Annual Insurance Review 2017

Contents

Introduction

A year of change as expected – and then some

Last year we identified the standout insurance law event of 2015 as the impending introduction of the Insurance Act 2015. Little did we anticipate the tumultuous events of 2016 that would shake up the global economic markets as a whole.

The introduction of the Insurance Act 2015 on 12 August 2016 was a momentous change for the insurance industry. Policies are now subject to the new regime introduced by the Act, including the new duty of fair presentation of risk and insurers' proportionate remedies for any breach, as well as the watering down of insurers' ability to rely on warranties.

What's more, for policies incepting after 4 May 2017 insurers will be required to pay any sums due in respect of a claim within a reasonable time. An unreasonable delay in payment will enable policyholders to claim against insurers for any loss this causes.

Seeing how the provisions of the Insurance Act will be interpreted by the courts and applied in practice will undoubtedly be a significant issue as we move thorough 2017.

Notwithstanding this significant shake up of insurance law, these issues have proved to be mere footnotes to 2016's twin political and economic shocks: the vote for Brexit and Donald Trump's rise to power.

Brexit alone creates huge uncertainty for the insurance market in the year ahead. In addition to the direct impact Brexit may have on insurers economically and from a regulatory perspective, a review of the articles in this report will show just how many classes of business are subject to laws and regulation introduced as a result of EU membership. The true extent of how these classes of business, and so the risks underwritten by insurers, will change following departure from the EU may only become clearer towards the end of 2017.

If the result of the vote on 23rd June 2016 wasn't significant enough, the USA's election of Trump, with his apparent protectionist intentions for the US and overseas trade, has already had global economic impact – and he's not even in office yet.

Against such a turbulent backdrop, we've been developing our services to meet the sector's changing needs, whether it's our new insurance management consultancy business, our market-leading financial modelling software Tyche, or the significant growth in our capabilities in Asia. So, we're well set to continue offering you the highest quality support in these challenging times.

The remarkable events of 2016 create uncertainly not just for the insurance market but for all businesses. With uncertainty comes risk. And with risk comes the need for insurance. So the coming year should bring you all opportunities as well as challenge. We hope we will be able to help you face the challenges and make the most of the opportunities.

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Accountants

Key developments in 2016

2016 was yet another year where tax avoidance schemes hit the headlines. April saw a particularly rich seam of news stories, with the publishing of the Panama Papers and the Supreme Court's decision to refuse permission to appeal in respect of the Court of Appeal's decision relating to the Eclipse Film Partners 35 scheme. Beyond the wave of celebrity bankruptcies that some have predicted in respect of the latter, a number of commentators see the particular significance being the clear signal from the Supreme Court that it will not readily interfere with decisions of "fact" from the Tax Tribunal. This may well be the end of the road for a number of appeal cases in respect of other similar schemes.

Many professional indemnity practitioners have been predicting a decline in claims against accountants relating to tax avoidance schemes for some time now. Confidence in such predictions is only likely to be strengthened by the updating of the Professional Conduct in Relation to Taxation (PCRT) guidance in late 2016. This guidance has been endorsed by HMRC and signed by the major accountancy bodies (including CIOT, ATT, AAT, ACCA, ICAEW, ICAS and the Society of Trust and Estate Practitioners). The tax planning standards in the latest update include the clear message to members that they "must not create, encourage or promote tax planning arrangements or structures that (i) set out to achieve results contrary to the clear intention of Parliament in enacting relevant legislation, and/or (ii) are highly artificial or highly contrived and seek to exploit shortcomings within the relevant legislation."

What to look out for in 2017

2017 is likely to see the outcome of the government's consultation "Strengthening Tax Avoidance Sanctions and Deterrents", which closed in October 2016. This included proposals to penalise "enablers" of tax avoidance, defined as "anyone in the supply chain who benefits from an end user implementing tax avoidance arrangements and without whom the arrangements as designed could not be implemented". The potential penalties mooted include stripping the "enabler" of 100% of the benefit they receive from their services, or – potentially far more significantly – requiring them to pay the amount of tax understated. The trigger for such penalties would be the defeat of the tax avoidance arrangements.

One further interesting development for 2017, which many underwriters are likely to want to keep an eye on, is the Legal Services Board's decision in respect of the ICAEW's application to become an approved regulator of five reserved legal activities under the Legal Services Act 2007. The application covers: conduct of litigation; rights of audience; reserved instrument activities; notarial services; and administration of oaths.

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Key developments in 2016

The leaking of the Panama Papers in May of this year has dominated headlines and fuelled the debate about secrecy in the art world, a topic discussed in last year's review in the context of freeports. The release of 11.5 million of Mossack Fonseca's files constituted the biggest data leak in history and they highlight the extent to which art ownership can be shrouded in mystery. Clear legal title is fundamental to the value of the artwork and therefore to its insurance.

The Panama Papers are thought to solve ownership queries relating to masterpieces by artists such as Modigliani, van Gogh and Matisse. Artwork once considered lost may come to light as a result of the Panama Papers. While in some cases, this may be of more academic (or tabloid) interest, in others it may well lead to collectors (or insurers with subrogated claims) being able (or thinking they are able) to trace stolen artwork and making claims accordingly. Modigliani's "Seated Man with a Cane" is one such piece which has had questions about the work's ownership answered (to some extent) by the Panama Papers and where the Panama Papers have been used in support of litigation.

What to look out for in 2017

The Queen's Speech announced the UK's intended accession to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and its two Protocols through the Cultural Property (Armed Conflicts) Bill. The Bill recently completed the committee stage in the House of Commons. A date for the report stage has not yet been announced.

As the name suggests, the Bill is intended to protect cultural property in the event of armed conflict. If passed, it will not only introduce a number of criminal offences associated with dealing cultural property illegally exported from occupied territory during an armed conflict, but also forfeiture provisions in respect of the illegally exported property. These apply even where the property is owned by someone who acquired it in good faith and without knowledge of the illegal export – although in such cases the court has discretion to make forfeiture conditional on the payment of compensation to the innocent owner. As a result, the Bill, once law and if regularly enforced, may lead to claims for defence costs in respect of criminal prosecutions and forfeiture applications and for loss in the event that any compensation paid is insufficient to cover the value of the property.

Although generally well received, concerns have been raised that the definition of "cultural property" is ambiguous and may cast the legislation's net too widely. However, with cross-party support, the Bill is likely to receive Royal Assent in 2017.

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Key developments in 2016

In advance of its enactment, we saw insurers and brokers taking steps to adapt to the new rules introduced by the 2015 Insurance Act. Much of this adaptation was focused on the more onerous duties imposed on brokers to ensure that full disclosure, now known as "the duty of fair presentation", to insurers is made when placing risks.

With the need for brokers to assist clients to meet their duty of fair presentation, it has become, more than ever, imperative that brokers understand their clients' businesses and needs, as emphasised by one of the key broker's negligence cases decided this year.

A court of first instance decided that an insured was entitled to recover damages from its insurance broker, which had failed to advise it that it was required to maintain minimum security standards (ie mortice locks and hinge bolts on external doors and locks or steel bars on windows) at its premises as a condition of retaining insurance cover. The defendant broker might have avoided this claim by (a) better understanding its client's business and business practices and (b) fully describing the same to insurers. Had the broker done so, the inadequacies with the insured's security measures would have been flagged prior to inception of the policy, giving the insured the opportunity to implement the precautions that were a condition of cover. Whilst the subject policy of this claim did not fall within the Act, the outcome of the dispute further emphasises the need for brokers to "get under the skin" of their commercial clients and fully explain the potential implications of failing to comply with policy conditions.

What to look out for in 2017

One need look no further than the recent US election or high-profile government information leaks to appreciate that cyber threats are an emerging risk. Indeed, according to government data, one in four businesses has reported a cyber-breach in the past 12 months.

For insurance brokers, the potential gains, as well as the potential risks, of working within this emerging market are significant. On one hand, the global annual spend on cyber liability insurance tripled between 2012 and 2015. This growth is expected to continue. On the other hand, where the level of cover placed is insufficient to protect against a major data breach, significant claims will follow.

For example, the EU's General Data Protection law is due to come into force. Whilst Brexit may mean that this law doesn't apply in the UK, it will undoubtedly still be relevant for many UK organisations, particularly those operating internationally. Under these regulations, data breaches will have to be declared to anyone put at risk of the breach to a very tight timetable. The costs of complying with this obligation could be considerable and clients that have purchased a cyber-liability policy may well expect such costs to be covered. If these risks are not covered, and the limitations of cover are not fully explained by the broker, an insured may look to recover the costs of complying with cyber legislation and regulation from its broker. Insurance brokers looking to take advantage of this market will, therefore, need to fully understand the product that they are selling.

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Key developments in 2016

The recent case of *Allen Tod Architecture Ltd (In Liquidation) v Capita Property and Infrastructure Ltd*, provides a timely reminder of the risks of changing experts. In this case, the Defendant made an application for specific disclosure of documents prepared by the Claimant's first expert. The High Court held that privilege in such documents should be waived and the documents should be disclosed where a party seeks to rely upon the evidence of an alternative expert.

This decision provides a clear message; that the courts will adopt a robust approach to case management and the requirement for transparency between the parties. It is well known that the concept of "expert shopping" will not be tolerated with the court looking to take a firm stance where the parties change their expert, even for legitimate and/or practical reasons.

