



## Consequences for Breach of the Duty to Cooperate

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I watched a baseball game the other day where a player for the Boston Red Sox appeared to believe the umpire's evaluation of the strike zone was wanting. The player proceeded to test the structural integrity of the dugout walls with his bat. As players ducked to avoid the shrapnel, I recalled how I learned to play the game and how such conduct would have ended my summer of baseball. I guess there are different consequences for uncooperative behavior for a baseball player who makes \$14 million a year.

The Oregon federal district court took the opportunity last week in *Charter Oak Fire Ins. Co. v. Interstate Mechanical, Inc.* to remind insureds of the consequences for failing to cooperate. At issue was the insurer's argument that the insured failed to cooperate by colluding with the underlying plaintiff in a lawsuit against the insured. The court granted the insurer summary judgment, concluding the insured breached a clause in the insurance policy that required the insured to "[c]ooperate with us in the investigation or settlement of the claim or defense . . . ." As a result, the insurer owed no coverage to the insured.

The *Interstate Mechanical* case is full of interesting legal issues between an insured and its CGL insurer, and a complete recitation of the background is beyond the space limitations here. An oversimplified description of the background follows. Real estate developer Donald Abbey formed two companies to build a luxury residence on rural Shelter Island in Montana: Abbey/Land, a development entity, and Glacier, a building contractor. Glacier hired Interstate, an Oregon HVAC and plumbing subcontractor to work on the project. Interstate purchased insurance policies from Travelers and Continental naming Glacier as an additional insured. Problems with the construction project developed. In the course of the litigation that followed, Abbey/Land amended its complaint to turn Glacier from a plaintiff into a defendant, retaining only the negligence claims against Glacier. Glacier then sought insurance coverage for liability on the claims made by Abbey/Land.

In Oregon, an insured's breach of an insurance policy's cooperation clause nullifies the insurer's coverage obligations if the insurer establishes three elements: (1) the insurer diligently sought the insured's cooperation; (2) the insured willfully failed to cooperate; and (3) the insured's failure to cooperate prejudiced the insurer.

In *Interstate Mechanical*, the insurer satisfied its burden of proof on the three elements by showing that Glacier actively colluded with Abbey/Land by allowing itself to be made a defendant for the benefit of Abbey/Land, a related entity. Glacier also worked directly with Abbey/Land to create evidence favorable to Abbey/Land and to increase Abbey/Land's damages claims. Glacier worked with Abbey/Land's accountant to help create damage estimates for use with the insurance claim. Glacier also invoked a joint privilege for communications between itself, Donald Abbey, and Abbey/Land in response to the insurer's discovery requests.

It is significant that the court found the insured's non-cooperation caused prejudice *before* the underlying liability action had concluded. The court noted that other jurisdictions confronting this issue hold that a court can only determine whether the insurer has been prejudiced after the underlying injury action is concluded. The court distinguished those cases as involving an insured's passive non-responsiveness to the insurer, rather than active collusion with the injured party. In the case before it, the court concluded that insured was barred from recovering under the policies because of its cooperation with the claimant in the maintenance of his suit rather than with the insurer in the defense.