Subject: Care, Custody or Control in CGL

Q. A long-time insured of mine is a painting contractor who specializes in high-end, custom home and office painting, with a small amount of artisan interior building glass installation. We ran into each other at a restaurant last week, and during the course of the conversation, I discovered some things about his operations that I not only did not know about, but I’m not sure are adequately covered by his current CGL. He told me that many of his regular customers will give him the keys to their home or office, as well as the pass code for their alarm system, so he can do the painting while they are not there. I immediately thought about the care, custody or control exclusion in the CGL. Also, I am concerned about his coverage should he fail to set the security system alarm upon leaving the job for the day, and the home or office is burglarized later. I would appreciate your thoughts on these issues.

A. Well, I’ll bet you had heartburn by the time the meal was over. Your experience certainly supports the recommendation from E&O seminars, to conduct some sort of annual review in conjunction with each renewal. I’m just glad you found out this information before a claim.

The term “care, custody or control” is something of a shorthand description used by many of us in insurance, but it can unfortunately lead us off the correct path to a proper coverage analysis. The CGL does have a “ccc” exclusion, of course, but this is only one part of the broader exclusion for damage to property, which is Exclusion j. Here are the pertinent excerpts of the exclusion:

\textit{CG 00 01 04 13}

\textit{Coverage A – Bodily Injury and Property Damage}

\textit{2. Exclusions}

\textit{j. Damage To Property}

"Property damage" to:
(1) Property you own, rent, or occupy, including any costs or expenses incurred by you, or any other person, organization or entity, for repair, replacement, enhancement, restoration or maintenance of such property for any reason, including prevention of injury to a person or damage to another's property;
(2) Premises you sell, give away or abandon, if the "property damage" arises out of any part of those premises;
(3) Property loaned to you;
(4) Personal property in the care, custody or control of the insured;
(5) That particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations, if the "property damage" arises out of those operations; or
(6) That particular part of any property that must be restored, repaired or replaced because "your work" was incorrectly performed on it.

Comments: Key parts of the exclusion which relate to your painting contractor’s possible exposures are as follows:

(1) Exclusion 2.j. (1) applies to damage to owned, rented or occupied property (building or personal).
(2) Exclusion 2.j.(4) contains the only reference to “care, custody or control” in the entirety of Exclusion j., and as you can see, this language only applies to damage to personal property.
(3) Exclusion 2.j.(5) pertains to specific parts of real property on which work is being performed.
(4) Exclusion 2.j.(6) applies to real or personal property which must be remediated due to work done incorrectly. This is often referred to as the “faulty workmanship exclusion.”

Here is how these exclusions could apply to some common situations your painting contractor might run into. For the discussion which follows, assume your insured is Smith Painting, Inc. (SPI).

**Situation #1: Damage to the building or building items.**
Exclusion 2.j. (1) would apply if it was determined that SPI “occupied” the home or office at the time some part of the building was negligently damaged by SPI. One unusual fact for a painting contractor in this situation is that SPI might have the keys to the premises, which raises the possibility of “occupancy” and Exclusion 2.j. (1). On the other hand, this is an ordinary occurrence for a janitorial service. Even then, however, it is not clear-cut that having the keys to the building, in the course of performing work, necessarily constitutes occupying the building.

A common view appearing in numerous court cases is that “occupy” means a “continued, non-transitory physical presence in the building,” versus simply “being there.” ISO commented on the meaning of “occupy,” in the context of Exclusion 2.j. (1), in Circular GL 79-12:

“The exclusion of property occupied by the insured is not intended to apply to occupancy in the sense of the insured’s mere presence therein. The exclusion applies only to property which is formally occupied over a period of time for a
specific purpose, as in the case where a general contractor is given the exclusive use of an area in a building as headquarters for his construction operations."