It is worth remembering that disclosure can extend to any documents in which an expert has expressed a substantive opinion and is not necessarily limited to the original expert's final or draft report. Out of caution, all communications with an expert must be considered as being potentially disclosable.

In the event a party does have to change expert, they should be prepared to be open, explaining the reasons why another expert is required and being ready to disclose as much information, including any draft reports.

What to look out for in 2017

The long awaited new Pre-Action Protocol for Construction and Engineering Disputes came into force on 9 November 2016, with some significant changes for 2017.

The main changes include:

- parties can contract out of the Protocol
- parties can agree to use an optional "Protocol Referee Procedure" which will allow parties that have "opted in" to seek advice on compliance from an independent referee, appointed by the Chairman of the TeCSA
- parties should meet within 21 days (rather than the previous 28 days) after receipt by the Claimant of the Defendant's Letter of Response
- the deadline for provision of the Defendant's Letter of Response can only be extended by 28 days rather than three months
- the court's ability to impose costs consequences for non-compliance is limited.

The main hurdle Defendants will face is the limited requirement for a Claimant to particularise its claim, given the stipulation now is for a Claimant to provide a "brief summary" of its claim which is "proportionate" to the nature and value of the dispute.

This more streamlined approach seeks to encourage early settlement at limited expense. However due to the subjective nature of interpretation, the new rules will undoubtedly give rise to problems. A Defendant may be unable to accurately assess the merits of any claim with such limited information. This could have the effect of leading to a delayed settlement, with Defendants waiting until they have sufficient facts to be able to justify a resolution to its financial decision makers (most likely insurers).

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Key developments in 2016

On 1 January 2016, the much awaited and belated Solvency II regime was implemented in the UK. The regime provides the framework for an EU solvency and supervisory regime for the insurance sector and applies to almost all UK insurers and reinsurers.

In summary, Solvency II represents a harmonised approach to the capital requirements, corporate governance, risk management, reporting and prudential standards that insurers and reinsurers should observe. It is also intended to provide better and consistent levels of consumer levels and protection and competition in the insurance market.

However, the effects of Solvency II have been questioned both prior and post its implementation by many in the market. In February 2016 the Treasury and Bank of England made their concerns known to the EU Commission and to a House of Commons Treasury Select Committee. This Committee is holding an inquiry into EU Insurance Regulation, with the Chair commenting that "Brexit provided an opportunity for the UK to assume greater control of insurance regulation". In a recent submission to the committee the ABI has commented on Solvency II's impact on the UK market's competitiveness. However, whilst others complain about apparently excessive and disproportionate compliance, governance and reporting requirements, the ABI did also comment that Solvency II, though not perfect, is broadly fit for purpose and should be refined and reinterpreted rather than replaced. Although some in the market would rather see the regime dropped altogether, the ABI's view likely represents the reality of what will occur in the coming months and years.

What to look out for in 2017

Early next year the FCA will issue a consultation paper outlining how it proposes to extend the Senior Managers & Certification Regime, which currently applies only to banks, to all regulated financial services firms, including insurance intermediaries. Whilst insurers had to prepare for the introduction of a similar PRA led regime in March this year (called the Senior Insurance Managers Regime), the extension of the banking regime for personal responsibility across financial services represents a far more wide-ranging and substantial change.

Firms coming within this new regime will need to prepare for all three key components . The first of the components comprises rules for senior management that require a strict allocation of roles and an enforceable duty relating to these responsibilities. The second component is the certification regime will encompass a large number of staff who potentially pose a risk to the firm itself or to customers of the firm – this will mean that individuals in a firm, such as senior claims handlers (and also some individuals at outsource providers), will need to be 'certificated' on an ongoing basis. The third main component of the new regime involves the application to nearly all staff (except ancillary staff) of personally enforceable conduct rules (including treating customers fairly). Other significant aspects to the new regime include the need for firms to give and obtain "meaningful" regulatory references. The Government and FCA are keen for the regime to apply from the start of 2018, and therefore firms will need to spend much of 2017 preparing for the change.

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Key developments in 2016

The Insurance Act 2015 has significantly extended the disclosure obligations in the proposal for insurance policies, which could have the consequence of increasing the liability exposure to D&O policies.

Compared to the previous regime, the class of individuals whose knowledge "counts" for disclosure is substantially wider and there is a new obligation for them to conduct a "reasonable search" for relevant information. The enhanced disclosure obligations could well represent a trap for the unwary and thereby result in an increased liability exposure for directors and other insured persons covered by D&O policies, which are increasingly being used as an "all risks policy" where other insurances fail.

A classic D&O exposure is the "follow on claim" brought by a policyholder who has suffered loss caused by its directors (or other employees who would be insured persons in D&O policies) in the placement of their insurances. The landmark D&O case of *Re D'Jan of London*, which set the standard of care for directors, was based on exactly this scenario. Further, the frequency of such claims may now increase since insurers may be prepared to take "non-disclosure" points more often now that the Act has introduced "proportionate remedies".

What to look out for in 2017

The Netherlands is viewed as a "hot spot" for European D&O claims and a likely new law will further entrench this position. Under current Dutch law, foundations can bring proceedings for a declaration of mis-management, which is then used as the basis of separate damages claims by each claimant. The bill, which was put before the Dutch Parliament on 15 November 2016, will streamline this procedure by permitting opt-out collective actions for damages.

Under the bill, the collective action may only be brought by a claim foundation that complies with stringent criteria. The draft bill anticipates that there may be competing foundations to pursue the claim, in which case the court will appoint the foundation that has the strongest (i) expertise; (ii) funding; (iii) supervisory board; and (iv) support from the aggrieved parties.

Unlike the WCAM settlement procedure which will remain available for the settlement of pan European disputes wherever venued, the Dutch courts will only accept jurisdiction for such collective actions where there is a sufficiently close nexus with the Netherlands. The likely test is either (a majority) of the claimants or the prospective defendants should be domiciled in the Netherlands.

This will be an opt-out collective action, so is similar to the class action system in the US. However, one point of difference is that the claimants will have to opt out at an early pre-defined stage set by the court and much before the settlement discussions have commenced. If a claimant does not opt out at that early stage then it will be bound by any eventual settlement and it cannot choose to opt out at that stage. Since the parties will know the extent of the opt-outs, there will be no need for any "blow out clauses" in the settlement contracts.

Energy

Key developments in 2016

Pollution Liability Post-Macondo: In May 2016, the Nigerian Federal Government commenced proceedings against members of the Royal Dutch Shell group for USD6.5bn following the Bonga FPSO oil spill of December 2011. The proceedings were commenced on behalf of 350 communities impacted by the offshore spill of 40,000 barrels of oil from a ruptured export line. The scale of the sum claimed by the Nigerian Government serves as a reminder of the draconian pollution liability landscape that has arisen since the 2010 Macondo spill.

Prior to Macondo, and the resultant BP litigation in the US, the fines and claims for compensation following pollution incidents had been reasonably manageable for E&P companies. However, the scale of the four million barrel Macondo spill (coupled with the punitive nature of damages in the US courts) resulted in the introduction of unprecedented fines and compensatory awards. In the aftermath of Macondo, several other jurisdictions followed the lead of the US Authorities and imposed multi-billion dollar fines upon E&P companies following far less severe pollution incidents.

In relation to the Bonga spill, the amount of oil spilled amounted to 1% of that spilled from the Macondo. However, the compensation sought by the Nigerian Government was over 22% of that recovered from BP in the US. In the absence of any clear precedent for the determination of quantum (especially in less-developed jurisdictions), the imposition of fines and awards of compensation appear to be assessed arbitrarily. The Bonga spill has reiterated the substantial risk for E&P companies and their underwriters in respect of unquantifiable pollution liability.

What to look out for in 2017

Reduced investment, reduced premium: In last year's Annual Insurance Review we reported on the falling price of crude oil and examined the ramifications of this decline for the oil industry and the energy insurance market. Although this year has not seen any further reduction in the price of oil, the price has remained low at around USD30-50 per barrel.

We previously reported on the impact of falling oil prices on the risk management budgets of oil companies, and the resultant downward pressure on premium income. These pressures will continue for as long as oil company profits remain subdued. However, a perhaps greater and more long-tail threat posed by prolonged periods of low oil prices is the reduced premium pool arising from curtailed oil company spending and investment. Energy consultants Wood Mackenzie reported that oil companies have reduced their planned spending for 2015 to 2020 by 22%. The International Energy Agency has reported that the average annual investment by oil companies in new projects has fallen from USD15bn to USD6.5bn over the last year. Over the next 5 years this reduction in spending and investment is expected to total USD1 trillion.

The decline in spending and investment has potentially long-lasting implications for the energy insurance market that are likely to outlive this period of low oil prices. Reduced investment equates to a reduction in insured property and projects. Correspondingly, insurance programme limits and the available premium income pool have also reduced.

Irrespective of the macro-economic trends discussed in last year's Review, the reduced premium income pool arising from curtailed oil company investment will continue to increase competitive pressures in the market - and supress rates - even after oil prices have recovered, and perhaps until oil companies return to their early-2014 levels of activity.

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Financial institutions

Key developments in 2016

During 2016, annuities have been back in the spotlight, with widespread reports of mis-selling by pensions and annuities providers.

An FCA investigation identified failures on the part of annuity providers to give customers a full picture of their options on retirement and to explain the benefits of shopping around. In particular, customers in poor health, who would have qualified for the most advantageous rates and enhanced terms reflecting their medical conditions, were not made aware of their entitlement to enhanced annuities.

