

Health & Insurance Disputes

Update

Keeping you covered

Key legal updates



1. The Current Outlook

December 2020: The current outlook for Irish Healthcare & Insurance Disputes

a. Where are we now?

In the midst of the significant economic disruption caused by COVID-19, Irish healthcare and insurance businesses once again found themselves under the spotlight.

Businesses will have seen a seismic shift to commercial and 'balanced' negotiations with their insurers in 2020. These encompassed premium, rebates and claims considerations and commercial negotiations. In respect of claims management this has corresponded, in large measure, with a lack of appetite for litigation in court disputes.

The question of deferred hearing dates, multiple court closures and limited or reduced access to remote hearings has had the anticipated knock-on effect of diluting litigant's appetite for adversarial review before the courts. Logistical and pathway changes to access to court services has, needless to say, had a knock on delay and negative impact on defendant and insurer claims' strategies, this was particularly the case if it had been their intention to proceed and progress their claims and to defence cases before the courts.

In this respect, the latest High Court Notice advises that any Motions or cases that cannot proceed remotely in the Chancery List (Tuesday-Friday) will stand adjourned 'For Mention' to Thursday 11 March 2021 or the first available date thereafter. This Notice and other High Court updates can be read in full at: .

The President of the High Court Mary Irvine is urging settlements and resolution between the parties. However, without the business-drivers and 'court date' cut-off, this is having a slow impact. We did not see the annual uplift in settlements in July 2020, and Level 5 restrictions negatively impacted the anticipated uplift in engagement between the parties and resolution of claims in Q4 2020.

Similarly, Angela Denning, CEO of the Courts Service is seeking to balance the urgent and necessary access to the courts systems with the "Business As Usual" functioning of the Courts and Court buildings, amid COVID-19 health and safety restrictions. We all look forward to Q1 2021, and

the hoped-for reduced levels of restrictions, allowing for increased activity and appetite to engage and resolve claims.

We understand insurers have, as yet, not seen an uptick in 'COVID claims'. We anticipate that health and 'essential services' employer's liability claims, as well as health and safety when 'Working from Home' related claims, may form the basis of the initial wave of 'COVID claims' likely commencing Q2/3 2021.

The Cost of Insurance Working Group has maintained the spotlight on insurers, focussing on the insured and consumer, and the impact on pricing to them. Pressure is on to keep premiums down and under review. It is important, however, that this be balanced with the need to maintain supply in the market and not seeking to limit the insurer players in the market.

It may be said that the net positive impacts of the Cost of Insurance Working Group and Judicial Council have not been positively felt by hard-hit businesses and it is likely that sector negotiations will become all the more relevant – and under scrutiny – in the near future.

With limited budgets and profits challenged, the clear focus of insurers and brokers will have to be regulatory compliance and reporting. Keeping abreast of Brexit-related responsiveness and preparedness will be key. In this respect, Eversheds Sutherland's all-island of Ireland offering is a key differentiator and one which will enable us to continue to provide insurance and healthcare providers with clear, authoritative legal advice throughout this challenging period.

The latest Cost of Insurance Working Group "Action Plan for Insurance Reform" can be read in full here: <https://www.gov.ie/en/organisation-information/b891e-cabinet-committee-sub-group-on-insurance-reform/>.

b. Law Reform Commission publishes report on capping personal injuries actions

On Wednesday 30 September, the Law Reform Commission ("LRC") published a report entitled "Capping Damages in Personal Injuries Actions", in which they held that, in principle, proposed legislation to limit the level of awards for general damages could be permitted under the Constitution.

The report comes in the wake of a pledge by the Government to review the need for a constitutional amendment to allow the Oireachtas to legislate for appropriate levels of awards of general damages in personal injuries actions. The Personal Injuries Guidelines Committee, a sub-group set up by the Judicial Council, is set to imminently produce draft guidelines for the courts. It is envisaged that these will eventually replace the Book of Quantum, currently considered by Judges when deciding on the level of general damages to be awarded.

