

## Contents

### International



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## Introduction

Welcome to RPC's Annual Insurance Review. In addition to our now traditional sector specific articles, each highlighting the main developments in 2017 and looking forward to expected issues for 2018, this year we also have a number of articles on issues from other jurisdictions. These include an article from our Asia offices detailing the key developments from these jurisdictions; an article from our Latin America desk on claims protocols, short deadlines and reduced adjusting times in Latin America; and an article from US firm Wood Smith Henning Berman on claims and insurance issues arising from the California wildfires.

In last year's review we were just coming to terms with the twin uncertainties of Brexit and Trump; 12 months on and the situation appears no less settled. The form of any deal on Brexit still seems nearly as opaque as it did at the beginning of last year, and the full impact of Trump's presidency still remains to be seen.

The regulatory impact of Brexit, across many different business sectors and the insurance market more directly, is still very unclear. This means regulatory risk will be very real for many businesses in 2018. Perhaps ironically, some of the key themes that receive numerous mentions in the sector-specific articles that follow are direct consequences of European legislation. 2018 will see the implementation of the General Data Protection Regulation, the Trade Secrets Directive and the Insurance Distribution Directive.

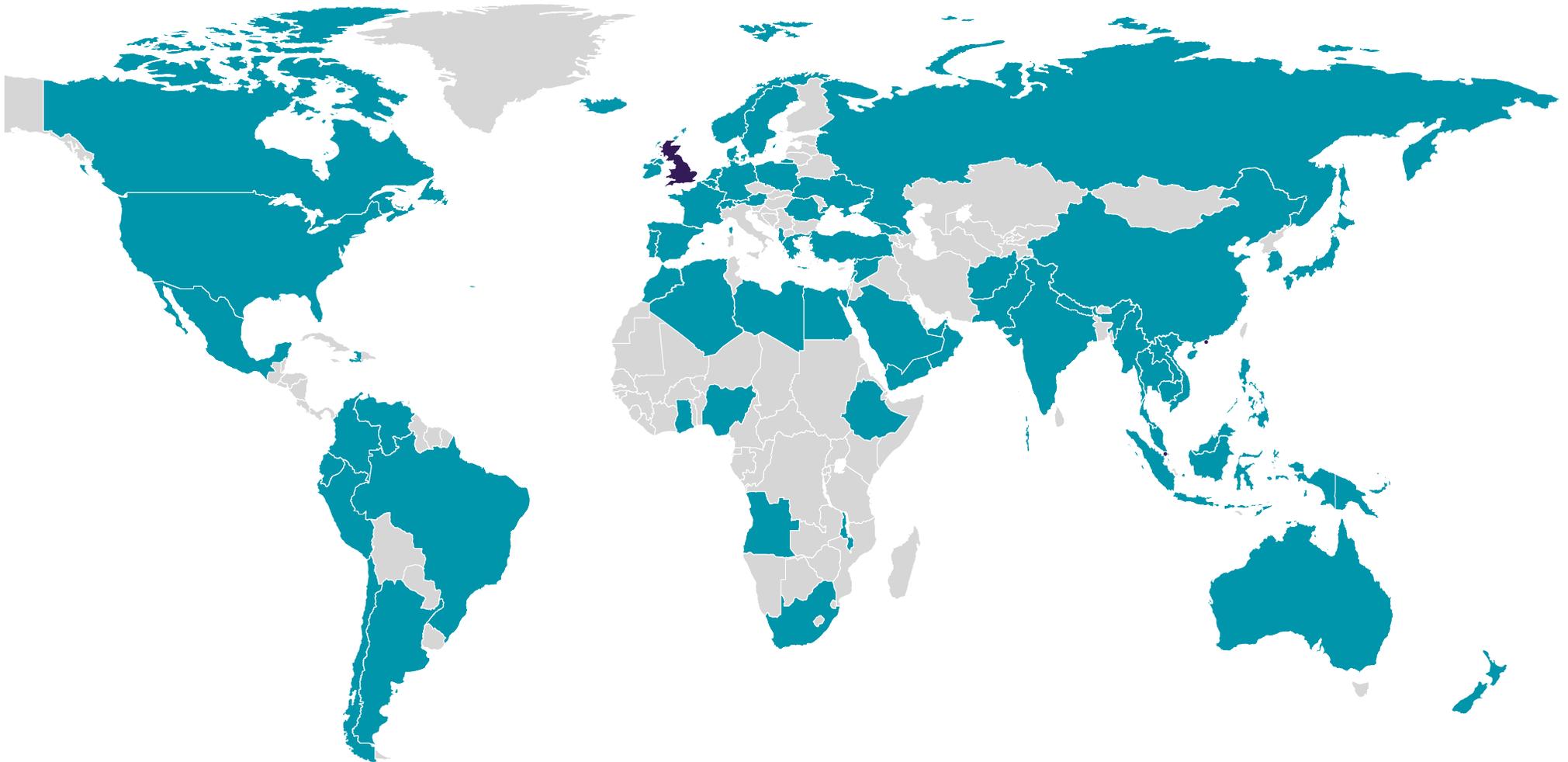
Beyond such geo-political and regulatory issues, data protection and cyber security have very much come to the fore for many industries this year – with events such as the Paradise Papers leak and numerous high-profile cyber-attacks, such as WannaCry. Unsurprising, then, that 2017 was the year when RPC's data breach response product, ReSecure, won a number of awards including Adviser of the Year at the Insurance Day (London Market) Awards and The Lawyer's Best Client Service Innovation award.