As a result, the FCA has directed a number of providers to undertake reviews of annuity sales, with a view to compensating purchasers who did not receive proper advice. Some providers have been asked to review all non-advised sales going back to 2008, and are also being investigated by the FCA's enforcement division to see if further action is necessary.

Some 90,000 pensioners are expected to be compensated based on these reviews. The FI Professional Indemnity market will continue to keep a close eye on these developments.

What to look out for in 2017

The FCA's thematic review of the asset management industry is nearing completion and the final report is expected in the first half of 2017 (following an interim report before year-end). The review was originally intended to focus on fees and profitability in asset management, as well as potential conflicts of interest in the investment consulting market. A recurring theme is whether the higher charges payable for active funds are justified when the returns are no better, or are worse, than those for passive funds.

In April 2016, the FCA identified issues of closet index tracking, where investors are being charged higher fees on funds sold as actively managed funds, but which are in reality passive index hugging funds. Absolute return funds have also recently been included within the FCA's review. The higher fees charged contrast starkly with the conspicuous underperformance of funds in this sector.

Firms have already been criticised for their failure to provide sufficiently clear and transparent information on hidden fees, performance targets, asset selection and complex funds, to enable investors to make informed choices.

Now, in a 200 page interim report issued in November 2016, the FCA has proposed that asset managers overhaul their charging structures, on the basis that investors are getting poor value for money in actively managed funds. A single, transparent, all-in fee is suggested, allowing investors easily to compare charges. The FCA also wants to strengthen the use of benchmarks to assess fund manager performance. Overall, these measures are designed to hold asset managers to account for how they deliver value for money.

An industry consultation process on these proposals will end in February 2017. The regulator is also consulting on whether to refer the investment consulting market to the Competition and Markets Authority. Following the FCA's final ruling on the asset management industry, due in the first half of 2017, we fully expect action to be taken against particular firms in the light of the report's findings.

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Financial professionals

Key developments in 2016

In March 2016 the FCA published the result of its Financial Advice Market Review, a joint review between HM Treasury and the FCA. The review focused on how to provide accessible and affordable advice for consumers, setting out 28 separate recommendations to tackle the "advice gap". Work continues, with the Financial Advice Working Group taking forward a number of FAMR's recommendations including designing a new set of rules to increase consumer engagement set to be published in early 2017, with the Working Group having already published a potential shortlist of potential new terms to describe guidance and advice in late 2016.

2016 has also seen an increase in complaints and claims arising from SIPPs (for more details, see the Pensions and actuaries section of this Review) and fraudulent transfers involving financial advisers. There are now published FOS decisions in relation to financial fraud where findings have been made against financial advisers relying on hacked emails to transfer client funds. With high net worth clients often instructing advisers to make large transfers on short notice, advisers may be seen as a new soft target for fraudsters.

The exposure to fraudsters and wider cyber risks is potentially more acute given the FCA's focus on financial innovation with 24 fintech firms having been recently admitted to the FCA's "regulatory sandbox" – a "safe space" for firms to test products, services and business models. This increased focus on robo advice, providing a mass market advice option, also shows the industry's approach to filling the "advice gap" identified in FAMR.

What to look out for in 2017

The FCA will continue to review the financial advice market as it continues to roll-out its FAMR recommendations and we expect more developments in this area during 2017.

The approach the FCA takes in 2017 is also likely to be moulded by the consultation on the "FCA's mission". The issues raised in the consultation include whether or not the FCA's approach to offering consumers greater protection for more complex products is the right one. The findings are likely to make interesting reading in early 2017.

With an ever aging population and many pensioners' biggest asset being their home, we also anticipate a rise in the use of equity release products. Annual lending in 2016 has exceeded £2bn for the first time in the history of equity release plans and this is likely to continue to be a growing area in 2017.

Perhaps of greatest interest to insurers in this area, though, is the growing noise being made by the FCA about perceived inadequacy of PI insurance for adviser firms. At the time of writing this article, we anticipate a paper from the FCA by the end of 2016 in which they will outline plans for a review of funding for the Financial Services Compensation Scheme. As part of this paper, we understand the FCA will also propose to consult on plans to review PI insurance more generally. We should all watch that with interest.

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Key developments in 2016

In our 2015 review, we stated that due to the cost benefit Defendants obtain from a finding of fundamental dishonesty, it was likely that 2016 would see the courts being asked to provide further guidance on this issue, and so it has proven to be. The lower courts, in particular, are still 'finding their feet' when it comes to determining what amounts to "fundamental dishonesty" and the following cases are good examples; in *James v Diamanttek Ltd* (2016) the Claimant alleged exposure to high levels of noise from 2002 to 2014 saying he was not provided with ear protection until 2012. He later conceded that he had been provided with ear protection since 2006. The District Judge found that the Claimant had lied and therefore rejected the claim. However, she refused to make a finding of fundamental dishonesty. The Defendant appealed and this decision was overturned. The Court of Appeal found that the Claimant had lied about the correct version of events in order to assist with a finding of liability in his favour and that since this was a critical part of the claim, the claim should be categorised as being fundamentally dishonest. In *Rouse v Aviva Insurance Ltd* (2016) the Claimant claimed to be a passenger in a vehicle involved in an RTA. This was disputed by the Defendant. Two days before trial the Claimant discontinued the claim and the Defendant applied for a finding of fundamental dishonesty. The Claimant did not attend the hearing, claiming ill health and his Counsel asked the court to deal with the matter in the Claimant's absence. The District Judge found that the Claimant was not obliged to give reasons for his discontinuance and that no adverse inference should be drawn. He found it disproportionate to hold a mini trial and refused to make a finding of fundamental dishonesty. The Court of Appeal held that the district judge had been wrong. It was not disproportionate to hold a mini trial in circumstances where the parties were ready for trial and where the Claimant chooses not to give evidence or proffer a reason for discontinuing a Court could draw an adverse inference.

What to look out for in 2017

Lord Justice Jackson is continuing to attack the cost of litigation, with a view to introducing fixed costs into the multi-track. He told *The Times* in October 2016 that "the experience we have gained in recent years from fixed recoverable costs and costs management now makes it possible to develop a regime of fixed recoverable costs for the lower region of the multi-track." A figure of £250,000 has been mooted as being a possible cut off point. A move to introduce fixed fees into fast track clinical negligence claims was delayed this year, having previously been considered for introduction by 1 October. Also, George Osborne's autumn statement plans to raise the personal injury small claims limit and scrap compensation for whiplash injuries was halted. However, further examination of such matters will likely remain on the Government's agenda in 2017.

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Key developments in 2016

Revised sentencing guidelines now apply to all health and safety, corporate manslaughter, and food hygiene offences sentenced after 1 February 2016, regardless of the date of offence.

Fines of £1m or more for larger organisations have become commonplace, some receiving close media attention. Merlin Attractions has received the largest fine to date under the guidelines, £5m following an accident on its Smiler roller coaster at their Alton Towers theme park in 2015, which left several people very seriously injured. The fine would have been £7.5m but for the early guilty plea. Similarly there was a £4m fine for Network Rail following the death of a pedestrian on one of their level crossings.

Corporate manslaughter cases in 2016 have been less frequent, perhaps highlighting the difficulty for prosecutors in establishing sufficiently grave failings at senior management level, particularly within larger organisations. This was demonstrated in the collapsed case against an NHS Trust following the death of a mother during childbirth. None of the three corporate manslaughter convictions since the sentencing guidelines have exceeded the fine of £600,000 for CAV Aerospace in 2015, which alongside the same fine imposed on Bilston Skips in August 2016, remains the highest to date for corporate manslaughter.

Given the levels of fines now possible for non-corporate manslaughter H&S offences, prosecutors may take the view that only in the clearest of cases will they incur the cost of pursuing a manslaughter charge.

What to look out for in 2017

Prosecutions against company directors and senior managers (as opposed to other employees) effectively trebled over the last year. This is a worrying development if it signifies a trend. Under the guidelines, prison sentences are more likely than before.

With the stakes now much higher in terms of individuals' liberty and potentially crippling fines, we expect more "Newton" hearings, mini-trials aimed at determining the precise factual basis on which an offender is sentenced. The sentencing guidelines have many aspects potentially open to debate in terms of the level of culpability and risk of harm.

Organisations can expect greater scrutiny of their finances. Courts will be encouraged to investigate corporate structure, particularly any overlap between holding companies and subsidiaries, in an attempt to establish a more accurate reflection of finances than mere annual turnover of the defendant alone. It remains to be seen how the courts will interpret what level of turnover "very greatly exceeds" the £50m threshold for large organisations, enabling upward departure from the sentencing brackets.

Speculation about health and safety fines reaching the level of multi-million pound fines often imposed within the financial services sector has not yet materialised. However, this may change. We expect to see the growth in substantial fines continuing.

The HSE's Fee for Intervention scheme (FFI) is facing judicial review, on the alleged basis that the lack of an impartial appeals process makes it unlawful. The application has been listed for hearing in May 2017. In 2015-2016, the HSE received £14.7m from businesses under the scheme.

International arbitration

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Key developments in 2016

This year saw the development of the recoverability of third party funding costs in arbitration as insurers increasingly enter into the litigation funding market – an interesting and potentially profit-making area for insurers and litigants alike.