The report warns against the introduction of mandatory caps, which may be subject to a constitutional challenge, and instead proposes more flexible "presumptive" caps as a constitutionally viable approach. It is likely that the new system will continue to cap personal injuries awards at €500,000 in catastrophic injury claims, which can be exceeded if a Judge believes there to be exceptional circumstances at play.

It is hoped by the Government that legislation capping awards will reduce high insurance costs. Opponents of the proposed legislation argue that it potentially breaches the separation of powers and the requirement that the administration of justice be performed by the courts. The findings of the LRC reduces the likelihood of a referendum being held on this issue.

Eversheds Sutherland will continue to monitor the proposed legislation and advise our clients accordingly in order to protect their best interests.

The full report can be read at:
<https://www.lawreform.ie/fileupload/Reports/LRC%20126-2020%20-%20Capping%20Damages%20in%20Personal%20Injuries%20Actions.pdf>.

c. High Court rules in favour of Supermac's decision to refuse to hand over CCTV footage to a Plaintiff

The High Court has dismissed the appeal of a Plaintiff who alleged that they were entitled to obtain CCTV footage of an incident prior to the hearing of a case where liability was not in issue. In dismissing the appeal, Judge Barr upheld the decision of Galway Circuit Court a year prior, noting that there is no automatic right to discovery of CCTV footage in cases where liability is admitted.

The Plaintiff in this case claimed to have fallen from a chair in Supermac's and sought CCTV footage of the night in question through the discovery process. In circumstances where Supermac's had already admitted that the chair in question was damaged prior to the incident, they refused to comply with the Plaintiff's request.

In finding for the restaurant chain, Barr J noted that the CCTV material being sought by way of

discovery went "*exclusively to the issue of the plaintiff's credit*". The only purpose that would be served by handing over the CCTV footage in advance of the plaintiff giving evidence and undergoing cross-examination was whether the assertion that they fell to the ground was correct. In circumstances where liability had already been admitted, Supermac's was not obliged to hand over the footage in advance of the Plaintiff verifying their claim in accordance with the Civil Liability and Courts Act 2004.

The decision has been welcomed by the Alliance for Insurance Reform who note that the decision will be helpful in preventing potential claimants from requesting CCTV in advance of setting out their claim in verified pleadings.

For more information on Eversheds Sutherland's Healthcare, Insurance and Corporate Claims offerings, please contact:



Aisling Gannon
Partner, Head of Healthcare

+353 1 6644 205
AislingGannon@
eversheds-sutherland.ie

2. Business Interruption

a. Test cases

Looking across to the UK, insurers will have noted the judgement of the UK High Court, handed down on 15 September 2020, in what has been known as the 'FCA Test Case'. In finding in favour of the FCA and its argument advanced for policyholders, the judgement brings highly anticipated guidance on the proper operation of cover under certain non-damage business interruption insurance extensions.

The Court considered a number of sample wordings from eight defendant insurers and concluded that most, but not all, of the disease clauses in the sample policy wordings provided cover, finding that the proximate cause of the business interruption was the notifiable disease of which the individual outbreaks form indivisible parts. The Court so concluded to avoid any 'anomalous' results that would follow from the Insurer's position where *'there would be no effective cover if the local occurrence were a part of a wider outbreak'*.

The judgment has clarified that the COVID-19 pandemic and the Government and public response thereto amounted to a "single cause" of the covered loss and the key requirement for claims to be paid. As anticipated however, the judgement in question is currently under appeal in the UK Supreme Court and will be challenged with all parties putting a stay on proceedings.

Turning back to Ireland, the well-publicised and highly anticipated Irish Test case commenced for hearing before the Commercial Court in October 2020. The initial hearing has been concluded and a decision is awaited. The test case is brought by a number of publicans in respect of their business interruption insurance cover with FBD. They have argued that FBD has inappropriately determined that the policy does not cover the impact of COVID-19 on their business and they have refused to make payment on foot of their policies.

