

## **Managing Mold Related Risks, After the Mold Exclusions Become Effective**

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### **Mold damages will transform from first party claims to third party toxic tort claims in 2003**

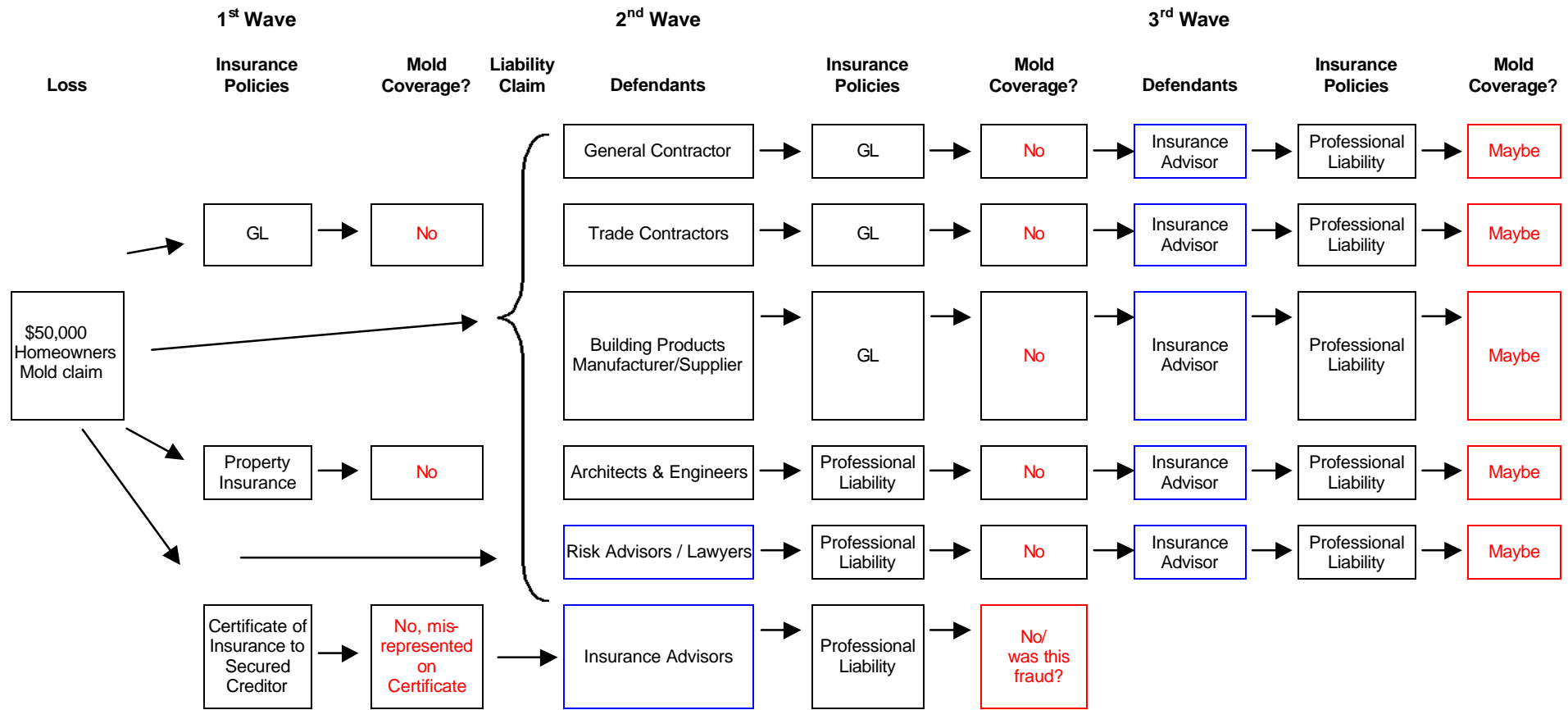
As tens of thousands of property owners seek funds to pay for expensive mold remediations, universal “mold” exclusions are destined to transform many insurance claims on homeowners and all risk property insurance policies into toxic tort liability claims against contractors, engineers, architects, building products suppliers, real estate professionals and landlords. By fact, history and circumstance, risk advisors have already been positioned to be “the insurers of last resort” for their clients unintentionally uninsured environmental and toxic mold claims. In many cases there is prospective insurance available to cover mold and environmental losses. This insurance is either in the form of a buy back on homeowner’s policies or environmental insurance on commercial accounts. However, based on the current sales of the specialty environmental insurance products covering mold damages, risk advisors are loath to utilizing them. The combination of an explosive growth in newly uninsured mold related damages claims, in the face insurance product availability, has already subjected risk advisors to unprecedented levels of professional liability.

The progression of an uninsured mold claim from the property insurance company to liability insurer’s and ultimately to the risk advisor is shown in The Domino Effect of an Uninsured Mold Claim. Risk advisors can easily avoid professional liability claims for uninsured mold damages by advising their clients of the mold hazard and offering to procure the appropriate insurance. Simply pointing out the new mold exclusion will not keep a risk advisor out of the professional liability soup if their client suffers an unexpectedly uninsured loss when coverage was available but not offered to the client.



