



Mold Risk Management for Restoration Contractors

By

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Mold has created new opportunities, as well as new risks, for the restoration business. Fear of “toxic mold” has created demand for more professional and expensive mold remediation services. At the same time, new risks are assumed when performing mold remediation, water damage restoration and general construction. By implementing a mold risk management strategy, contractors can participate in what can be a lucrative business, without betting their company over uninsured liability for toxic torts.

A Brief History on Mold and the Insurance Business

The response to mold claims by the insurance industry significantly changed the risk management and insurance needs of restoration contractors.

Insurance claims for mold damages exploded onto the scene between 2000 and 2001. The short-term benefit to restoration contractors was a sudden surge in demand for mold remediation services and a seemingly endless supply of money from insurance companies to pay them. Unfortunately for the insurance companies, they had not anticipated “toxic mold” claims and had not priced their policies accordingly.

In response to surging toxic mold damage claims the insurance industry implemented their mold risk management strategy: risk avoidance. Insurance companies avoid mold risk by issuing over one hundred million mold exclusions and limitations annually. These exclusions can be characterized as universal mold exclusions. Although mold exclusions and limitations are not standardized and vary a greatly in scope, they are universally applied in virtually all forms of property and liability insurance. By implementing a mold risk avoidance strategy, the insurance industry was able to dump billions of dollars of mold related damage losses back into the economy. This was successfully accomplished without a rate reduction or a whimper of protest from insurance buyers, lenders or insurance regulators. Score a big win for the insurance companies! But the insurance industry’s success in managing its mold loss exposure only increases the risk of uninsured mold losses for all of their policyholders and insureds.

The introduction of universal mold exclusions had four major impacts on the restoration business.

1. Property owners now have a lot less insurance coverage to pay for mold losses than they once had. This decreases the overall demand for mold remediation services.
2. Without insurance to cover mold damages, property owners will seek more qualified firms to perform mold remediations. This increases demand for the more professional, better- trained remediation firms.
3. The potential liability loss exposure of a contractor is increased because property owners may need to seek outside sources of funding (liability lawsuits) to pay for their mold losses.
4. Contractors no longer have insurance for mold damages in their General Liability insurance policies because all of these policies now have mold exclusions. For this reason restoration contractors now need to purchase separate Contractors Pollution Liability insurance to fill the gap in their business liability insurance protection.

Where will all those mold damage insurance claims go?

Damages caused by mold did not go away just because the insurance coverage did. This is evidenced by the amount of mold remediation work restoration contractors still perform.

Now that the insurance companies have solved their mold risk management problem by off loading mold losses onto others it is easy to forecast who will get stuck with the bills for mold damages. Property owners, lenders, contractors, building products suppliers, building inspectors, real estate agents and insurance agents are now in line to pay for mold losses, many for the first time.

Without insurance to pay for mold related damages, many property owners fix mold problems on their own, usually in an amateur fashion. These mold problems can resurface as depreciated property values, defaulted mortgages and professional liability claims against inspectors and real estate agents when the defective property is sold.

For a property owner seeking recovery for uninsured mold losses, other cost recovery targets include negligence claims made against contractors, building products suppliers and their insurance agent who may have left them unintentionally uninsured for mold losses. In a presentation made by attorney Ed Eschoo (a Co Chair of the American Trial Lawyers Mold Subcommittee) to the Environmental Risk Resources Association in September of 2005, Mr. Eschoo identified restoration contractors not following IICRC S520 protocol and insurance agents who leave their clients unintentionally uninsured for mold damages as being the path of least resistance in recovering mold damages for his clients. If you would like to have a copy of Mr. Eschoo's Power Point presentation on the future of mold claims, please e-mail your request to Dybdahl@armr.net

Most of the potential targets for mold liability lawsuits mentioned above do not have any coverage in their business insurance policies for these claims unless special insurance covering mold related damages has been purchased.

Practical Risk Management for Restoration Contractors

2005 saw the first indications that the customers of restoration contractors had started to figure out mold insurance exclusions were going to have a material financial impact on them. The predictable response was the customers of restoration contractors (often the same insurance companies that decided mold was uninsurable) started asking for Contractors Pollution Liability insurance as part of the standard insurance package carried by the restoration firm.

