

# Cleaning & Restoration™

\$9.00

August 2010 • Vol. 47 No. 8

Published by the Restoration Industry Association



## Risk Management

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# Insurance Industry Update for Restorers

*By Ross Driscoll, CR*

**T**here have been numerous changes in the insurance market place over the past 10 years. The market has made the full swing from the hard market cycle to the soft market cycle during that period of time. This author has not witnessed a market this soft since 1993 and 1994, and now is the time for restorers to take full advantage of this extremely soft market and obtain additional coverage that may have been previously unthinkable and unobtainable.

Many may recall how difficult it was in the past to obtain insurance as a restoration and/or reconstruction contractor. The pollution exclusion was made part of general liability policies about 10 years ago, which then created the need to purchase separate contractor pollution liability coverage. Many general liability carriers would not write this class at all and if they did, they were getting a much higher premium than today. A contractor then had to purchase a separate general liability and separate contractor pollution liability policy.

## Hard vs. Soft Markets

A hard market occurs when carriers have a lack of capacity or capital to write coverage or when carriers experience a lack of investment income. When investment income is low, insurance carriers may restrict the types of coverage and the classes of business they are willing to write. They need to depend more on underwriting profit/gain as they do not have the investment income to support their writings. They must underwrite to make a profit.



An example would be a contractor who was with a particular carrier for several years only to find out he is being non-renewed and has no losses. He may be a good risk, but the carrier has decided they will no longer entertain that entire class of business as they have limited capacity and are “cherry picking” the classes of business they are willing to write. With their limited capacity or capital, they start shedding business to keep only their most profitable classes of business.

Another hard market example would be a contractor who is offered a renewal at a significantly higher premium with reductions in coverage and terms from the prior year. During a hard market there will typically be fewer carriers writing a



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particular class of business. There may have been 10 carriers in a particular class during a soft market only to be reduced to three when the market hardens.

A soft market occurs when investment income is high. Traditionally insurance rates are low when investment income is higher as the companies resort to “cash flow” underwriting. They typically relax their underwriting guidelines as they are looking for the premium to invest as the return on investment income is high. The carriers typically start offering better and better terms and conditions combined with rate reductions to attract new business. *This is where we are at right now.*

The restoration professional now has the ability to increase their coverages for very little or no additional premium. Since the current market is so soft, there are several coverage enhancements which were unavailable even three months ago which can have a huge impact for a restoration company.

### **Occurrence vs. Claims Made Policies**

Up until now, most general and pollution liability combined policy forms came with occurrence general liability with defense outside the limit, occurrence pollution with defense inside the policy limit, and claims made mold. There are still some policies out there which contain claims made contractor pollution

liability. There is absolutely no reason why any policies for CPL today should still be claims made unless the insured has very, very poor loss experience.

There are a number of carriers today willing to write occurrence mold and provide a prior acts “nose” to their package and monoline CPL policies. One should always purchase occurrence insurance when it is available. There is absolutely no reason to continue to renew and purchase claims made mold when occurrence mold is available. As a general rule, one should never purchase claims made when occurrence is available.

In the past, carriers were only willing to write mold on a claims made basis. With an occurrence policy, one has a separate limit each and every policy period. A claim may be reported in the future for a job which took place during that policy period. For example, if there were any alleged construction defects claimed for a job performed in 2003 and presented in 2010, the 2003 occurrence policy can be triggered. There is no limitation on when a claim may be reported for work performed during that policy period. Unlike claims made, there is a separate limit of liability for claims which are alleged to have occurred as a result of work performed during that period.

With claims made, one starts with an inception date/retroactive date when claims made coverage is first purchased. The insured has a single limit of insurance which transcends all the various policy periods and various carriers. There may have been numerous carriers over the years and the insured may have started claims made coverage in 2003 with continuous coverage into the present.

The limit of liability for the current policy applies to all claims reported for work performed over the last seven years. There is only one policy limit available for all of the policy periods instead of separate policy limits for each year. As the number of years of claims made coverage increases, one must purchase larger limits as the coverage is for a greater number of years of claims exposure.

Claims made covers claims which may be presented now for work performed years ago and occurring after the retro/inception date. The carrier who the insured is with when the claim is presented gets to defend the claim.

