Care, Custody, or Control Exclusion in the CGL

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Humankind has been pondering certain fundamental questions since the beginning of time. What is the meaning of life? Why are we here? Is this the best of all possible worlds? What is meant by care, custody, or control?

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I suppose the last question is not quite as important as the others, but in the world of risk management and insurance, questions involving care, custody, or control do frequently arise. And, like the other questions, the answers we find often fall short of expectations. Maybe the discussion that follows will shed some light on this issue.

Property Damage Exclusion

Among the property damage exclusions in the post-1988 edition Insurance Services Office, Inc. (ISO) commercial general liability (CGL) policy is exclusion j.4.—excluded from coverage is any property damage to *personal* property that is in the care, custody, or control of the insured.

We sometimes forget how easy it is to assume everyone knows our insurance lingo. I was reminded of this a while back when a client remarked "it's not personal property—the business owns it." So it is worth pointing out that, in the context of this exclusion, the reference is not to ownership (business or personal), but rather the type of property. In other words, the exclusion does not apply to property that is considered real property, such as a building.

Back to our question: As the exclusion applies only to personal property in an insured's care, custody, or control, what constitutes care, custody, or control?

Case by Case

The bad news is that there is no "one-size-fits-all" answer to this question. Put another way, whether something is in the care, custody, or control of another is dependent on the circumstances. After reviewing cases that considered how the care, custody, or control exclusion should apply, the Court of Appeals of Indiana made this observation:

The common thread running through these opinions is the recognition that application of such clauses depends on the facts of each case. *(American Family Mut. Ins. Co. v. William J. Bentley, 352 N.E.2d 860 (Ind. App. 1976)*

A very similar position was articulated by the Supreme Court of Arkansas*:*

> The care, custody and control clause in liability policies, so far as our research has extended, appears to be almost universally used, but its construction is, to a large extent, dependent upon circumstances of each case and we conclude that the phrase should be applied with common sense and practicality. [Emphasis supplied] *(Hardware Mut. Cas. Co. v. Crafton, 350 S.W.2d 506 (Ark. 1961)*

Some General Guidance

Of course, this provides only limited guidance on the issue. After all, if common sense and practicality were the order of the day, we might not need the courts at all (and we may have answered whether we live in the best of all possible worlds). But are there at least some general rules to keep in mind as to the meaning of care, custody, or control? In the above case, the Supreme Court of Arkansas went on to explain*:*

> In a general way the word "care" has reference to *temporary charge*; "custody" implies a *keeping or guarding and a necessity for an accounting*, and "control" refers to power or authority to *manage, superintend, direct or oversee*. [Emphasis supplied.]

Now we are getting somewhere. As most might guess, such definitions are not universally accepted. For example, Illinois appears to follow a two-pronged test:

> Under Illinois law, the "care, custody, or control" exclusion precludes insurance coverage if a "two-pronged test" is met: (1) the property was "within the *possessory control* of the insured at the time of the loss"; *and* (2) the property was "a necessary element of *the work performed* [by the insured]." [Emphasis supplied.] *(Essex Ins. Co., v. Soy City Sock Co., William E. Phillips Co., Inc., and Federal Ins. Co.; 503 F. Supp. 2d 1068 (U.S. Dist. 2007).*

By "possessory control," the court means the property is in control only if it is in the insured's possession—whereas the Arkansas definition of "control" is

a broader concept and applies when the insured has the *authority or power* to control the property—not necessarily possession. Also in Illinois, the reason for the possession of the property must be to perform work on it. More on that later.

Illustrations

Probably the best approach to gaining an overall perspective on meaning of care, custody, or control is by examples or illustrations.

Got Milk?

A trucker brought a tank trailer of milk to a dairy. The procedure was that the driver of the truck would park the tractor and tank trailer, and the employees of the dairy would unload the milk after the dairy determined the milk was acceptable. Unloading was by electric pump, with a hose attached to the tank trailer. While only the dairy employees could unload the tank trailer, only the driver could move the truck.

If the truck needed to be repositioned, the dairy employees had the authority to direct the driver to move the truck, but were prohibited from actually moving the truck themselves. In this case, a vacuum resulted from the pumping, causing the tank trailer to collapse. The truck owner made claim against the dairy for damage to the tank trailer, resulting in a finding of negligence by the dairy in causing the damage to the tank trailer.

No Coverage Applied. The liability insurer for the dairy denied coverage, contending the tank trailer was in the care, custody, or control of the dairy and thus excluded from coverage. The dairy contended that since the driver was the only person authorized to move the tank trailer, it was under the control of the driver and not the dairy. The court disagreed—although the driver was the only person authorized to actually *move* the truck, the court concluded the dairy had sole authority to *direct* that the truck be moved. The court ruled that the authority to direct movement of the truck meant the truck was under the *supervision* of the dairy at the time of the collapse—and concluded this meant the truck was under the care, custody, or control of the dairy. Therefore, the exclusion applied.