It is also apparent when reading this year's articles that increasingly the events having significant and sector-wide impact on insurance claims are global in nature. In this context, RPC has seen a significant strengthening of its international claims capabilities with the arrival of Naomi Vary and Karen Morrish from Sedgwick. Naomi's arrival bolsters our political risk and trade credit practice, building on the expertise we have in this business line in Singapore. Karen further adds to our international professional and financial risks claims expertise.

More generally in respect of our international reach, when supporting insurers it's a truism that, as lawyers, you go where your clients are. But that means different things to different firms. At RPC, we focus on consistently delivering the best quality and most relevant advice, with unparalleled levels of service. That consistency and quality is hard to achieve if you're juggling the demands of different offices in 50 jurisdictions. Beyond our own teams in the key insurance hubs of UK, Hong Kong and Singapore, we focus on what's best for our clients. We work together with market-leading local firms all over the globe; firms who share our commitment to performance, quality and service and who understand the business of insurance. Just like us.

It's a different approach from our competitors, but it's a flexible model that our clients value and that has helped us resolve disputes wherever our clients have needed. In recent months we have advised across six different continents on a variety of matters (Japanese earthquake, US class actions, cyber breaches in Israel). You can see on the next page the scope of RPC's international coverage, in a world where business beyond Europe looks increasingly vital.

## International – insurance coverage



Afghanistan | Albania | Algeria | Angola | Argentina | Australia | Austria | Belgium | Bermuda | Brazil | Cambodia | Canada | Chile | China | Colombia | Denmark | Ecuador | Egypt | Ethiopia | France | Georgia | Germany | Ghana | Greece | Haiti | Hong Kong | Iceland | India | Indonesia | Ireland | Japan | Laos | Lebanon | Libya | Malawi | Malaysia | Maldives | Mexico | Morocco | Myanmar | Nepal | Netherlands | New Zealand | Nigeria | Norway | Oman | Pakistan | Papua New Guinea | Peru | Philippines | Portugal | Poland | Romania | Russia | Saudi Arabia | Singapore | South Africa | South Korea | Spain | Sweden | Switzerland | Syria | Thailand | Turkey | UAE | UK | Ukraine | United States of America | Venezuela | Vietnam | Yemen

# Accountants

## Key developments in 2017

The publication of the Paradise Papers in the later part of 2017 brought focus on to an array of celebrities and the accountancy world alike. As with the Panama Papers in 2016, the inadvertent release of some 13 million documents has placed further pressure on HM Revenue and Customs to be seen to be properly investigating tax arrangements. Even before the Paradise Papers, we saw the Requirement to Correct penalties laid before Parliament in the Draft Finance Bill 2017 (requiring taxpayers to ensure they have declared their interests in offshore investments) and the implementation of the Criminal Finance Act (introducing a new corporate criminal offence of failing to prevent criminal facilitation of tax evasion).

In the Hong Kong Court of Appeal we saw an interesting development when an accountant successfully appealed against a disciplinary decision by the Hong Kong Institute of Certified Public Accountants (HKICPA). The Court of Appeal found that HKICPA's complaint against the accountant and its later finding were "wholly different", meaning that HKICPA's penalty and costs sanctions were overturned. As this case is understood to be the first time a disciplinary decision by the HKICPA has been successfully challenged, we will have to see whether this encourages other Hong Kong-based practitioners to take a more robust approach in challenging the findings of their regulatory body.



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## What to look out for in 2018

Cyber fraud and IT security is high on the risk agendas of most accountants for 2018 (or if not, it should be). Solicitors firms have historically found themselves to be the principal targets of so-called Friday afternoon frauds, resulting in improved security processes.

The fraudsters are now targeting accountants – particularly those who offer payroll or bookkeeping services, where fraudulent email instructions can result in payments being made to fraudsters if suitable checks are not in place.

Separately, the news that Deloitte's IT systems were hacked, resulting in confidential client information being compromised, has reminded accountants that the nature of the information they hold makes them prize targets for cyber attacks. The costs and reputational damage caused by such a security breach can affect all sizes of accountant firms, and the impact this can have on a business can be substantial.

On a related note, the introduction of the General Data Protection Regulation (GDPR) in May 2018 will place further obligations on firms to put in place clear policies and procedures to protect personal data. The clock is ticking for firms to ensure they do not fall short of the GDPR requirements. The potential penalties for breaching the GDPR requirements will also be of concern, given fines can be handed out of up to 4% of the business's annual worldwide turnover or €20m, whichever is the greater.

It is also notable that the responsibility for disciplinary proceedings against auditors of Hong Kong-listed companies is shortly due to transfer from the HK Institute to the Financial Reporting Council (FRC). As it stands, the FRC only has investigatory powers. But 2018 will see the FRC's powers expanded to take on the HK Institute's role of dealing with disciplinary proceedings. This move will give the FRC further power to regulate auditors of some 2,000 Hong Kong-listed companies.