The biggest problem with claims made occurs when one decides to leave a claims made policy for an occurrence policy or decides to go out of business. With claims made the trigger

depends on who you are with when the claim is presented. The claim must be presented during the policy period. The claims made policy comes with a 60-day “mini tail” or extended reporting period. Any claims for all of the years with claims made coverage must be presented to the carrier within those 60 days or there is no coverage.

When purchasing a claims made policy, there is a section in the back of the policy referring to the Extended Reporting Period option or “tail.” One may typically purchase a three-year extended reporting period for two times one year’s premium. This is a very expensive proposition and most

contractors elect not to purchase the “tail.” Even if the insured purchases a three-year “tail,” there is no coverage for claims reported after the three-year period ends. An example would be a construction defects claim that is reported five years after the purchase of the “tail.” There would be no coverage or defense under this scenario.

The solution is to purchase occurrence based mold insurance which includes coverage for prior acts or “nose coverage.” Under this solution, the new carrier writing the occurrence policy agrees to provide coverage for all of the prior claims made policy periods into the future.

An example would be a contractor who has an original retroactive date of 2003. The new carrier would provide coverage and allow the reporting of claims for jobs occurring between 2003 and 2010 in the future. If a claim is presented in 2013 for a job that occurred in 2007, the coverage would be triggered by this policy.

All claims presented for work which took place from 2003 to 2010 would be reported to the 2010-2011 carrier. The insured would then purchase occurrence based

insurance in the future and would then have separate limits of liability for each and every future year, plus there would be no limitation on when claims for work performed during those policy periods may be reported.

Part two will look at naming additional insureds, site pollution coverage and professional liability insurance. ■

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## Hot Points

- ▶ **Hard market – When carriers lack investment income or capital to write coverage, results in higher insurance rates.**
- ▶ **Soft market – When investment income is high and insurance rates are lower allowing for additional coverage.**
- ▶ **Claims made forms – claim must be made during coverage period or extended reporting period, *no coverage for claims made outside policy period***
- ▶ **Occurrence forms – claims may be reported in the future after policy expiration for alleged events occurring during policy period**

# Cleaning & Restoration



\$9.00

September 2010 • Vol. 47 No. 9

Published by the Restoration Industry Association

## Expanding Your Market Share

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# Insurance Industry Update for Restorers

*By Ross Driscoll, CR*

**Editor's Note:** Part 1 of this series appeared in the August 2010 issue of *Cleaning & Restoration*.

Part one of this series reviewed the differences between claims made and occurrence policies, and the considerations for both. It also explained hard and soft insurance markets and why today's soft market provides restoration contractors with opportunities to purchase additional coverage at lower rates.

This article will examine naming additional insureds, site pollution coverage and professional liability insurance.

A problem scenario can occur when naming others including general contractors, property management companies, franchisors and claims administrators as additional insureds. Most contractors typically sign indemnification agreements. These documents require the contractor to indemnify the additional insured regardless of whether or not their insurance triggers. Many of the carriers writing restorers will not offer "your work" wording for completed operations. These companies issue additional insured endorsements which state the additional insured may make a claim as long as there are "ongoing operations."

If a claim is presented and there are no ongoing operations, the property has been put to its intended use, and the job has long since ended, the additional insured would not trigger. The additional insured "could not step into the contractor's shoes" for a defense and would be forced to sue under the indemnity agreement. The words "your work" would allow the additional insured endorsement to trigger

as the work was done during the policy period. In a worst case scenario, a contractor is forced to provide a legal defense with the lawyers chosen by the party he originally named as an additional insured at the contractor's expense for the party he agreed to indemnify if the carrier does not agree to defend.

In the last three months, sudden and accidental site pollution has become readily available to restorers. While recently examining various possible coverage scenarios, the firm realized its insureds were not covered at their own locations for pollution. Contractor pollution liability provides coverage to a contractor at a job site but not at his own location.

A possible scenario would be a contractor who does a pack-out and brings the items back to the shop. The items have some contaminants such as asbestos or lead and there is an allegation that he cross-contaminated everything at his own site, including other customer's goods. Another scenario might be that his air movers and dehumidifiers were used at a job site where asbestos or lead dust was present and he brought those machines back to his shop for storage, allegedly cross contaminating other people's goods and property.

Restorers use various types of chemicals, biocides and fungicides that may be stored at their premises and a spill could occur, causing the need for a first-party clean-up. Someone may be near the property and allege that they are somehow sick, causing a third-party liability claim.