In light of the fact that there are identical policies in about 1,100 other policyholders, the outcome of the case will be potentially determinate in a large number of claims going forward. Judgement is anticipated to be delivered early 2021. Insurers and businesses eagerly await the outcome.

For more information on Eversheds Sutherland's Insurance offering please contact:



Stephen Barry
Partner, Insurance

+353 1 6644 284
StephenBarry@
eversheds-sutherland.ie

b. Regulatory requirements

On 5 August 2020, the Central Bank of Ireland ("**CBI**") issued a supervisory framework (the "**Framework**"), setting out its approach to dealing with the issue of business interruption insurance cover for losses arising from the outbreak of COVID-19 in Ireland.

The Framework notes that the CBI has no statutory role in dealing with individual customer complaints and that the extent to which a company can rely on any business interruption insurance cover is, in principle, a contractual matter between the individual company and their insurance provider.

However, the CBI states that it *"has no tolerance for systemic consumer or customer harm to go unresolved"* and has emphasised that it expects insurance companies to take a *"customer first"* approach to the resolution of any of the relevant issues. Where there is any doubt about the interpretation of a term in an insurance policy, *"the interpretation most favourable to the customer should prevail"*.

If an insurance company reaches a resolution with a customer, in favour of the customer, the insurance company is required to carry out an *"impact assessment"* on the potential wider impacts and apply the beneficial impact of the resolution to all customers in a similar situation.

Moreover, the CBI is now using its compulsory powers to obtain relevant information from insurers and is requiring this information to be certified as accurate and complete by a senior executive with authority to bind the company. This power will certainly concentrate the minds of many insurers on the increasingly important issue of individual accountability and the risks for individuals of 'getting it wrong'.

Keeping you covered

Health & Insurance Disputes Update | Winter 2020/2021

It is paramount that insurers understand their obligations in this regard and that they take this opportunity to analyse any risk of non-compliance within their organisations. Eversheds Sutherland are on hand to assist regulated entities to ensure they meet all of the regulatory requirements and expectations on them.

For more information on Eversheds Sutherland's Insurance Regulatory offering, please contact:



Ciaran Walker
*Consultant, FS Regulation &
Governance*

+353 1 6644 986
CiaranWalker@
eversheds-sutherland.ie



3. Eversheds Sutherland's Global Health and Life Sciences Insights

a. European Commission Pharmaceutical Strategy for Europe

On 25 November 2020, the EU Commission adopted a "Pharmaceutical Strategy for Europe" (the "**Strategy**"). Clients will note that the Strategy comes at a time when the vulnerabilities of the global healthcare industry have been laid bare by the COVID-19 pandemic. The Strategy aims to address these vulnerabilities going forward by ensuring increased research into vaccines and treatments, secure supply chains and access to medicine for all EU citizens.

Namely, the Strategy has four main objectives:

- Ensuring access to affordable medicines for patients, and addressing unmet medical needs (eg in the areas of antimicrobial resistance, cancer and rare diseases);
- Supporting competitiveness, innovation and sustainability of the EU's pharmaceutical industry and the development of high quality, safe, effective and greener medicines;
- Enhancing crisis preparedness and response mechanisms, and addressing security of supply; and
- Ensuring a strong EU voice in the world, by promoting a high level of quality, efficacy and safety standards.

The Strategy will also set the basis for the regulatory landscape in the future and can be read in full at https://ec.europa.eu/health/human-use/strategy_en.