# Art and specie

## Key developments in 2017

As anticipated in last year's review, the Cultural Property (Armed Conflicts) Act 2017 received royal assent on 23 February 2017, which marks the UK's implementation of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict. The Act is designed to protect cultural property in the event of armed conflict and came into force on 12 December 2017 .

The Convention requires states to implement policies that encourage the protection of cultural property in their own states and externally, but does not extend to the destruction of property by terrorist groups such as Islamic State and Boko Haram. Such groups call for the destruction of cultural property of other religious groups, while at the same time funding themselves through the sale of cultural property on the black market.

The looting of artefacts is said to represent a major source of income for some terrorist groups. Indeed, recently there has been a vast increase in the supply of antiquities from Syria and Iraq, and evidence of widespread looting of archaeological sites has been mounting. Unsuspecting purchasers could find themselves in possession of looted property if they do not carry out thorough due diligence to establish clear legal title.

Given the increasing attention paid to this issue by the press and politicians, and the potential for claims for defence costs and loss from forfeiture applications, insurers should continue to be mindful of the need for insureds to conduct robust due diligence to establish provenance.

## What to look out for in 2018

Insurers will be well aware from other sectors of the risks associated with, and potential losses arising from, cyber crime. Now increasingly moving into the art world, cyber criminals are stealing large sums of money from art galleries using a simple email deception, which allows hackers to access galleries' email contacts to transfer client funds to fraudulent bank accounts. Similar techniques are used to intercept payments made by galleries. The sums lost are significant and are said to range from £10,000 to £1m.

The prevalence of cyber crime in the art industry is only likely to increase in 2018, because cyber criminals see a business that frequently operates on a handshake basis as easily exploitable and because the technologies employed are often not as robust as those in other sectors. The fast-paced transactions and large sums of money changing hands make it particularly attractive for criminals. At the same time, the consequences for failing to have adequate systems and controls to prevent loss of personal data will increase in May 2018, when the General Data Protection Regulation comes into force. It will provide for businesses to be fined up to 4% of their annual turnover for such failures.

Insurers may well therefore see an increase in demand in 2018 for policies extending to cyber crime and defending investigations by the Information Commissioner, as well as associated claims, as galleries continue to fall victim to cyber criminals.



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# Brokers' professional indemnity

## Key developments in 2017

Widely publicised cyber attacks, such as those on the NHS and Equifax, continued to provide brokers with a strong platform for selling cyber insurance in 2017. Since 2016, the number of websites and use of cloud services have increased, with the majority of UK businesses now storing their customers' personal data electronically. According to government statistics, 74% say that cyber security is a high priority for their senior management. Despite this, however, many companies still do not have the basic protections in place, with only 38% of businesses having insurance to cover a cyber security breach or attack – the same figure as in 2016.

For some businesses, there is still a complete lack of awareness of cyber insurance. For others, there is a perception that the cover provided is not extensive enough. With just under half of all UK businesses identifying at least one cyber security breach or attack in the last 12 months, there remains a significant role (indeed, duty) for insurance brokers to educate their clients on how to protect themselves and respond in the event of a cyber attack or breach.

Earlier this year, a broker who was found to have failed to place professional indemnity (PI) insurance for an accountant had a lucky escape, when the Court of Appeal found that he had not caused his client any loss. The broker was saved by a finding that PI insurers would not have provided an indemnity in respect of the claims against the accountant for reasons other than the broker's negligence.

## What to look out for in 2018

2018 looks set to follow its predecessor with more mergers and acquisitions within the broking community. Merging with, or acquiring, another business can create significant gains, but can also give rise to a number of potential risks. On the one hand, companies will merge to allow the new business to have greater economies of scale and a larger share of the market. On the other hand, however, service issues could arise due to delays or difficulties in integrating the IT infrastructure. Further, mergers can result in a loss of talent resulting from a drop in employee morale. Inevitably, this can give rise to an increase in complaints or claims and we suspect this will be a key trend in 2018.

In addition, increased commoditisation at the lower end of the market and new broking technology (such as auto-rating tools and robo-advisors) will give rise to new challenges. A survey carried out by the Chartered Insurance Institute shows that nearly half of the UK's SMEs would, in principle, be comfortable buying all or some of their insurance products online or in a commoditised way in the future.

This gives brokers an opportunity to move away from their traditional transaction-led role to more of an advisory role, providing risk information and business advice. It also brings risks. Duties imposed on brokers by the courts are already onerous. The trusted advisor role will place even more pressure on brokers to have a better understanding of their clients' businesses and insurance needs.



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# Construction

## Key developments in 2017

We have seen a significant number of claims arising out of renewable energy projects in 2017. Primarily, these have been in the wind, solar and biogas sectors, and have often been pursued by adjudication or arbitration rather than through court proceedings.

A theme in the allegations is that the components of the schemes are not suitably integrated and, taking a holistic view, the scheme is not appropriate for that client or environment. There are many possible reasons for this, including: that it is not clear who holds responsibility for integration; the client does not appreciate the risk of trying new technology; the scheme is too difficult to operate in practice; and the rates of return are not as high as the client expected.

