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 for breach of the insurance contract due to failure to make payment. Besides the damages that arise from the coverage provisions of the policy, the insurer may also be liable for consequential damages because of its failure to honor the insurance contract. The court then found that the evidence supported the trial court's conclusion that the insurer's breach caused the loss of the business and the insurer could have foreseen the effects of its breach.

Repo Losses Covered by Bank Bond

First Federal Savings and Loan Association of Toledo v. Fidelity and Deposit Co. of Maryland, 895 F.2d 254 (6th Cir. 1990).

Loan loss and trading loss exemptions in a bankers bond do not preclude coverage for lost repurchase agreements. A savings and loan, Sandusky, bought repurchase agreements from two related dealers. A repurchase agreement, or repo, provides that the buyer will resell the underlying securities it purchases back to the sellers after a fixed period of time at a price set at the time of the original purchase. Under the Sandusky agreement, Sandusky made payment to an intermediary, Bradford, who held the money until the sellers deposited the securities with it. Sandusky made several payments for securities that were not received by Bradford. The seller subsequently went into bankruptcy, and Sandusky discovered the discrepancy. Sandusky then became insolvent and was taken over by First Federal.

First Federal sued to recover on a bond for Sandusky's officers' failure to protect the business on the basis that the bond covered the "mysterious and unexplainable disappearance" of bank property. In part, the court agreed. First, the court concluded that the repurchase agreements were not covered by a loan loss exclusion. It found the agreements were not loans since they did not contain provisions concerning default and did not require collateral. Second, the court held that a rider denying coverage for trading losses did not apply since the ordinary meaning of the provision suggested that it covered only market fluctuations. The court nonetheless remanded the case to the trial court to determine if a provision of the bond excluding defaults for assignments or sales of notes or accounts applied.

Bankers Blanket Bond Termination Provisions Upheld

FDIC v. Aetna Casualty and Surety Co., 903 F.2d 1073 (6th Cir. 1990).

The Sixth Circuit Court of Appeals reversed a trial court decision awarding the Federal Deposit Insurance Corporation (FDIC) $6.5 million in compensatory and punitive damages for Aetna's failure to honor FDIC's claims under a bankers blanket bond. The case arose from the ongoing legal saga of C.H. Butcher and the failure of the United Southern Bank of Nashville. Prior to the bank's failure, Aetna issued two bankers blanket bonds for $3 million covering losses caused by dishonest acts of employees. The bonds provided that coverage terminated immediately upon the appointment of a receiver. The bonds further provided that a government receiver could not purchase additional coverage to extend the terms of the bonds.

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