



Banc Ceannais na hÉireann
Central Bank of Ireland

Eurosystem

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Re: COVID-19 and Business Interruption Insurance - Expectations in relation to costs and the criteria for test cases

Dear [NAME]

The Central Bank of Ireland's (the Central Bank) COVID-19 and Business Interruption Insurance Supervisory Framework dated 5 August 2020 (the "Supervisory Framework") sets out the Central Bank's expectation that where a legal action (which includes arbitrations, proceedings before the Courts and before the Financial Services and Pensions Ombudsman) has been concluded and the final outcome/s may have a wider beneficial impact for similar groups of customers, then insurers should carry out an impact assessment to ascertain whether there is such a wider beneficial impact and take remedial action to ensure that customers impacted obtain the benefit of the final outcome/s. If an insurance policy is interpreted in any legal action in a manner favourable to policyholders, the Central Bank is of the view that an insurer would not be acting fairly and in the best interests of its customers if it does not give the benefit of that outcome to other similarly placed policyholders. Insurers should not insist on policyholders pursuing a multiplicity of legal actions dealing with similar issues.

The Central Bank also expects insurers to consider publicly available outcomes of legal actions in relation to policies offered by other insurers with similar Business Interruption clauses and to give the benefit of such outcomes to its policyholders where appropriate.

In light of the expectation that an impact assessment will be carried out, certain legal actions may be capable of acting as a test case. Some test cases have already been heard or are due to be heard shortly. Where a legal action is capable of acting as a test case, this has obvious benefits for an insurer because it will provide clarity in relation to the correct interpretation of the policy at issue. In light of this, and cognisant of the financial burden imposed on a customer in taking a legal action, the Central Bank's expectation is that where the outcome of a legal action could be said to apply to a number of other policyholder customers, the plaintiff in such a case should not suffer financial prejudice as a result of taking the legal action and the relevant insurer should agree to pay the reasonable costs of such customer plaintiffs.

In the interests of fairness to the customer plaintiffs and similarly affected policyholders, the Central Bank expects insurers to consider the extent to which a particular legal action has the potential to act as a test case at the earliest opportunity (either during pre-action correspondence or in the early stages of legal actions).

The following non-exhaustive list of factors should be taken into account by the insurer in carrying out that assessment:

- (i) Whether there are already other legal actions underway which deal with the Business Interruption clauses in the Business Interruption insurance policy at issue in the legal action;
- (ii) Whether the determination of the legal action will require the relevant decision-maker to decide on the correct interpretation of the Business Interruption clauses in the Business Interruption insurance policy at issue in the legal action;
- (iii) The number of customers of the insurer with the same Business Interruption insurance policy and/or Business Interruption clause the subject of the legal action (or with a Business Interruption insurance policy with broadly similar Business Interruption clauses);
- (iv) The number of COVID-19 related claims that have been made under the Business Interruption insurance policy in dispute (or any Business Interruption insurance policies with broadly similar Business Interruption clauses). In considering this, insurers should take account of potential claims and claims that have been rejected; and
- (v) The number of legal actions that have been commenced in respect of the Business Interruption insurance policy (or any Business Interruption insurance policies with broadly similar Business Interruption clauses) and the stage such actions have reached.

The Central Bank may request insurers to produce their analysis of whether a legal action is likely to have a broader application to the position of customers other than the plaintiff.

The Central Bank expects insurers to engage with claimants in threatened or commenced legal actions in relation to whether a particular legal action could be considered to be a test case, by reference to the factors outlined above, and to take an appropriate position in relation to the costs of any test cases in light of the Central Bank's view that plaintiffs should not bear the financial burden of test cases.



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Yours sincerely

Gráinne McEvoy
Director of Consumer Protection