The English High Court recently affirmed a tribunal's decision (*Essar Oilfields v Norscot Rig Management* [2016] EWHC 2361 (Comm)) to award the costs of third party funding, including a success fee, to the recovering party on an indemnity basis. In making this decision, the Judge and the tribunal gave considerable weight to the conduct of the parties and their comparative financial status. The Judge confirmed the decision in the underlying award that the borrowing costs, including the success fee (300% of the funds advanced or 35% of the damages recovered) fell within the category of "other costs" under the Arbitration Act 1996/ICC Rules and were therefore recoverable. In the ruling it was significant to both the Judge and the tribunal, that Essar's conduct throughout the litigation effectively compelled Norscot to fund the claim via a litigation funder else it might have been prevented from bringing the claim at all for lack of funds.

This decision goes against recent trends in English litigation that success fees are generally not recoverable. The effect of the judgment is that the categories of recoverable costs in arbitration are wider than in English litigation; recoverable costs in arbitration may now include a success fee under a DBA, a premium for an ATE policy, or a CFA uplift. It is yet to be seen how other tribunals will rule when faced with a similar set of circumstances; the outcome might be different where the paying party's conduct does not justify an indemnity costs order.

What to look out for in 2017

Going forward into 2017, we expect to see this issue developed further resulting in the growth of a larger market for litigation funding in arbitration. Not only does this present a wider recoverability of costs in arbitration over English litigation, but we expect to see it expand to various international seats such as Singapore and Hong Kong which are increasingly vying to be at the fore of the international arbitration community. The consequences of this decision could open up a large and profitable market for litigation funders. Similarly, the costs liability for a paying party may vary dramatically depending on how the successful party has funded their claim – ie whether self-funded or through a third party. Worth noting on a practical level is the potential risk that the paying party may not know the extent of their costs liability – it might be worth requesting disclosure of the other party's funding arrangements at the outset of a matter in order to set reserves. Equally, parties in receipt of third party funding may wish to use the risk of a large adverse costs order as tactical leverage in settlement discussions.

There has been commentary since the *Essar* decision (above) that the costs of third party funding should more accurately be viewed as a "damage" to be pleaded and proven as opposed to a cost, and it has yet to be seen how much will be made of the "necessity" element in the present case. Should recoverability be limited to cases where self-funding is not an option? What should be made of a litigant who opts to hedge their litigation risks by seeking a third-party funder? This all remains to be seen and we look forward to these developments in 2017.

International property

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Key developments in 2016

2016 has seen a surge in deadly and destructive storms. This year's Atlantic hurricane season alone has, to date, spawned 15 named storms and contributed to a significant increase in global reported losses. Hurricane Matthew, in particular, caused widespread devastation in the US and Caribbean. Current estimates suggest that the total losses caused by the hurricane could reach $15bn, of which uninsured losses represent $10bn. The press cites the prevalence of storm surges (seldom a windstorm peril but rather listed under less common flood coverage) caused by Hurricane Matthew as the reason for these high uninsured losses. Following initial assessments, insurers still await final confirmation on the nature and extent of the damage.

This year's natural catastrophes have not been confined to the Americas; a number of earthquakes in central Italy caused considerable loss of life and property damage, whilst tropical storms in the Philippines, China and Korea led to the filing of over 100,000 claims. China and Taiwan saw Typhoon Meranti, the year's strongest storm, wreak particular destruction, with insured losses expected to reach up to $1.15bn. More recently New Zealand was struck by a 7.8 earthquake. The economic and insured losses have not yet been calculated but the damage to property is expected to be considerable.

2016 has been kinder to the mining industry, with an absence of major losses. Despite this, the first half of the year saw mining premiums continue to spiral downwards. Commodity prices also continued to fall, which in turn has seen business interruption premiums plummet. Whilst a recent stabilisation in prices could suggest that the rate of these reductions is decelerating, an increase in premiums still appears some way off.

What to look out for in 2017

Global Weather Oscillations used climate pulse technology to predict that the Atlantic hurricane seasons in 2016 and 2017 would be the most active and dangerous for more than a decade. With this prediction having proved accurate for 2016, insurers may want to brace themselves for a 2017 season which may be similarly affected by a number of lethal storms and resulting losses.

The US President Elect, Donald Trump, has pledged to revive the US mining industry, promising a particular boost to US coal mining. The exact impact that his presidency will have upon the mining industry is unclear but commodity prices have already seen a boost following his promise to dramatically increase spend on infrastructure. Shares in Peabody Energy, one of US' largest coal companies, temporarily skyrocketed following Trump's victory which could signal that coal will make a comeback in 2017 after he assumes the presidency. The Baltic Dry index (seen by many as a leading indicator of the state of the world economy) has also surged to a recent high on the back of Trump's infrastructure plans. Data also shows that the economic conditions in China are beginning to improve and with that its demand for natural resources will also rise.

Cyber-terrorism will continue to remain a key issue for mining companies, with Willis Towers Watson's Natural Resources Risk Index 2016 citing cyber-risk as one of the top three risks facing the industry. Terrorists are well-aware of the potential to hack mining machinery and companies are as a result, facing increased pressure to ensure that hackers are not able to use their facilities or equipment to cause devastating economic damage and human casualty. Conventional terrorism remains an enduring global threat and insurers should continue to be alert to the risk of considerable property damage resulting from a larger, explosive attack.

Legal practices

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Key developments in 2016

The use of claims management companies (CMC) is increasing. CMCs undertake aggressive marketing to "farm" as many claimants as possible. Claims asserting under-settlement of divorces (normally involving inadequate pension provision) and personal injury claims (Vibration White Finger claims, motor vehicle accidents, and Noise Induced Hearing Loss) are on the increase. These claims are usually relatively modest and rely on an assumption that insurers will settle quickly. This is a fair assumption in the current environment, where costs are often the major factor and where the recent decision in *Proctor v Raleys* (which has made it more difficult for defendants to argue that they gave adequate advice if it was contained in precedent letters and questionnaires) has done little to assist Defendants facing claims arising from process-driven work such as personal injury litigation or wills and probate.

Tax mitigation continues to be a hot topic within HMRC and firms that have had any historical involvement in tax mitigation schemes have enjoyed considerable scrutiny this year. Claims have been seen from those who invested believing the schemes would save money, but such claims are starting to become socially unacceptable and so volumes are lower than we might have expected.

Whilst cybercrime remains on the up, firms have been slow to seek individual cyber-liability policies, despite more high profile data breach incidents in 2016 including the likes of Mossack Fonseca in Panama. Whilst larger firms appear to have recognised the risk, smaller firms have yet to embrace it and remain vulnerable, particularly if their IT security is not kept fully up to date.

What to look out for in 2017

2016 saw a further increase in mergers, and this looks set to continue into 2017. This is good news for firms in terms of consolidating ever increasing overheads. However, the difficulties will lie in blending cultures, IT systems etc. The fall-out from mergers often results in more claims.

We are still awaiting the outcome of the SRA consultation which proposed significant changes to the Solicitors MTC. Insurers have continued to be hit hard by claims (especially recent fraud related claims) and under the current MTC, have had very little ability to decline/reduce their exposure. Rates have been artificially supressed by the continued influx of capacity into the market, but the Solicitors Regulation Authority is mindful that this will not last forever. The proposed changes propose various ways in which the MTC could be softened to reduce Insurers' exposure (and therefore premiums), whilst still providing protection to the consumer.

The Law Society has also encouraged so called "regulator shopping" so long as principles of client protection are not compromised. The SRA wants to remove the requirement for firms to have professional indemnity insurance run-off cover in place when they switch to another regulator. The proposals are designed to enhance choice and competition.

Life sciences

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Key developments in 2016

The vote on 23 June 2016 to leave the EU has thrown into uncertainty the regulatory landscape for Life Sciences. EU regulations determine what manufacturers must do to demonstrate and maintain regulatory compliance. Classification according to the EU's sliding scale of "low" to "high" risk; detailed submissions to regulators; and audits by Notified Bodies give some assurance to underwriters as to the quality of the products manufactured by a potential insured. Any change post-Brexit (especially if the government replaces these regulations with a regime that is less onerous) might mean that underwriters have to intensify their own scrutiny of medical products.

For claims handlers, there is uncertainty over consumer protection legislation. Much Life Sciences litigation is driven by the EU's "strict liability" regime derived from the Product Liability Directive, implemented by the Consumer Protection Act 1987. Claimants and defendants are familiar with almost thirty years of statute-based law, peppered with decisions at the EU level. If the current consumer protection framework is amended significantly, then claims handlers will find it (even) more difficult to predict the outcome of litigation, and to set the appropriate reserves.

Much Life Sciences market practice is already based on global standards. In the face of Brexit, we expect insurers to place more emphasis on ensuring that insureds in this sector are complying with worldwide standards, whether set by Europe, the United States or any economy with a stringent regulator. Amidst concern following the referendum, adopting this approach could provide insurers with much needed reassurance.

What to look out for in 2017

2017 may be the year that Mobile health (mHealth) apps fulfil their potential to revolutionise the way in which healthcare is accessed. The credibility of the market has been given a boost by the chief executive of NHS England stating that smartphones are one of the "most powerful diagnostic tools now available". The NHS now plans to approve and fund dozens of innovative apps, which could accelerate the acceptance of apps as diagnostic tools in the hands of members of the public.

Apps already on the market range from the fairly simple fitness-tracking variety, to those providing more sophisticated diagnostics and treatment options. There is a risk that users may operate apps incorrectly or interpret any recommendations more loosely than they would advice from their GP. This has the potential adversely to affect the health of users, who could seek redress for any injury from manufacturers or suppliers. Insurers of the devices will need to work with manufacturers to mitigate those risks.

