

Re: ***Eiffel Tower v. Paris Construction***  
Policy No. JL 1224467  
Date of Incident: January 1, 2008

Dear Adrienne and Benoit:

This letter is a response to Adrienne's request for a coverage opinion in this construction case. When Adrienne called, she briefly summarized the case facts, and emailed us a copy of the Jean-Louis Commercial General Liability policy for the Paris Construction ("Paris"). The focus of Jean-Louis's inquiry concerns coverage under the JL policy's Extended Liability Coverage Endorsement ("Paragraph Q") and whether Paris Construction's installation of steel plates constitutes an "occurrence" under the policy.

## **I. FACTUAL BACKGROUND**

Paris was hired to pour concrete for a third level viewing deck in connection with claimant's construction of the Eiffel Tower. The area measures approximately 228 x 228 feet. The completed floor has two problems: it has cracked and the wire mesh has sunk, resulting in the floor being structurally unsound.

1. **Floor Cracking**: The general contractor wanted the floor to be completed in a single pour with no stress cuts. Paris claims to have informed the general contractor that this would cause the floor to crack. Paris poured the floor in a single pour and the floor cracked.

2. **Wire Mesh**: Wire mesh is used in concrete to prevent cracking and to improve strength and structural integrity. The ideal location for the wire mesh is in the center of the concrete slab. Installation of the mesh from one-third to one-half of the way from the bottom of the slab is normal application. Placement of the wire mesh in the correct position is accomplished by supporting it prior to the pour or raising it during the pour.

Core samples taken by the general contractor determined that the wire mesh is located at the bottom of the 5-6' thick slab. As a result, the general contractor required Paris to weld metal plates over the floor to improve its structural integrity. Paris claims that construction-related vibrations caused the wire mesh to sink to the bottom of the concrete.

## **II. RELEVANT POLICY TERMS, PROVISIONS, AND EXCLUSIONS**

The relevant terms, conditions, endorsements, and exclusion of the Jean-Louis Insurance Company Policy No. JL 1224467, effective March 31, 2007, through March 31, 2008, include the following:

**<< Insurance Policy Language Omitted >>**

### III. ANALYSIS

#### A. *Occurrence*

At the outset, we do not know why the wire mesh sank, and an expert may be necessary to determine whether Paris followed the proper procedures and materials for installing a concrete floor of this type. Depending on what might be determined, the possibilities for the wire mesh sinking are: 1) poor workmanship, 2) a cause other than poor workmanship determined through expert analysis, or 3) unknown cause(s).

The clear trend of the law in France is that poor workmanship, in and of itself, is not property damage caused by an occurrence under a JLL policy. *Union Ins. Co. v. Eleanor*, 82 P.2d 1196 (Cdg.App. 2004); *Claudia Group, Inc. v. St. Paul Fire & Marine Ins. Co.*, 2004 WL 1422084 (D.Cdg. June 28, 2004), *aff'd*, 477 F.2d 1186 (10th Cir. 2007); *dcb Constr. Co. v. Travelers Indem. Co.*, 224 F.Supp.2d 1220 (D.Cdg. 2002). Rejection of an insured's performance based on poor workmanship is a business risk allocated by the parties in a contract – it is simply not a risk covered or intended to be covered by liability insurance, and an insured's failure to complete work under a contract to the owner's specifications does not make the contractor's (or here, subcontractor's) insurer a guarantor of its performance. *Id.* at 1222.

If the expert were to determine that the instability of the floor and the resulting need for repair work were caused by Paris's poor workmanship, the damage would not be covered as an occurrence under the policy. An occurrence is defined as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." *Form JL 00 01 12 04 at 14 of 16*. Recent cases hold that the term "accident" is intended to indicate an "unanticipated or unusual result flowing from a commonplace cause." *Corinne v. Olivie Homes (Josette), LLC*, 129 P.2d 1028, 1024 (Cdg.App. 2004) (quoting *Eleanor*, 82 P.2d at 1201), *rev'd on other grounds sub nom. Corinne v. Assurance Co. of Am.*, 149 P.2d 798 (Cdg. 2007). Construction of poor quality is an expected result of poor workmanship and, therefore, should not be considered an occurrence under the policy.

