

# Prior Acts Exclusion Is Inapplicable When Acts Took Place During Prior Policy Issued by Same Insurer

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The United States District Court for the District of Oregon has held that a prior acts exclusion does not bar coverage under an insurance policy when the acts at issue took place during a prior consecutive policy issued by the same insurer and containing the same material terms. *Keizer Campus Operations, LLC v. Lexington Ins. Co.*, 2013 WL 4786521 (D. Or. Sept. 5, 2013). In addition, the court ruled that the policy's bodily injury exclusion did not apply because the underlying complaint alleged emotional harm unrelated to any "bodily injury" and because, in any event, the policy was ambiguous as to whether unwanted but beneficial medical treatment constituted "bodily injury." Finally, the court held that the policy's automatic extended reporting period applied even though the insured decided not to renew its policy and to instead purchase coverage from a different insurer.

The insured operated a senior health care facility. From 2008 until 2011, it was continuously insured by one insurer under three successive health care professional liability policies. During the second policy period, the insured received notice of a potential claim by a personal representative for the estate of a former resident at the insured's facility. Later, three days after the third policy period, the representative filed a suit against the insured alleging that, in the course of treating the former resident, the insured violated the resident's "do not resuscitate" order by providing emergency medical services to her. The medical services were allegedly rendered during the second policy period. The insured tendered the suit to its insurer, and the insurer denied coverage. A coverage action followed.

On cross-motions for summary judgment, the court ruled in favor of the policyholder and held that the insurer breached its obligations when it refused to defend the insured in the underlying litigation. First, the court rejected the insurer's argument that the "prior acts" exclusion in the third policy barred coverage. As a threshold matter, the court ruled that the insurer waived any argument with respect to the prior acts exclusion because it was raised for the first time in its response to the policyholder's motion for summary judgment. Alternatively, the court ruled that the prior acts exclusion did not apply because the relevant "acts" at issue occurred during one of the insurer's prior policy periods and that the exclusion would not apply when the insured was covered under "consecutive and substantively identical policies with the same insurer throughout the relevant time period." The court then ruled that, since the policies were continuously in effect, the real

issue was whether the timing of the policyholder's notice was prejudicial, and the court concluded that the insurer failed to carry its burden on this point because it did not brief the issue. As such, the court held that the prior acts exclusion did not apply.

Second, the court ruled that the policy's exclusion for "any bodily injury . . . sustained by [the insured's] patients or residents" did not bar coverage for the claim that the insured violated the resident's rights. The court first determined that the representative's claims for emotional distress she allegedly suffered as a result of "having to make the decision to end the life of her grandmother" were unrelated to the resident's alleged "bodily injury" and thus that the insurer had a duty to defend those claims. In addition, the court ruled that the term "bodily injury" did not unambiguously include allegations of "unwanted life sustaining treatment" since the alleged treatment, even if characterized as "battery," did not actually damage, hurt, or injure the resident's body.

Third, the court ruled that the policy's automatic extended reporting period was not rendered inapplicable, as contended by the insurer. First, the court rejected the insurer's argument that the automatic extended reporting period only applied when the insurer terminates coverage or decides not to renew the insured's policy, noting that nothing in the automatic extended reporting period provision provided for that result. In addition, while the insurer maintained that the automatic extended reporting period was not implicated because the policyholder obtained "other insurance [that] cover[ed] [it] or would cover [it] if its limits of insurance had not been exhausted," the court rejected that argument after observing that the later insurer denied coverage on prior knowledge grounds and thus the policyholder was not covered under the terms of another insurance policy.