When assessing a risk, insurers would be advised to pay close attention to the regulatory regime. The MHRA requires manufacturers to implement an effective surveillance system, to capture any recurring misuse of an app, or other frequently-occurring risks. The MHRA recommends the implementation of a registration or activation system that may help trace devices that have been distributed by third parties. These are smart practices that insurers should insist are followed, to avoid risks to their own financial health.

Marine

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Key developments in 2016

The Supreme Court's decision in *Versloot Dredging v HDI Gerling* [2016] related to a claim under a marine policy but will have an impact on claims across all lines of business. In the claim presentation the assured erroneously told underwriters that the insured vessel's bilge alarm had sounded during flooding, but the crew had been unable to deal with the leak due to the rolling of the ship in heavy weather.

The untruth was told in the belief that it would fortify the assured's claim. However, it turned out to be irrelevant to the merits of the claim as it was held that the loss was proximately caused by a covered peril, namely fortuitous entry of seawater. Giving the leading judgment, Lord Sumption held that the "collateral lie" would not affect the assured's right to claim under his insurance because it was not material to the merits of the claim. Only fraudulent statements that improve or exaggerate a claim will result in the assured forfeiting his right of recovery.

The decision jars with the fundamental principles of good faith in insurance contracts. On one view, it undermines the ability of underwriters to take a representation made by an assured during a claim presentation at face value. Lord Mance (dissenting) considered the decision to amount to a "charter for untruth". However, commercially minded businesses that depend upon insurance in order to operate should see the imprudence of using it as such. Proven dishonesty by an assured in a claim presentation will of course impact an underwriters' decision to renew/write further covers in the context of historical "collateral lies".

What to look out for in 2017

The IMO Ballast Water Management Convention will enter into force on 8 September 2017. The Convention is designed to control the spread of intrusive aquatic species. The introduction of foreign aquatic species into marine ecologies can have a profoundly damaging effect on marine ecosystems. The aim of the Convention is to control and regulate the discharge of harmful aquatic organisms within ballast water and sediment.

The Convention will require ships in international trade to manage their ballast water to the Convention's standards. Vessels will have to have on board a ballast water record book and an International Ballast Water Management Certificate. The Convention applies to vessels, submersibles, floating platforms, floating storage units and FPSOs. Presently, the proportion of global tonnage covered by the treaty is over 50%, and the IMO continues to urge countries which have not yet done so to ratify the treaty.

The cost of installing ballast water management systems is significant. Subject to the vessel, the price for retrofitting a ballast management system can be anywhere between hundreds of thousands to millions of dollars. The production of ballast management systems is in its infancy. It will take time before manufacturers are able to obtain type approval. There is therefore uncertainty as to which systems owners should be investing in.

The consequences and prospective liabilities for violation of the Convention are to be determined by each contracting state. P&I and other liability insurers should keep a close eye on developments in terms of approved systems and circulate guidance to their members/assureds accordingly. They should also ensure that the terms of the cover they provide require compliance by their members/assureds with the Convention.

Media

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Key developments in 2016

The eagerly anticipated appeal in the seminal case of *Vidal Hall v Google*, due to go before the Supreme Court this year, was withdrawn following agreement between the parties. This means that the 2015 Court of Appeal decision stands and claimants suing under the Data Protection Act 1998 may recover damages where they have not suffered pecuniary loss – ie for pure distress. Data protection is an increasingly popular avenue used by claimants against media defendants to circumvent thresholds in more traditional media claims such as the "serious harm" test in defamation. The "journalistic exemption" provided for under the Data Protection Act goes some way to protect media defendants in such claims, although the debate still rages as to what constitutes "journalism" for the purpose of the exemption. It also remains to be seen in what guise this protection will survive once (and if) the General Data Protection Regulation comes into force in 2018.

The Press Recognition Panel has accepted the application by IMPRESS for recognition under the Royal Charter (enacted in the wake of the Leveson Inquiry) as a state-backed press regulator. IMPRESS – funded by Max Mosley – at present has only a few subscribers and no national newspapers are members. Most of the mainstream national media (except certain outlets such as the Financial Times and the Guardian who are self-regulating) subscribe to the alternative press regulator – IPSO. IPSO has not sought, and does not intend to seek, recognition under the Royal Charter. The Royal Charter recognition entitles IMPRESS members to favourable treatment in the courts and subjects non-members to punitive awards and costs in certain circumstances (see more on this below).

What to look out for in 2017

As referred to above, the Royal Charter recognition of IMPRESS as the UK's first "Leveson-compliant" press regulator means that certain provisions of the Crime and Courts Act 2013 (the Act) will apply based upon whether news publishing media defendants are members or not. Non-members of IMPRESS (i.e. all the national newspapers and the majority of regional newspapers) leave themselves open to exemplary damages being awarded against them in cases where their conduct has shown a deliberate or reckless disregard of an outrageous nature for the claimant's rights. Furthermore, should it be implemented, section 40 of the Act leaves defendants facing potentially large legal bills, in respect of their own costs and those of a claimant, even when they successfully defend themselves at trial. No court has yet had the chance to apply such provisions and the activation of the cost-shifting provisions under section 40 is still being considered by the Department of Culture, Media and Sport.

The Leveson Inquiry which took place in 2011-2012 examined the culture, practices and ethics of the press. Elements of illegality, such as phone hacking and payments to public officials, were not investigated at the time due to ongoing criminal proceedings which have since concluded. It remains to be seen whether or not the Government will go-ahead with the second phase of the inquiry given the huge costs that are likely to be incurred and in circumstances where criminal investigations have already been carried out and either resulted in prosecutions or charges being dropped.

The Government is currently undergoing a consultation upon both the implementation of section 40 of the Act and Part 2 of the Leveson Inquiry and is due to report on its findings in early 2017.

Medical malpractice

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Key developments in 2016

Issued in late 2015, the Memorandum of Understanding (MoU) between the Coroners' Society of England and Wales and the Care Quality Commission (the CQC) was a key development impacting on the medical malpractice sphere in 2016 (and which will have continuing repercussions).

The MoU states an intention "to promote and continue effective working relationships between coroners and the CQC". It arises from new powers given to the CQC from 1 April 2015 to prosecute healthcare providers for failures in care which result in avoidable harm. It encourages greater cooperation between the two authorities in recognition that some deaths will have been caused by such failures, and sets out the practical means by which that co-operation will be achieved. It potentially places greater scrutiny on the insured – as an interested person at an inquest or the subject of a CQC investigation. Paragraph 21, for example, requires the CQC to share with the coroner evidence about the quality of care or treatment the deceased received. And paragraph 30 provides that coroners will notify the CQC as soon as is reasonably practicable of any inquest where concerns exist about care or treatment.

The MoU implies a new proactivity by the CQC, bringing forward regulatory action, with the CQC (at times) seeking to be directly involved in an inquest. This adds a new complexity, as an insured faces the investigatory tribunals simultaneously. In protecting the interests of insureds and their insurers, it is important to be mindful of this new partnership, and manage communications carefully.

What to look out for in 2017

With the Supreme Court's decision in the seminal case of *Montgomery v Lanarkshire Health Board* still reverberating through the medico-legal world, the issue of consent will continue to be of great interest (or, perhaps, concern) not only to patients and clinicians, but also to insurers.

At the end of October 2016, the Royal College of Surgeons (RCS) published new guidance advising its members on obtaining appropriate and "informed" consent from patients. In accordance with the Supreme Court judgment, and moving away from the "Bolam" approach to consent (which gave clinicians a defence if they could prove that a responsible body of doctors would have done the same), the focus for all clinicians must now be patient-centric, patient-specific and subjective.

So what does this mean for hospitals, individual clinicians – and their insurers? In litigation, we expect to see a rise in "consent" claims – a combination of clinicians adapting to the new law and patients (and their solicitors) seeking to run Montgomery style consent allegations. We have heard claimant lawyers being encouraged to add Montgomery allegations to existing claims, and to trawl filing cabinets for claims that could be revived to plead Montgomery consent. Robust defences are available but, it is always better to protect against future claims: hospitals should be training their consent-takers; longer time should be allowed for the consenting process; and clinicians should consider overhauling their personal approach to the process. Insurers may wish to check whether these precautions are being taken.

Miscellaneous professional indemnity

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Key developments in 2016

Miscellaneous PI is now well and truly established as a lucrative and popular class of its own, with hundreds of emerging professions now seeking PI insurance. The market is hugely wide ranging, incorporating clients as varied as agronomists, balloon modellers, fluvial geomorphologists and wedding photographers. With each new profession differing vastly from the next and often subject to its own legislation and regulation, the one common thread is that it is impossible for any one person to be an expert in this area.

The industry's focus in 2016 has therefore been on understanding the client, their industry and their specific (and frequently niche) insurance requirements, which can lead to the need for a bespoke product. Many existing products are simply not wide ranging enough to cover the demands of such individual businesses. Clients in this area may be "green" as they are often entrepreneurs rather than "professionals" and may not understand their insurance needs, or articulate (or perhaps anticipate) how their business – and consequently their insurance needs – might evolve. A client acting as an interior designer now could easily move into project management in the coming months or years. Clients who have purchased "off the shelf" products therefore may well be disappointed should a complex claim arise.

