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## ILLINOIS LAW MANUAL

### CHAPTER XII EXCLUSIONS TO COVERAGE

#### **K. CARE, CUSTODY, OR CONTROL EXCLUSION**

A “care, custody, or control” exclusion is common in liability policies. Bolanowski v. McKinney, 220 Ill. App. 3d 910, 914 (1991); State Farm Fire & Cas. Co. v. Hatherley, 250 Ill. App. 3d 333, 337 (1993). The homeowners and comprehensive general liability policies both provide that liability coverage is excluded for any property damage to property owned, rented to, occupied or used by or in the care of any insured. Country Mut. Ins. Co. v. Waldman Mercantile Co., 103 Ill. App. 3d 39 (1981); Bolanowski v. McKinney, 220 Ill. App. 3d at 914; Bituminous Cas. Corp. v. Fulkerson, 212 Ill. App. 3d 556, 564 (1991).

The care, custody or control exclusion prevents the general liability insurer from becoming a guarantor of the insured’s workmanship in his ordinary operations. Failures of workmanship are a normal business risk which the insured is in the best position to prevent. To determine whether property is in the care, custody or control of an insured so as to preclude liability under such an exclusion clause, Illinois courts employ a two-pronged test. If the property damaged is within the possessory, control of the insured at the time of the loss and is a necessary element of the work performed, the property is considered to be in the care, custody, or control of the insured. While the control exercised by the insured must be exclusive, it need not be continuous, and if the insured

has possessory control at the time the property is damaged, the exclusion clause will apply. Essex Insurance Company v. Wright, 371 Ill. App. 3d 437 (1<sup>st</sup> Dist. 2007).

With respect to the first element of whether an insured has possessory control over the property at the time of the loss, it has been noted that while the control exercised need not be continuous, it must be exclusive and if the insured has possessory control when the property is damaged, the exclusion will apply. Country Mut. Ins. Co. v. Waldman Merchantile Co., 103 Ill. App. 3d 39, 42 (1981); Bolanowski, 220 Ill. App. 3d at 914. It has also been held that an insured does not have the necessary “care, custody, or control” of another’s property when the insured only has “temporary or incidental access to the property or limited possession of an area of the property” rather than “care, custody or control over the property itself.” Leiter Elec. Co. v. Bituminous Cas. Corp., 99 Ill. App. 2d 386, 389 (1968); Bolanowski, 220 Ill. App. 3d at 914-5.

The courts have devised a two-part test to determine whether an insured has “care, custody, or control” of another’s property for purposes of the exclusion:

- (1) whether the property was in the possessory control of the insured at the time of the loss; and
- (2) whether the property was a necessary element of any work performed.

Two cases illustrate the exclusion. In Bolanowski, 220 Ill. App. 3d at 910, the Appellate Court held that the “care, custody, or control” exclusion did not apply with respect to musical instruments damaged by a fire which occurred after a music group left the instruments at the insured’s lounge overnight. The court reasoned that the lounge did not clearly exercise any right of access to the instruments in order to maintain, move, or protect them, and that the lounge exercised no prerogative to do anything other than permit the music group to leave their instruments on the premises between shows.

However, in *State Farm Fire & Cas. Co. v. Hatherley*, 250 Ill. App. 3d 333 (1993), the Appellate Court held that the “care, custody, or control” exclusion did apply as a matter of law when the insured damaged his own condominium unit during mortgage foreclosure proceedings when he removed lighting fixtures, kitchen cabinets and counter tops, electrical fixtures, bathroom fixtures including a whirlpool tub, and carpeting. The court concluded that the exclusion applied where the bank alleged that the unit was damaged by the insured’s removal of the improvements and that the insured was in “exclusive” possession of the unit.