

# Missouri Federal Court Holds Insured Breached Cooperation Clause by Invoking Fifth Amendment

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The United States District Court for the Eastern District of Missouri, applying Missouri law, has ruled that a dentist breached the cooperation clause in his medical malpractice insurance policy by asserting his Fifth Amendment privilege and refusing to give testimony in the litigation against him. *Med. Protective Co. v. Bubenik*, 2008 WL 5070042 (E.D. Mo. Nov. 21, 2008). The court determined that the insurer had been substantially prejudiced and was not required to provide coverage.

The insurer issued a medical malpractice insurance policy to the insured dentist, who specialized in treating physically and mentally handicapped patients. The policy contained a cooperation clause that required the insured to "at all times fully cooperate with the Company in any claim hereunder and attend and assist in the preparation and trial of any such claim." The policy also required the insured to "notify the Company . . . as soon as possible, of any threatened claim, with full information relative to the services rendered."

The dentist was sued in connection with the death of two patients. In the first lawsuit, the insured asserted his Fifth Amendment privilege and refused to give deposition testimony or answer interrogatories. The dentist also declined to discuss the claims with his insurer, which warned him that his refusal to testify might jeopardize his insurance coverage. The court precluded the dentist's expert witness from testifying at trial because the expert would have been relying on opinions or impressions she had learned from conversations with the dentist. On the day of the trial, the case settled for \$575,000, significantly above defense counsel's estimated settlement value of between \$100,000 and \$150,000.

In the second lawsuit, which was filed while the first action was still pending, the dentist again asserted his Fifth Amendment rights at deposition. In addition, his defense counsel declined to provide the insurer with copies of documents in a related disciplinary board proceeding that were potentially relevant to the defense of the lawsuit. The insurer reserved its rights based on the dentist's continuing refusal to cooperate and asserted that it had been prejudiced by the refusal to cooperate. After a failed mediation, the dentist fired the defense counsel provided by the insurer, and his own personal counsel settled the lawsuit without the knowledge of the insurer.

The insurer then brought the instant declaratory judgment action and asked the court to declare that the dentist had breached the insurance contract and that it was not obligated to provide coverage for the second settlement. The court applied Missouri law, which provides that an insurer may deny coverage based on an insured's breach of the cooperation clause if it can prove, by a preponderance of the evidence, the existence of substantial prejudice and the exercise of reasonable diligence to secure the insured's cooperation.

The court first ruled that the dentist had breached the cooperation clause in the policy by refusing to answer interrogatories, give testimony at his deposition, testify at trial or turn over documents relevant to his defense. In doing so, the court concluded that the insurance contract did not require waiver of the dentist's constitutional rights but instead presented the dentist with the choice of either cooperating with his defense attorneys and obtaining the benefit of his insurance coverage or invoking his Fifth Amendment privilege.

The court also ruled that the insurer was substantially prejudiced by the dentist's failure to cooperate and that coverage was barred. The court found that the dentist's testimony was "highly important" to his defense, noting that the testimony was not available from any other source. The court also cited expert testimony that, in a medical malpractice case, the defendant is "the most important witness in the defense." The court also found that the dentist's refusal to testify limited the ability of others, such as expert witnesses, to testify in his defense.

The court further found that the insurer had exercised reasonable diligence in attempting to secure its insured's cooperation. In particular, the court found that the insurer had "made numerous attempts" to secure the dentist's cooperation in letters and personal conversations and by asking questions in connection with interrogatories and at deposition. The court rejected the argument that the insurer had waived its right to deny coverage by providing a defense for almost a year before reserving its rights. The court explained that the insurer "cannot be criticized for waiting, in holding coverage open for [the dentist]" in part because "pulling the coverage early would arm [the dentist] with the argument that he was not given a fair chance to assess his options . . . ."