Exclusion 2.j. (5) would apply if the damage to the building or any building item (floors, walls, cabinets, wall-to-wall carpeting, etc.) occurred to “that particular part” on which the work was being done. The CGL form does not contain a definition of, or provide any guidance on, the term “that particular part.” Courts have therefore weighed in, but with mixed and inconsistent results. In the case of SPI, if the job they contracted to do was to paint the interior walls and ceiling, and a worker accidentally gouged a large hole in the drywall where they were painting, the exclusion would almost certainly apply. On the other hand, if a worker accidentally spilled paint on the wall-to-wall carpet, or rammed a ladder through a window, it seems unlikely that the exclusion would apply.

However, the gray area for painting contractors often does involve windows. The glass can get damaged in the course of painting the wood trim around the windows, or cleaning up the over-painting on the glass afterwards. Some argue that any damage to the window glass – which is usually done while using tools or chemicals to remove paint which inadvertently got on the glass – is not within the scope of Exclusion 2.j.(5) or (6), since the contract did not call for any painting or cleaning of window glass. Conversely, others maintain that cleanup is a part of the painting job, and anything damaged during the cleanup is included as damage to “that particular part” where work is being done. In addition, insurers could also look to Exclusion 2.j.(6), which applies to “any property that must be restored, repaired or replaced because "your work" was incorrectly performed on it.”

Situation #2: Damage to personal property.
Exclusion 2.j.(4) applies to personal property in the care, custody or control of the insured. Determining which items of personal property are in one’s “care, custody or control” is the insurance equivalent of “beauty is in the eyes of the beholder.” In actual practice, the jurisprudence tends to take a more restrictive view of the phrase than some insurance practitioners do. For example, in the case of your insured SPI, the fact that they have the keys and security pass code which allows them complete access to the entire home or office does not automatically mean that they have care, custody or control of every item of personal property inside. It depends on the beholder.

The so-called “ccc” exclusion is said by many experts to be one of the most litigated exclusions in the CGL. Interpretations of “ccc” are about as varied as those involving “pollution” claims in the CGL.
For illustrative purposes only – and with no intent to convey any legal opinions – here are some Louisiana court cases. First are several which held that the damaged property was not in the care, custody or control of the insured.

1. Plaintiff had property stolen from a self-storage (“miniwarehouse”) unit. He sued the self-storage facility for negligence, and their CGL denied the claim, arguing that the personal property of the unit owner was in the care, custody or control of its CGL insured. The Louisiana Supreme Court disagreed, and held that the ccc exclusion would apply only if the insured had actual physical possession or control over the property, and also had a proprietary or monetary benefit from the property. The Court pointed out that the only monetary benefit the storage facility received was the rent, and not from the stored property itself. [Reynolds v. Select Properties, Ltd., 634 So. 2d 1180 (La. 1994)]

2. Personal property of 61 jockeys and some computer-wagering equipment of a vendor was destroyed by a fire at the Fairgrounds. The CGL insurer of the Fairgrounds denied the claim, maintaining in court that such equipment was in the care, custody or control of its insured. The Court disagreed, and citing the Reynolds case (above), held that although the damaged property was stored and kept at the Fairgrounds, the Fairgrounds received no direct monetary benefit from the equipment, and did not exercise any supervision or control over the property. [St. Paul Mercury Ins. v Fairgrounds Corp, 123 F.3d 336 (5th Cir, 1997).]

3. A security guard company was sued by one of its customers, after a night watchman allegedly failed to detect a fire on the premises. The insurer of the security guard company denied the claim for the damage to the customer’s personal property, on the grounds that such property was in the care, custody or control of the security guard company and/or its employee. The Louisiana Court disagreed, holding that the jurisprudence associated with Louisiana Civil Code Article 2317 requires “some sort of supervision and control either because he has an interest in them or derives a benefit from their use.” [Gulf-Wandes Corp. v. Vinson Guard Service, 459 So. 2d 133 (La. Ct. App. 2nd Cir. 1979.).]

