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Private insurance

Prior risk clause and the principle of continuous coverage in liability insurance

Par Marco Mazzilli le 29 July 2026

In its decision 4A_433/2025 of May 27, 2026, the Federal Court dismissed the appeal of a liability insurer that had refused to pay benefits under a policy structured according to the *loss-occurrence* principle. This mechanism links the claim to the time when the damage becomes apparent, rather than to the date of the underlying event.

The insured, a manufacturer of aluminum composite panels used for facade cladding, had been covered by the appellant's liability insurance for several years. The insurance program is based on a master policy, governed by Swiss law, which sets forth the general terms and conditions—including the temporal scope of coverage and exclusions—and on a specific policy that follows the master policy's terms in the event of renewal. The program as a whole covers civil liability risks related to the insured's business activities worldwide. The master policy also includes a prior risks clause, which serves as the standard modification to the *loss-occurrence* principle. Since such a policy may extend to claims whose cause may predate the coverage period, the insured must, in order to be eligible for insurance benefits, demonstrate that it was unaware, at the time the contract was entered into or renewed, of any fact that could give rise to its liability.

During 2013 and 2014, legal proceedings in France revealed that the insured's panels could facilitate the vertical spread of fire during a fire in a high-rise building. The French court ultimately ruled that the insured was not liable, on the grounds that the panels complied with the fire safety regulations in effect at the time. Nevertheless, a liability risk remains for the future in all countries where the insured exports its products.

On December 16, 2016, the insured renewed the specific policy, with coverage running from January 1, 2017, to December 31, 2018.

The risk identified during the aforementioned legal proceedings materialized in 2019 when the insured was named as a defendant in a *class action* in Australia (the moment constituting the temporal connection of the loss under the *loss-occurrence* principle). The insurer then refused to pay, arguing that the insured was already aware of the risk at the time of the policy renewal. The insured validly filed a claim with the Zurich *Handelsgericht*.

The case first resulted in a ruling by the *Handelsgericht*, followed by a remand decision by the Federal Supreme Court (Federal Supreme Court 4A_503/2023, dated July 29, 2024). Called

upon to rule a second time, the *Handelsgericht* ordered the insurer to pay the claim. It noted that the insurer, in addition to retaining the insured's attorneys in the French proceedings, was aware of the risk associated with the flammability of the panels and had been able to factor it into its premium calculations.

The insurer filed a new appeal with the Federal Court, which ruled on two issues : (i) the characterization of the pre-existing risks clause, which is decisive for the allocation of the burden of proof, and (ii) the limits on its invocation when the insurance relationship continues uninterrupted with equivalent coverage.

To classify the prior risks clause, it is necessary to distinguish between two types of clauses. Primary risk limitation (*primäre Risikobegrenzung*) positively defines the scope of coverage. It is up to the insured to demonstrate that the loss falls within this scope. Secondary limitation (*sekundäre Risikobegrenzung*), on the other hand, excludes certain claims from a risk that is otherwise covered. In such cases, the insurer bears the burden of proving that the claim in question is excluded. The classification depends on the substantive content of the clause, regardless of its wording or its location in the policy. In this case, clause 6.2(d) of the master policy falls into this second category, since it excludes coverage only when the insured was aware, at the time the contract was concluded or the policy was renewed, of a fact that could give rise to her liability. The Federal Supreme Court emphasizes in this regard that the absence of such knowledge constitutes an indeterminate negative fact (*unbestimmtes Negativum*) that is, by its nature, difficult to establish. It follows that the burden of proof regarding this prior knowledge rests with the insurer. Since the insurer has not met this evidentiary requirement, it cannot invoke the exclusion of coverage.

Regarding the purpose of the prohibition on retroactive insurance, the Federal Supreme Court clarifies the scope of Art. 9 aLCA, to which the appellant equates the disputed clause. In its former wording, this provision rendered an insurance contract null and void when, at the time of its conclusion, the risk had already ceased to exist or the loss had already occurred. It was thus intended to prevent the purchase of coverage for a loss that had already occurred. The Federal Supreme Court, however, distinguishes this scenario from that of an insured who renews an identical policy—that is, with equivalent coverage and an unchanged insured risk. In such cases, the exclusion may be invoked only if the insurer establishes an actual break in the continuity of coverage. Since the insured had benefited from equivalent protection at the time she discovered the risk, the exclusion is without merit. The Federal Supreme Court thus establishes a principle of continuity of insurance coverage : when successive policies are based on the same temporal basis, their succession must not result in unforeseeable gaps in coverage, lest coverage be reduced to a "lottery."

Henceforth, a private insurer may no longer invoke the pre-existing risks clause solely on the grounds that the insured was aware of a fact that could potentially give rise to liability at the time of renewal. The insurer must establish either that this fact was not already covered by equivalent coverage or that the renewal altered the scope of the insured risk.

In practical terms, the ruling strengthens the position of an insured party facing a denial of coverage based on a strictly literal interpretation of the pre-existing risks clause. The insured party would be well advised to retain successive policies, endorsements, application forms, risk disclosures, and correspondence regarding premium rates to demonstrate the absence of any substantial change from one coverage period to the next.

The ruling adopted, however, warrants one observation. The Federal Court bases part of its reasoning on the concept of “equivalent” coverage, without specifying the criteria for defining its scope. The uncertainty arises precisely in intermediate scenarios : a limited increase in the sum insured, the incidental addition of a covered activity, a marginal territorial extension, or the granting of an additional coverage of limited scope. The ruling does not specify at what level of change to the scope of coverage equivalence must be denied, nor whether equivalence should be interpreted strictly or more functionally. In any event, the insurer must document the equivalence—or its absence—or risk having its reservation rejected for lack of evidence.
