

There Is Less Gold in Mold For Restoration Contractors

By

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When mold cleanup exploded onto the scene as a new and expensive service to be offered by restoration contractors there was a period of time when mold was as good as gold in its ability to generate revenue for the contractors. This changed abruptly with the introduction of universal mold exclusions and limitations in insurance policies. Today there is still gold in mold work but it is harder to mine and more risky than it once was. The insurance exclusions and limitations for mold related damages not only made it more difficult for restoration contractors to get paid for mold work, exclusions for mold related losses in all forms of insurance significantly increase the risk involved in providing restoration services. Restoration contractors can manage the increased risk of “toxic” mold liability claims relatively easily, but it will take effort and money to do so.

The introduction of mold exclusions changed the business climate for restoration contractors. Without primary insurance to pay for mold damages, property owners are much more likely to sue their contractors in an attempt to recover money for uninsured mold related losses. In addition to being faced with more lawsuits, universal exclusions for mold related claims in Commercial General Liability (CGL) insurance policies leave restoration contractors without liability insurance coverage to pay for these claims.

To compound the new risk management challenges in the restoration business, plaintiff’s lawyers specializing in recovering mold damages for their clients have already identified contractors and insurance agents as their softest targets for cost recovery. Restoration contractors are easy targets for cost recovery if they do not follow generally accepted mold remediation protocols.

Insurance agents are even easier targets for plaintiff’s lawyers if appropriate insurance was available to cover a mold related loss and the insurance agent negligently leaves their customers unintentionally uninsured. However restoration contractors should not depend on their insurance agent’s professional liability coverage as a source of insurance of last resort for uninsured mold claims. Mold related claims exclusions have even found their way into some insurance agent’s Professional Errors and Omissions liability insurance policies.

Restoration firms will need to invest more into risk management to survive these sea change events in the restoration contracting market. The investments will include, training staff in state of the art drying and restoration protocols, being aware of the heightened risk of performing water related work, avoiding high-risk jobs and purchasing a good quality CPL insurance policy. The revised IICRC S500 and S520 guides scheduled for release this summer have new chapters on risk management that are a recommended read for all restoration contractors.

In developing a risk management strategy restoration contractors will need to fill the gap in their business liability insurance policies created by mold exclusions. This will require the purchase of a Contractors Pollution Liability insurance policy in addition to the traditional Commercial

General Liability policy. CPL insurance was invented for hazardous waste contractors working on Superfund sites in the mid 80's. The original CPL insurance policies were designed to fill the gap in General Liability insurance coverage created by absolute pollution exclusions, which were introduced by insurance companies in 1986. For reasons much too lengthy to discuss here, water and mold do not fit very well within the definition of a "pollutant" in the Commercial General Liability insurance policy. Without a separate mold exclusion contractors had liability insurance for most mold related damages under their CGL policies. This all changed with the introduction of universal mold exclusion two years ago.

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.

A properly structured CPL policy will fill the gap in the General Liability insurance policy created by 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.

Contractors Pollution Liability insurance covers Bodily Injury, Property Damage and Clean Up cost claims arising out of the contractors operations and completed operations, it also pays for defense costs within the limit of liability. It is important to recognize that a good quality CPL policy gets the contractor back to where they were on mold losses prior to the introduction of universal mold exclusions in the General Liability insurance policy. Most CPL policies also provide coverage for the release or escape of a broad range of other pollutants including asbestos and lead, cleaning chemicals, carbon monoxide or biocides that may not be covered in the General Liability policy because of the pollution exclusion. Therefore a firm that purchases a CPL policy actually has better insurance coverage than they did before mold exclusions were introduced.

With the core CPL policy form having its roots in Superfund hazardous waste contractors, some of the policy provisions in various CPL insurance policies turn out to be totally inappropriate for the insurance needs of restoration contractors. 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 Property 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 combined with a total pollution exclusion which is also commonly added to GL policies by endorsement can eliminate the products liability coverage that was normally covered in the GL policy. As a result 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 practical 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 Product Liability 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. Depending on the operations of the contractor and the exact wording of the exclusion, a CPL policy with one of these provisions could be almost valueless contractor.
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 a remnant of the original hazardous waste CPL policies 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 on CPL insurance purchase decisions would be at least five times less valuable than a policy that did not have this limitation if the primary concern is insuring against mold claims.
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. 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 not standardized and vary in scope. Professional liability exclusions may come into play if a contractor modifies a work plan prepared by a consultant, prepares a scope of work for others or prepares reports or opinions for a fee. Since most restoration contractors that have taken training courses and hold “Professional” designations the effect of the Professional Liability exclusion on coverage can be difficult to determine. Because of this exclusion a

restoration contractor should never sell plans or reports to a customer for a fee without first purchasing a separate professional liability insurance policy covering those activities. Newer CPL policies may have the Professional Liability exclusion modified so that activities normally associated with restoration are not inadvertently excluded by the wording of this exclusion.

It takes specialized expertise to evaluate the coverage differences in CPL policies. Virtually all CPL policies sold to restoration contractors in 2005 had at least two of the above flaws and some contain all five. In general the more coverage flaws a policy has the less expensive it is but this is not always the case. 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.

In environmental insurance it is entirely possible to choose an inappropriate environmental insurance policy for the specific needs of the firm, 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.

Unlike General Liability insurance, CPL insurance policies are not standardized, they do not have to be approved by state insurance commissioners and are written on an excess & surplus lines basis. This allows the insurance companies that sell CPL insurance to customize their policy forms and the rates they charge without having to wait for an insurance commissioner to approve the changes. The unregulated nature of rates and policy forms in CPL insurance creates a very complex insurance marketplace for the buyer and the insurance agents selling these policies. In stark contrast to General Liability insurance there is no instruction manual on how to work with environmental insurance policies.

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 excess and surplus Lines brokers who work in supporting local insurance agents.

It requires a excess & surplus lines insurance license to sell CPL policies and to pay the premium taxes on the policies to the state insurance commissioners office. Most retail insurance agents do not hold the E&S license necessary to sell CPL policies 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 good quality insurance coverage. 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.

Generalist insurance agents will often attempt to get quotes from all the insurance companies they can find that sell insurance to restoration contractors. If this strategy is followed, each insurance company's CPL applications should be completed to avoid prejudicing the underwriters as they open the underwriting file on your company and see their competitor's application.

Before starting the application process, a specialist insurance broker should be able to narrow the field of potential insurance suppliers based on the services mix of the firm. In a ten-minute phone call a knowledgeable insurance broker will 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. These reasons including inappropriate or unresponsive policy forms that might work fine for a competitor but don't cover your firm very well. Another downside of the "blanket the market with insurance submissions" approach is if you do get multiple quotes you will have six different twenty five page CPL policies to try to sort through.

It takes a qualified insurance consultant eight hours per insurance policy to make a good policy comparison. Due to the time demands this accurate evaluation process is very unlikely to take place, which directly leads to insurance agent's errors and omissions in recommending CPL insurance coverage and all the common coverage flaws mentioned above. A much better result is achieved by engaging the services of a credentialed environmental insurance specialty broker with expertise in the restoration contracting business. This expertise can be obtained in the form of a wholesale broker that will work with the local insurance agent or there are a limited number retail insurance agencies that also specialize in restoration contractors.

Conclusion

Mold created new opportunities and risks for restoration contractors. 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. The newly revised IICRC S500 and S520 which are scheduled for publication this year have chapters on risk management that offer practical risk management advice. 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 performing all restoration services.

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