In the above example, control by the dairy was found to apply because the dairy had the *authority to direct* movement of the truck, which was deemed *to be supervision, despite the fact that the dairy was prohibited from actually moving the truck by driving it (Paul Madden v. Vitamilk Dairy, Inc. & Continental Cas. Co., 367 P.2d 127 (Wash. 1961).*

Fire It Up!

A truck driver parked his employer's truck and trailer at the site of a wood products company. The wood products company was to load the trailer with sawdust. The driver left (leaving the keys in the ignition), and an employee of the wood products company inserted a blow pipe into the rear of the trailer to blow in the sawdust, after which the employee left.

While the sawdust was being blown into the unattended trailer, a fire broke out, damaging the truck. The owner of the truck made claim against the wood products company, seeking payment of damages to the trailer caused by the fire. The wood company sent the claim to its liability insurer, who subsequently denied coverage for damage to the trailer, citing the care, custody, or control exclusion.

The insurer argued that the truck owner had surrendered care of the trailer, including its custody and control, to the wood products company. Here, the wood products company did not have the right to move the truck. If it needed to be moved, the wood products company was required to find the driver to move the truck. The court pointed out that the wood products company did not "exercise dominion or control" over the truck and trailer as they were required to notify the truck owner to *send a driver to move the truck.*

Coverage Applied. *As the wood products company did not have authority to do anything with the truck, except fill it, and there was no agreement that the wood products company was obligated to guard the truck, the court ruled against the insurer and found the trailer was not in the care, custody, or control of the wood products company at the time of the fire. Thus, coverage applied (Employers Mutual Liab. Ins. Co. of Wisconsin v. Puryear Wood Prod. Co., 447 S.W.2d 139 (Ark. 1969)).*

The distinction between this and the damaged milk tank trailer is that the wood products company was found not to have supervision over the truck. In the sawdust case, the unattended truck was merely left at the wood products premises to be filled. No right to direct the truck or trailer's movement was conferred on the wood products company. The court pointed out that the driver could have remained with the truck during the filling process, but chose not to do so.

With Friends Like These!

Friends agreed to store a dragster for its owner in their garage for no charge. A fire in the friends' home (and garage) destroyed the home, including the dragster. The owner of the dragster brought claim against his friends for destruction of his dragster. The friends sent the claim to their insurer, who denied coverage, citing the care, custody, or control exclusion found in the friends' homeowners policy.

In the coverage litigation that followed, the friends testified that they felt the same responsibility for the dragster as for their own property; they locked the garage (the owner of the dragster had a key), and further testified they would not allow access to the dragster to anyone but the owner.

No Coverage. The court concluded that both parties agreed the friends were to keep the dragster safe. Thus, the care, custody, and control exclusion applied as the friends had "affirmative duties with respect to the dragster, bringing it within their care, custody, or control and within the exclusionary clause."

The safekeeping or "care" was the key issue in this case; the court determined the circumstances were such that the friends had "care" of the dragster. Worth noting is the fate of argument that the care, custody, or control exclusion applied only to *commercial transactions*, which the court rejected by simply stating, "The insurance policy does not so limit the provision." This can be instructive as oftentimes it is presumed that lack of consideration—i.e., no charge for storage, garaging, etc.—eliminates the possibility of care, custody, or control (*New Hampshire Ins. Co. v. Frank Adellera, et al.*, 450 P.2d 668 Wash. 1972).

May I Park Here?

Apparently with permission, a person parked his trailer on the premises of the owner. The owner of the trailer brought the trailer to the premises with his own tractor, unhooked, parked the trailer, and drove away. Subsequently, the trailer caught fire and was damaged. The owner of the trailer brought suit against the property owner, contending the property owner was liable for the damage to his trailer as the trailer was lawfully parked on the premises of the owner. The property owner tendered the suit to his liability insurer to defend the suit.

The property owner's liability insurer refused to defend based on the care, custody, or control exclusion.

Coverage. The court noted that the fire happened some 9 hours after the owner had parked the trailer. Further, the court pointed out the property owner neither moved nor loaded the trailer and that there was no proof that the property owner undertook to maintain the safety of the trailer. Thus, the court concluded that the trailer was not in the care, custody, or control of the property owner, and the property owner's liability insurer should have defended the suit.

Unlike the dragster case, the court found no obligation on the part of the property owner to safeguard the trailer. Thus, the trailer was not in the "care" of the property owner (*Rochester Woodcraft Shop, Inc. v. General Acc. Fire & Life Assur. Corp. Ltd.*, 316 N.Y.S.2d 281 (N.Y. App. Div., 3d Dept., 1970)

Pack and Ship

The insured owned and operated a warehouse. For one of their customers, the insured had an agreement to not only store merchandise, but also to "store, package, and ship" the merchandise of the customer.

