

TOXIC MOLD: Managing the Risk in the Post Insurance Exclusion Era

By:

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Mold is the fastest growing risk management problem in the US

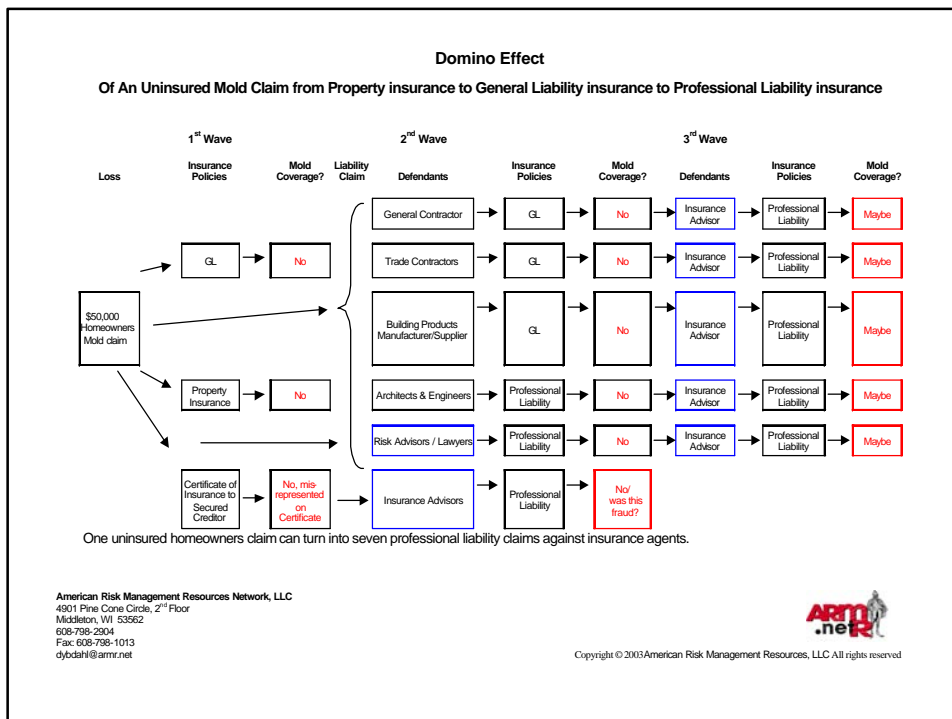
- A rapid increase in mold claims, followed by universal insurance exclusions for mold related claims will create hundreds of thousands of uninsured mold related losses. An army of specialized plaintiffs lawyers will gravitate towards liability lawsuits to seek recovery when the property policies deny the mold loss. Insurance to cover mold is available in the environmental insurance market, but risk management advisors historically ignore environmental insurance. The result is unprecedented E&O exposure for insurance advisors which will trigger a separate mold related claims exclusion in the advisors own E&O policies. In anticipation of the claims morass, adjusters professional E&O policies also have mold related claims exclusions.

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Is Mold Toxic?

- Nobody knows for sure
- There is growing scientific evidence it might be
- From a risk management stand point...
It does not matter
- Universal insurance exclusions force special treatment of this risk

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Where did all these claims come from?

- Prior to the new science linking mold to adverse health affects in humans, prior to the the lawyers and prior the media attention, mold claims were water damage claims without Bodily Injury and Defense costs.
- There are hundreds of thousands of water damage claims annually, they are not going away.

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What contributed to the rapid increase in mold claims?

- Changes in building materials and techniques
- An emphasis on energy efficient buildings
- New science linking mold to adverse health effects
- Lawyers attended hundreds of “mold is gold” seminars
- The press
- Tens of thousands of successful claims, for billions of dollars

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What types of businesses have the highest risk ? (Highest to lowest)

1. Uninsured businesses (today) Insurance companies & banks that operate insurance agencies are the #1 exposed classes
2. Insurance agents and brokers for leaving their clients unintentionally uninsured for mold damages. (2004)
3. Contractors and architects (today)
4. Banks who get left holding the keys (2004)+trusts+owned property
5. Building managers (today)
6. Building products manufactures and suppliers (2004)
7. Insurance companies (2002)

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Why are insurance agents ranked so high on the loss exposure list?

