

# Refusal To Testify Based on Fifth Amendment Breaches Cooperation Clause

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The United States Court of Appeals for the Eighth Circuit has held that an insured who invoked his Fifth Amendment privilege against self-incrimination at trial and refused to provide pertinent information to his insurer violated his policy's cooperation clause and was not entitled to coverage. *Med. Protective Co. v. Bubenik*, 2010 WL 547053 (8th Cir. Feb. 18, 2010).

The insured, a dentist, was sued for medical malpractice. During the course of the malpractice litigation, the dentist refused to respond to interrogatories, attend a deposition or testify at trial. He also declined to provide his medical malpractice insurer with a state dental board report concerning the malpractice. The carrier repeatedly sought the insured's cooperation and advised the insured multiple times that his refusal to participate in his defense may constitute a breach of his duty to "fully cooperate" and "assist in the preparation and trial" of claims asserted against him. Subsequently, the insurer sought a declaratory judgment regarding its coverage obligations.

The court found that the insurer had presented evidence sufficient under Missouri law to justify a denial of coverage for breach of the duty of cooperation. Specifically, the court found that the carrier demonstrated that the dentist's breach of the cooperation clause was material, that the carrier's defense of the malpractice litigation was substantially prejudiced by the insured's refusal to participate, and that the carrier had acted with reasonable diligence to secure the insured's cooperation. The court also found that the insurer had not forfeited its right to deny coverage through waiver or estoppel by continuing to provide a defense subject to a reservation of rights after learning that the dentist intended not to testify. A finding of estoppel would be inconsistent with the insurer's obligation to exercise reasonable diligence to secure the insured's cooperation, and the insurer's efforts to secure such cooperation did not manifest an intent to relinquish the right to enforce the insured's duty to cooperate. Accordingly, the court held that the insurer's denial of coverage was proper.