BY-LINED ARTICLE

First Circuit Holds That Warranty Not Exclusive Remedy When Repeated Corrective Efforts Fail

November 16, 2011 by Michael B. Donahue

According to the U.S. Court of Appeals for the First Circuit in *Berkshire Medical Center, Inc. v. U.W. Marx, Inc.*, an owner is at some point legally entitled to run out of patience, at least where defective work is concerned. That court recently considered the terms of a typical construction contract warranty and held:[1]

- The owner was entitled to employ self-help remedies when the contractor was not able to effectuate acceptable corrective measures for more than a year, despite multiple efforts; and
- The contractor was liable for the cost of a complete replacement of the work, even though the contractor had never refused to correct defects, the owner provided no prior notice of its intent to replace the work, and the owner did not offer the contractor the chance to do so itself.

Factual Underpinnings. Berkshire Medical Center experienced problems with its new vinyl operating-room floors from the moment of substantial completion in January 2004. The floors bubbled, split and cracked—apparently due to the condition of the concrete subfloor and an underlayment "flash patch" employed to correct waves and undulations in the concrete prior to flooring installation. Berkshire insisted that its general contractor Marx correct the defect. Marx made individual repairs to certain areas, paying its flooring subcontractor Rochester to do the corrective work. The bubbling and cracking continued in different areas of the operating rooms for more than a year, with Marx and Rochester fixing the condition each time it arose. By March 2005, all of the troublesome areas had been replaced by Marx, with no charge to Berkshire.

Unfortunately, the same problems persisted into late 2005 and 2006, and Marx and Rochester again made repeated repairs at no cost to the hospital. However, Berkshire was increasingly concerned and retained a consultant who recommended complete replacement of 8,000 square feet of operating room flooring. Berkshire decided to do this work without Marx's involvement. At

some point in this process, certainly no later than December 2006, Marx learned that its services were no longer required and that replacement work was being done by another contractor. Berkshire spent almost $400,000 in doing so—though it initially paid Marx roughly the same amount to perform the original job of 110,000 square feet of flooring.

Claims Asserted. Berkshire filed suit against Marx seeking to recover its costs, on the theory of breach of express warranty, among others. On the warranty claim, Marx's main legal defense rested on the language of the warranty itself, which required notice to the contractor and an opportunity to cure the problem. The contract contained a typical warranty provision, under which Marx promised to repair any defects in its work which arose for one year following substantial completion, and required Berkshire to give written notice of such defects to Marx "promptly" upon noticing them. On this point, Marx contended that it had made repairs as required during the one-year warranty period, and that the bubbles and cracks that arose after the warranty period were not covered by the warranty.

At trial, the jury found for Berkshire on the warranty claim and awarded roughly $332,000. Marx appealed, and the First Circuit upheld the jury verdict. The appellate court concluded that the repeated bubbling and cracking of the floor was a manifestation of the real defect in the concrete floor and subsequent underlayment, which first arose during the warranty period. Thus, the incidents in 2005 and 2006 were further "symptoms of the disease" and not independent occurrences, a view it noted Marx seemed to share, given Marx's continued efforts to remedy the floor problems more than a year after substantial completion. Thus Marx's obligation did not end in January 2005. Somewhat conversely, the court also agreed that Marx was not entitled to make patchwork attempts at correction in perpetuity. "(W)hile the contractor gets first crack, there has to be some end point. If the contractor refused to do anything, the owner could do the job itself and sue for the cost; the result cannot be otherwise if, after repeated efforts over an extended period . . . the contractor has attempted to provide a fix and failed to do so." *Berkshire* at 77.

The same logic applied to Marx's claim, that it was entitled under the warranty to replace the floor itself and Berkshire's election to go elsewhere had waived its rights. "As for giving Marx the option of doing the replacement job itself, Berkshire had little reason to think that Marx either could be trusted to do it or would have any interest in doing so," given Marx's previous piecemeal approach. Thus, Marx could not rely on the warranty as the owner’s exclusive remedy.

Post Mortem. This case should interest contractors and subcontractors for three reasons. First, even in a commercial context, *Berkshire* illustrates that the terms of a warranty are not absolute and will not provide absolute protection. Where an owner's frustration with repeated, unsuccessful fixes is reasonable, a contractor will not be able to avoid liability when the owner elects to go elsewhere for its remedy. Second, continuing manifestations of the same defect that occur during and after the warranty period expires will be covered by the warranty, even when discovered "late." Third, perceived attempts to minimize or escape responsibility will be punished by juries and courts. Here, while there was no dispute that Marx and Rochester responded to Berkshire's complaints, even beyond the one-year period, it is possible that the manner of correction was deemed too superficial. Marx could have undertaken responsibility to fix its own concrete and underlayment work, which would have been a much more complicated (and expensive) solution than replacing certain sections of flooring. Given that the problem was as pervasive and severe to require wholesale floor replacement, the jury might have felt that Marx's isolated fixes were a short-term approach, which amounted to an effort to whistle past the graveyard with crossed fingers, rather than an ongoing attempt to satisfy a customer.

The moral of the *Berkshire* case is not that no good deed goes unpunished. Rather, efforts to identify and correct the sources of problems should be thorough and complete. Contractors' and subcontractors' exposure on warranty items may not be limited by the warranty claims as much as they think. Thus, a prompt and complete attempt at correction may be a better strategy than ongoing, partial efforts.

Note

1. *Berkshire Medical Center, Inc. v. U.W. Marx, Inc.*, 644 F.3d 71 (1st Cir. 2011).