Insurance companies that ask restoration contractors for CPL coverage are actually the smart ones. Because CPL fills gaps in the CGL policy, it is irrational to demand GL insurance and not ask for CPL insurance from firms working with water and mold. For this reason it is just a matter of time before all the insurance companies demand CPL insurance from restoration contractors.

The most common cause of mold related losses for restoration contractors starts with an insurance consumer who is angry that his or her insurance company will not cover a mold loss. In looking for sources of money to help pay for the mold damages, it is common for a property owner to sue the insurance company for unfair claims adjusting and sue the contractor for poor work. If the contractor has good CPL insurance, at least the property insurance company is not in the defense game alone which is why some of the smarter insurance companies are asking for CPL.

But simply buying CPL insurance is not the best risk management solution in the above scenario; the best solution for the contractor is also risk avoidance. CPL insurance should be the backstop in cases where risk avoidance does not work. Knowing that universal mold exclusions increase the likelihood there will be no insurance money available for property owners to pay for a mold loss that property owners are likely to be angry about this situation, and that trial lawyers are targeting restoration contractors as soft targets, what can restoration contractors do to manage liability losses?

Here are some useful risk management tips:

1. Carefully evaluate potential customers; if they are angry with their insurance company about the loss you are contemplating working on, avoid having the customer's potential wrath being targeted towards you. It is best to avoid these jobs entirely because they are very high risk. You may choose to refer the property owner to your competitor who has not read this article. Any restoration contractor loading up on jobs with these dynamics will not be your competitor for long. Also, do not plan on your customers' insurance companies indemnifying you in a liability suit against both of you. Invariably you will be on your own and the damages being sought will be for a lot more money than your job billings.

2. Carefully resolve and document each stop work order. If the insurance company tells you to pack up your equipment and go home because they are not paying any more of the claim, do not do it without fully advising the claims adjuster and customer of the ramifications of stopping the work. Seek competent legal advice in this situation; you are in a high-risk situation if you are performing drying or mold work. Nobody can expect you to work for free. But shutting down a water drying or mold job without warning the customer of the ramifications of doing so exposes you to potential liability. Mold has created a toxic tort cottage industry with claims well over \$1,000,000 being common. Avoid starting work on jobs that do not have sufficient funding to complete them without cutting corners.
3. Make sure your contracts fully explain your scope of work and that the customer fully understands the scope. Communicate all change orders quickly and make sure there is agreement from the customer. Do not make assumptions of understanding. A normal contract dispute with overtones of exposure to toxic mold is a plaintiff's lawyer's dream, especially if the defendants have money. Never act with arrogance and indifference in these situations. Doing so creates a plaintiffs lawyers dream on steroids.
4. Make sure the scope of work includes fixing the source of the water intrusion problem that created the mold growth. Doing partial or incomplete mold remediations is a ticket to a lawsuit with toxic tort overtones.
5. Seek IICRC certifications, follow IICRC S520 to the letter wherever possible and document the rationale behind any deviations. Having been drafted with input from over one hundred commentators, a remediation job following S520 protocol is defensible from a liability standpoint. If you make up your own remediation protocol there is nothing objective to point towards to establish the absence of negligence as a defense. Interestingly the EPA and New York City mold remediation guidelines are not risk-based protocols nor do they set standards. Relying on these documents as a sole guide to set work protocol is very risky. At a minimum IICRC S520 protocols should be used in conjunction with these general guidance documents. If you do not know what IICRC S520 is, stop doing mold and water drying work.
6. Have a qualified, independent professional set the scope of work for mold remediation and then stick to the scope. Deviations from the scope of work open the contractor up to allegations of negligence if something goes wrong with the job. It is a good idea to check if the indoor air quality professional setting the scope has professional liability insurance covering mold.
7. Never use uninsured subcontractors. Every subcontractor should have a good quality GL policy with at least \$300,000 in limits. Those working with water and mold should carry CPL insurance. Both types of insurance should include you as an additional insured and you should have a contract with the subcontractor indemnifying you for losses as a result of their work. There are two main reasons

for this. First, the insurance underwriting process screens out unqualified firms much more efficiently than any due diligence you can perform on your own. Second, if a subcontractor causes a loss it will be infinitely better for you to have their insurance to pay for it rather than have a claim on your insurance. Past insurance losses haunt a firm for years after the insurance company pays them. There are some restoration firms that cannot find insurance for today because of historical loss problems caused by uninsured subcontractors three years ago.

