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