In particular, as more and more businesses develop into multidisciplinary practices, new challenges have come into play for those placing such risks. More complex problems emerge when one of those disciplines may benefit from minimum terms insurance (which typically does not exist in this area) eg where an accountant acts as an IFA. Each individual set of circumstances must be considered carefully.

What to look out for in 2017

Although it is difficult to identify trends in such a wide category of business, it is becoming clear that a large proportion of the claims we see are both large and complex which we expect to continue into 2017. Many of the difficulties arise precisely because clients in this category frequently are not "professions" in the traditional sense ie they are not governed by a representative or regulatory body and are not subject to a code of conduct. It can therefore be difficult to establish the true nature of their "professional business", or what the appropriate standard against which they should be judged might be. As a result, establishing whether the professional was negligent or not can prove rather tricky; unlike the traditional professions, there is generally no established body of experts to call upon in the event that a claim is brought. For example, we are currently in search of an expert in cow nutrition...

With this category of insureds only looking to increase, we anticipate seeing a lot of similar situations emerge as the year progresses. Insurers should consider carefully when placing risks how they will realistically be able to defend any claim that comes through the door.

In addition, we expect to see an increased amount of media related claims as more and more businesses use social media platforms for their own advertising.

Pensions and actuaries

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Key developments in 2016

Pensions have not been far from the headlines in 2016. The big headline for final salary pensions was BHS and British Steel. In light of the underfunding of these schemes (and generally rising deficits), the Government is looking at strengthening the Pensions Regulator's powers and, in particular, its involvement in mergers and acquisitions. The Pensions Regulator has already flexed its muscles having issued warning notices in relation to BHS including to Sir Phillip Green and other related entities. We have also seen the Pensions Regulator using its powers when issuing over 25,000 compliance notices to employers who have failed to implement auto-enrolment.

In the personal pension plan area, we have seen rising complaints in relation to SIPPs. The FOS has seen an increase in complaints over 2016 rising from 806 in the first two quarters of 2015/2016 compared to 853 in the same quarters for 2016/2017. The number of complaints upheld by FOS has also increased to 66% from 49% in the previous year. We also continue to see conflicting published decisions from the Pensions Ombudsman and FOS when it comes to investments in SIPPs – with the FOS taking a less adviser/provider friendly approach. We expect this trend to continue in 2017 as we continue to await the release of the Berkeley Burke FOS decision which has been under review since September 2014.

In more positive news, following a review of the enhanced annuities market, the FCA decided that an industry wide review was not required and so there will be no consumer redress scheme for enhanced annuity providers.

What to look out for in 2017

The Pensions Regulator released its 21st Century Trusteeship and Government consultation paper in 2016 indicating that it would be looking at standards for all pension trustees. The consultation is to review the role of the trustee board and the minimum levels of competence for trustee boards with its findings set to be released in 2017 – perhaps an indication of rising standards for trustees?

The FCA also released its Retirement Outcomes Review in October 2016, looking in particular at the de-cumulation phase of pension advice - converting assets held in a pension pot into a fund for a pensioner's desired lifestyle. The FCA intends to publish its final report in the summer of 2017 and it is likely to have an impact on the advice journey for pensioners. The review may overlap with the proposed introduction of a £500 pensions advice allowance.

The FCA is also reviewing the redress methodology for pension transfer cases and is set to announce the results of its review in Spring 2017; it is anticipated that quantum for pension transfer cases will increase as a result.

However, one development we will not see in 2017 is the introduction of a market for the sale of annuities which the Government scrapped shortly after the Brexit vote.

Political risk and trade credit

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Key developments in 2016

D Day in terms of the implementation of the Insurance Act 2015 on 12 August 2016 has had a significant impact on Political and Credit Risk (PCR) wordings especially due to the historic use of detailed warranties and conditions precedent to limit risk. The market is also getting to grips with underwriting the first risks subject to the new rules on disclosure and fair representation of risk.

In our review of 2015 we commented that the market appeared to be experiencing increased claims due to the end of the commodities super cycle. This trend persists and the prolonged depression in the price of oil and commodities and the slow-down in China's economy has led to an increase in loss notifications in the Asia-Pacific region, in particular, in China and India. In India, corporate debtors had been using protections of the Sick Industrial Companies (Special Provisions) Act 1985, in attempts to frustrate overdue receivables due to foreign unsecured creditors. This Act was repealed on 1 December 2016 and interested parties await to see how the replacement process of referral to the National Company Law Tribunal under the Insolvency and Bankruptcy Code 2016 will develop.

2016 will be marked by the surprising results of two significant democratic processes, the US election and the UK's referendum on Europe. In the US, eyes will be on Trump's first year as president and how his "putting America first" agenda will impact the global economy. In Europe, the immediate fall out of Brexit was the impact on the pound but the mid/long term economic and political fallout for the UK and Europe is yet to be seen.

What to look out for in 2017

The rise of nationalism was a trend identified in last year's review: win or lose, a strong performance by Marine Le Pen in the French presidential elections in 2017 could provide more legitimacy to nationalist parties already emboldened by Brexit, the result of the Italian constitutional referendum and Trump's victory. In Germany, the elections in 2017 may bring an end to Angela Merkel's 12 year rule. This would further destabilise the EU which is already suffering from the departure of Matteo Renzi, one of the most prominent pro-EU leaders, and Brexit.

In Asia, President Geun-hye of South Korea will be removed from office, either by impeachment or in the upcoming election (in which she cannot stand); any new incumbent could influence the delicate situation with North Korea. Attempts to change the electoral system prior to the election of a new Chief Executive in Hong Kong in 2017 have given rise to protest and unrest. Any unrest or controversy with the election itself in Hong Kong could cause wider problems for the Communist Party of China Congress in autumn 2017.

In the Middle East, Hassan Rouhani is expected to win a second term in Iran's presidential elections in 2017 affirming popular domestic support of the 2015 nuclear deal. However, any regime change could threaten rapprochement (irrespective of whether Trump's election will change the constructive approach the US has taken to Iran).

The more immediate issues so far as the market is concerned, are whether sanctions on Iran will be tightened on the one hand or relaxed against Russia on the other.

Power

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Key developments in 2016

This year has seen a continued focus on non-fossil fuel power generation. One of the most contentious projects is the third nuclear facility at Hinkley Point. Backed by the French and Chinese states, Hinkley Point C is due to begin generating electricity in 2025. The power station has been the subject of rising costs and extensive delays. In July, the newly incumbent Prime Minister Theresa May announced a further review of the project.

Climate change considerations have been a significant driver behind the government's desire to construct Hinkley Point C. Low-carbon electricity has been a focus of high profile international climate change summits. Between 7 and 18 November, the Marrakech COP22 UN climate change conference focussed on two central issues – water-related sustainability; and scrutiny of the 2015 Paris Agreement.

The Paris Agreement was ratified by the UK on 17 November 2016. Roughly 200 countries have now agreed to keep global warming below 2°C, whilst aiming for the more ambitious target of 1.5°C. A key element of the Paris Agreement is the long-term objective of net zero emissions – which implies the phase out of fossil fuels. This can explain, in part, the push to commence building Hinkley Point C, along with the UK's pledge to completely phase out coal as a power generation source by 2025.

However, there is inconsistency in the government's strategy. The recent support given to shale gas extraction runs in contrast to the Paris Agreement's ideals, and shows that fossil fuel will remain part of the UK's energy mix for the foreseeable future.

The extent to which fossil fuels form part of the UK's power generation strategy will obviously have a significant impact on the types of risks and claims that arise in the coming years.

What to look out for in 2017

The combined uncertainties of when (and how) Brexit will occur, and which direction Donald Trump's U.S. administration will take place the UK in an interesting position as far as power generation is concerned.

The extent to which UK energy companies have access to the EU market, and correspondingly what restrictions EU companies face when trading with the UK, remain very hard to predict.

President-elect Trump has been a vocal and vociferous critic of the Paris Agreement. His campaign-trail rhetoric included promises to not just "cancel" the Paris Agreement, but to withdraw from the UN's climate change process altogether. We await to see how or if Trump's position will alter when he formerly takes charge on 20 January 2017. Several countries have already moved to pre-emptively condemn Trump's position. On 1 November, Chinese climate change negotiator Xie Zhenhua stated that a political leader would be "wise" to "take policy stances that conform with global trends". Exactly how China, and the rest of the UN, will handle Trump now that he has been elected remains to be seen.

The impact of Brexit and the policies of the Trump administration will inevitably have a significant bearing on the UK's power generation strategy.

Procedure, damages and costs

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Key developments in 2016

A well-judged settlement offer using CPR Part 36 (with its adverse consequences if not accepted) can put your opponent under real pressure and sometimes a dilemma as to whether to accept it or continue. Courts are regularly asked to look at the consequences of Part 36 offer and 2016 is no exception. In *DB UK Bank Limited (t/a DB Mortgages) v Jacobs Solicitors*, the High Court held that advancing a Part 36 offer amounts to an implied rejection of an earlier non-Part 36 offer (aka a Calderbank offer), meaning that the Calderbank offer is no longer capable of acceptance. Whilst the Judge's logic is appealing, this is a surprising decision in light of the fact that Part 36 is a self-contained code where the usual rules of contract such as offer and acceptance do not apply. This decision could change the way parties engage in negotiation – Part 36 is often used as a tactical tool; a separate and parallel tactic to the exchange of Calderbank offers, especially costs inclusive offers. Litigators will now need to be mindful of the effect of subsequent Part 36 offers on earlier Calderbank offers. Watch this space, though – the decision is under appeal. The High Court recently reinforced the notion that Part 36 is a self-contained code in *Titmus v General Motors UK Limited*, in which it held that it had no jurisdiction to alter the 14-day period for payment of the settlement sum after acceptance of a Part 36 offer. Perhaps DB Bank may be overturned on appeal.

