

# Continuous Emission Monitoring System: Federal Appellate Court Addresses Mississippi Steel Mill Breach of Warranty/Contract Action



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The United States Court of Appeals for the Fifth Circuit (“Court”) addressed in a May 18th opinion an appeal from the United States District Court for the Northern District of Mississippi (“USDC”) of a breach of warranty action involving air pollution monitoring systems. See 2018 WL 2293234.

The USDC addressed in a March 31st opinion a Columbus, Mississippi, steel plant’s (“Steel Dynamics Columbus, L.L.C. [“Steel Dynamics”]) action against a firm (“Altech Environment USA Corp [“Altech”]) alleging defects in two continuous emission monitoring systems (“CEMS”). [See previous post here.](#)

CEMS are a type of air pollution control monitoring that provide continuous data on the amount of specific pollutants emitted by the facilities. Certain federal and state related Clean Air Act requirements sometimes include their installation and operation. The inability of purchased CEMS or other monitoring and/or pollution control equipment to meet applicable regulatory or permit requirements sometimes leads to breach of contract/warranty litigation between the permittee and equipment vendor.

The Steel Dynamics Clean Air Act Title V permit issued by the Mississippi Department of Environmental Quality (“MDEQ”) required the installation of CEMS to monitor for four pollutants. They included nitrogen (“NOx”), carbon monoxide (“CO”), volatile organic compounds (“VOCs”), and sulfur dioxide (“SO2”).

Steel Dynamics stated that it experienced multiple operating issues with the CEMS over the course of three years of operation. As a result, the company filed an action against Altech alleging that the CEMS were defective.

The USDC held a bench trial and determined that Altech breached its express warranty. It awarded some incidental damages. However, it found that Steel Dynamics failed to prove its direct damages and attorney’s fees.

Altech cross-appealed Steel Dynamics’ award of incidental damages arguing that the USDC should have enforced a contractual limitation on their recovery.

The Court determined on appeal that three provisions to the parties’ contract were relevant. They included:

- Altech warranted the CEMS “shall be of good quality and free from defects, latent and patent, in design, materials and workmanship; [and]. . . shall be suitable and sufficient for their specified

purpose.” (The parties stipulated that Altech understood that Steel Dynamics intended to use the CEMS units to monitor emissions in compliance with the Title V permit.)

- The contract provided, “If [Altech] breaches its warranty. . . [Altech] shall, at its option, repair and/or replace . . . any of the Goods which breach this Warranty.” (The exclusive remedy for breach of warranty was repair or replacement.)
- The contract limited damages – “[I]n no event shall [Altech] be liable for special, indirect, incidental, consequential, or punitive damages whether attributable to contract, warranty, tort (including negligence), strict liability or otherwise.”

The Court noted that MDEQ had assessed penalties to Steel Dynamics for both inadequate CEMS and the failure to report malfunctions. Additional violations were stated to have been self-reported by Steel Dynamics. Further, Steel Dynamics is stated to have contracted with a third party to install a different CEMS.

Steel Dynamics alleged the following causes of action:

- Negligence
- Breach of contract
- Breach of warranty
- Contractual indemnification

As for breach of warranty, Steel Dynamics sought damages for:

- Full purchase price of the Altech CEMS (direct damages)
- Incidental costs sunk while trying to fix the Altech CEMS (incidental damages)
- \$135,000 fine
- Attorneys’ fees incurred in dealing with environmental regulatory issues (consequential damages)

The USDC found that the “recurrent malfunctions” of the CEMS rendered them “unsuitable and insufficient for the specified purpose” in breach of the contract’s express warranty. However, the USDC determined that Steel Dynamics could not recover its direct damages for failing to prove the value of the CEMS as received.

Attorneys’ fees were denied because there was stated to be a failure to attribute either the fees or the fines to Altech’s breach. As a result, the Court awarded Steel Dynamics \$83,820.27 in incidental damages for the company’s efforts to fix the CEMS.

On appeal, the Court noted that the USDC determined that Steel Dynamics did not prove that the CEMS were worthless at the time of acceptance. In reviewing the record, the Court found support for the finding, noting:

In fact, the evidence shows Steel retained at least some value from the CEMS. Bryan Vogel, one of Steel’s engineers, testified Steel received \$23,340 in credit for components of the Altech CEMS.

As a result, the Court held an award of the full purchase price would not only relieve Steel Dynamics of its burden but would result in its unjust enrichment of at least \$23,340.

Altech asserted that the USDC erred by not enforcing a contractual limitation on incidental damages.

The Court cites Section 75-2-719 which allows for the limitation of damages. See MISS. CODE ANN. §§ 75-2-719(1-4). However, also cited is the phrase “[w]here circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this code.” It further notes that the Supreme Court of Mississippi has declined to enforce a damage limitation when an exclusive repair or replace warranty fails of its essential purpose.

The Court therefore determined that Altech provided an exclusive repair or replace warranty. It further stated:

The warranty failed of its essential purpose when Altech – over the course of years – was continually unable to repair the CEMS. Thus, the district court did not err in holding the limitation on consequential and incidental damages also failed. . . .

Finally, the Court addressed the USDC’s denial of the attorneys’ fees (\$172,704.97) incurred. The company had asserted that the fees were consequential damages incurred to address “environmental regulatory issues and the MDEQ fine caused by the defective Altech CEMS units.”

The USDC had concluded that the fine could have been the result of Steel Dynamics’ reporting violations. As a result, it determined that the attorneys’ fees incurred “dealing with the MDEQ could not be traced to Altech’s breach.” The Court notes that Mississippi law requires that damages be reasonably certain.

In reviewing the record, the Court’s opinion references both trial testimony of a Steel Dynamics’ corporate representative and billing records. It cites an admission by the corporate representative that the MDEQ fines and agreed order were not entirely related to the CEMS.

As to the billing records, the Court notes that a number of hours relate to Steel Dynamics’ response to the MDEQ’s NOV. Further, a portion of the NOV is stated to be devoted to the company’s self-reporting of its own violations. The Court notes that the issue is not whether the fees are related to the CEMS or the NOV. Instead, the issue is whether the fees resulted from Altech’s breach.

The Court upholds the USDC’s finding that Altech did not prove with a reasonable certainty the fees resulted from Altech’s breach. In other words, it determined that such a finding was supported by the evidence.

The USDC’s judgment is therefore affirmed.

A copy of the opinion can be downloaded [here](#).