



Failure to Disclose Material Circumstances under a Claims-Made Policy: misrepresentation under Article 1892 of the Italian Civil Code and Inapplicability of the Continuous Cover Clause

By judgment No. 2642/2026, published on 16 October 2026, the Milan Court of Appeal, First Civil Division – Specialized Business Court Section, upheld the insurers’ appeal and, partially reversing the first-instance judgment, dismissed the insured’s claim for indemnification, ordering the insured to reimburse the legal costs incurred in both instances of the proceedings.

In the author’s view, the decision is noteworthy because it confirms that, in the context of claims-made insurance policies, a letter by which an injured party alleges the insured’s liability and reserves its right to take legal action, while not constituting a claim capable of triggering cover under a claims-made policy, nevertheless amounts to a notifiable circumstance that must be disclosed by the insured in the proposal form. Failure to disclose such circumstance constitutes a material breach of the duty to disclosure under Article 1892 of the Italian Civil Code, resulting in the loss of the right to indemnification and rendering the continuous cover clause unapplicable.

1) The Case before the Milan Court of Appeal

The dispute arose from payment orders for their fees obtained by three former members of the board of statutory auditors of a real estate company. The company challenged the payment orders, raising a defence of non-performance pursuant to Article 1460 of the Italian Civil Code and, by way of counterclaim, seeking damages from the auditors in respect of losses allegedly suffered as a result of their conduct.

In particular, the company alleged that, during the period in which the management body was vacant following the

death of the sole director, the auditors – who had assumed responsibility for the ordinary administration of the company pursuant to Article 2386, final paragraph, of the Italian Civil Code – failed to monitor the company’s certified email account. As a result, they overlooked communications by which the prospective seller of a parcel of land invited the company to execute the final sale agreement, thereby causing the termination of the preliminary sale agreement and the forfeiture of the deposit.

One of the auditors filed a third party joiner to his insurers seeking to be indemnified in the event of an adverse judgment.

By judgment No. 10564/2024, published on 6 December 2024, the Milan Court found the auditors liable and ordered them jointly and severally to compensate the company for their losses. The Court also upheld the insured auditor’s indemnity claim against insurers without any clear stating.

2) The Judgment

Insurers, defended by Nicolò d’Elia and Federico Montanaro of international law firm CMS, appealed the first-instance judgment.

While confirming the auditors’ liability on the merits and dismissing their appeals, the Court of Appeal first examined – pursuant to the principle of the *“ragione più liquida”* (the most straightforward ground for decision) – insurers’ second ground of appeal, finding it both well founded.

It emerged during the proceedings that, when completing the proposal form for the policy period from 30 October

2018 to 30 October 2019, the insured had answered affirmatively to the question concerning his awareness of *"circumstances that could give rise to a compensable claim"*. However, while he disclosed a different dispute, he failed to mention a letter dated 17 November 2017 in which the company's legal counsel had formally alleged potential liability.

The Court agreed with the first-instance judge's finding that the letter did not constitute a claim capable of triggering the claims-made clause since the company had merely invited the auditors to provide observations; however – and this was the aspect overlooked by the first instance court – the letter *"clearly foreshadowed the possibility of a future claim for damages"* and therefore constituted a circumstance which, pursuant to Article 1892 of the Italian Civil Code and Articles 1 and 14 of the policy conditions, the insured was required to disclose when completing the proposal form.

Referring to Supreme Court judgments no. 20997/2023 and 23961/2022, the Court clarified that, under a claims-made policy, all events or facts which may potentially give rise to future claims are necessary for insurers to assess the risk and determine the appropriate premium and, accordingly, they constitute circumstances that must be accurately reported. In the Court's view, the insured's failure to disclose such circumstance was carried out with gross negligence, if not with willful misconduct, sufficient not only to preclude indemnification but also to render the continuous cover clause unapplicable.

The Court further rejected the insured's argument that the subsequent claim for damages had not been foreseeable. As the Court observed, *"the issue is not whether the insured could or should have foreseen the claim, but whether he failed to disclose a circumstance capable of increasing the risk"*, since the consequences under Article 1892 derives *"not from an error of prediction, but from an error of disclosure"* (Supreme Court no. 20997/2023). This conclusion was reinforced by Article 14 of the policy conditions, pursuant to which the insured declared that he was unaware of any fact or circumstance that might reasonably be expected to give rise to a liability to pay damages. The Court described this provision as being *"extremely broad"*, leaving no room for subjective assessments by the insured as to the relevance of information concerning the insured risk.

The Court also dismissed the insured's defence based on the limitation period set out in Article 1892(2) of the Italian Civil Code. It noted that insurers had not sought avoidance of the insurance contract but had instead exercised their right, under Article 1892(3), to deny cover since the claim occurred before they became aware of such misrepresentation.

Finally, with regard to the materiality of the non-disclosure to the insurer's consent, the Court observed that *"disclosure of the circumstance could potentially have doubled the risk*

of having to pay the insured sum, in addition to the only claim that had been disclosed, and the insurer might therefore have declined to issue the policy or offered coverage at a different premium". In doing so, the Court reiterated the principle that Article 1892(1) of the Italian Civil Code *"constitutes a fundamental safeguard for insurers which, given the inherently aleatory nature of insurance contracts, rely on the insured's representations in assessing the level of risk and determining the corresponding premium"* (Supreme Court no. 20997/2023).

All in all, the Milan Court of Appeal upheld the insurers' appeal, dismissed the insured's claim for indemnification and ordered the insured to reimburse the legal costs incurred in both instances of the proceedings. The Court affirmed the principle that, under claims-made policies, a communication alleging professional liability and reserving the right to take legal action constitutes a material and notifiable circumstance that must be disclosed by the insured when completing the proposal form. Failure to disclose such circumstance may result in the loss of coverage pursuant to Article 1892 of the Italian Civil Code and preclude reliance on a continuous cover clause.

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