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NEWSLETTER

New York Court Enforces Excess Exhaustion Language, Precludes "Gap-Filling"
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A New York trial court has granted an excess insurer's motion to dismiss coverage litigation against it on the basis that its excess policy was not triggered by settlements in which the underlying insurers paid a portion of their policy limits toward settlement of a claim and the insured "filled the gap." *Forest Laboratories, Inc. v. Arch Ins. Co.*, No. 600219/2010 (N.Y. Sup. Ct., N.Y. County Sept. 12, 2012).

The defendant insurer's excess policy attached "in the event and only in the event of a reduction or exhaustion of the Underlying Limits of Liability, solely as a result of actual payment of a Covered Claim pursuant to the terms and conditions of the Underlying Insurance thereunder." The insured argued that the excess policy was triggered by a settlement of the underlying claim in which underlying insurers paid portions of their limits of liability and the insured "filled the gap" to reach the limit of liability for each underlying policy. The excess insurer contended that, since underlying insurers had not paid the entirety of their limits, its excess policy was not triggered.

The court agreed with the excess insurer, despite noting that other policy forms discussed in prior cases employed greater clarity regarding exhaustion. The court found that the above exhaustion language is not ambiguous, and requires the excess insurer to pay only after the underlying insurance has been paid under the terms of the underlying policies, which, the court reasoned, necessarily include their limits of liability. Accordingly, the excess insurer pays "only after the underlying insurers pay up to their policy limits." The court concluded that, while the defendant excess insurer "could certainly have done a better job of drafting its policy, and has many examples of better language to refer to accomplish that, the language it chose still protects [the excess insurer] in the situation, as here, where the underlying insurers never paid their full policy amounts due to settlements with [the insured]."