in their state), or a negligence claim. They are no better or worse off than they would be without the cost-allocation provision.

The society-wide scope of the bedbug problem justifies such cost spreading. As anybody could pick up bugs while traveling, when a friend or relative visits, or by purchasing used furniture, and anybody living in an apartment is in danger of a neighbor's infestation spreading to their domicile, only hermits can consider themselves truly safe from bedbugs.¹⁶⁵ Bedbugs are a shared problem, not an individual one; the risks of treatments should therefore be shared and not borne by the isolated tenant. Cost spreading across tenants and time in the

expenses and lost profits, coordinate with regulatory authorities, and consult with policyholders to minimize the risk of infestations occurring. *See id.*

¹⁶³ *See supra* note 65 and accompanying text.

¹⁶⁴ *See supra* notes 15–19, 39–40.

¹⁶⁵ *See supra* notes 39–43 and accompanying text.

form of marginally increased rent is the best mechanism currently available to facilitate this risk pooling.

Making landlords strictly liable for infestation-treatment costs would not encourage tenant laziness or noncompliance with treatment efforts. Tenants suffer the effects of the infestation directly: tenants—not landlords—get bitten, develop allergic reactions, lose sleep, and experience stress.¹⁶⁶ Tenants thus have a strong incentive to fully cooperate when treatment plans call on them to wash laundry to kill bugs or to clear away clutter to eliminate hiding places.

Landlords may be more receptive to such an arrangement than one might at first think. After all, landlord and tenant advocates jointly drafted and unanimously approved statutory language that the Maine Legislature enacted with no significant modifications.¹⁶⁷ To the extent that the proposed statute adopts rules similar to those in the Maine statute, it also enjoys that statute's legitimacy as the product of landlord-tenant consensus. Landlords do benefit under the proposed model statute. They are not barred from renting infested units if a tenant assumes the risk. Landlords enjoy the predictability of clearly defined statutory standards and may be able to calculate prospective costs, taking into account their past experiences with affected units.

The statute also allows landlords to avoid litigation, and the claim preclusion provision assures them that they will not be sued at a future date. This preclusion would also promote judicial efficiency by barring tenants from relitigating bedbug claims under different legal theories, such as negligence or battery.¹⁶⁸ The proposed statute contains a safety valve, however, which allows parties willing to go through the traditional tort litigation process, and capable of proving the gross negligence of the other party, to recover. An innocent party would not be stuck holding the bill in egregious cases where there may be ample evidence of fault, and punitive damages are still available to spur or deter future conduct.¹⁶⁹

¹⁶⁶ See *supra* notes 26–31 and accompanying text.

¹⁶⁷ See *supra* notes 123–24 and accompanying text.

¹⁶⁸ See, e.g., *Mathias v. Accor Econ. Lodging, Inc.*, 347 F.3d 672, 675 (7th Cir. 2003).

¹⁶⁹ The proposed claim preclusion provision would not prevent the result in a case like *Mathias*, in which two hotel guests successfully recovered from a hotel for negligence when the hotel knew of the infestation problem yet rented the guests a room that was classified “DO NOT RENT UNTIL TREATED.” *Id.* The hotel did not diligently treat all infested rooms, and at one point another guest was moved to four successive rooms because he complained of bugs in the first three. *Id.* On this evidence the jury awarded each guest \$186,000 in punitive damages, which the Seventh Circuit upheld. *Id.* at 678.

A similar no-fault cost-allocation system accompanied by claim preclusion rules has proven workable and effective in another context: workers' compensation. Before workers' compensation schemes were in place, an employee injured on the job had no avenue of recourse other than suing for negligence. A successful negligence claim required the employee to (1) prove that the employer had not exercised due care and that this lapse proximately caused the worker's injuries, and (2) defeat any affirmative defense raised by the employer, such as assumption of the risk or contributory negligence.¹⁷⁰ Employers, for their part, faced the unpredictability of litigation and exposure to large jury awards.¹⁷¹

Reforms ultimately endorsed by both employees and employers established funds for workers injured on the job in exchange for the relinquishment of employees' rights to sue employers in tort; thus workers' compensation schemes "shift[ed] liability for workplace accidents from negligence liability to a form of shared strict liability."¹⁷² The replacement of negligence litigation with a no-fault cost-allocation system eliminated the evidentiary difficulties employees faced in proving lack of due care and causation.¹⁷³ Such an approach also reduced uncertainty by protecting employers from large jury awards and ensuring injured employees some amount of compensation.¹⁷⁴ The costs associated with administering these plans and making payments were in large part passed on to workers through marginally lower wages, which allowed them to be spread across the workforce.¹⁷⁵

