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## Federal Court Applying Michigan Law Recognizes Implied Warranty Of Design Adequacy

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The United States District Court for the Western District of Arkansas has come to the conclusion that implied warranty of design adequacy should apply to private parties to a construction contract. In [Midamerica, Inc. v. Bierlein Companies, Inc.](#), the court analyzed prior decisions of the Michigan Supreme Court which recognized the existence of an implied warranty within a construction contract created by affirmative statements by the state government when soliciting bids from contractors.

According to the Arkansas district court's Oct. 9 opinion, the "core consideration that created the warranty was that of fair dealing and not one party's status as a governmental entity. The reasoning of the controlling precedent articulates no exception for private contracts and the principles underlying the implied warranty are easily applicable to contract between private parties."

*Midamerica* involves the decommissioning, demolition and decontamination of a retired power plant. The defendant was the general contractor and the plaintiff was the subcontractor tasked with remediating environmental contamination and providing waste disposal services. The subcontractor bid the project based on plans and specifications provided by the general contractor. According to the subcontractor, the plans and specifications

expressly stated that the material it was removing was No. 2 fuel oil.

During a preconstruction inspection, the subcontractor contends that an agent of the plant's owner confirmed that the material to be removed from the plant's piping and associated equipment was No. 2 fuel oil. Based on these representations, the subcontractor submitted a bid in the amount of \$16,420 for the removal of No. 2 fuel oil. Unfortunately, when the subcontractor started removing the fuel oil, it determined that the material in the pipelines was No. 6 fuel oil as opposed to No. 2 fuel oil. No. 6 fuel oil was significantly more difficult and expensive to remove. As a consequence, the price jumped from a modest \$16,420 to \$453,159.88. When the general contractor rejected the subcontractor's change order request, the subcontractor filed suit for breach of contract and unjust enrichment.

The parties filed competing motions for summary judgment. While the subcontractor contended that the plans and specifications contained material misrepresentations, the general contractor argued that the work performed by the subcontractor was contemplated by the parties' subcontract and that the subcontractor exhausted its remedies under the subcontract.

The district court denied both motions. In regards to the subcontractor's motion, the district court relied upon the site specifications which mention the presence of an empty No. 6 fuel oil storage tank on the premises. According to the district court, the presence of the tank alone should have put the subcontractor on notice that No. 6 fuel oil may be present on the site.

The general contractor fared no better. In denying the general contractor's motion, the district court reasoned that "Michigan's implied warranty of design adequacy applies to contracts between private parties" and that the specifications identified No. 2 fuel oil as a material that may be encountered but omitted No. 6 fuel oil. Coupled with the fact that a representative of the project owner confirmed that only No. 2 fuel oil was present during a pre-bid site visit, the district court opined that a reasonable fact finder could determine that the affirmative statements could create an implied warranty of design adequacy.

Finally, the district court rejected the general contractor's argument that under the exclusive remedy provision of the subcontract, the subcontractor was limited to submitting a change order for differing site conditions. In rejecting this argument, the district court stated "[a] principle of contract law in Michigan is that each party to a contract must have some means of remedy for a breach by the other party . . . defendant's interpretation of the subcontract creates the possibility that a legitimate breach of contract claim by plaintiff can fail simply because neither [the owner] nor defendant decide to respect plaintiff's request for reimbursement."

The district court noted that there were prior lower court decisions in Michigan that "narrowly define the warranty to situations with government contracts." Ultimately, however, the district court concluded that the Michigan Supreme Court would apply the implied warranty to private contracts, and that its decision was "buoyed" by the reasoning of one other federal court decision in Michigan applying the implied warranty to a private construction contract. The district court's decision clarifies the scope and reasoning behind the implied warranty of design adequacy under Michigan law and further emphasizes the need to conduct a vigorous pre-bid site inspection.