

## Mold Risk Management for Restoration Contractors

by David Dybdahl

**M**old 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

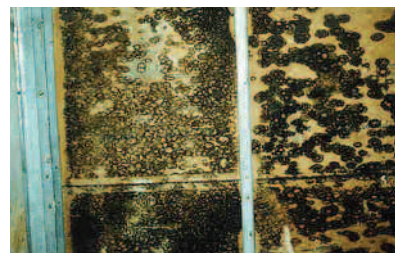
The response to mold claims by the insurance industry significantly changed the risk management and insurance needs of restoration contractors. Insurance claims for mold damages exploded onto the scene between 2000 and 2001. The short-term benefit to restoration contractors was a sudden surge in demand 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?**

Damage 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 offloading 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 amateurish 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, 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. Most of the potential targets for mold liability lawsuits 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:

- 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.
- 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 million being common. Avoid starting work on jobs that do not have sufficient funding to complete them without cutting corners.



- 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 plaintiff's lawyer's dream on steroids.
- 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.
- Seek IICRC or other widely accepted certifications. Follow the IICRC S520 guidelines 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 scientifically risk-based protocols. 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.

- 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.
- 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 prob-



lems caused by uninsured subcontractors three years ago.

- The IICRC has added risk management chapters to S500 and S520. The revised S500 is scheduled for release in February, the S520 in the fall. 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 percent safety credit in CPL insurance premiums from leading underwriters. ASCR accreditations also receive discounts. Contact the IICRC for information on this insurance program at [www.iicrc.org](http://www.iicrc.org).
- 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 million 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. **ICS**

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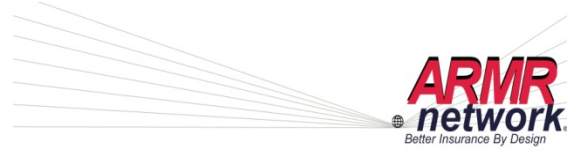
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