It is important for insurers to consider whether the insured has responsibility for an integration role when assessing the risk they are being asked to underwrite. Insurers may also wish to ask questions to check that the insured's contracts are clear and that the role of each party on a project is set out in writing.

Insurers may also want to consider whether the insured chose or recommended the type of technology being used, whether the client has been advised of the risks involved in using the technology, and whether the insured's contract is based on the client achieving a specific rate of return.

## What to look out for in 2018

Claims arising in respect of cladding and building envelopes look set to be a potential issue for construction professional indemnity insurers in 2018.

The design and construction of facades is a complex area, often undertaken by a specialist design and construct subcontractor. Issues with ensuring the water-tightness of facades are not uncommon, and can prove difficult to rectify. Attempts at patch repair often give way to a demand for the complete replacement of the facade many years after practical completion, once the building owner's patience runs out with the patch repair approach. If leaks do arise, investing in ensuring that the true cause of the leaks is identified can lead to savings in the long run, given the significant costs associated with replacement and further potential for consequential losses, such as business interruption and diminution in value.

In addition, 2018 will likely see significant developments in the fire safety regulations that apply to the design and build of facades. Following the tragic events at Grenfell Tower, the independent Review of Building Regulations and Fire Safety was set up. Led by Dame Judith Hackitt, it is expected to provide its provisional report shortly. The Grenfell Tower Inquiry, led by Sir Martin Moore-Bick, will also consider the adequacy of building regulations, among other things, and anticipates providing its preliminary report around Easter 2018. The impact of these developments on the fire safety regulations that apply to cladding, and the construction professionals that apply them, will be substantial.



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# Corporate and restructuring

## Key developments in 2017

2017 has seen a great deal of restructuring activity in the insurance market. Some of this has been fuelled by the threat of Brexit on the horizon – most notably, insurers are earnestly preparing for insurance business transfers under Part VII of the Financial Services and Markets Act to beat not only the Brexit clock but also a potential regulatory bottleneck.

The Part VII transfer process requires the involvement of the UK regulators, the courts and an independent expert – getting these three in tow with little under 18 months to go is certainly going to be a challenge.

To assist practitioners and insurer applicants, the Financial Conduct Authority (FCA) published in May 2017 a consultation paper and draft guidance on its approach to the review of Part VII transfers. Final guidance was expected in autumn 2017; watch out for updates in 2018. The FCA takes an active role in the Part VII transfer process, offering views to the court that can impact on whether the transfer is sanctioned. By offering guidance, the FCA therefore intends to particularly help reduce the time and cost required to undertake a Part VII transfer.

In addition to Brexit-fuelled activity, we have seen a continued trend of private equity-backed consolidation and acquisition, particularly in the broker space. It must be noted that the weaker pound has almost certainly helped drive some of this business.

## What to look out for in 2018

We expect more of the same in 2018 in the restructuring and mergers and acquisitions space. As well as implementing and managing the regulatory changes required under the Senior Managers and Certification Regime (SM&CR), the Insurance Distribution Directive (IDD) and the General Data Protection Regulation (GDPR), the regulators will also need to oversee a potential record number of Part VII transfers. On top of this, the regulators will also need to consider more generally the issue of Brexit and transition.

The new insurance-linked securities (ILS) regime came into force early in December 2017, with the extent of its effects expected to be seen throughout 2018. ILS transactions offer tradable securities that have a value linked to insured loss events. This allows insurers and reinsurers to reduce their risk by passing it on to the capital market investors who invest in the ILS, effectively providing reinsurance. Investors in return receive sums linked to the (re)insurer's income and profits.

The ILS transaction structure often involves a middleman company that acts as the issuer of the ILS to investors. These companies are known as insurance special purpose vehicles (ISPVs). The danger when one ISPV is used to issue different ILS under multiple ILS transactions is that there can be a blurring of the lines between the different sets of securities, with all assets of the ISPV available to satisfy liabilities from all ILS issued.

Recognising this and other potential problems with the way ILS transactions are currently handled, and with London the largest commercial re/insurance market in the world, the government has taken a more hands-on legislative approach. A significant aspect of the new laws is the introduction of a new company structure: protected cell companies (PCCs), which will bring the UK more level with ISPV structures in other jurisdictions with strong ILS markets.

In line with European Solvency II legislation, the UK regime will ensure through PCCs that, where one ISPV is used for multiple ILS transactions, the lines between the different transactions will not be blurred. This strict separation of ILS transactions will be achieved through PCCs being one entity, with one core legal personality, but within which sit separate ring-fenced cells, each with its own distinct assets available to satisfy liabilities only in relation to its own ILS transaction. This significant change to company law promises to be an interesting area of activity in 2018.



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# Directors and officers

## Key developments in 2017

The UK Criminal Finances Act 2017 received royal assent on 27 April 2017. The Act's wide-ranging provisions include two new corporate offences of facilitating tax evasion, which came into effect on 30 September 2017.

The offences relate respectively to evasion of UK tax and foreign tax.