Beware of offers made in foreign currencies. Due to a sharp change in the exchange rate between sterling and the dollar, the Claimant in *Novus Aviation v Alubaf Arab International Bank BSC* found that, post-trial, it had beaten its Part 36 offer made in US dollars. During the majority of the case and during the trial, the exchange rate meant that the offer was for a less advantageous sum, but as judgment was handed down shortly after the outcome of the referendum was announced, the Claimant beat its offer. The Court held that it would be unjust to order that the Defendant pay interest at an enhanced rate and indemnity costs as the Claimant had only beaten its offer by chance. A lucky escape for the Defendant.

What to look out for in 2017

Costs management is definitely here to stay, but since it is not as effective at reducing costs as hoped (in part due to the additional costs burden added by the process itself), the Ministry of Justice is looking to reduce litigation costs further. It seems increasingly likely that the fixed costs regime will be expanded. Lord Justice Jackson, who is a strong advocate of expanding fixed costs, is undertaking a review with a view to recommending the types of claim to which fixed costs should apply. His report is due to be published in July 2017, so these reforms, if implemented, are unlikely to come into force until 2018 at the earliest.

2017 will hopefully bring some clarity on the mysterious new test for proportionality (another cost-cutting measure). The current law means that Costs Judges have the opportunity to reduce the winner's bill of costs on grounds of proportionality twice – once on their item-by-item assessment and once again at the end of the assessment if the total continues to appear disproportionate. Why should this happen in cases that have been cost managed? This was the decision in *BNM v MGN* – it is being appealed.

Products

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Key developments in 2016

Howmet Limited v Economy Devices Limited [2016] EWCA Civ 847 was a key Court of Appeal decision determining the extent of a manufacturer's negligence and breach of duty for a defective product where there was previous knowledge by the purchaser of a defect. Howmet designed and manufactured a thermolevel, a device that was intended to switch off heating equipment if the liquid in a tank fell below a certain level. The device failed and the resulting fire caused damage in excess of £20m.

It was found that Howmet's junior employees had extinguished fires in the tank on two earlier occasions after the device had failed to operate, following which a new system was implemented to prevent the conditions for another fire from occurring. However, as is often the case when a human response is required, an error occurred and the tank was switched on when it was empty and after the thermolevel again failed to operate, a fire was caused. It was held at first instance that no liability would attach to EDL as Howmet employees had knowledge of the problems with the product and had gone so far as to put in place a new procedure as a work around. Causation and EDL's negligence was also considered to be undetermined. Howmet's appeal was unanimously dismissed. The Court of Appeal agreed that there was no proof of causation and that the cause of the fire had not been the defective device, as reliance was no longer placed upon that, but the system which Howmet's employees had subsequently put in place. Since those employees were entrusted by the directors to operate the tank safely, their knowledge of the defect was attributed to Howmet.

The case highlights the need to report any defects found to the manufacturers of the product and to cease using it until it is repaired. If such steps are not taken, then this could release the manufacturer from having a continuing duty of care towards the purchaser.

What to look out for in 2017

In 2013, the European Commission adopted a package of reform called the Product Safety and Market Surveillance Package which is intended to simplify and clarify the legal framework which governs consumer product safety. An impasse had been reached in relation to the issue of marking products with the country of origin. The concern is that marking products in this way would not necessarily resolve the problems faced with traceability of products, and that this requirement would place an undue burden on businesses.

The main elements include a Regulation for Consumer Product Safety (CPS), which is intended to repeal and replace the General Product Safety Directive, and a Regulation on the Market Surveillance on Products (MSP). If the package does come into force, the core obligations of manufacturers to make and distribute products which are safe would remain unchanged. However, there would be clearer obligations on manufacturers and distributors with improved traceability of products, with those in the supply chain required to retain records surrounding the manufacture and sourcing of products of up to 10 years.

There is an uncertainty about timing of when the package will come into force in light of the disagreement on marking products with the country of origin. This is further compounded in the UK following the outcome of the EU Referendum. However, if an agreement can be reached, the package is likely to improve the rights of consumers and increase the burdens on manufacturers and distributors to maintain records and ensure traceability of the products that they sell.

Property and business interruption

Key developments in 2016

Last year we discussed *Western Trading v Great Lakes*, in which the Court granted the insured a declaration that it was entitled to be indemnified for the costs of reinstating its fire-damaged property. This is despite the property not yet being reinstated and without deciding whether the insured in fact intended to reinstate.

In October 2016, the Court of Appeal clarified the circumstances in which an insured is entitled to an indemnity on a reinstatement basis. In short, the measure of indemnity depends upon the policy terms, the insured's interest and the facts, including whether the insured intends to reinstate.

Where there is a real possibility that reinstatement will not take place, the insured must show that it has a genuine intention to reinstate and that such intention is "fixed and settled". It is open to the court to decline to make an immediate award of damages and to either give declaratory relief or to postpone assessment of the extent of indemnity. Declaratory relief is awarded at the court's discretion and may provide insurers with a measure of protection (for example if the insured then fails to reinstate) which an award of damages would not.

Meanwhile, in *Versloot Dredging BV and another v HDI Gerling Industrie Vershicherung AG and others*, the Supreme Court held that the "fraudulent claims" rule does not extend to fraudulent devices which are immaterial to the insured's right to recover. In short, fraud which fabricates a claim, or exaggerates an otherwise genuine claim will continue to lead to forfeiture of the entire claim, but collateral lies no longer will.

Finally, 2016 saw the launch of the government backed reinsurance scheme, Flood Re, which provides affordable insurance cover for flood prone households.

What to look out for in 2017

The Enterprise Act 2016 contains a number of provisions which will amend the Insurance Act 2015. These amendments will come into force on 4 May 2017, and will apply to all insurance/reinsurance policies which are entered into on or after that date.

The Enterprise Act will introduce an implied term that insurers will pay any sums due in respect of a claim within a reasonable time. If there is an unreasonable delay in payment of the claim, policyholders will be able to bring a claim against insurers for any losses suffered as a result.

The type of insurance, the scale and complexity of the claim, compliance with any statutory/ regulatory rules, and factors outside of the insurers' control will be taken into account by the court when assessing whether or not there has been an "unreasonable delay".

Insurers are entitled to a reasonable time within which to investigate and assess a claim, and any time spent disputing a claim will not count towards any period of delay, providing that there are reasonable grounds for the dispute.

We reported in last year's review that a draft Riot Compensation Bill was laid before parliament in March 2015. This received royal assent in 2016, and it is anticipated that the Riot Compensation Act 2016 will come into force in early 2017, once the government has passed secondary legislation, formally bringing the Act into effect.

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Reinsurance

Key developments in 2016

In 2016, new legislation was enacted containing provisions in relation to insurance linked securities (ILS). ILS are a means of providing insurers with an alternative method of ceding risk to the capital markets as opposed to traditional reinsurance.

The Bank of England and Financial Services Act 2016 (BEFSA) received royal assent on 4 May 2016. Section 31 of BEFSA provides the HM Treasury (the Treasury) with powers to make regulations relating to tax treatment of ILS (at the level of issuers and the investor) and relating to transformer vehicles.

Transformer vehicles are used in transactions related to ILS, and regulation establishing and governing their use will provide the framework for the UK to establish itself in the ILS market. Regulation is also expected to clarify and provide guidance on ILS tax treatment. Tax treatment is expected to be favourable as it is hoped that ILS will become a viable option for many insurers. Research published by Aon Benfield estimates that the total amount of capital in ILS products now exceeds US$75b and that this figure has continued to grow throughout 2016.

The UK Government are currently consulting on the new anticipated regulations, which Simon Kirby, Economic Secretary to the Treasury, hopes will "provide London with the framework it needs to remain a world leader in reinsurance". Now is a good time to consider what opportunities more local access to ILS could provide, and the potential effect on reinsurance rates.

What to look out for in 2017

For a number of years reinsurance rates have been in steady decline. Reinsurance capacity has been plentiful given the shortcomings of many other methods of obtaining return on investment.

However, the June/July 2016 reinsurance renewal season indicated that the trend of decline in rates is slowing and that rates are stabilising. There is speculation that the market may bottom out as it reaches a point where reinsurers are unable to offer cheaper rates whilst maintaining profitability. Reinsurance remains a buyers' market, largely due to remaining surplus reinsurance capacity, with supply exceeding demand. But a point is perhaps being reached where there is no further give in the cost of prudently underwritten risks.

Underwriting discipline will be important for reinsurers as margins continue to compress, particularly with reinsurers facing the threat of a potential La Niña event in 2017 which would lead to increased catastrophe activity. Whilst reinsurers have had little appetite to contest claims due to market conditions in recent years, indication of stabilisation of reinsurance rates and the potential for the market to escape a softening cycle could lead to more claims being challenged in 2017.

Stabilisation of reinsurance rates is also causing convergence in pricing levels between the traditional and ILS markets. Look out for further developments in 2017, with a potential for reinsurance rates to hit a pricing floor as the prospect of increasing access to alternative structures shakes up the market.

