

# Hydraulic Fracturing Services: New York Appellate Court Addresses Request to Dismiss Common-Law Indemnification Claim



**Walter Wright, Jr.**  
wwright@mwlaw.com  
(501) 688.8839

01/05/2018

The Supreme Court of the State of New York (Appellate Division) (“Court”) in a December 22, 2017, Memorandum and Order (“Order”) addressed whether a lower court erred in failing to dismiss a third-party claimant’s indemnification claim for failure to state a cause of action. See *U.S. Energy Development Corporation v. Superior Well Services, Inc., et al.* 2017 WL 6545322.

Plaintiff U.S. Energy Department Corporation allegedly sustained damages because of Superior Well Services, Inc.’s (“Third-Party Plaintiff”) improper performance of hydraulic fracturing operators on 97 natural gas wells owned by Plaintiff.

Plaintiff in its third amended complaint asserted causes of action for:

1. Breach of contract
2. Subordination payments
3. Promissory estoppel
4. Unjust enrichment
5. Negligence

The Court addressed in a November 9th Memorandum and Order whether Third-Party Plaintiff was entitled to summary judgment dismissing the Complaint because of certain terms and conditions in the “field invoices.” Field invoices had been provided to Plaintiff’s representatives at the worksite. They are stated to have contained “various terms and conditions limiting Defendant’s liability.”

The Court rejected the contention that the Third-Party Plaintiff was entitled to summary judgment because of the field invoices’ terms and conditions. It noted several reasons in support of its decision and held that Plaintiff did not accept or ratify the terms and conditions contained in the field invoices.

The Court, in the December 22nd Order, addressed Kroff Chemical Company, Inc.’s (“Third-Party Defendant”) contention that the lower court erred in failing to dismiss Third-Party Plaintiff’s indemnification claims for failure to state a cause of action, noting:

. . . [T]o establish a claim for common-law indemnification, the one seeking indemnity must prove not only that it was not guilty of any negligence beyond the statutory liability but must also prove that the

proposed indemnitor was guilty of some negligence that contributed to the causation of [the alleged wrong]”. . .

Plaintiff is stated to have alleged in the third amended complaint that Third-Party Plaintiff jointly designed, developed, and modified the SAS systems and fracturing fluid used during the fracking operations, and that those systems were defectively deigned, improperly manufactured, and improperly used. The Court further notes:

- Third-Party Plaintiff acknowledged in the third-party complaint that the products were jointly invented and developed, but alleged that Third-Party Defendant was responsible for their production
- Third-Party Plaintiff alleged that it was therefore entitled to seek indemnification and/or contribution in the event that Plaintiff recovers for negligent production of the products

The Court concludes that the third-party complaint alleges sufficient facts that, if true, may entitle Third-Party Plaintiff to indemnification from Third-Party Defendant based upon its alleged negligence in manufacturing the products used in the fracking operations.

[A copy of the Order can be found here.](#)