Under the UK provision (section 45 of the Act) a corporate body or partnership commits an offence where a person with whom it is associated facilitates the criminal avoidance of UK tax, while acting in that capacity. A person is associated with a relevant entity if it performs services for or on behalf of the entity.

To make out the offence, three elements must be proved:

1. There must be criminal evasion of UK tax by a taxpayer. This is wide-ranging and includes any offence of being knowingly concerned in, or taking steps with a view to, the fraudulent evasion of tax. It also includes the offence of cheating the public revenue.
2. A person associated with an entity must criminally facilitate the criminal tax evasion, whilst acting as an associated person. This can be by: (a) being knowingly concerned or taking steps with a view to the taxpayer fraudulently avoiding the payment of tax; (b) aiding, abetting, counselling or procuring the commission of a UK tax evasion offence; or (c) being involved in an offence of being knowingly concerned or taking steps with a view to the fraudulent evasion of tax.
3. The relevant entity must have failed to prevent the person associated with it from committing the act or acts of criminal facilitation.

The relevant entity has a defence if, notwithstanding the above, it can demonstrate that, at the material time, it had in place reasonable prevention procedures or it was not reasonable in all the circumstances for it to have had such procedures. The Government has issued general guidance concerning what these procedures should be, with industry-specific guidance to follow.

The provision concerning evasion of foreign tax (section 46 of the Act) is similar to the UK provision save that there must be a connection with the UK in that the corporate body must be incorporated, or carry out business, in the UK, and the relevant activity facilitating the evasion of tax must take place in the UK.

The increased exposure of corporate bodies by reason of these offences has clear implications for D&O insurers, who may need to consider enquiring as to the potential exposure their insureds have to such matters and the procedures they have in place to prevent them.

## What to look out for in 2018

The Senior Managers and Certification Regime (SM&CR) is a new framework being implemented by the Financial Conduct Authority (FCA) and the Prudential Regulation Authority (PRA) in relation to regulated entities in the banking industry. A similar regime – the Senior Insurance Manager Regime – is being implemented in relation to the insurance industry.

The SM&CR is designed to replace the approved persons regime. It has operated in respect of certain entities since March 2016. The FCA and the PRA are to extend the scheme to all regulated entities, and consultations concerning this closed on 3 November 2017. The FCA and the PRA are expected to publish their policies, final rules, and implementation proposals during 2018.

A key part of the SM&CR is the Senior Managers Regime (SMR). Its aim is to improve standards of governance and, perhaps critically, to increase individual accountability. That is, among other things, it will make it easier for the regulator to hold individuals responsible for regulatory failings.

The SMR imposes a duty of responsibility on senior managers. Under the SMR, a senior manager can have action taken against them by the relevant regulator (FCA or PRA) where:

- they are the relevant responsible manager in respect of the contravention by a regulated entity of a relevant regulatory requirement, imposed by the Financial Services and Markets Act 2000 or other sources, including EU regulation or requirements of the Treasury.
- the senior manager did not take the steps that a person in their position could reasonably be expected to take to prevent that regulatory breach from taking place.

While it is not anticipated that the SMR will reduce the responsibility of regulated entities themselves for regulatory breaches, it does mean that senior managers, and their D&O insurers, may face an increased exposure.



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# Energy

## Key developments in 2017

Major hurricanes (Harvey, Irma and Maria) once again swept through the Gulf of Mexico and the Caribbean in August and September 2017, causing widespread damage to the community as a whole. But hurricane Harvey also had a significant impact on oil facilities in the Houston area.

Given their locations, it might be considered unsurprising that these facilities were affected. Perhaps more surprising was the extent to which damage was caused not by the high winds, but as a result of flooding.

Hurricane Harvey illustrates the extent to which oil refineries in sensitive locations are vulnerable to floods, and the need for risk managers and insurers to consider whether facilities have adequate protection and measures in place to address specifically the risk from flood. Such measures could, in appropriate cases, include the construction of flood walls of the kind used to combat the overspill of water (from river or reservoir) close to source.

Again, as might be expected, production at the affected facilities resulted in a drop in supplies of gasoline and other petroleum products, and as much as a quarter of US refining activity was shut down for a period. It might also have been expected that such a significant loss of capacity would have an impact on the price of crude oil. However, while there was a drop in the price of crude oil for a limited time, the price recovered fairly rapidly.

There are several reasons why the impact was limited, but hurricane Harvey may also be seen as illustrating the extent to which the exploitation of shale in the US has transformed the landscape for oil and reduced exposure to traditional vulnerabilities.

## What to look out for in 2018

Cyber exposure is currently much talked about as high-profile cyber attacks continue and awareness of the risk rises.

For insurers, cyber gives rise both to risks of exposures that insurers did not anticipate facing and to opportunities when insureds will increasingly be seeking to buy suitable cover.

Cyber raises particular issues in the energy field as a result of the increasing digitalisation of facilities. Cyber also poses not only obvious and substantial financial risks, including business interruption, but also the possibility of significant physical damage.

Cyber risks may be seen as a concern where policies are liable to be found to respond in the absence of the express provision of cover and where there will not have been any corresponding premium (so-called silent cyber). Such exposures can also give rise to regulatory issues.