8. IICRC has added risk management chapters to S500 and S520. The revised S500 is scheduled for release in February, S520 at the end of 2006. Get the new versions of one of these and read the chapter on risk management. Also consider becoming an IICRC Certified Firm, which makes you eligible for a 10% safety credit in CPL insurance premiums from leading underwriters. Contact IICRC for information on this innovative insurance program at www.iicrc.org.
9. Get good quality Contractors Pollution Liability insurance in place on your firm. What types of contractors need CPL insurance? Essentially anyone working in the built environment. Certainly all mold remediators, asbestos and lead paint remediators and drying contractors at a minimum need CPL insurance. But the need for CPL insurance goes further. What does a plumber's work do when it is defective? What damage will result? How about roofers? Even the electrical contractor was sued for mold damages on the \$95,000,000 mold loss at the new Hilton hotel in Hawaii. With universal mold exclusions none of these firms have coverage for mold damages any more unless they have purchased CPL insurance.

A Guide to CPL insurance

Contractors Pollution Liability was invented for hazardous waste contractors working on Superfund sites in the mid 80's. This insurance is necessary to fill the gap in liability insurance coverage created by the Absolute Pollution Exclusion in everybody's Commercial General Liability insurance. For reasons much too lengthy to discuss here, water and mold do not fit within the Absolute Pollution exclusion so contractors had liability insurance for mold damages prior to the introduction of universal mold exclusions in 2004.

The mold exclusion in a General Liability policy is essentially a total pollution exclusion for the specific pollutant mold. The mold exclusion on the GL policy eliminates insurance coverage for liability claims arising from the contractor's premise, operations, products and completed operations. Mold exclusions may even eliminate the insurance for defense costs, which can be hundreds of thousands of dollars in a toxic mold case. CPL is designed to fill the gaps in the General Liability insurance policy created by the introduction of the mold exclusion the same way an Automobile policy is needed to fill the gaps in liability insurance created by the Automobile exclusion in the GL policy. The same could be said about Workers Compensation insurance and the necessity of buying a separate insurance policy to cover that loss exposure. It is important to

recognize a good CPL policy gets you back to where you were on mold losses prior to the introduction of universal mold exclusions in the General Liability insurance policy. The CPL policy also provides coverage that was not covered in the General Liability policy because of the pollution exclusion on that policy.

With the core CPL policy form having its roots in Superfund hazardous waste contractors, some of the common policy provisions in CPL insurance turn out to be totally inappropriate for the insurance needs of restoration contractors. Some of the material coverage flaws in CPL policies sold to restoration contractors today include:

1. **Property Damage to Your Work.** This is a very common exclusion in CPL policies. It basically says your liability insurance will not pay for damage to the work you do. If you are a Superfund contractor incinerating solvent contaminated soil, excluding damage to the dirt you are burning is not important. Now apply the exclusion to a drying job. Water and high humidity in the walls and flooring of a building can be ambient throughout the entire structure. A poorly performed drying job will result in mold and the damage is likely to be to the entire building which may need to be demolished. Although it was not the original intent of the exclusion to eliminate property damage liability coverage on the entire job a contractor is working on, by default that is how most Damage to Your Work exclusions read within the context of mold and drying work. To evaluate the ramifications of this exclusion, it helps to know that 90% of all paid mold claims are property damage and clean up claims; they are not bodily injury claims. It also is interesting to note some CPL policies do not have a Damage to Your Work exclusion at all, while others modify the exclusion to provide insurance on the property you are working on if you damage it. A CPL policy without a Damage to Your Work exclusion could cover literally five times more claims scenarios for a drying contractor than a CPL policy with this exclusion and the premiums are likely to be very similar between the two policies.
2. **Product Liability arising from or as a consequence of products sold or supplied by the insured.** These exclusions are also very common in CPL policies. The problem with this exclusion on the CPL policy is mold exclusions and total pollution exclusions on the GL policy now eliminate the products liability coverage that was normally covered in the GL policy. Claims arising from the use of biocides for example could be excluded under the GL and CPL policy leaving the firm uninsured if this exclusion is not corrected on the CPL policy. The only way to fix the products liability coverage gap for mold and pollution claims is usually on the CPL policy. For general contractors the wording of some of these exclusions is sufficiently broad to exclude the entire project since all the building materials are “supplied” by the insured. Although this was not the intent of the exclusion when it was crafted for Superfund contractors a literal reading of it leads you to the excluded project scenario.

