The court stated that the regulation would fail if it was inconsistent with a clear legislative statement. In this case, the regulation was inconsistent since the statute concerning insurance payments plainly contemplated direct payments to the hospitals from insurers. The court further reasoned that the conflict with the direct payment restrictions could be avoided since it applied to payments for which the Medicare recipient was entitled and no entitlement existed to a payment covered by insurance. The court also noted that HHS had failed in attempts to have Congress adopt legislation that would provide the basis for its regulation.

Secured Creditor Liability under CERCLA

United States v. Fleet Factors Corp., 901 F.2d 1550 (11th Cir. 1990).

In the first appellate court decision on the matter, the Eleventh Circuit Court of Appeals concluded that a secured creditor could be liable for hazardous waste clean up costs if it assumed managerial responsibilities for the debtor. Fleet held a security interest for funds it advanced against a textile plant's accounts receivable, equipment, building, inventory, and fixtures. In 1979, the plant filed for bankruptcy, but the bankruptcy court permitted the financing arrangement to continue. In 1981, however, Fleet refused to provide further funds under the agreement and the plant failed. In May 1982, Fleet foreclosed on its security interest and liquidated the assets of the plant. It assisted in winding up the affairs of the business. Its activities included shipping approvals, setting prices on excess inventory, employee layoffs, office supervision, and tax preparation. It may also have directed the handling of some of the toxic materials held at the plant.

In 1984, the Environmental Protection Agency spent $400,000 to remove 700 fifty-five gallon drums of toxic chemicals and forty-four truckloads of asbestos containing materials. EPA sued the plant owners and operators as well as Fleet to recover the costs of the clean up under the liability provisions of the Comprehensive Environmental Responsibility and Liability Act (CERCLA). Fleet sought to avoid liability under an exemption for secured creditors. The trial court determined that Fleet had acted as an operator and was not eligible for the exemption. The court of appeals affirmed.

The appellate court began with the assumption that CERCLA was adopted to impose clean up costs on the party responsible for creating the problem. To that end, the statute covers owners and operators who release or dispose of toxic materials and others who treat, transport, or dispose of waste. The statute exempts secured parties who are not "participating in the management.". The court found that the remedial nature of the statute suggested a narrow interpretation of any exemption from coverage. Though the court recognized that a secured creditor could be involved in discrete financial decisions of the operator without being liable for clean up costs, it concluded that a secured creditor was participating and "liable if its involvement with the management of the facility is sufficiently broad to support the inference that it could affect hazardous waste decisions if it so chose." Based on Fleet's alleged involvement in the plant's operations, the court found that the government had substantial grounds for holding the secured liable for clean up costs.

Drop Down Obligation of Excess Coverage Insurer

Shapiro v. Associated International Insurance Co., 899 F.2d 1116 (11th Cir. 1990).

The Eleventh Circuit Court of Appeals avoided deciding whether an excess coverage insurer must drop down to pick up the liability of an insolvent primary carrier. While at a resort, Shapiro was injured. He received a settlement of $950,000 from the resort. The resort carried two policies. The primary carrier was liable for the first $1 million of a claim. The excess coverage carrier was liable for up to $10 million. The second policy contained a provision that it was to be excess coverage for claims exceeding any scheduled coverage, "plus applicable limits of any other underlying insurance collectible by the insured." After Shapiro was injured but before settlement, the primary carrier became insolvent and could not pay the claim. It assigned its rights to payment from the excess coverage carrier to Shapiro. On the theory that the excess coverage insurer was required to drop down and pay the claim when the insolvent primary insurer did not, Shapiro sued.

The court of appeals concluded that the excess coverage carrier was not responsible for the claim. The court noted that there is a split of authority as to the interpretation of the clause requiring the excess coverage carrier to pick up the claims of the insolvent primary carrier that are within the policy limits of the primary carrier (and thus by definition usually excluded from the excess coverage policy.) Finding the contract governed by Florida law, the court concluded that the liability of the primary carrier attached at the time of the accident and prior to its insolvency. Because the claim was collectible at that time, there was no excess coverage liability.

Consequential Damages for Breach of Insurance Contract

Royal College Shop, Inc. v. Northern Insurance Co., 895 F.2d 670 (10th Cir. 1990).

Even when a claim for bad faith failure to pay is not available, an insured party may still recover consequential damages for a business failure if the insurer breaches the agreement. In 1982, the Royal College Shop closed following a fire. The owner filed claims for insurance coverage. The insurer refused the claims after a preliminary determination that arson caused the fire. The owner was tried for arson, but the state voluntarily dismissed the case with prejudice. Royal and the owner then sued for the loss of the business as an ongoing concern due to the insurer's refusal to pay the claim. The trial court awarded Royal $175,000 in consequential damages for the going concern loss. On appeal, the Tenth Circuit Court of Appeals upheld the decision.

Although Kansas, the state in which the claim arose, does not recognize a common law tort for bad faith failure to pay a claim, it does permit a claim