Historically, insurers in the energy sector have not sought to provide cyber cover as a default and have typically expressly excluded cover. If insurers do not wish to provide cover for cyber risks, it is clearly important to ensure the policy provisions are sufficiently fit for this purpose. It cannot be assumed that wordings that have been used in the past achieve this end.

An increasingly digitalised world also offers new opportunities for providing cover for what could be substantial exposures. The digitalisation of production facilities is only likely to increase, both as a result of further developments in technologies and as a means of reducing costs. Assessing the exposure to cyber risks requires gaining an understanding of the new technologies and the new processes they will produce.



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# Financial institutions

## Key developments in 2017

There was marked shift in the Financial Conduct Authority (FCA)'s focus away from the banking sector to fund/asset managers with the publication in June 2017 of its final report, following a year-long market study of the asset management industry.

The FCA has made three core findings, which will be the pathfinders for the package of industry measures previewed in the report. These start with the FCA's conclusion that the asset management industry does not provide good value for money to investors. It cites management price clustering, the industry's high profitability, lack of competition and, most significantly, that both the active and passive fund sectors do not on average outperform their benchmarks, after management costs.

The second conclusion is that the reporting of investment strategies and fund objectives is inadequate. It cites the FCA's view that there is "around £109bn in 'active funds' that closely mirror the market ... but are charging 'active' prices." It also points to concerns as to the accuracy of reporting on performance and the use of potentially misleading target benchmarks, in particular in the absolute return fund sector.

The third core theme is the FCA's conclusion that the industry's reporting of management costs provides insufficient visibility on the underlying costs and charges.

The package of measures is designed to maintain the industry's competitiveness in the global market. However, a number of the conclusions in the report, in particular relating to the funds that are said to track their indices (a suggestion based apparently on a single uninformative metric), are in our view simplistic and open to challenge.

The conclusion on value for money also does not reflect the strategic advantages the asset management industry provides, including diversification of exposures, asset class spread, and access to thematic and geographical funds.

## What to look out for in 2018

The direction of travel for asset managers is clear from the measures previewed in the report. These include: imposing a general duty on fund managers to demonstrate that they are acting in the best interests of investors; to report on the value for money they provide, to identify the remedial measures where sub-standard value for money exists; with personal manager responsibility under the Senior Managers and Certification Regime to comply with these duties.

For performance reporting, the FCA will consult in 2018 on reporting of investment strategies and fund objectives, how funds' performance is measured, and rationalising the target benchmarks used. For management costs, there is likely to be a standard template presentation of an all-in-one fee, broken down to provide granular transparency on costs and charges.

In the future, the greater transparency and clarity on each of these operational factors should, in our view, be constructive for the industry and its risk profile.

The challenge for the asset management industry in 2018 will be to find the best way of complying with these measures and demonstrating that it is delivering value for money (and rectifying value-for-money issues) but without signposting potential issues for investors in relation to past activity.

It will need to work with the FCA to formulate its investment reports to provide the required level of clarity on investment strategies, fund objectives and performance targets – and in this process to neutralise the sweeping criticisms of the industry that can be read into the FCA's conclusions in the report. For example, the commentary directed to the invested funds that track their indices, a matter that has been publicly identified as a potential mis-selling issue for a number of fund managers.



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# Financial professionals

## Key developments in 2017

2017 has seen considerable activity in the financial services market. There have been three key Financial Conduct Authority (FCA) publications impacting the financial advisory market:

1. second consultation paper on funding for the Financial Services Compensation Scheme (FSCS) and reviewing the adequacy of personal investment firms' professional indemnity (PI) insurance;
2. consultation paper on changing the rules for defined benefit (DB) pension transfer advice; and
3. updated guidance on the methodology for calculating redress for DB pension transfers.

Of key concern were the FCA's proposed changes to increase personal investment firms' PI insurance requirements, ostensibly with a view to reducing the costs of FSCS funding. RPC was involved in consulting with the FCA and putting forward a response on behalf of a number of participants in the PI insurance market. Following publication of a second consultation paper, the FCA is no longer considering changes to PI insurance (focusing only on exclusions for policyholder-related insolvency).

The FCA is still considering its proposed changes to the rules for provision of DB pension transfer advice, but the wider advice market is impacted by the FCA's position on the risks of outsourcing pension transfer specialist advice, where we have seen a number of section 166 reviews take place. Delegating of aspects of an advice process to a different adviser (often driven by a firm's permissions) is an area attracting regulatory action and consequent liability for firms and their insurers.

The now finalised updated methodology for DB pension transfer redress is broadly likely to increase redress sums when unsuitable advice is found. Other broad areas that have been particularly active during 2017 are claims against Self-Invested Personal Pension providers, and claims linked to unregulated introducers and alternative investments.

## What to look out for in 2018

Pension transfer advice will remain in the headlines during 2018. The FCA's proposed changes to DB transfer rules under the Conduct of Business Sourcebook are set to be introduced in early 2018. However, those changes do not include the delegation of pension transfer advice, which we expect to continue to attract scrutiny and claims.

