

**Agents/brokers exposed
to E&O claims over mold**

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Citing intermediaries' neglect of clients' interests, underwriters add mold exclusions to agent E&O cover

By Sally Roberts

Insurance agents and brokers that neglect to advise their clients on the impact of mold exclusions within their insurance policies and fail to procure mold coverage if it's available are exposing themselves to potential errors and omissions claims, experts warn.

Although intermediaries have yet to become the prime target of mold coverage disputes from uninsured policyholders, experts say it's only a matter of time if agents don't educate themselves and their clients properly about mold exclusions and potential coverage.

Anticipating this type of future litigation, a number of agency E&O underwriters, especially in the surplus lines market, are putting mold exclusions in their policies.

At the same time, a number of other underwriters and associations are hoping to educate agents about the mold issue and the environmental insurance market as a means to mitigate the exposure.

"Uninsured (mold) claims work their way through in two waves of claims," said Dave Dybdahl, senior consultant with the American Risk Management Resource Network in Middleton, Wis. "They are denied under the property policies, which turns them into liability claims against various responsible parties, and when they are denied there, they will go against the agents," he predicted. "And since it will be much easier for plaintiff attorneys to go after agents for professional liability than to try and blast through a mold exclusion, the agents are likely to be left holding the bag," he said.

"There's absolutely an issue here that (agents) need to be concerned about," said Steve Germundson, a partner with the agency consulting group OPTIS Partners L.L.C. in Minneapolis.

"The perception the public has of what an agent owes its customers is continually increasing," he said. "It's one of the reasons why we see such a tough E&O market right now. The severity of professional liability suits against insurance agencies is increasing all the time," he said.

"Any time an insurance agent is working with its customers, it's got a duty to fully disclose to the customer what's going to be covered and what's not," Mr. Germundson said. "And anything that they hold back on and do not share with the insured—whether they know it or not—the insured can come back to them and hold them liable."

As a result, some underwriters are excluding mold claims from their agency E&O policies.

"We have seen it in the E&O marketplace," said David Hulcher, director of E&O operations for the Alexandria, Va.-based Independent Insurance Agents & Brokers of America, referring to mold exclusions. He said most of the exclusions he's seen are in the surplus lines market and



A contractor garbed in an environmental protection suit inspects mold damage to a house in Flour Bluff, Texas.

with some insurers that underwrite "harder to place" agency E&O business rather than in the standard agency E&O market.

"Generally, what drives (the mold exclusions) is concern on the reinsurers' part that mold claims will start creating a substantial amount of losses, and I don't know if we're seeing that at this point in time," Mr. Hulcher said.

National Union Fire Insurance Co. of Pittsburgh, Pa., for one, has been excluding mold claims across the board on its agency E&O policy since the latter half of 2001, said John Iannotti, executive vp of the financial services group

for the American International Group Inc. unit. "It was very apparent to us...that this was going to be a new source of litigation, and we were very concerned about it," he said.

But not every agency E&O underwriter is following suit.

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JOHN IANNOTTI
NATIONAL UNION FIRE INSURANCE
CO. OF PITTSBURGH, PA.

"Our policy does not exclude mold," said Sabrina Sally, second vp for Westport Insurance Corp. in Columbus, Ohio. Westport, a unit of Employers Reinsurance Corp., is the endorsed insurer for the IIABA's E&O program. "At this point, what we have done is we've got excellent risk analytic tools, and we use them to monitor developing trends on all types of claims, including mold," Ms. Sally said. "To date, we just haven't seen a trend developing. If that were to come to change, we might reconsider."

Utica Mutual Insurance Co. also is not excluding mold in its agency E&O policy.

"It's an exposure agents definitely need to be concerned about," said Curtis M. Pearsall, vp-E&O programs for the Utica, N.Y.-based underwriter. "What we're trying to do is to take a proactive approach and essentially help agents and give them the tools that they need to identify the different mold exclusions in policies and to make sure they explain them properly to their customers."

"One of the concerns I have about the mold exclusions is the fact that many carriers have different definitions of what mold is," Mr. Pearsall said. "The agent needs to understand the exposure and be able to explain to customers what the mold exclusion on their underlying

policy does."

Whether Utica excludes mold claims in the future will depend a great deal on the reinsurance market, Mr. Pearsall said. "If the reinsurance market mandates it, then, in many cases, you don't have a lot of choice."

"It's a topic of conversation (with reinsurers), but I think they are allowing us to take a very proactive approach with education with the hopes of resolving the issue there," he said.

Indeed, E&O experts say agents can take an assertive approach and become immune from such E&O exposures in the future.

"If they offer appropriate advice and coverage to their clients today and there hasn't been a claim, they can avoid the professional liability exposure," Mr. Dybdahl said. "They're not destined to pay these things. They can proactively manage the risk by offering appropriate advice and coverage. But if they ignore it and it becomes an uninsured loss on a policy they were responsible for, they have few defenses."

At least two associations are attempting to better educate agents on their professional liability exposures for mold exclusions.

The IIABA, for instance, is in the process of developing a mold module for its best-practices E&O claims-prevention manual and plans to offer an E&O seminar on the issue for its various state associations to conduct for its Westport policyholders, Mr. Hulcher said.

The mold module also will include a checklist agents can go over with their clients that points out problem areas of a policyholder's home or business and provides various loss prevention tips, explained Rob Eilers, manager of E&O claims prevention services for the IIABA.

"What we're trying to accomplish is to educate agents on mold," Mr. Hulcher said. "By doing that, they are going to be in a better position to educate their clients on the exposures they have for mold."

Not only do agents need to understand where in a policy mold is covered and where it is excluded, agents need to know where they can go to obtain coverage if it's available,"

Mr. Hulcher said.

"And if it's not available, there certainly needs to be a signed disclaimer in the client's file saying we were unable to obtain this," he said.

"We generally think it's good that an agency's procedures include outlining any exclusions that may be in the policy and making sure that the clients sign off that they understand there is that exposure," Mr. Hulcher added.

In addition to the IIABA, the Environmental Risk Resources Assn. recently announced a new series of insurance agency seminars titled "Mold is Gold" with the goal of reducing an agency's professional liability loss exposure to uninsured mold and pollution claims.

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DAVE DYBDAHL
AMERICAN RISK MANAGEMENT
RESOURCE NETWORK

According to the ERRA Web site, the professional liability exposure of a risk adviser can be mitigated in a two-step process: educating agents to mold risks and the availability of environmental insurance and alerting clients to the issues and insurance solutions that are available through the agency.

The new seminars are designed to accomplish those two steps, according to ERRA.

For more information about the seminars, log onto the ERRA Web site, at www.erraonline.org. ♦