3. **Limiting coverage for completed operations.** In other words the only insured claims are those that arise when the contractor is actively working at the job site. This is also a remnant exclusion that has no effect on contractors burning dirt. Usually these exclusions only apply to Clean Up expenses, but remember most mold claims are for clean up and property damage not bodily injury. Since mold takes days to grow and the contractor is unlikely to be there when the mold is discovered, a CPL policy with a limitation on completed operations is considerably less valuable than one that does not have the restriction of coverage. A good rule of thumb would be at least five times less valuable if the concern is mold losses.
4. **Excluding all claims arising from work performed by subcontractors.** This exclusion usually appears as an endorsement on the CPL policy. For firms that sub contract work, an exclusion of this type can be very onerous. Remember a drywall screw into a pipe can cause a mold loss that takes months to discover. The effect of this exclusion goes well beyond mold remediation jobs and applies to any liability claim under the CPL policy. For a firm subbing out 50% of its work, a policy with this exclusion would cover half as many claims as a policy without this exclusion. If subcontractors are used on every job this exclusion may be the coverage equivalent of a “all the jobs you do “exclusion. Hard to believe but it is true and it is legal to sell. In contrast, if the insurance buyer does not use subcontractors, this exclusion is irrelevant and the policy may be a good insurance value.
5. **Excluding claims arising from the preparation or approval of opinions, reports, specifications, change orders, or designs.** This exclusion will normally be entitled Professional Liability in the policy form. These exclusions are common in all GL and CPL insurance policies sold to contractors. The exclusions are also not standardized. The insurance coverage is when performing a mold remediation job under a work plan prepared by a CIH or other qualified person, when does a loss that is a result of an “opinion” to request a “change order” for example become a excluded claim under the policy. The answer is it depends on the facts of the claim and that is not the time to find out the policy will not respond to the loss. Since IICRC S520 refers to “Professional Remediators“ who actually take courses to render valuable professional opinions, a unamended Professional Liability exclusion is less than desirable in a restoration contractor’s CPL policy.

In all cases the coverage flaws mentioned above are inadvertent errors that are made by well-intentioned vendors. Most of the flaws are a direct result of taking an insurance policy that was designed for Superfund hazardous waste contractors and using it to insure contractors working in the indoor environment with water.

CPL policies are not standardized so there is a wide degree of variation in the coverage provided by individual policy forms. It takes a considerable amount of expertise to evaluate the coverage differences in CPL policies. Virtually all CPL policies sold to restoration contractors in 2005 have at least two of the above flaws and some contain all five. Interestingly, in 2006 all of these coverage deficiencies can be fixed for restoration contractors for the first time in the history of the CPL product line.

Finding quality CPL coverage

The environmental insurance market is relatively small and accounts for much less than 1% of all of the insurance sold in the US. Unlike general liability or automobile liability insurance, environmental insurance is not standardized. Although the environmental insurance market is relatively small, it is very complex with over 100 different customized policy forms available with thousands of endorsements available to modify those policies.

The complexity of environmental insurance leads to coverage errors by insurance agents. In environmental insurance it is entirely possible to choose an inappropriate environmental insurance policy, pay top dollar for it and have the policy exclude everything you do for a living. For example, a policy sold to a firm that subcontracts all of its work would not have insurance for anything if the CPL policy has a subcontracted work exclusion. To make the challenge of obtaining good quality and appropriate CPL insurance even more complex, training courses for insurance agents are virtually devoid of any mention of environmental insurance. Further difficulty results from the fact that only a few environmental underwriters even work in the restoration contracting business sector. Superimpose on this background that mold has created a new need for environmental insurance with a new set of customers (restoration contractors), and the number of qualified and experienced insurance practitioners even gets even smaller. There are fewer than 25 insurance practitioners that are proficient in restoration contractors today, and that number includes the underwriting community!

There is a small group of environmental insurance brokers that has developed expertise in the restoration contracting market place. Searching for “mold insurance” on the Internet pulls up a number of firms that specialize in environmental insurance covering mold. Some of these firms act as your retail insurance agent and some are wholesale insurance brokers who work through local insurance agents. CPL insurance is written on an Excess & Surplus lines basis. It requires a special type of insurance license to sell these policies and to pay the premium taxes on the policies to the state insurance commissioners office. Most retail insurance agents do not hold an E&S license and also may not be authorized by the insurance companies that offer the best CPL policies.