Intermediary relationships are also likely to be key for 2018, as the FCA warns firms to improve due diligence and monitoring of business from introducers and appointed representatives. The FCA's focus is widening from unauthorised introducers to execution-only providers (where claims are currently active). We predict a further increase in claims holding firms responsible for intermediaries' actions.

Discretionary Fund Managers (DFMs) may see increased claims and exposure to systemic risk in 2018. Several DFMs ceased business in 2017 following the FCA's scrutiny of model portfolios, a cost-effective and popular option for retail customers. Systemic issues may lead to regulatory activity including reviews of business resulting in potential civil liabilities.

Regulatory and investigatory costs (plus management liabilities) add pressure alongside claims, and this is likely to continue following the implementation of the Senior Managers and Certification Regime across financial services in 2018. This is going to affect not only those in the financial advisory industry but also claims managers.



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# General liability

## Key developments in 2017

In February 2017, the Lord Chancellor amended the discount rate from 2.5% (the level at which it had stood since 2001) to minus 0.75%. While a review of the rate had been a long time coming, such a drastic alteration had not been expected. It caused an uproar across the insurance industry, which rallied against the new rate.

The alteration to minus 0.75% has had a significant impact on the value of personal injury claims, and many argue that at such a level claimants are currently being over-compensated (although some argue that claimants had been under-compensated for several years).

The reaction to the change led to a review of the entire rate-setting system by the Government, which has proposed changes to the way the rate will be set in the future: the discount rate will be reviewed at least once every three years; the methodology for calculating the discount rate shall be revised, with claimants assumed to be low-risk investors (rather than very low-risk as it stands); and the Lord Chancellor will in future determine the discount rate in consultation with an expert panel made up of actuaries, an investment manager, an economist, and an expert in consumer affairs.

Ministry of Justice spokesman Lord Keen has targeted early 2018 for the introduction of the proposed legislation, with a review of the discount rate to follow later in the year.

## What to look out for in 2018

The Government has announced its intention to increase the small-claims limit for personal injury claims. For road traffic accident (RTA)-related personal injury claims the limit will increase to £5,000, and for other personal injury claims (employers' liability/public liability) to £2,000.

In respect of RTA claims, the Government has also proposed a tariff system for calculating damages for whiplash claims, starting at £225 for a 0–3-month injury and rising to £3,725 for a 24-month injury. Such a change will have a significant impact on those claimant firms that operate a model focusing on high-volume, low-value work. With solicitors unlikely to take on such claims (since they will not attract payment of costs), there is expected to be a rise in the number of claims being pursued by litigants in person.

The Government also proposes to introduce fixed fees into clinical negligence claims. The intention had been for fixed fees to be introduced by 1 October 2017. However, the timetable proved to be too tight. We expect this issue to remain on the table for 2018.



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# Health and safety

## Key developments in 2017

As anticipated, 2017 has seen an increase in the severity of sentences for health and safety offences. This is the first full year that the Health and Safety Sentencing Guidelines, effective from February 2016, have been in place.

Fines of £1m or more have become commonplace, with a number of record-breaking fines being imposed. The highest fine of the year was £2.5m for Iceland Foods in September, after the supermarket retailer was found guilty of two offences under the Health and Safety at Work etc Act (HSWA) following the death of an external contractor.

Other notable fines include two against the bread makers Warburtons, of £1.9m and £2m, for two offences arising out of separate health and safety-related accidents. Wilko Retail Ltd. received a fine of £2.2m after pleading guilty to four offences under the HSWA.

The number of directors being sentenced to immediate or suspended custodial terms has risen this year. Immediate custodial sentences now represent 6% of all prosecutions, compared with 4% in previous years, and the number of suspended sentences has doubled from 6% to 12%. Over half of the sentences imposed for breach of the Gas Safety (Installation and Use) Regulations 1998 resulted in immediate or suspended custodial sentences.

The Health and Safety Executive (HSE) completed its public consultation into the Fee for Intervention scheme on 2 June 2017, in accordance with a settlement agreement made with the OSC Group in March 2017. As of 1 September 2017, disputed invoices will now be considered by an independent panel to ensure that the fees imposed by the HSE are fair and transparent.

## What to look out for in 2018

The number of successful prosecutions in 2017 under the Corporate Manslaughter & Corporate Homicide Act 2007 increased very slightly from the previous year. The highest fine under the Act to date, £1.2m, was imposed on Martinisation London Limited in July.

The Sentencing Council concluded its consultation on 10 October into sentencing guidelines for manslaughter offences. Approval and implementation are expected during 2018, leading to even harsher sentences – particularly for gross negligence manslaughter (GNM). The guidelines will cover four offences: manslaughter by reason of loss of control, manslaughter by reason of diminished responsibility, unlawful act manslaughter, and GNM.

Prior to these guidelines, the average sentence for GNM was three years and eight months. The starting points in the draft guidelines are eight years' imprisonment for high culpability and four years' imprisonment for medium culpability defendants. Far longer prison sentences should therefore be anticipated for those convicted of GNM once the sentencing guidelines are effective.

The Grenfell Tower fire in June 2017 has led to a public inquiry to investigate the cause of the fire and lessons that can be learned. Sir Martin Moore-Bick, a retired Court of Appeal judge, is chairing the inquiry. Evidential hearings are due to begin in 2018 and an interim report is expected later in the year.