A fire at the insured's warehouse damaged their customer's merchandise. The customer's property insurer paid the customer, but as a subrogee for the customer, the customer's property insurer sought to collect from the warehouse operator the costs of damage to the customer's merchandise damaged by the warehouse fire.

The liability insurer for the warehouse denied coverage for the claim, citing the care, custody, and control exclusion in the warehouse operator's CGL policy and also sought a declaratory judgment from the courts that the insurer owed no duty to the warehouse owner/insured.

Applying Illinois law, the court noted:

> Under Illinois law, the "care, custody, or control" exclusion precludes insurance coverage if a "two-pronged test" is met: (1) the property was "within the possessory control of the insured at the time of the loss"; and (2) the property was "a necessary element of the work performed [by the insured]."

Apparently, the warehouse did not dispute that the customer's merchandise was property on which the warehouse performed work: the packing and shipping. However, the warehouse argued that the warehouse did not have "possessory control" of the customer's merchandise because the customer had access to the merchandise, and the fire occurred at night when no employee of the warehouse was at the premises. At the root of the warehouse argument is that possessory control cannot exist if the warehouse had only "temporary or incidental access to the property" or "limited possession."

No Coverage. The courts found possessory control by observing, "While control exercised must be exclusive, it need not be continuous." Exclusivity of possession may exist even if the possession is of a short duration, the court opined, and the fact that the customer had access to the merchandise did not preclude possessory control. Exclusive possession centers on factors such as who supervised the operation in which the property was damaged. The court's conclusion was that because the warehouse stored, packed, and shipped the customer's merchandise, the warehouse had taken exclusive possession of property, and the merchandise was a necessary element of the work the warehouse performed. As both prongs of the test were met, the care, custody, or control exclusion applied, and warehouse operator's liability insurer had no further duty to their insured for this incident.

In rendering this decision, the court reviewed another case applying Illinois law where care, custody, or control was *not* found. That case involved musicians who left their musical instruments in an establishment that caught fire, damaging the musical instruments. The distinction was the establishment did not exercise possessory control solely because the musical instruments were left on the premises between shows*. (Essex Ins. Co., v. Soy City Sock Co., William E. Phillips Co., Inc. and Federal Ins. Co.,* 503 F. Supp. 2d 1068 (U.S. Dist. 2007)

A Needed Lift

The insured was a contractor using a crane supplied by its owner under an oral agreement (the invoice to the contractor was stamped "crane rental"). The owner of the crane supplied not only the driver of the crane, but also an operator to make lifts, and these two employees of the crane owner retained full control over the crane. During the course of the construction work performed by the contractor, the crane was damaged, and the contractor was sued by the crane owner for the cost of the damage to the crane.

The liability insurer for the contractor denied coverage, citing the care, custody, or control exclusion of the contractor's liability policy. The court acknowledged that businesses, for various financial reasons, rent equipment which, for all intents and purposes, they operate and control—such as a leased fleet of trucks. In taking exception to the insurer's position that the word "rental" was conclusive as to the parties' intention, the court stated, "We think this ignores the on-the-ground facts."

Coverage. Instead, the court found use of the crane to be a service agreement, not a rental agreement. This was based on several factors, including the facts that the crane owner's employees drove, operated, fueled, maintained, and repaired the crane. Further, the court pointed out the crane owner could move the crane to another job site and substitute equipment capable of the same work. While the contractor could direct where and when the crane should make lifts, the court deemed that to be the typical function of a general contractor.

The court concluded that the same factors that make the agreement a service agreement also determine the crane was not in the *custody of the contractor.* And, without possession or control, the exclusion did not apply and the insurer was required to defend.

Here, the degree of supervision—that typical of a general contractor over a subcontractor—was not, in the view of the court, enough to constitute custody or control. (*Crane Service & Equip. Corp. v. USF&G*, 496 N.E.2d 833 (Mass. App. 1986)

Conclusion

While some general guidance can be found on the meaning of care, custody, and control and thus the scope of the CGL exclusion for personal property in the care, custody, or control of the insured, what becomes evident is that each claim is fact specific. Seemingly small changes in the circumstances—such as the degree of access the owner has to the property that has been damaged—can result in a totally different outcome as to whether property is in the care, custody, or control of the insured.

Additionally, as can be seen, some courts may emphasize some factors, while other courts weigh more heavily other factors. For example, contrast the approach of the Arkansas courts to the Illinois courts. If there is a serious question about care, custody, or control, it may be best to remove such doubt and purchase more appropriate additional coverage.

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