4. Health and Insurance Business Needs – Legal Services

a. Employment

Our Employment Law Unit continues to advise clients on their obligations during these challenging and uncertain times. The following is a high level overview of key considerations from a business perspective in light of new Government restrictions:

- i. **Working from Home:** Importantly, under all five levels of the Plan, employees are advised to continue working from home, where possible. Employees who can work from home are advised to only attend work for essential on-site meetings, inductions and training. Therefore, employers should continue to facilitate home working, where possible.
- ii. **Pandemic Unemployment Payment ("PUP"):** PUP will be paid at three different rates and will remain open to new entrants up until 31 December 2020 given the need to continue supporting people through the next phase of the pandemic.
- iii. **The Employment Wage Subsidy Scheme ("EWSS"):** The EWSS provides a subsidy of up to €203 per week for eligible employees normally earning between €203-€1462 per week and €151.50 to those normally earning between €151.50 - €202.99. This will remain in place until 31 March 2021.
- iv. **Redundancies:** In the normal course of events, employees who have been temporarily laid off or placed on short time work for at least four weeks (or six weeks within a period of 13 weeks) have the right in certain circumstances to demand that their employer make them redundant, pursuant to the Redundancy Payment Act 1967. However, in light of the current climate, emergency legislation introduced earlier this year contained a provision which suspended the right of laid-off employees or those placed on short time work to apply for redundancy from their employer. These provisions have now been extended until 31 March 2021 in the interests of protecting businesses and preventing permanent job losses.
- v. **Covid-19 Illness Benefit:** The rate of payment is €350 per week and this payment will remain in place until end-March 2021.
- vi. **Supports for businesses:** In July, the Government announced its Jobs Stimulus, made up of €4 billion in direct expenditure, €1 billion in taxation measures, and €2 billion in credit guarantees, providing certainty on supports for employers and workers into 2021. The Government will continue to consider whether there is a need for any further targeted business support measures, building on the extensive July Stimulus measures, in the event of further restrictions being introduced.

For more information regarding Eversheds Sutherland's Employment Law offering, please contact:



Julie Galbraith
Partner, Employment Law
+353 1 6644 398
JulieGalbraith@
eversheds-sutherland.ie

b. Data Protection

Our Data Protection team have recently published guidelines regarding the impact on businesses of the *Schrems II* judgement. The decision will no doubt be of interest to insurers, healthcare providers and any organisation that handles personal data of individuals.

What is *Schrems II*?

Most organisations which transfer personal data outside of the EU rely on data transfer agreements, which adopt the "Standard Contractual Clauses" or "Model Clauses" (or for transfers to the US, the EU:US Privacy Shield Framework), to adequately protect the data of EU citizens. The CJEU in *Schrems II* was asked to

review the validity of the Privacy Shield and Standard Contractual Clauses as approved mechanisms to protect the transfer of personal data from the EU under the General Data Protection Regulation.

In short, the CJEU has invalidated the EU:US Privacy Shield Framework as a transfer mechanism for exports of personal data to the US.

However the greater sting from this decision may be the impact on the use of Standard Contractual Clauses. These remain valid, in principle, as a mechanism and can still be used to transfer personal data outside the EU/UK, but the CJEU judgement adds a significant due diligence burden to this continued use by organisations that want to rely on it, and confirms that individual data protection authorities can effectively revoke reliance on the mechanism and prohibit or restrict transfers if they believe the Standard Contractual Clauses won't be complied with and the personal data adequately protected.

The Irish Data Protection Commissioner commented in response to the judgement:

"...the application of the SCCs transfer mechanism to transfers of personal data to the United States is now questionable. This is an issue that will require further and careful examination, not least because assessments will need to be made on a case by case basis."

What should businesses do now?

- Review and evaluate the data transfers which take place throughout your supply chains and intragroup so as to understand the country to which it is transferred and the mechanism relied upon.
- You will need to note in particular any transfers based on Privacy Shield. Transfers to the US based on Standard Contractual Clauses will need to be identified and risk assessed as a priority.
- This case set a clear focus on transfers to the US, but the issues raised and decision outcome mean that an approach to the due diligence adequacy assessments will need to be thought out for all datastreams going to "third" countries. This assessment will need to look at factors such as access by public authorities to the data, limits on that access, oversight and judicial remedies, data importer behaviours, its own data protection laws as well as whether technical (e.g. encryption) and other protections might be applied to the data to enhance protection.