- In most states, insurance intermediaries have a fiduciary duty to:
 1. Advise of loss exposures and consequences
 2. Advise of coverage gaps and consequences
 3. Find appropriate coverage if it is available
- The agency plant is not performing these steps today
- The fiduciary duty extends beyond the ability to be paid a commission

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Agents Professional Liability

- Prospective insurance is available for mold damages
- The web turbo charges agents' loss exposure
- There will be very limited defenses for the insurance agents', all of these defenses will be based on what degree ignorance was reasonable and prudent.
- In defense of the agents', very little information has been provided to agents so far.
- The only good way to prevent the E&O is to offer coverage

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Why mold related losses are difficult to insure and adjust?

- No recognized standards for exposure
- Poor medical cause & affect relationship
- Losses are expensive - multi-million dollar claims are common
- Insurance coverage is being eliminated, nobody knows to what extent

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Relative Impact on Commercial Accounts (Mold is Bigger!)

	<u>Asbestos</u>	<u>Superfund</u>	<u>Mold</u>
# of firms* affected	4000	6000	10,000,000**
# of Claims	Hundreds of thousands in total	Less than 60,000	300,000 claims in 2002
\$ Exposure	\$ 20 Billion paid to date \$200 Billion next 20 years	\$26 Billion paid to date Over 23 years	About \$12 Billion Annually Losses from fire in the US, \$12 billion/yr

* More than \$100,000 in loss exposure

** with mold exclusions on their insurance policies

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This is just a Texas homeowners insurance problem, right?

Wrong!

- There are mold claims in every state
- Mold grows well in places humans find comfortable
- This is an indoor air quality issue there is exposure anywhere there are people in buildings
- Mold claims can be “company busters” and unlike Superfund, they happen fast

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The states with the most risk and least risk related to mold damages

- Top 10

- Texas	2.95
- Florida	2.50
- Oklahoma	2.45
- South Carolina	1.91
- Nevada	1.90
- Arizona	1.90
- California	1.73
- South Dakota	1.47
- Tennessee	1.33
- Kansas	1.25

- Bottom 5

- Wisconsin	.06
- West Virginia	.07
- Alabama	.13
- Massachusetts	.18
- Minnesota	.19
- None are zero	
- Source, Madison Mold Relative Hazard Ranking Model	

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Common themes in insurance policy drafting

- There will be no insurance for non-fortuitous causes of loss, business risk and inherent vice
- There will be no coverage for “pollution” losses – pollution exclusions were driven by Superfund claims

Mold claims can fall into multiple exclusions

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Mold coverage in Property and Builders Risk insurance policies 1994 ISO Policy

Insuring Agreement Pays for direct Physical Loss of, or Damage to, Covered Property arising from a Covered Peril, Consequential Loss is also covered

Limitations on Pollution

Pollutant Clean Up and Removal,

Limited to \$10,000

Policy does not cover testing monitoring

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The definition of a pollutant in a Property and Builders Risk policy

“Pollutants” means any **solid**, liquid, **gaseous** or thermal **irritant** or **contaminant**, **including** smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.

Does mold fall into this definition?

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Limitations in standard Builders Risk and Property insurance policies

- Wear and tear, **gradual deterioration**, corrosion, rust, **rot, mold**, inherent vice, **latent defect**, insects, rodents, birds and other animals are not covered as a proximate cause of loss, nor are the consequential damages
- Water damage caused by freezing of water in plumbing, air-conditioning, or other systems, unless proper precautions have been taken
- Pollution, unless the release results from specified perils, subject to limitations

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General Liability

Insuring Agreement

- Pay those sums that the insured becomes legally obligated to pay for Bodily Injury & Property Damage
- The Policy also provides for Defense Costs and Contractual Liability

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Possible limitations in the GL policy for mold losses

- Pollution exclusion
- Damage to **your work** once completed
- A defect or dangerous condition in **your work**

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Umbrella Liability policies

- Insuring Agreement mirrors those in General Liability insurance policies

Limited coverage for pollution claims

- Exceptions to the pollution exclusion offer some coverage for losses that fit certain time elements, usually measured in hours too short to be of value for mold losses

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Pollution exclusions in standard liability insurance contracts

- In theory may not apply to mold
- In theory do not apply to losses from completed operations or products liability
- In theory were not intended to exclude mold claims

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Troublesome words in the “Absolute” pollution exclusion on the General Liability policy

Pollutants means any solid, liquid, gaseous or thermal **irritant** or **contaminant, including** smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste, waste includes materials to be recycled, reconditioned or reclaimed

Does mold fall into this definition? Nobody Knows!