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Restructuring and insolvency

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Key developments in 2016

Insolvency

The Third Parties (Rights against Insurers) Act 2010 came into force on 1 August 2016, some six years after it was enacted. The 2010 Act succeeds the earlier Third Parties (Rights against Insurers) Act 1930. It makes it easier for a third party claimant to claim direct against insurers if the insured enters an insolvency proceeding. Among other changes, the rights of the insured transfer to the claimant without the need first to "establish the claim" by a formal settlement or judgment against the insured. Also the claimant has enhanced rights to disclosure of information from the insurer.

The 1930 Act is repealed and replaced, except for cases where both the insured incurs liability to a third party and its insolvency proceedings commenced before that date.

Restructuring

Following 2015's "spike" in the number of firms seeking to complete Part VII transfers of insurance business in advance of the implementation of Solvency II, 2016 has been a much more subdued year for transfers, with only eight transfers completing or expected to complete. This is likely to be the result of a combination of factors, including a continued regulatory bottleneck, firms bedding in Solvency II and, of course, the fall-out from the Brexit vote in June, which will have resulted in some planned projects being put on hold until the unchartered consequences of a decision to leave the EU are better understood. In fact, the last time the Part VII transfer count was this low was in the immediate aftermath of the global financial crisis.

What to look out for in 2017

Restructuring

We expect a considerable increase in restructuring activity in 2017, including through the use of Part VII transfers and other EU directive restructuring tools. Firms will have a much better understanding of the impact that Solvency II has had on their balance sheets, as a result of both having lived with the new regime for a year and the increasing availability and sophistication of tools designed to help them do just that, and will be beginning to implement plans to optimise their balance sheets.

UK based firms with European business will also be starting to implement their Brexit contingency plans, which might involve moving business (eg through Part VII transfer) or whole firms (eg through cross border merger or, in the case of SEs only, the transfer of registered office) to other EEA states. Finally, those firms relying on transitional measures to avoid the consequences of a breach of the SCR may be looking to take decisive action before those measures expire at the end of 2017.

Firms will likely be competing with each other for the PRA's limited capacity in what could prove to be a race against time to take advantage of these restructuring tools before the UK eventually leaves the EU in 2019 (and these tools are no longer available to UK firms unless alternative mechanisms or transitional arrangements are put in place).

Insolvency

Spring 2017 will see the coming into force of the Insolvency (England and Wales) Rules 2016 on 6 April. The first overhaul of the rules underpinning formal insolvency regimes in 30 years, they are intended to be modernised, streamlined and to consolidate all amendments.

Shipping

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Key developments in 2016

The global shipping market has faced yet another challenging year in 2016, particularly in container shipping where market imbalance worsened as overcapacity and a significant drop in demand on high volume Asia-Europe trading lanes resulted in the further plunging of global freight rates. It therefore came as no surprise when South Korean shipping giant Hanjin Shipping Co. Ltd filed for bankruptcy protection on 31 August 2016, after months of trying to restore liquidity and restructure its debt.

Hanjin Shipping was the seventh largest container shipper in the world and its collapse is the largest container shipping bankruptcy in history. The effects of the bankruptcy are still being felt down the international supply chain, as some port operators refuse to service Hanjin vessels amidst fears of non-payment, and consignees of the cargo shipped on board Hanjin vessels are left to deal with collecting stranded containers (with cargo) from port and/or disposing of empty containers which Hanjin vessels have not made return trips to collect.

To alleviate some of these problems and to enable the discharge of cargo in various ports without putting any of the vessels or cargo at risk of seizure, Hanjin Shipping has applied for and obtained bankruptcy protection, including asset stay orders, in many countries around the world which allow such protection, including the USA.

Total losses have yet to crystallise in the wake of the bankruptcy. However, insurance industry analysts estimate that losses could amount to $2bn, being losses arising from business interruption claims, marine and cargo insurance claims, and legal expenses claims.

What to look out for in 2017

2016 was a tumultous year with breaking news of Brexit in June 2016 and the results of the US Presidential elections, both of which bring some measure of uncertainty to the future of global shipping and its ancillary services in 2017.

The impact of Brexit on global shipping may not be immediate as the key legal, insurance and brokerage services provided in London to the international shipping community are unlikely to be directly affected. However, if Brexit eventually results in the departure of major international banks and financial institutions from London, this may have a knock on effect on the position of global marine insurers or brokerages headquartered in London since London's status as an international shipping centre is in part dependent on free trade benefits of EU membership and easy access to European markets.

Across the pond, a Trump presidency has the shipping industry watching carefully, as the health of global shipping very much depends on the health of global trade. Although little is known at present about Trump's potential trade policy, the protectionist, anti-trade and anti-globalisation stance taken in his election campaign has fuelled worries that future US policies may further disable global shipping, as operators continue to struggle with the worst shipping market in years. Shipping companies had hoped that projected US growth in 2017 would help pull the industry out of crisis as demand in Europe and Asia stays low, particularly in container shipping, but this remains to be seen.

Surveyors

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Key developments in 2016

The most widely talked-about case this year was *Tiuta v De Villiers*, in which the Court of Appeal overturned a first instance decision to the effect that the defendant valuer was not liable for the lender's alleged loss. This loss arose from a second loan it had made in reliance of the defendant valuer's second valuation of the same property, because the loss (or the vast majority of it) had been sustained when the lender had made the first loan to the borrower. It did this in reliance of the valuer's first valuation report (which was not criticised by the lender).

The Court of Appeal disagreed and held that the second loan, made in reliance of the second valuation report, should be assessed on a standalone basis, and that it was irrelevant that the second loan had been the means of repaying the first loan. Accordingly, it held that the defendant valuer would be liable for all of the alleged loss sustained by the lender as a result of the second valuation, if its second valuation is found to be negligent and subject to the SAAMCo "cap".

Some have found the logic of decision difficult to understand, and it is fair to say that the defendant valuer's arguments were compelling. However, the Court of Appeal had in mind, when reaching its decision, the scenario where the lender who makes the second loan is different to the lender who made the first loan. When viewed in that context, the Court of Appeal's judgment is logical. One could not say that a second lender would not suffer loss, relying on a valuer's second valuation, in circumstances where the loan it makes is used to repay the original lender's loan.

What to look out for in 2017

Watch out for the RICS new rules and guidance on how surveyors should avoid or manage conflicts of interest in 2017.

The RICS undertook extensive market research in Autumn 2015, followed by a consultation process, during which it invited views from a wide range of entities impacted by conflicts within the surveying industry, including surveyors themselves, and those in real estate, legal and banking sectors. The RICS is now nearing completion of its review of its rules and guidance on conflicts of interest, and expects to publish its new rules in April 2017. The initial guidance will be in the form of a Global Professional Statement, which is mandatory and will apply to all sectors of surveyors world-wide. It will also contain associated commentary, however, which is advisory only. The Global Professional Statement will be followed by sector specific guidance eg for commercial valuation, residential valuation and so on. The first of this sector specific guidance is for the commercial investment agency in the UK and is also expected to be published in April 2017.

The RICS guidance is expected to provide more detailed guidance to assist surveyors to understand when a conflict has arisen and, if so, whether they are permitted to act and/or how to manage the conflict. Given the delicate balance to be struck between protecting consumers and the reputation of the industry, against the need to enable surveyors practices to grow and continue to provide competitive services, it is inevitable that there will be some who do not consider the rules go far enough to address the concerns, and some who consider the rules are too restrictive.

Technology and cyber risks

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Key developments in 2016

We have seen a notable increase in the number of notifications being made under cyber policies through our breach response service, ReSecure, and have identified a number of recurring trends and themes over the last twelve months.

A number of notifications relate to so-called "social engineering" or "phishing" scams which target either the insured or one of its clients. These types of claims raise interesting coverage issues, as these scams often do not involve any breach of the insured's IT systems (which can be required for a cyber policy to be triggered). Instead, they are simply an opportunistic attempt to obtain confidential information and/or data using relatively unsophisticated methods, such as spoof emails. Insureds and brokers often (erroneously) expect these types of claims to fall within the scope of their cyber policies. There is also ongoing debate over whether cyber policies should extend to cover these types of loss, or whether they should be dealt with under crime policies.

We have also seen a number of cases where the insured has failed to notify the breach response provider promptly, either because they were not aware that such assistance was covered, or because they were trying to deal with the matter in-house. Notwithstanding the coverage issues that this can create, it can also prolong or complicate any investigation, and exacerbate any loss suffered by the insured.

These issues highlight the fact that, despite cyber insurance gaining in popularity, there is still considerable uncertainty both on the part of insureds and insurers in relation to the scope of cover available.

What to look out for in 2017

A review published by the Prudential Regulation Authority (PRA) in November 2016 has demonstrated that insurers are likely to be under increased scrutiny by regulators in relation to their cyber exposures over the coming months and years, and that steps will need to be taken to identify and manage their "silent" cyber exposures in particular. These "silent" cyber exposures can arise in liability insurance products (particularly, but not exclusively, in casualty lines) which fail to explicitly exclude cyber risks, either unintentionally or because some policies cannot reasonably do so.

The PRA review found that; many insurers did not fully understand their "silent" cyber exposures, insurance company boards did not have clear strategies for managing cyber risks; and that insurers were failing to invest in developing their expertise in cyber risk, despite many seeking to increase their exposure to this class of business.

It is clear that going forward, they expect firms to be able to identify, quantify and manage cyber underwriting risks for both direct cyber products and silent cyber exposures. They expect firms to give specific consideration to "silent" cyber exposures, and introduce measures to reduce any unintended exposure.

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