## Domino Effect

### Of An Uninsured Mold Claim from Property insurance to General Liability insurance to Professional Liability insurance



One uninsured homeowners claim can turn into seven professional liability claims against insurance agents.





## **A new perspective on mold claims**

The frequency and severity of mold related damages claims on a national basis are somewhat of a mystery. Based on insurance company testimony to the Maryland Insurance Administration on November 7<sup>th</sup>, 2002, the total property damage claims as a result of mold can be estimated to be roughly 8.5 billion dollars. Prior to the new wave of mold exclusions, the average mold remediation claim was costing \$20,000 on homeowner's insurance policies and in the \$200,000 range on commercial property losses. Carrying forward the first six-months claims figures for 2002, there were approximately 350,000 property insurance losses for mold related damages in the year. To contrast mold losses to fire losses, were 12.6 billion dollars in total fire claims in 2000. There were 505,000 insured fire losses with an average loss of \$25,000.

Measuring mold losses based on property damage alone underestimates the loss content. Unlike fire losses, mold introduces a toxic tort element into the loss mix. By adding a conservative estimate of toxic torts to the mold related property losses, mold related damages produce claims frequency and severity that mirrors fire claims in the US. The big difference between mold and fire claims is fire is covered as a cause of loss on all prospective insurance policies and mold is not. Leaving clients bare for an exposure similar to fire claims is an unanticipated result of mold exclusions for risk advisors.

## **Residual liability insurance coverage for mold related damages**

In 2003, virtually all property and liability insurance policies will contain mold, microbial matter or fungus exclusions. These exclusions are commonly referred to as "mold exclusions" although the definition of the materials excluded goes beyond mold. The new mold exclusions will apply to new loss events incurred during the policy period.

However, even with the new mold exclusions on their 2003 policies, most business will have some residual liability insurance protection for historical mold related losses. This is because most businesses purchase "Occurrence" based liability insurance. In occurrence-based liability insurance coverage, the policy in force when the accident took place including continuous or repeated exposure to the cause of the loss, is the policy that will apply to the loss. Liability insurance policies purchased prior to May 2002 will most likely be silent on the subject of mold. Therefore these policies should have a coverage element in them for historical mold related liability damages. However, general liability insurance policies will still have absolute or total pollution exclusions, which may be used by the insurance company to deny a claim for mold, related damages.

In mold related damages, setting the date of loss and which policy should apply will be an inexact process. Arguably the date of loss may be the date the building was constructed, the date water first entered the building, the date the mold was discovered, the period of time the mold was growing or a combination of these coverage triggers. The discussions on which insurance policies apply to a mold loss will be reminiscent of those

held over pollution and asbestos losses and vary by state. The residual coverage for mold related damages in historical occurrence-based general liability policies will become considerably less valuable over time as it becomes more and more likely that a new water intrusion event that leads to mold growth will be incurred during the coverage period of a liability insurance policy that has a separate mold exclusion endorsed on to it

The new ISO Commercial General Liability coverage form attempts to clarify which policy will apply to a loss that occurs over time. However, due to the nature of some mold related losses, where there is subsequent damage each time there is a water event or the humidity reaches a certain level, there will no doubt be considerable debate on which policy or policies should apply to the loss.

Rather than guessing which old General Liability insurance policies might address liability for mold related damages a more predictable solution on commercial accounts will be to purchase environmental insurance that has been modified to cover mold as a pollutant. These environmental insurance policies are written on a claims-made basis, which clarifies which policy will respond to a loss. The environmental insurance market is a constant state of flux and must be closely monitored in order to advise clients on the availability of environmental insurance covering mold. A recent search of the Internet produced 4000 hits for words “mold insurance”. The website of the Environmental Risk Resources Association at [www.erraonline.org](http://www.erraonline.org) listed the commercial mold insurance market. There are also a number of specialty environmental insurance wholesalers listed on their site who are excellent resources to monitor the insurance market through.

In many states, buy backs for mold related damages from covered perils are available on homeowner’s insurance policies.

To avoid unanticipated uninsured losses in their customer base and the resulting professional liability exposure, risk advisors should always offer to procure environmental and mold insurance coverage if it is available in the market place.

### **Coverage under liability insurance policies issued in the past**

With out separate mold exclusions on old general liability insurance policies, some insurance companies may still deny mold related damages under the pollution exclusions that universally appear in general liability insurance contracts.

### **7 reasons why mold is not a pollutant in the absolute pollution exclusion**

The meaning of pollution exclusions could be the most litigated words in the history of insurance. In my opinion, mold related damages should not be subject to the absolute pollution exclusion for the following reasons:

- Mold does not release or escape within the intent of the pollution exclusion.
- Mold is not a waste.