Shifting the liability for bedbug infestations from common law claims to a form of shared strict liability would net similar efficiency gains through analogous cost-spreading mechanisms. The elimination of fault as a prerequisite to recovery and the preclusion of future claims would lessen the amount of litigation surrounding infestations and reduce uncertainty. Marginally raising periodic rent payments would allow the costs of bedbug infestations to be spread among tenants and over time, just as the workers' compensation system distributed workplace injury costs across workers and paychecks.

¹⁷⁰ See Price V. Fishback & Shawn Everett Kantor, *The Adoption of Workers' Compensation in the United States, 1900–1930*, 41 J.L. & ECON. 305, 308–09 (1998).

¹⁷¹ See *id.* at 309.

¹⁷² *Id.* at 305.

¹⁷³ See *id.* at 308.

¹⁷⁴ See *id.* at 307.

¹⁷⁵ *Id.*

D. Mediation

The proposed statutory scheme admittedly relies heavily on pest control agents, who in turn are often likely to rely on pesticides. This is unavoidable, as landlords and tenants are typically incapable of eliminating infestations on their own.¹⁷⁶ If either the tenant or landlord does have a principled objection to the use of pesticides—for religious, environmental, or health reasons, for instance—the statute refers the parties to mediation.¹⁷⁷ Such mediation would provide the parties with an opportunity to avoid litigation and perhaps fashion, along with the pest control agent, an alternative treatment plan that avoids the use of pesticides.¹⁷⁸ In any event, such objections in the face of a bedbug infestation are likely to be relatively rare, so the proposed statute can still definitively resolve the majority of cases.

V. ALTERNATIVE SOLUTIONS ARE UNSATISFACTORY

There are other approaches to addressing the bedbug problem, including tort suits, the deregulation of certain pesticides, and increased research funding. These measures, however, are either ineffective or insufficient on their own to eliminate or prevent the spread of infestations, or fairly allocate costs.

Although some bedbug victims have been able to recover successfully under negligence theories,¹⁷⁹ negligence and other tort causes of action do not offer a satisfactory method of resolving the majority of bedbug-related disputes. First, the evidentiary problems discussed above render any litigation problematic.¹⁸⁰ Second, the financial stakes are simply not substantial enough in many cases to make litigation worthwhile. Bedbugs are not known to transmit diseases and bite marks usually heal without scarring, so despite rare cases of large awards, damages are not likely to be large enough to entice many attorneys to take bedbug cases.¹⁸¹ Third, the unpredictability of tort litigation—characterized as a “lottery system” by some—places landlords at risk of being unfairly subjected to large jury awards.¹⁸²

¹⁷⁶ See *supra* notes 44–46 and accompanying text.

¹⁷⁷ The proposed model statute is not designed to address these issues; the resolution of such religious, environmental, or health debates is beyond the scope of this proposal.

¹⁷⁸ High-heat treatments have also proven effective. See *supra* note 44 and accompanying text.

¹⁷⁹ See *Mathias v. Accor Econ. Lodging, Inc.*, 347 F.3d 672, 675 (7th Cir. 2003).

¹⁸⁰ See *supra* notes 101–08 and accompanying text.

¹⁸¹ See J. Freedom duLac, *Md. Lawyer Helps Bedbug Victims Bite Back*, WASH. POST, Nov. 28, 2010, at C1.

¹⁸² See Murphy, *supra* note 4.

However, tort suits do have a place in cases of egregious tenant or landlord misconduct when there is more likely to be evidence sufficient to prove fault in a court of law.¹⁸³ In such cases, punitive damages would still be available when compensatory damages are insufficient to induce landlords and tenants to modify their conduct. These cases are not the norm, however; tort suits need only be utilized as a safety valve to a no-fault, shared-liability system.