- Consider alternatives to transferring to a third country. Careful consideration will be needed however in respect of surveillance law territorial reach and access to the data.
- The existing EU standard contractual clauses were due to be refreshed so as to better align with the GDPR. The new clauses were held back pending the outcome of this CJEU case so they could be adjusted. These new clauses won't negate the need for the underlying assessment to be conducted, but a watching brief on the emergence of those new clauses will be required, as will a degree of planning around the adoption and rollout.
- Updating of data protection impact assessments, records of processing, other risk registers, and operational resilience reviews may also be required.
- Some consideration of derogations from the restriction on transfer may prove relevant in particular instances but it is likely to be limited in application. Consent is one of those derogations but it can be withdrawn and of course is itself subject to limits on its effective application, such as the requirement to be freely given, specific and informed.

For more information on Eversheds Sutherland's Intellectual Property and Data Protection offering, please contact:



Marie McGinley
*Partner, Head of IP, Technology
and Data Protection*

+353 1 6441 457
MarieMcGinley@
eversheds-sutherland.ie

5. Our All-Island Offering: Updates from Northern Ireland

The Dispute Resolution & Litigation Team in the Belfast office of Eversheds Sutherland are dealing with a number of matters on behalf of insurer clients. These include a run of matters for one particular insurer who insures domestic customers, and the claims largely relate to matters such as water leaks, dog bites, oil spills and other similar disputes.

Our colleagues in Belfast are also dealing with a matter for a well-known manufacturer of tyres, relating to an asbestos claim in a factory premises.

Finally, our colleagues in Belfast are considering and providing updates and advices to clients in relation to the recent FCA test case judgment from the High Court in London concerning business interruption insurance.

For more information on Eversheds Sutherland's Belfast office offering please contact:



Matthew Howse
Partner, Dispute Resolution & Litigation

+44 28 9526 2040
MatthewHowse@
eversheds-sutherland.ie



6. Diversity & Inclusion

Central Bank of Ireland (“CBI”) have been very vocal on the need for greater diversity in thought and leadership within the insurance sector. As one of our core values as a firm, Eversheds Sutherland champions Diversity and Inclusion (“D&I”) and celebrates those who contribute towards a more inclusive, understanding world for all. We welcome the success of “Dive In”, the diversity and inclusion festival for Insurers held on 22-24 September and we applaud all who took part.

We are delighted to work alongside insurers as they progress their D&I goals and strategy. Below is a selection of recent achievements which highlight the firm’s dedication to promoting diversity and inclusion in the workplace and beyond.

a. Eversheds Sutherland’s Aisling Gannon recognised at Women in Business Law Europe Awards 2020

We are delighted to announce that Aisling Gannon, Partner and Head of Healthcare, won the Best in Insurance and Reinsurance category at the Women in Business Law Europe Awards 2020.

The awards were held online on Thursday 10 September from London and celebrated the achievements of law firms setting the standard in terms of women-friendly work practices and women leading the field in the legal sector across Europe.

Eversheds Sutherland Ireland was also shortlisted in two other categories: *Women in Business Law – International Firm* and the category for *Ireland*.

b. Eversheds Sutherland Ireland signs the Law Society of Ireland’s Gender Equality, Diversity and Inclusion (GEDI) Charter

Eversheds Sutherland has confirmed its commitment to supporting diversity and inclusion by signing the Law Society of

Ireland’s Gender Equality, Diversity and Inclusion (“GEDI”) Charter.

Signatories to the GEDI Charter commit to treating all individuals and groups of individuals fairly and equally and no less

favourably, specific to their needs, in areas of gender, civil status, family status, sexual orientation, religion, age, race, class, disability or membership of the Traveller Community.

c. Discontinuance of “Dear Sirs” Salutation

Eversheds Sutherland is proud to have played an integral role in the “Discontinuance of ‘Dear Sirs’” proposal to the Law Society of Ireland.

The proposal aims to phase out the widespread use of the exclusive and gendered salutation “Dear Sirs” among members of the legal profession and replace it with more gender-neutral greetings such as:

- Dear Mr/Ms Surname;
- Dear Colleague;
- Dear Position ie Managing Partner, Senior Associate etc; or
- Dear Counsel.

