

# General Liability Insurance & Mold

By Paul Duggan, ERM, and David Dybdahal, CPCU

**7**his article is, in part, an extension to Michael Pinto's article in the December 2007 of *Cleaning & Restoration* entitled, "How to Get Sued Without Really Trying." In this informative article, Pinto outlined how a mold remediation project goes bad due to the contractor's failure to follow industry standards, and the building owner's failure to follow written protocols or hire an accredited contractor. While we agree completely with his comments, there is another aspect to address in this study on risk management.

This article describes an office building with multiple water leaks and visible mold growth. Several tenants complained of odors and ill health. An indoor air quality consultant was hired to perform an investigation. He issued a report outlining the areas of concern and need for remediation. The lowest bid contractor was hired to perform the remediation by the building owner. Unfortunately, the contractor failed to address the problems effectively, resulting in added costs and potential liability for all of the stakeholders in the project.

Let's add a risk management perspective to this scenario. It is very likely that all the parties associated with this project, including the general contractor, subcontractors, consultants, building owner and building manager had no General Liability (GL) insurance coverage for any part of this the project. This is due to the universal mold and bacteria related claims exclusion found in virtually all GL policies sold in the United States today.

To manage the risk of performing water, drying and mold work, or even general contracting work, it is important for all the parties to realize:

1. That the mold and bacteria exclusion kicks in as soon as the insured sets foot on the property.
2. The entire GL policy is voided out even if only a very small part of the loss is "related to" any amount of mold. In theory, a single mold spore triggers the exclusion.
3. Purchasing a separate Contractors Pollution Liability policy to cover mold is only a partial solution to the insurance

coverage gap created by this far reaching exclusion in the General Liability policy.

The good news is that there is an economical solution to the insurance problem. Although these exclusions are not standardized, the most common mold or bacteria exclusion found in a General Liability policy reads as follows:

*This insurance does not apply to:*

#### **Fungi or Bacteria**

**a.** "Bodily injury" or "property damage" which would not have occurred, **in whole or in part, but for the actual, alleged or threatened inhalation of, ingestion of, contact with, exposure to, existence of, or presence of, any "fungi" or bacteria on or within a building or structure, including its contents, regardless of whether any other cause, event, material or product contributed concurrently or in any sequence to such injury or damage.**

**b.** Any loss, cost or expenses arising out of the abating, testing for, monitoring, cleaning up, removing, containing, treating, detoxifying, neutralizing, remediating or disposing of, **or in any way responding to, or assessing the effects of "fungi" or bacteria, by any insured or by any other person or entity.**

This exclusion is so broad it essentially voids out the GL policy entirely as soon as any insured party is in any way "related to" a mold project. The GL policy is voided out even if the only activity of an insured party is evaluating the "threatened existence of mold or bacteria." Since mold spores are omnipresent, it is impossible to interpret what the threatened existence of mold may mean; mold spores will always exist in the built environment.

If contractors remediate mold, come in contact with mold, or their work causes or has allegedly caused mold growth **in any amount**, this exclusion voids out all GL coverage including the defense cost coverage. This excerpt emphasizes just how far reaching the exclusion is. **Mold only has to be involved or allegedly involved in a loss, not be the cause of the loss, for this exclusion to take effect over the entire GL policy.**

Because of this universal exclusion, contractors and consultants are voiding all their GL coverage when they perform any work related to mold or bacteria, or if mold or bacteria in any quantity becomes part of a claim. Even carpet cleaners are affected by this common exclusion. It is also very likely that the building owners and managers in Pinto's article have no insurance coverage at all for their costs arising from mold or bacteria, which increases the chances the owner will need to sue the contractors and consultants to recover costs from the botched job.

## The Catastrophic Uninsured Loss

The following claim scenario applied to Pinto's project illustrates the far-reaching effects of the exclusion.

*The contractor while removing moldy materials accidentally starts a fire that destroys the building and severely injures several tenants. As a result of the loss, the building owner and property manager sue the contractor and the tenants sue the contractor, building owner and property manager.*

- Can the contractor's GL insurer deny the entire loss from the fire citing the mold exclusion?
  - Can the building owner's and property manager's GL insurers deny the tenants' claims by citing the mold exclusion?
- The consultant, while less exposed, could still be sued by the damaged parties for the fire loss; can his GL insurer deny the claim citing the exclusion?*

The answer could be yes to all three questions. Although we doubt this is the intent of the exclusion, the insurance company has the option to deny all these claims because of it.