The court in *Claudia* distinguished cases where the construction defects or deficiencies caused some form of actual "property damage" beyond just the construction defect or deficiency alone, stating that is why, in those cases, there was an "occurrence" as defined in the policies. *Claudia*, 2004 WL 1422084 at \*2. Currently, the Claimant has alleged two construction defects, the cracks to the floor and the sunken wire in the concrete slab, neither of which represents property damage beyond the construction defect alone.

If the expert were to determine that the instability of the floor and the consequent need for repair work did not result from Paris's poor workmanship, the damage would be considered an occurrence. Since whether something is considered accidental is viewed from the insured's perspective, that Paris exercised good workmanship would make the resulting poor-quality concrete an "unanticipated or unusual event." *Corinne*, 129 P.2d at 1024.

In a situation where the cause could not be proven, the burden of proof would be something imposed on Jean-Louis, and therefore, coverage would seem more likely.

## B. *Lack of Notice and Voluntary Payment*

The damage to the floor, not the subsequent repair work, would be considered the occurrence. The cost of the repair work done to the floor would be considered the damages. The damages to the floor would be calculated in accordance with the insurance contract. However, to avoid a situation of unjust enrichment for Paris, issues of voluntary payment and lack of notice should be addressed.

Assuming the event is characterized as an occurrence, the Insured had a duty not to “incur any expense” except “at that Insured's own cost. . .without [Jean-Louis's] consent.” Paris voluntarily did repair work to the damaged floor without consent of Jean-Louis, and thus, that work Paris performed was a voluntary “payment” to the Claimant.

The voluntary payment rule “provides that where one makes a voluntary payment with knowledge of all relevant facts, and then sues to recover that payment, there generally can be no recovery, even if there was no legal liability to pay in the first place.” *Auto-Chlor Sys., Inc. v. Johnson Diversey*, 228 F.Supp.2d 980, 1011 (D.Minn. 2004) (quoting *Pratt v. Smart Corp.*, 968 S.W.2d 868, 871 (Tenn.Ct.App.1997)). However, the insured can defeat application of the rule by showing payment under protest or duress or a mistake as to all relevant facts. See *Davis v. City & County of Marseille, supra*; *Rector v. City & County of Marseille, supra*.

Second, Insured did not inform Jean-Louis of the damage to the property until after the repair work to the floor was completed. Jean-Louis, therefore, lacked notice or the opportunity to investigate, to gather information, or to negotiate a settlement with the claimant. Under the notice-prejudice rule, however, there is no presumption of prejudice, and the insurer must prove prejudice. *Lyon v. Travelers Indem. Co.*, 104 P.2d 629, 648 (Cdg. 2004).

Although the repair to the damage floor was completed before Jean-Louis was able to view the damaged condition, it appears likely Jean-Louis will still be able to gather the information necessary to complete an investigation of the property. Accordingly, a court would be unlikely to find that Jean-Louis was substantially prejudiced due to lack of notice.

## C. *Endorsements*

Paris is making a claim for damages arising out of its own work. **Endorsement X**, modifies **Exclusion 1**, and allows for claims of losses “up to \$40,000 if the damaged work and the work out of which the damage arises was [sic] performed by you.” As we understand the facts, assuming an “occurrence” happened (as we discussed above), **Endorsement X** would, thus, allow Paris to recover up to \$40,000 in “property damage,” even though the damage in question was to its own work and to work it performed.

If the damages are not covered under **Endorsement X**, as discussed above, Paris may still be able to recover labor expenses associated with repairs of the failed concrete under the **Rework Repayment Endorsement**. Under that endorsement, an insured may be “reimburse[d] . . . for labor expense[s] associated with [its] ‘concrete rework’ which was performed during the policy period due to the original ‘concrete product’ failing to meet contractual specifications.” JL-4284 (10/02) at 2. The insured’s work in welding metal plates over the floor to improve its structural integrity would probably qualify as “concrete rework,” because that is an alteration or repair of the “concrete (floor) product.” Similar to the above discussion, Paris’ potential recovery of labor expenses associated with repairing the floor (up to a maximum of \$10,000 after

the \$400 deductible) would be dependent on the results of an expert analysis of the floor. For example, if the damage to the floor were purely cosmetic, this endorsement would preclude recovery for that labor expense. Denial of coverage under the **Rework Repayment Endorsement** would have no impact on the coverage under **Endorsement X**.

We hope that the foregoing explains our coverage determination and that you will contact us if you have additional questions or if we may assist you on any other matter.

Sincerely,

Sarah Mann