

# Missouri Court Finds That Insured's Refusal to Testify Based on Fifth Amendment Rights Is Not a *Per Se* Violation of a Policy's Cooperation Clause

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April 2008

The United States District Court for the Eastern District of Missouri, applying Missouri law, has held that an insurer cannot establish a *per se* violation of a policy's cooperation clause on the basis of an insured's invocation of the Fifth Amendment during the defense of the underlying action. *The Medical Protective Co. v. Bubenik*, 2008 WL 382384 (E.D. Mo. Feb. 12, 2008).

In the underlying case, the estate of a patient killed by a dentist's alleged malpractice sued the dentist. The insurer provided a defense for the dentist pursuant to a professional liability insurance policy. During the course of the litigation, the dentist invoked his Fifth Amendment rights, refusing to provide deposition testimony or respond to discovery. The insurer diligently attempted to secure the dentist's testimony, but to no avail.

The insurer sought summary judgment on the basis of the dentist's failure to comply with the policy's cooperation clause. The court held that the invocation of the Fifth Amendment was not a *per se* violation of the cooperation clause and denied summary judgment on the question of whether the available facts established a violation.

The court also denied the dentist's motion for summary judgment on the question of whether the insurer was prejudiced by the alleged violation of the cooperation clause. While the insurer relied upon evidence that the trial court had sanctioned the dentist for his refusal to testify, the insured presented evidence that the plaintiff's case in the underlying action was so strong that there was essentially no chance of a defense verdict even if the dentist had testified.

Finally, the court rejected the dentist's argument that the insurer waived its right to rely on the cooperation clause defense by defending this action and a prior related action, despite the dentist's refusal to testify. The court found that the insurer had diligently pursued the dentist's cooperation, and therefore could not be seen to have relinquished its right to deny coverage if the dentist refused to cooperate.