- The proximate cause of mold is water and water does not fit the definition of a pollutant in the policy.
- Mold is a naturally occurring, living material that does not fit the definition of a pollutant within the insurance policy.
- Environmental Impairment Liability insurance policies were specifically developed to fill the gap in insurance coverage created by the pollution exclusions in general liability insurance contracts. Some EIL policies specifically exclude naturally occurring substances from the definition of “Pollutants” in the environmental insurance contract. This is evidence that senior insurance underwriters looking into the need for environmental insurance thought naturally occurring substances were not excluded under the absolute pollution exclusion in the general liability insurance policy. Therefore there was no need to cover naturally occurring materials (molds) as pollutants within in the environmental insurance contract. This evidence tracks back to at least the early 90’s.
- Underwriters were not addressing mold as a separate loss exposure or coverage issue until late 2001. The training materials used in the insurance industry to illustrate the intent of pollution exclusions are silent on mold as a potential pollutant in liability insurance contracts.
- If pollution exclusions excluded mold, then there would be no need for separate mold exclusion on new liability insurance policies.

**No residual mold coverage in claims made insurance, Professionals have uninsured loss exposures.**

The mold exclusion’s effect on claims made liability insurance is dramatically different than on occurrence based liability insurance. On a claims-made policy, a mold exclusion on the renewal of the policy is in effect a full prior acts and prospective work exclusion for all mold related damage claims. For example, an architect with a mold exclusion on the renewal of their professional liability insurance would not have insurance for mold damage claims that were caused by the defective design of a vapor barrier that causes water to accumulate in walls. The insurance coverage gap created by the new mold exclusion would apply to the loss regardless of when the loss occurred, when it was discovered, when the design was completed or when the building was built. The professional liability insurance policies of insurance agents/brokers, real estate brokers, lawyers, architects and engineers are all written on a claims-made basis. All of these professions face the same retroactive coverage gap if a mold exclusion is added to their professional liability insurance.

Many risk advisors including insurance agents, brokers and lawyers will likely face a full prior and prospective acts “mold related damages exclusion” on their professional liability insurance coverage in 2003. More than ten million mold exclusions have been delivered in the past six months on commercial accounts and only a few hundred environmental insurance policies covering mold have been sold to date. Therefore, risk advisors on commercial accounts already have already incurred twelve months worth of incurred but not reported professional liability claims exposure for leaving their customers uninsured mold damages. These potential professional liability claims will be

retroactively excluded under the insurance agent's professional liability insurance policy if it is renewed with a mold related damages exclusion.

Mold has created unprecedented professional liability loss exposure for insurance agents and brokers. In addition to the introduction of mold related claims exclusion on insurance agents professional liability insurance, there will be hundreds of thousands of water damage/mold claims that will be uninsured for the first time in 2003. *Our research in ARMR.net indicates that mold related damages mirror insured fire losses in the US for claims frequency and severity. At these loss levels there could be one uninsured water damage/mold claim for every 2 1/2 licensed property and casualty insurance agents in the United States this year. Most of these claims will be relatively small but they will still strain the agent's relationship with a client.* The average mold claim in Texas is \$22,000. No agent wants to tell their client they are not covered for a loss, especially one for twenty thousand dollars. Some of these mold losses will be more significant and potentially expose insurance agents to professional liability for failure to advise the client of the loss exposure and failure to procure the appropriate environmental insurance covering mold. In the age of the Internet it will be more and more difficult for an agent to create a successful defense by saying they did not know mold insurance was available or how to obtain it. A recent search for the key words "mold insurance" produced one hundred and seventy two thousand hits utilizing the Google search engine. The entire commercial mold insurance market was summarized within the first page of search results. To avoid having their own mold related professional liability losses, all risk advisors should implement a mold claim loss control procedure by advising their clients on the hazards of mold and offering the appropriate environmental insurance covering mold if it is available. The mold insurance market is in constant state of flux as underwriters introduce more coverage into the market place in various policy forms as other underwriters move to exclude all claims for mold damages.

A summary of the current mold insurance market for commercial accounts is shown on the website of the Environmental Risk Resources Association at [www.erraonline.org](http://www.erraonline.org).

## **Conclusion**

Mold exclusions will transform property insurance claims into liability insurance claims in 2003. Mold exclusions on liability insurance policies will eliminate insurance coverage for new occurrences but most business will have some residual liability insurance protection in place. In the absence of separate mold exclusions, mold claims may also be denied under the terms of pollution exclusions in liability insurance contracts. However, there are a number of arguments that can be made as to why mold is not a pollutant within the context of the standard pollution exclusion. Organizations with loss exposure to mold related damages should actively seek to fill the insurance coverage gap created by mold exclusions with appropriate insurance coverage. Commercial insurance covering mold related damages is available today for building owners, contractors and environmental consultants through the environmental insurance underwriters. Some homeowner insurance companies are currently offering buy backs for mold coverage.

Risk advisors who fail to advise their clients on the hazards of mold related damages and fail to offer appropriate insurance covering mold risks face the most severe insurance coverage gaps. This risk can be managed by advising clients on their exposure to mold related damages and offering the appropriate insurance to cover this loss exposure.

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**The views and observations contained in this paper are his own and do not reflect the views of the Environmental Risk Resources Association, it's members or any other organization.**

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