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“Absolute” pollution exclusions in GL policies (do not absolutely exclude pollution claims)

- If Mold/ Fungus/ Microbial Matter is a “Pollutant”, Then the Absolute Pollution exclusion eliminates:
 1. Coverage for any premises the insured is involved with
 2. Coverage for the operations of the insured or vendors
 3. Coverage for any waste disposal activities
 4. All claims arising out of restoration or remediation
- Products and Completed Operations claims are not excluded by the Absolute pollution exclusion

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The General Liability, “Total” Pollution Exclusion

- If Mold/Fungus/Microbial Matter is a pollutant then
 1. Products and Completed Operations Claims for claims related to “Pollutants” are excluded. There is no prospective coverage for Premises or Operations exposures either.
 2. Building products manufactures, lumber yards, contractors, roofers, plumbers and restaurants just to name a few classes, will no longer have mold coverage for products and completed operations loss exposures.

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Why the standard definition of a “Pollutant” does not apply to mold*

- Mold does not release or escape
- Mold is not a waste
- The proximate cause of mold is water
- Mold is naturally occurring
- Mold is not covered in many EIL policies
- Historically no mention of mold in insurance training materials on pollution exclusions
- If mold is a pollutant, why add new exclusions?

*Disclaimer: This is the personal opinion of David Dybdahl, CPCU which does not reflect the position or opinion of any other organization.

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Mold exclusions today

- Hundreds of variations, no standards
- Basically three categories
 1. Total exclusion for all “mold related” damages
 2. Partial exclusion for resulting loss from mold
 3. Full coverage if caused by a covered loss
- Sublimits are common

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Common traits in mold exclusions

- Exclude more than mold to include fungus and sometimes all microbial matter
- By default many bio terrorism agents would be excluded
- Mold exclusions are usually trying to clarify other policy limitations in respect to mold

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ISO property exclusions for mold

- Exclusion does not apply to
 - losses caused by fire or lightning
 - losses caused by named perils
- Mold related losses from the back up of sewer and sump losses are excluded
- Latent defect losses are excluded

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ISO General Liability Exclusions

- Exclude BI and PD for loss in whole or in part cause by fungi and bacteria
- All loss caused by remediation of fungi
- In theory are total pollution exclusions

The exclusion does not apply to fungi or bacteria meant for consumption. (The blue cheese exemption.)

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Typical Homeowners exclusion

- Reaffirms losses from continuous or repeated leaks are not insured
- Excludes wet and dry rot
- Newly excludes loss of use, remediation of mold or any costs for testing and monitoring

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Case Study I

A plumber during the construction of a new school leaves a pipe fitting loose which drips down an interior wall near an air intake. Mold begins growing in the wall cavity and is taken into the air recirculation system. The occupants of the building report breathing problems and eye irritations. Testing indicates there is “toxic” mold in the school.

- Remediation takes nine months
- Alternative class room facilities need to be leased
- Forty students report lingering side effects

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The loss from the event includes:

- Replacing dry wall, flooring and ceiling tile
- Extra expense of school district
- Bodily injury claims from students
- Legal defense costs

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A Typical Contractors Insurance Program

Affected by mold exclusions

Builders Risk	*
Property Insurances	*
General & Umbrella Liability	*
Workers Compensation	
Automobile Liability	
Professional Liability	*

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Contractors Insurance Program

Maybe Covered
 Excluded
 Covered

	Property		Builders Risk		General Liability		Umbrella		Pollution Liability	
	Covered Cause of Loss	Mold Exclusion	Covered Cause of Loss	Mold Exclusion	Traditional Pollution Exclusion	Mold Exclusion	Traditional Pollution Exclusion	Mold Exclusion	Traditional Definitions	Specific Mold Coverage
Replacement Costs	Maybe Covered	Excluded	Maybe Covered	Excluded	Maybe Covered	Excluded	Maybe Covered	Excluded	Maybe Covered	Covered
Extra Expense	Maybe Covered	Excluded	Maybe Covered	Excluded	Maybe Covered	Excluded	Maybe Covered	Excluded	Maybe Covered	Covered
BI	Excluded				Maybe Covered	Excluded	Maybe Covered	Excluded	Maybe Covered	Covered
Defense Costs	Excluded				Maybe Covered	Excluded	Maybe Covered	Excluded	Maybe Covered	Covered
Contractual Liability	Excluded				Maybe Covered	Excluded	Maybe Covered	Excluded	Maybe Covered	Covered