A restorer could leave a chemical container open and a neighboring tenant, business, or one of their employees or visitors could possibly allege that they breathed in fumes from the restorer's premises. The clean-up costs and/or the

defense costs from a third-party claim could be financially devastating to an uncovered restoration contractor.

Full professional liability is now readily available to restorers and should be purchased. Professional liability (errors and omissions) provides coverage when someone relies on one's professional opinion. Professional liability is always excluded by most general liability policies.

If a contractor writes any reports, prepares scopes or estimates for adjusters or others and charges money, he needs coverage. If a restorer hires a certified industrial hygienist, a certified asbestos consultant, architect, civil engineer or any other design professional and these people are uncovered, the restoration contractor has an exposure and needs his own insurance.

If the design professionals have coverage, and their carriers do not defend for any reason such as non-payment of premium, exhaustion of limits by prior claims, or any other reason, the contractor needs his own coverage to trigger. There are carriers that presently offer some incidental professional liability coverage. This is not enough when the true professional liability is readily available.

There are others out there who will state that since they do not have a professional liability exclusion, that coverage exists. One should never ever assume they have coverage for something that is not excluded. If a potential claim is big enough, the carrier may deny the claim if it chooses to and could very easily say it was not providing coverage. The broker can argue until the cows come home, but the carrier and the adjusters make those claims decisions.

This creates a huge coverage issue when the lawsuit is presented to the carrier for defense. In this event, the contractor will be suing his broker for errors and omissions as he was relying on a non-exclusion for coverage. It is always better to have an absolute positive grant of coverage in a policy one can point to and read, period. One always wants to have a policy that absolutely states what is covered in no uncertain terms.

Coverage is now available that specifically includes coverage for medical, infectious, or pathological wastes, electromagnetic fields, low-level radiological matter, mold, viruses, and bacteria including

## Hot Points

New coverages available include:

- ▶ Medical, infectious, or pathological wastes
- ▶ Electromagnetic fields
- ▶ Low-level radiological matter
- ▶ Mold
- ▶ Viruses
- ▶ Bacteria, including *Legionella pneumophilla*
- ▶ Non-owned disposal sites
- ▶ Contingent transportation pollution
- ▶ Fines, penalties, punitive, exemplary or multiplied damages

*Legionella pneumophilla*. An informed contractor will want proof from his broker or agent that this coverage exists.

Many carriers have had some type of recently included coverage specifically for transportation pollution. This coverage is important if one has a vehicle going down the road and suffers some type of chemical or fuel spill. Another possible scenario might be if the vehicle has some construction debris that contains asbestos fibers or lead dust.

A new coverage available is non-owned disposal sites. A contractor may take some construction debris or discarded contents which may contain asbestos or lead, to a disposal site when the materials should have gone to a hazardous waste facility. The contractor may now need to defend a lawsuit in this type of event.

In a recent incident, a large concrete tilt-up contractor had a laborer who put 15 empty 55-gallon drums of bond breaker on

the back of a roll off dumpster. When the dumpster was offloaded at the dump, the empty drums came rolling off. The dump was shut down the rest of the day and the contractor had no insurance for this despite being offered pollution coverage for the previous two policy periods.

Contingent transportation pollution is available for waste hauled by third-party carriers as well. A liability claim may be presented to the generator if the transport carrier loses a load for some reason.

A new coverage endorsement is fines, penalties, punitive, exemplary or multiplied damages where allowed by law. Most policies exclude these and insurance typically does not pay for fines, penalties, punitive, exemplary or multiplied damages. In many states, carriers cannot provide coverage even if they wanted to since it is against their public policy. However, there are some states that do allow it and where these types of exposures are insurable, cover can be found.

Some examples of fines and penalties may be for disposal, storage, transportation or staging of construction debris in compliance with the new EPA lead rules and the like. Most carriers only pay compensatory damages and never pay punitive damages or multiplied damages. These types of items can be insured against depending on where the contractor works. He may operate in two states that allow fines and penalties, and three others that do not. He would have this coverage in the states that allow it.

There are a number of carriers able to provide these new types of coverage. The market has been rapidly changing and now is the time for restorers to take advantage of the new forms and endorsements available. Rates have been steadily declining for the last few years and cannot go much lower, and companies are now competing more on coverage rather than price. ■

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