

DECISION OF INTEREST. SUM - Exhaustion of Limits. Second Department affirms order granting SUM insurer's petition to stay arbitration. Insured settled with one tortfeasor for the full amount of its policy limits and settled with a second tortfeasor for less than its policy limits without the insurer's consent. Dissenting justice argues that an insured is not required to exhaust the policy limits of every tortfeasor or to obtain the insurer's consent to enter into a lesser settlement before gaining access to SUM coverage since SUM carrier would have no incentive to give such consent and insured would be forced to fully litigate any claims it may have against all tortfeasors. *In re Central Mut. Ins. Co.* (Bemiss), 2008 WL 3463824 (3d Dept. August 14, 2008).

Discovery. In insured's action against insurer seeking a declaration that insurer was obligated to defend and indemnify it in an underlying bodily injury action, Second Department modifies order to grant insurer a protective order in connection with insured's discovery demand for all documents pertaining to past and current litigation involving the interpretation of certain policy terms. Court holds that the demand is overly broad and unduly burdensome. *Greenman Pedersen, Inc. v. Zurich American Ins. Co.*, 2008 WL 3854026 (2d Dept. August 19, 2008).

D&O Coverage - Bad Faith. The insured settled a securities class action suit following the refusal of his primary and excess D&O insurers to consent to the settlement, and thereafter brought breach of contract and bad faith actions against the insurers. The primary insurer and one excess insurer settled. A jury applying California law found the remaining two excess insurers' refusal to consent was made in bad faith. Second Circuit, applying California law, upholds the verdict. The two non-settling excess insurers brought bad faith claims against the primary insurer and settling excess insurer as equitable subrogees of the insured. The jury found in favor of the excess insurers on the claim, but the judgment was vacated following trial by the court and the claims dismissed. The district court determined that New York law, not California law, applied to the subrogation claims, and since the jury did not find "gross disregard" by the primary insurer and settling excess insurer, the claims must be dismissed. Second Circuit affirms finding that New York applies, and affirms the district court. Court rejects argument that as subrogees, excess insurers were entitled to have California law applied to their claims since insured's settled actions against the other insurers would have been decided under California law. *Schwartz v. Liberty Mut. Ins. Co.*, 2008 WL 3850768 (2d Cir. August 19, 2008).

Late Notice of Occurrence - Reasonable Excuse. Court grants summary judgment to insured, a laundromat, ordering its liability insurer to defend and indemnify it in connection with a slip-and-fall action. Insurer disclaimed in light of two-and-a-half month delay in providing notice of occurrence. Court finds that as a matter of law, insured had a reasonable belief in nonliability, despite fact that underlying plaintiff was taken from the premises by ambulance. Court notes that insured was new to the business, and that there was no indication that the premises were defective. Court places particular emphasis on claim representative's testimony that she, too, did not believe the underlying action had merit. Court also rejects insurer's argument that the policy should be rescinded based on a misrepresentation regarding the number of dryers on the premises. Court holds the argument was waived under Insurance Law § 3420(d). *Super Laundryland, Inc. v. U.S. Underwriters Ins. Co.*, 2008 WL 3350186 (S.D.N.Y. August 11, 2008).

Loss Payee Coverage. Mortgagee of insured property assigned the mortgage to another company. The policy at issue listed the original mortgagee as a loss payee, but was not amended to list the assignee. A fire destroyed the property. Insurer refused to pay the assignee policy proceeds since the policy was not amended to list the assignee. Court denies assignee's motion for summary judgment, holding that a provision prohibiting pre-loss assignment without the insurer's consent is enforceable. *NC Venture I, L.P. v. Valley Forge Ins. Co.*, 2008 WL 3409146 (Sup. Ct. New York Co. August 4, 2008).

Contractual Indemnification. Injured patient, as assignee of defendant hospital in underlying malpractice action, commenced suit against defendant doctor's employer after parties in underlying action entered into a settlement agreement in which hospital assigned to injured patient its contractual indemnification rights against doctor's employer. Third Department reverses summary judgment for employer and holds that trial court erred in finding that the general release did not unambiguously bar patient's indemnification claim and that parole evidence confirmed the parties' intentions to settle the malpractice action on the condition of the assignment. *Caruso v. Northeast Emergency Medical*

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Associates, P.C., 2008 WL 3861855 (3d Dept. August 21, 2008).

Contractual Indemnification/Common-Law Indemnification. In property owner's action for contractual and common-law indemnification after injured satellite installer was awarded judgment, Second Department holds that cross-motions for common-law indemnification were properly dismissed where proposed indemnitors were not negligent and did not control the work. Contractual indemnification claims were also properly dismissed where movants failed to establish that they were third-party beneficiaries of the subject contract. *Mid-Valley Oil Company, Inc. v. Hughes Network Systems, Inc.*, 2008 WL 3854006 (2d Dept. August 19, 2008).

PIP - Late Claim Submission. Court agrees that where it is undisputed that insured failed to submit claims for services within 45 days, insurer need not place policy into evidence since regulations require all policies to contain the language at issue. *Dana Woolfson LMT v. Government Employees Ins. Co.*, 2008 L 3080846 (N.Y. City Civ. Ct. August 6, 2008).

First-Party No-Fault - Failure of Proof. Summary judgment granted to provider where insurer failed to rebut provider's prima facie case where it submitted a conclusory affidavit that set forth no basis for insurer's claim that it timely denied provider's claims. *Uniondale Chiropractic Office v. State Farm Mut. Auto. Ins. Co.*, 2008 WL 3176602 (N.Y. Dist. Ct. August 7, 2008).