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EXHAUSTION CLAUSE PRECLUDES GAP-FILLING BY THE INSURED

The New York Supreme Court, Appellate Division, First Department affirmed the lower court's dismissal of *Forest Laboratories v. RSUI*, thus finding that RSUI's exhaustion clause precludes gap-filling and requires complete exhaustion by the underlying insurers themselves before the excess RSUI policy is implicated.

In the case, Forest Labs settled with two other excess insurers below RSUI's layer for less than limits. RSUI moved to dismiss based on its exhaustion clause, which states that the policy is only implicated when the "Underlying Limits of Liability" are exhausted "solely as the result of actual payment of a Covered Claim pursuant to the terms and conditions of the Underlying Insurance thereunder." RSUI thus argued Forest Labs could not implicate the RSUI excess policy by settling with other underlying insurers and filling in the gap itself because the RSUI clause, when referring to the underlying insurance, requires that actual payment be made "thereunder." In other words, an insured cannot make a payment "under" an insurance policy.

The principal authority relied on by RSUI was *JPMorgan Chase & Co. v. Indian Harbor Ins. Co.*, 930 N.Y.S.2d 175 (Sup. Ct. N.Y. Cty 2011), which involved five different excess policies. Some of the policies expressly required payment of underlying limits *by* the underlying insurers. Others – more similar to RSUI's – required payment of limits "under" such underlying insurance. Without specific analysis, the court in that case ruled in favor of the excess insurers, which RSUI argued effectively conflated the two types of exhaustion language, meaning that neither of them permit exhaustion by an insured's gap-filling. In its order, the First Department in *Forest Laboratories* cited *JPMorgan Chase* as the basis for its ruling.

Although the market has significantly revised exhaustion clauses in recent years, this decision shows that courts will still accurately interpret older clauses, many of which may still be in play despite their age. Eric Blanchard and William Bila of Walker Wilcox Matousek LLP represented RSUI in the coverage litigation and appeal.