Second, here are some cases which upheld the ccc exclusion.

4. A contractor was hired to repair some tubes inside a large boiler. In the process of accessing the damaged tubes inside, the outer frame of the boiler was damaged. The Court agreed with the insurer of the contractor that the entire boiler was in its care, custody or control. [H.E. Wiese v. Western Stress, 407 So. 2d 464 (La. Ct. App. 1st Cir 1981).]
5. A large-truck repair company destroyed a customer’s truck when a welder lit his welding torch too close to an open vent of an oil tank on the truck, causing an explosion. The repair company’s CGL denied the claim. The repair company sued its insurer, arguing that because the truck’s owner was supervising the work, and had occasionally used the truck between steps in the repair process, the truck was not in its care, custody or control. The Court disagreed, holding that the fundamental issue was that at the time of the explosion, the repair company had physical possession and control of the truck. [Industrial Supply Co. of La. v. Transamerica Ins. Co., 220 So. 2d 126 (La. Ct. App. 3rd Cir 1969.)

Issue #3: Lost keys and rekeying door locks.
If SPI loses a set of customer’s keys, the cost of the keys is usually negligible, while the cost of rekeying door locks could be substantially more. The CGL would exclude the loss of the keys under Exclusion 2.j.(4) – personal property in the care, custody or control of the insured. The coverage for the cost to rekey the locks is debatable. Some hold the view that such costs are contemplated within the definition of “property damage” in the CGL, which includes “Loss of use of tangible property that is not physically injured.” This view maintains that without keys, the locks are essentially useless. On the other hand, it could be argued that the locks are indeed operable, but are being rekeyed as a security measure. Another exciting insurance debate.

Issue #4: Failure to set the security system upon leaving the premises.
The majority view, I think, is that the CGL of SPI would respond for burglary, fire, or similar damage which could occur if the customer’s security system was not activated as SPI’s employees left the premises. If the loss is to personal property, it is doubtful that Exclusion 2.j.(4) applies under most circumstances anyway, as discussed above. In addition, where there was a viable argument to be made for applying the ccc exclusion, at the time of the loss, SPI would had left the premises, which would probably void any issue of care, custody or control. For losses to building property, I don’t see Exclusions 2.j. (5)(6) being applicable. In cases where the job has been completed, the loss would be a completed operations claim, as opposed to an operations claim.

Issue #5: Solutions.
Probably the ideal model to use as a template for these 4 situations discussed above is a janitorial service. Insurance coverages which are written specifically for janitorial services deal with the issues facing SPI. One way much of the property exposures are dealt with is by including a specific limit for “voluntary property damage.” These policies also generally include coverage for rekeying locks. An alternative some insurers use, in
the absence of a specific policy for insureds like your painting contractor, is to modify Exclusions 2.j.(4)(5)(6), often with deductibles and/or sublimits. Therefore, in working to address the exposures you’ve uncovered for SPI, a call or email to your friendly CGL underwriter would be a good place to start. In addition, for exposures involving theft of personal property from SPI’s clients by an employee of SPI, Crime endorsement CR 04 01 Client’s Property, provides the following coverage: “We will pay for loss or damage to money, securities and other property sustained by your client resulting directly from theft committed by an identified employee, acting alone of in collusion with other persons.”

**Issue #6: Resources.**
The IIABA’s Virtual University has several articles which discuss various issues relevant to the CGL and the exclusion for property damage (Exclusion j.). Here are the articles with links:

“Care, Custody or Control in the CGL”
[Click here.](#)

“CGL Coverage for Glass Scratched by Contractors”
[Click here.](#)

“Care, Custody or Control in Storage Warehouses”
[Click here.](#)

“CGL Coverage for Rekeying Locks”
[Click here.](#)

“Care, Custody or Control in Property Management”
[Click here.](#)

“HO Coverage for Glass Scratched by Contractors”
[Click here.](#)

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