



# Insurance Can Help Manage Risk of Toxic Mould

BELOW IS AN ARTICLE (WITH ADDITIONAL TEXT) BY CHRISTINE LITTLE, A SENIOR UNDERWRITER WITH AIG ENVIRONMENTAL DIVISION, AND RICARDO PHILIP A SENIOR CONSULTANT WITH AIG CONSULTANTS. THE ARTICLE WAS FEATURED IN THE LAWYERS WEEKLY, DATED JULY 5TH, 2002.

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The media has, at times, sounded an alarmist tone in its portrayal of the toxic mould issue and has inflamed the public's preoccupation with potential health implications to the point of creating a state of near hysteria.

Mould contamination is an issue charged with emotion, and the intensity of public reactions mounts further when the alleged place of exposure is a school, institution or workplace – society expects that owners and operators will observe a high duty of care not to put occupants of such buildings in harm's way.

Although the intensity of public reaction is subject to actual observation, the explicit causal relationship between moulds and human health is not so well established. Consequently, no definitive medically based standards exist to quantify unacceptable mould levels.

Some of the best-known cases so far in Canada have involved children allegedly exposed in institutional settings and subsequently displaying symptoms consistent with exposure to toxic mould. Responsible authorities took the dramatic step of ordering building closures.

Such closures due to "toxic" mould resonate in the public mind with the asbestos scares from bygone decades. In this atmosphere, where perceptions and reality combine in a stormy mix, risk managers are watching closely to try to determine their actual liability, the insurability of the problem and how to protect the bottom line in the face of this new challenge.

Endemic to certain natural environments, moulds also have the potential to exist in most man-made structures. They are part of the fungi kingdom of organisms and reproduce through spore production. Spores can remain dormant for long periods of time but will germinate within 24 hours once adequate conditions of humidity prevail.

For mould to proliferate, it requires adequate moisture, and a carbon substrate source. A building's drywall, ceiling and flooring tiles, carpet and wood are all good substrates for opportunistic mould.

Exposure to mould through inhalation or ingestion can elicit infectious, allergic or toxic responses. The risk of infection is most often associated with the *Aspergillus* species of mould and with individuals who have pre-existing immune system deficiencies. Allergic responses can include asthma attacks, congestion, cough and itchy eyes.

A number of moulds produce toxic chemicals known as mycotoxins, which are mostly present on the surface of the spores. Of these "toxic moulds," *Stachybotrys chartarum* is the most infamous.

The symptoms of exposure to toxic moulds can include eye, nose and throat irritation, nosebleeds, fatigue, coughs, headache and suppression of immune functions.

In the face of demands to offer guidance on the mould issue, Canada's provincial governments have responded with varying degrees of activity. The Ontario Ministry of Labour, for example, issued an "Alert" in December 2000. The document refers to several standards and guidelines, but such references provide relatively little certainty for employers who, under Ontario's Occupational Health and Safety Act are charged with the responsibility to protect workers from mould exposure.

By way of contrast, Manitoba's Ministry of Labour has been very proactive in providing mould guidelines, and in general, these are more onerous than those that apply in most U.S. jurisdictions.

The standards and practices developed in the U.S. context, to a great extent, owe their origin to a high tide of "serial" litigation and multimillion dollar mould contamination settlement awards. The dollar magnitude of the insured losses so far in the United States have elevated mould contamination to the status of one of the most pressing issues now facing the insurance industry.

Indeed, an October 2000 *Lawyers Weekly USA* article ("Toxic mould a growing legal issue," *United Press International*, October 6, 2000)

maintained that the mould issue threatened to push forward in a direction that, like the asbestos issue 30 years ago, could lead to the demise of numerous insurance companies.

In the wake of these kinds of predictions, insurers are rushing to clarify the mould issue in existing policies. Some industry participants have decided to exclude altogether mould-related contamination coverage for some policies. Alternatively, in the context of a reasoned management decision, some companies have moved to fully underwrite and charge premiums to provide mould coverage in some cases.

Drawing upon the U.S. experience, Canadian claims for bodily injury and property damage related to mould will have an impact on personal and commercial insurance and many different lines of coverage.

Sick building symptom claims have the potential to plumb the extent of coverage under both workers' compensation and general liability policies.

Developers, contractors and architects may find themselves facing professional or products liability claims where building owners assert that construction or design defects created conditions where mould growth would occur. Property managers may face claims for failing to exercise reasonable due diligence in maintenance, inspection and repair of a building.

Many allegations will not stand up to scrutiny because it is difficult to establish a "causal connection" and prove that a defendant was negligent for having known of instances of toxic mould contamination and consciously choosing to take no action. Despite these difficulties, it should be emphasized that even where allegations fail, sizable defence costs could be incurred.

Given the problems that may potentially arise due to the lack of clarity under the terms of usual insurance policies, many concerned with effective risk management are looking to specialty environmental insurers to provide definitive mould insurance coverage.

AIG Environmental®, for example, began endorsing policies in early 2001 to cover mould by adding mould, fungus and microbial matter to the definition of a "pollution condition."

With the expanded definition including mould, insureds are able to purchase coverage dealing with bodily injury, property damage, cleanup costs, business interruption and defence costs related to mould. Accounts are individually underwritten for exposure analysis. Upon satisfactory review of an Indoor Air Quality questionnaire and application, AIG Environmental® coverage may be available for up to \$150 million in coverage limits under the Pollution Legal Liability policy. Mould coverage may include a higher self-insured retention, a sub-limit, or a co-payment provision depending on the nature of the risk. Coverage for mould is generally offered in combination with a full pollution liability program.

Despite all of the negative attention focused on mould, the issue can be managed with the usual risk management techniques; knowledge and understanding, due diligence, planning and insurance strategies tailored to respond to the issue.

Any environmental liability policy may be one key component in this strategy to provide peace of mind.

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Article provided by Steve Muxlow  
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## A Claim on Your Labour and Material Payment Bond?

"He did it! Even after all of those jobs I gave him, treating him fairly, he actually did it!" In your hand is a copy of a written notice claiming against your Labour and Material Payment bond. If that was not bad enough, the part that bothers you most is that the amount claimed is way too high and does not reconcile, in any way, with your accounting. If this is your first experience with a claim under a Labour and Material Payment bond, you might ask the following questions:

### When I tell my surety company, will they just pay the claim?

No. Your surety company will first investigate the claim to determine whether or not the claim is valid. In consultation with you, and the organization making the claim (perhaps other effected parties), your surety company will assess the facts of the matter before responding. Claims that are found not to be valid are not paid.

### Is this claim going to affect my bond facility?

Not likely. If there are very strong defences to the claim or you are taking steps to resolve the claim directly, your bond facility will not be impacted. Your positive response to the claim and co-operation with the surety will be the best way to preserve your surety program.

### What can I do?

Be proactive. By providing timely and accurate information to your surety company and/or surety broker you can greatly assist them to better understand the matter and respond appropriately. Act early. The longer the problem goes unchecked the harder it will be to resolve the lien amicable for all parties.

For more information about labour and material payment bond claims or surety bonds in general, contact your Surety Company or Stevenson & Hunt Insurance Brokers.

This article should not be construed, in any way, as an amendment to any bond or surety facility, or as creating any legal obligation beyond that expressed in a particular bond or surety facility.

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