

**ALERT**

# New York Court Rejects “Gap-Filling”

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A New York appellate court held that an excess policy was not triggered by settlements in which the underlying insurers only paid a portion of their policy limits and the insured “filled the gap.” *Forest Laboratories, Inc. v. Arch Ins. Co.*, 2014 WL 1673096 (N.Y. App. Div.).

The 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 court found that such language unambiguously required the underlying insurance to be exhausted through “the actual payment” of the policies’ limits before the excess policy is implicated.

In so holding, the appellate court affirmed the trial court’s finding 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].”

The opinion is available [here](#).

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