Some commentators are calling for the deregulation of currently banned pesticides for use in exterminating bedbug infestations.¹⁸⁴ Pesticides are unlikely to offer anything but a temporary solution, however, as bedbugs are capable of quickly developing resistance to chemicals due to their short lifespan and breeding cycles.¹⁸⁵ DDT is often credited with nearly wiping out all bedbugs in North America, but in fact, the bugs had developed a resistance before the United States banned the chemical in 1972.¹⁸⁶ Even though some new chemicals appear to be effective today, they carry significant health risks.¹⁸⁷ Because these pesticides would have to be applied in the home where people sleep, even short-term reliance on them is unappealing. Also, deregulating pesticides does not answer the question of who should pay the costs of treatment in individual landlord-tenant cases.

Increased research funding is a very good idea, as bedbugs' hiatus in North America has led to insufficient public investments in the area,¹⁸⁸ and incentives for private chemical research absent a secondary agricultural application are also lacking.¹⁸⁹ Increasing research resources may ultimately yield an effective treatment method that is capable of eradicating the bugs once and for all, but such speculative, long-term benefits do nothing to ameliorate the problem in the short term, or to resolve landlord-tenant disputes about the allocation of treatment costs in the interim.

As a result, though alternative measures such as increased research should be undertaken to permanently eradicate bedbugs in the residential setting, and tort suits should be utilized in limited circumstances, no other alternative presents an adequate solution to the cur-

¹⁸³ See *supra* note 169 for an example of such a case.

¹⁸⁴ See, e.g., P.J. Glanick, *NYT Article Admits DDT Ban as a Cause of Bedbug Outbreak*, NEWSBUSTERS (Aug. 25, 2010, 07:16 AM), <http://newsbusters.org/blogs/p-j-gladnick/2010/08/25/nyt-article-admits-ddt-ban-cause-bedbug-outbreak>.

¹⁸⁵ See *supra* notes 34–35.

¹⁸⁶ Adler, *supra* note 12.

¹⁸⁷ *Id.*

¹⁸⁸ JOINT STATEMENT, *supra* note 12.

¹⁸⁹ Hargreaves, *supra* note 22.

rent problem of allocating the costs of bedbug infestations between landlords and tenants. Therefore, states should adopt this Note's model legislation to address this immediate and worsening problem.

CONCLUSION

If Ashlee Poole¹⁹⁰ had lived in a jurisdiction in which this Note's proposed statute were the law, her landlord would have been required to contact a pest control agent to inspect the premises and confirm the infestation. The landlord would then have been required to pay for the treatment, no matter from where Ms. Poole or the landlord contended the bugs came. Ms. Poole, for her part, would have been required to comply with the treatment plan designed by the pest control agent.

The proposed legislation would not have necessarily eliminated the bugs in Ms. Poole's case, nor would it have solved all of the problems created by the infestation. But it would have led to a better outcome for Ms. Poole, her landlord, and the wider community of Jacksonville, Illinois. Treatment would have begun immediately after the pest control agent's inspection, without any litigation or involvement by the local health department or code enforcement office. Neither party would have wasted time finding out what their responsibilities were. The landlord would have been able to pass along the costs of the treatment to Ms. Poole and other tenants through a marginal rent increase in future months, in accordance with the limitations in the lease and local law. Ms. Poole (who was unable to pay for the entire cost of hiring a pest control agent by herself) and other tenants would contribute towards the treatment costs at a more affordable rate. Ms. Poole may have been able to remain in the apartment and been spared the biting and accompanying worries of an untreated and worsening infestation; the risk of the infestation spreading to her new apartment would have then been obviated. The landlord would have been saved the trouble of finding a new tenant who wished to rent an infested apartment.

Ms. Poole's and her landlord's predicament is but one case among many in the growing national bedbug crisis. The lack of an effective and efficient method for exterminating the pests means that the problem will only worsen, and many more people will have to bear the physical, psychological, and financial costs of infestations. The statutory and common law rules governing landlord-tenant disputes about

¹⁹⁰ See *supra* notes 1–7 and accompanying text.

bedbugs have not developed uniformly across jurisdictions and in many cases fail to quickly resolve those disputes or encourage behavior that prevents the spread of infestations. States should adopt legislation that clearly defines the duties of landlords and tenants and that establishes a no-fault, shared-liability system to spread costs and to preclude future claims under different legal theories. Enacting the proposed model legislation is the best means currently available to facilitate the efficient treatment of bedbug infestations in the residential lease context, to the benefit of society as a whole.