## Does Your General Liability Insurer Want to Insure You?

A couple of years ago, we contacted several GL insurers who we had regularly found insuring fire/water contractors and restoration contractors. Our effort was to find GL insurers willing to offer insurance to our book of restoration contractors. However, to our surprise, nearly all the GL insurers at the home office director of underwriting level had one of the following responses:

- Fire/water and restoration contractors are a class of business their underwriters are prohibited from insuring.
- Their insurance company was in the process of non-renewing all such contractors because of the loss exposure to mold.

- Or they denied their insurance company was actually selling GL insurance to restoration contractors.

Yet we find these same carriers suspiciously continuing to insure restoration contractors today. The possible explanations for this include:

- Insurance agents may misclassify fire/water and restoration contractors as "janitors" when they submit their applications to the insurance company. The result is the insurer may be unaware they are even insuring a restoration contractor. Where paying the insurance rates of a janitor saves on the premium, the policy will not be a good value for a restoration contractor if a claim is denied due to insurance fraud.

- Underwriters may be ignorant about their own underwriting guidelines until there is a loss.
- Individual underwriters may agree to insure businesses submitted to them by their best agents by stretching their company's underwriting guidelines.

The interplay between universal mold exclusions and naive underwriting could be very detrimental for contractors in a claim situation. The insurance company may not like the idea of having to pay a large claim on a risk they never intended to insure. Therefore, the insurer's claims personnel are likely to look for any conceivable reason to deny coverage. The universal mold exclusion gives them a ready made reason to deny the entire claim if they so choose anytime there is a speck of mold involved in the loss.

## Other Coverage Solutions

Purchasing a CPL policy separately to cover mold does not fix the problem because the mold exclusion in the GL excludes more than the broadest CPL policy can cover. This is because the universal exclusion basically voids out the GL policy if mold in any quantity is even remotely involved with a loss.

On the other hand, all CPL policies only insure claims that are a result of the emission, discharge, release or escape of mold. A classic example that illustrates the coverage gap between these policies would be if a contractor starts a fire while performing a mold remediation. In theory, the GL is voided out for the entire job because the job was "related to" mold. The CPL would not engage for the fire loss either because there was no emission discharge, release or escape of



mold. So there is no coverage in either of these separate insurance policies for the fire loss.

One solution to filling this coverage gap is to purchase GL and Contractors Pollution Liability (CPL), including coverage for mold, from the same insurer. There are several insurers providing good quality package insurance policies to restoration contractors. This solution addresses many of the concerns raised including:

1. These specialized insurers understand the business of restoration contractors and want to insure them.
2. It is very unlikely these insurers could use the mold exclusion to deny a GL claim when they also insure the CPL. This is because the CPL policy requires that the insured complete an application detailing their services. The policy specifically lists these services as “covered services.” These insurers know that fire/water/restoration contractors may come in contact with mold and will not be able to use the “we were told the firm was a janitor” argument to deny a loss.

Having the same insurer on the GL and CPL prevents two well intentioned but adversarial insurance companies from using the classic “It’s not my job” argument for each policy. A coverage stalemate between these insurance policies could take years to work out.

To manage the risk of mold, in addition to Pinto’s advice, consider the following actions:

1. Always have good quality CPL in place.
2. Require subcontractors to carry CPL coverage if any work could involve water. (Our largest mold loss last year, \$9,000,000, was caused by a plumber in a remodeling project on an apartment building, not by a mold remediation contractor.)
3. Close the gap between the General Liability and Contractors Pollution Liability policies with the purchase of a good quality customized package policy.

The interface between GL and CPL is highly complex.

One solution to fill the coverage gap between General Liability and Contractors Pollution Liability is to purchase these coverages through a package policy, these can also include Professional Liability coverage.

While Pinto’s article contained excellent advice on how to reduce the risk of being sued, following this advice should help make sure there is insurance coverage for you if you are. ■

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