The proposal was recently approved by the Law Society of Ireland’s Co-Ordination Committee and communicated to members of the legal profession through the 2020 President of the Law Society, Michele O’Boyle.

Ms O’Boyle indicated that the Law Society will cease to use the salutation with immediate effect and encouraged members of the legal profession to do likewise and to consider using more inclusive language when communicating with each other.

d. HERoes Top 100 Women Role Model Executives 2020

We are delighted to see Eversheds Sutherland’s Aisling Gannon included on the 2020 HERoes Women Role Model Executives list - a list which celebrates 100 Irish women who are leading by example and driving change to increase gender diversity in the workplace.

The panel scored each person on the influence of their role, their impact on women inside and outside the workplace, and their business achievements.

Aisling was recognised for spearheading diversity, inclusion and equality within Eversheds and the wider market.

e. Eversheds Sutherland's Gender Identity and Expression at Work Policy

Our firm has five core values driving our culture – Collaborative, Open, Professional, Inclusive and Creative. In line with these values, we are committed to treating all employees with respect and dignity and ensuring that they are able to meet their full potential. We are also committed to providing an environment which is inclusive and welcoming to all, regardless of gender identity or expression, recognising that there can be differences between physical sex and gender identity or expression.

This policy, which we launched in 2019, is designed to promote a safe, inclusive and productive workplace environment for all employees. It sets forth guidelines to address the needs of transgender and gender non-conforming employees and aims to create an inclusive environment, free from discrimination, harassment or victimisation. The goal is to educate and raise awareness in order to ensure the safety, comfort, and development of transgender or gender non-conforming employees, maximise employee workplace collaboration and eliminate stigmatisation. All employees share the right to protection under this policy and carry a responsibility for ensuring the policy is adhered to at all times.

We are proud of our policy, and grateful to our people for contributing to its drafting. We are leaders in our sector in this area and proud of our culture.

f. Pro Bono Pledge Ireland

Eversheds Sutherland are proud to be a signatory of Pro Bono Pledge Ireland, the first collaborative effort in Ireland to articulate the shared professional responsibility of lawyers to promote access to justice and provide pro bono legal assistance to those in need. The Pledge sets out the core values of such work to assist both those who undertake it and their clients.

The Pledge was developed by an independent grouping of law firms, barristers and in-house legal teams with a presence in the Republic of Ireland who have come together to affirm their commitment to delivering pro bono services in Ireland. The Pledge is coordinated by PILA (the Public Law Alliance, a project of FLAC).

Launching on 26 November 2020, the Pledge provides a common definition of pro bono, a commitment to a minimum aspirational target of 20 pro bono hours per lawyer per year and a mechanism to benchmark progress through annual reporting of anonymous pro bono data.

The Pledge can be found at this link:

<http://probonopledge.ie/wp-content/uploads/2020/11/Pro-Bono-Pledge-Ireland-1.pdf>

Click here to watch a video on the pledge:

<https://www.youtube.com/watch?v=F55Biq9I0yc>

7. Events to Note

Members and guests of the Medico Legal Society of Ireland are invited to join the following upcoming events:

Webinar: *Professional and legal aspects of responsible telemedicine* with Professor Damian Mohan on Thursday, 21 January 2021

Webinar: *What are we prepared to concede in the name of safety* with Office of the Data Protection Commissioner on Thursday, 25 February 2021

Further details for the above can be found on the society's website at: <http://www.medico-legalsociety.ie>



Disclaimer

The information is for guidance purposes only and should not be regarded as a substitute for taking legal advice. Please refer to the full terms and conditions on our website.

Data protection and privacy statement

Your information will be held by Eversheds Sutherland. For details on how we use your personal information, please see our Data Protection and Privacy Policy.

[eversheds-sutherland.ie](https://www.eversheds-sutherland.ie)

© Eversheds Sutherland 2020. All rights reserved.
6912706.1