Accessing a wholesale environmental insurance broker who specializes in restoration contractors and mold insurance solves both problems and assures the contractor will obtain quality insurance coverage, as well as the value inherent in working with a knowledgeable environmental insurance professional. Another benefit of utilizing a wholesale insurance broker is that the contractor can retain its current insurance agent to service all of its business insurance needs while still accessing state of the art expertise in Contractors Pollution Liability insurance.

Most wholesale brokers will be glad to discuss the insurance alternatives for your firm directly with you and help you find a retail agent if you need one. At ARMR.Net, for example, our specially trained and credentialed insurance brokers are usually able to identify the best insurance company for a particular contractor before an insurance application is even completed. Pre-selecting the underwriter based on the experience gained from working with hundreds of restoration contractors across the country saves our customers a lot of time and effort. A much better result is achieved if an underwriter is provided with its own insurance applications, rather than sending them a competitor's application. Doing so implies the second underwriter was not good enough to deserve his or her own set of applications. It is hard to imagine creating a worse first impression.

Generalist insurance agents will often attempt to get quotes from all the insurance companies, which may be the only alternative to benchmark the proposed premium for reasonableness if the agent does not have a working knowledge of the restoration contractor insurance market. If this strategy is followed, each insurance company's CPL applications should be completed to avoid prejudicing the underwriters against you as soon as they open the underwriting file on your company and see their competitor's application. A complete CPL insurance application with supporting documentation on a restoration contractor will often be thirty or more pages. There are six environmental insurance companies providing CPL coverage to restoration contractors today. A complete insurance submission to each one would create close to two hundred pages of applications in order to properly present the contractor to each underwriter. However, there is no reason to go through the wasteful exercise of blanketing the insurance market with applications on your company.

Before starting the application process, ARMR.NET brokers evaluate the clients insurance needs, advise them on their insurance options and even provide premium indications. In a quick ten-minute phone call our brokers evaluate over 1000 potential combinations of variables to identify an insurance company that can meet the specific needs of the customer. This quick evaluation process avoids completing potentially hundreds of pages of insurance applications for insurance companies that cannot meet your needs for a broad range of potential reasons; including inappropriate or unresponsive policy forms that might work fine for a competitor but don't cover your firm. Another downside of the "blanket the market with insurance submissions" approach is if you do get six quotes you will have six different twenty five page CPL policies to try to sort through.

It takes a qualified broker eight hours per policy to make a good policy comparison. Due to the time demands this process is very unlikely to take place, which leads to insurance agent's errors and omissions in recommending insurance coverage and all the unaddressed coverage flaws mentioned above.

It should be noted that an insurance agent's access to one or more of the insurance companies that sell CPL insurance does not in any way qualify him or her to manage your CPL insurance. Properly structuring CPL insurance on restoration contractors is a very complex task that requires knowledge of the restoration business and specialized expertise in environmental insurance. Retail insurance agents are right behind restoration contractors on the plaintiff's lawyers easy target list because insurance agent's lack of specific training in pollution insurance results in so many mistakes. The vast majority of CPL policies sold to restoration contractors today actually have more than one of the material coverage flaws noted above, it will be interesting to see how insurance agents professional liability insurance is affected by these errors and omissions.

All of this complexity points to the need to engage specialist expertise to help you find and maintain CPL insurance. Specialist wholesale insurance brokers are an excellent way to access this expertise while maintaining your current local service from your insurance agent.

Conclusion

Mold created new opportunities and risks for restoration contractors. The insurance companies did not see surging mold claims as a new business opportunity and implemented their own risk management strategy of risk avoidance. This risk avoidance strategy was achieved and is maintained by issuing over one hundred million (100 million!!) mold exclusions on an annual basis. But mold exclusions did not cause mold damage losses to go away. Mold loss costs were simply shifted in the economy. Today restoration contractors and insurance agents are sitting at the top of the plaintiffs lawyers target lists. Active risk management including risk avoidance and properly written CPL insurance will allow restoration contractors to participate in this potentially lucrative business sector without risking all their personal and corporate assets on a daily basis. Restoration contractors are well advised to seek out expert risk management advice and assistance in finding appropriate CPL insurance to effectively manage the new risks associated with mold.

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