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Coverage trigger issues

- Covered peril claim on property policies
- Definition of occurrence on liability policies
 - completed operations
 - continuous and repeated exposure
 - stacking of limits
- Claims Made policies

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How to insure against Mold losses

- Make sure the policy specifically addresses mold as a covered loss
- If you are reading the exclusion section of any insurance policy looking for the mold coverage, there will be trouble with the claim
- There are no “buy back” standards
- There are no “standard” environmental insurance policies, over 100 different variations

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Environmental insurance policies can insure liability claims from mold

- **There are three basic types of environmental insurance for mold claims**
 1. Environmental Impairment Liability
 2. Contractors Pollution Liability Insurance
 3. Professional Liability

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Environmental Impairment Liability

- Site specific pollution insurance
- Covers third party claims for Bodily Injury, Property Damage, Clean Up and Defense from a release of pollutants
- Can cover, Products Liability, Contractual Liability, Business Interruption, Extra Expense, and Non Owned Sites

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Contractors Pollution Liability

- Insures Bodily Injury, Property Damage, Clean Up and Defense, from a release of Pollutants, arising from the insured's described operations
 - Appropriate for general contractors, home builders, remediation contractors, roofers, plumbers, trades, fire restoration
- Also covers Contractual Liability
- Training in mold prevention is usually required

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Professional Liability

- Insures a negligent Professional Error Act or Omission
- Coverage is provided by eliminating the pollution exclusion and adding clean up to definition of damages
- Policies are usually only sold to degreed "Professionals"

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Finding appropriate coverage for mold damages?

- Buy backs on homeowners policies
- Environmental insurance on commercial accounts
- The biggest constraint in the market for consumers will be the number of educated insurance advisors.
- There will be a flood of professional liability claims made against insurance advisors.

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The claims adjusters job is now complex on water claims

- No industry standards for adjusters
- Water Intrusion + 2 days = mold
- Mold exclusions are impossible to interpret
- Potential personal liability for toxic torts
- Potential bad faith exposures for the company
- “Mold related” claims exclusions are finding there way onto adjusters Professional E&O insurance policies

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Personal risk management advice for adjustors

- Become informed on the hazards of mold
- Do no further harm
- Review indemnity contracts with employers
- Review your own professional liability coverage
- Accelerate the turn around time on water claims
- Never act with arrogance and indifference

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Risk management advice for insurance advisors

- Become informed on mold risk and insurance issues
- The bullet proof E&O defense
 1. Advise of the exposure
 2. Advise of the insurance exclusions and their consequences
 3. Offer to obtain appropriate mold coverage
 4. Get a signed letter from the client declining the coverage
- Use resources, do not try this without help

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What will the future bring?

- Hundreds of thousands of new water intrusion/mold claims every year
- New mold exclusions on all types of insurance
- Uninsured mold claims on property policies will transform into liability claims against contactors, building products suppliers/manufactures, and advisors.

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What will the future bring?

- New microbial matter insurance policies will be introduced by environmental insurance underwriters.
- Personal lines underwriters will expand buy backs.
- Lenders will become concerned about uninsured collateral.
- Mold coverage is available today, which will supercharge the insurance agents E&O claims
- Hundreds of thousands of insurance agents will be forced to deal with environmental insurance for the first time. Thousands of coverage mistakes will be made.

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Sources of information on mold related insurance issues

- Property Loss Research Bureau, PLRB
www.moldupdate.com
- Environmental Risk Resources Association
www.erraonline.org
- Adjusting Water Intrusion Claims, University of Wisconsin-Madison College of Engineering,
matulionis@engr.wisc.edu

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Conclusion

- Mold will continue to be a growing problem in the insurance industry.
- The effects of mold exclusions are yet to be felt.
- Insurance agents face unprecedented uninsured E&O exposure
- The claims adjusters job will become more complex.
- Insurance product solutions will need to be created.
- The expertise needed to develop mold insurance products exists today.

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Conclusion

Mold Exclusions = Pollution Exclusions =

The most litigated words in the history of insurance

- It will be a lot better for everyone involved (except the trial lawyers) if consumers are given the option to purchase appropriate coverage for mold losses.

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