The fire has also prompted an independent Review of Building Regulations and Fire Safety, led by the former HSE Chair, Dame Judith Hackitt. A final report for the Review is due to be published in spring 2018. It is anticipated that the report will recommend fundamental changes to legislation on fire safety. The Review states a key priority is "to develop a more robust regulatory system for the future."



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# Insurtech

## Key developments in 2017

2017 saw a major shift in the insurance industry's attitude towards insurtech. It saw: UK investment in insurtech jump by 2,500% in the first half of the year; the first insurtech IPO, raising \$1.5bn; and a range of insurance companies testing and implementing insurtech solutions.

Insurtech now offers a wealth of possibility and improvements for every corner of the insurance industry. Insurtech companies offer products or solutions to improve every part of the insurance cycle, from advertising and distribution to underwriting, claims, loss adjusting, payments – and even audit and Solvency II calculations.

(Re)insurance companies now place a greater focus on insurtech and understand its impact on the future of the industry. While insurtech is still in its infancy, with new start-ups and products created on a daily basis, 2017 saw large (re)insurance companies working in closer collaboration with the insurtech industry, and helping to develop and fund start-ups.

However, the theme of 2017 is still evolution. Insurtech is slowly improving current processes in existing insurance structures, rather than creating new processes outright. Whether it is using analytics to evaluate large catastrophe losses post-Harvey/Irma/Maria, analysing claims data to spot signs of fraud, or using artificial intelligence to analyse and automate part of the wordings and endorsements process for new insurers, insurtech solutions or products are working alongside existing underwriters, claims handlers, and other industry personnel. They are intended to speed up their processes, make them more effective, reduce repetition and give them more time to work on the novel and more challenging areas of their work.

## What to look out for in 2018

Data will come to the fore in 2018.

As a society, we now create an immense amount of data. According to IBM, 90% of the world's total information was created in the last two years, and the growth of data creation is still accelerating at an exponential pace.

But the challenge is to use increasing levels of data more effectively. We will see a growth in "service before claims" insurance, which uses sensors or other publicly available information to warn insureds and provide a solution before the insured even realises there is a problem – for example, detecting industrial leaks by changes in sensor conditions or offering to re-book flights as soon as delays become likely.

In addition, we will see greater collaboration between companies. Insurtech companies with particularly strong analytics will begin working more closely with existing insurers and other new sources of data to find new and better quality insights. As this occurs, insurers will find new opportunities to improve current underwriting analyses, price more effectively, and create new products.

However, those who control and process data will also need to contend with the implementation of the General Data Protection Regulations (GDPR) on 25 May 2018. The GDPR will restrict the processing of personal data and, perhaps more importantly, restrict some forms of automatic processing of data. Breaching the GDPR carries a penalty of up to the higher of 4% of global turnover or €20m.

Nonetheless, new regulation also carries new opportunities. Undoubtedly, new forms of GDPR-compliant data-gathering will emerge. Similarly, other new regulation, such as the requirement for insurance product information documents under the Insurance Distribution Directive, provides new opportunities for automation and the collection of good-quality data.



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# Intellectual property

## Key developments in 2017

The UK Supreme Court addressed important issues regarding patent infringement in *Actavis v Eli Lilly* [2017] UKSC. The case has already been applied by the High Court in *MYLAN v Yeda* [2017] EWHC.

Actavis clarifies how you should compare an allegedly infringing product/process with the patented invention claimed. Step 1: does the product/process infringe any of the claims in the patented invention using a normal interpretation? Step 2: does the product/process infringe the patented invention anyway because it only varies from the patented invention in a way that is not material? If the answer to either is yes, there is infringement.

*MYLAN* confirmed that you should continue to interpret the construction of patent claims in a purposive (not literal) way. Contrast this with how you interpret a commercial contract – the reason being that a patent is a unilateral statement by the patent owner (whereas a contract is a bilateral agreement).

The decisions bring the UK closer to the position in Germany on patent infringement. This will likely lead to the UK being seen as a more favourable jurisdiction in which to enforce patent rights and, subject to the delayed Unified Patent Court and Brexit, may result in an increase in patent claims in the UK. By contrast, US patent infringement claims have decreased as there continue to be more challenges to patent validity before the US Patent Office.

## What to look out for in 2018

We continue to see an increase in the number of confidential information claims, as businesses become ever more alive to protecting their confidential information, including trade secrets. This trend will likely continue with the upcoming Trade Secrets Directive, which the UK must implement by 9 June 2018.

When the Directive is implemented, it will introduce a definition of a “trade secret” in UK statute for the first time. Companies in the UK must currently rely solely on either common law claims for breach of confidence or contractual claims. The Directive defines trade secrets as information that is secret, has commercial value because it is secret, and has been subjected to reasonable steps by the person in control of it to keep it secret.

Trade secrets and confidential information constitute an extremely valuable part of many business models, particularly those companies that are knowhow- and data-driven. We expect insurers to see an uplift in claims brought against former employees and directors who join competitors and/or start up competing businesses.

These claims may arise under a range of policies, including more traditional directors and officers policies where the ex-employee joins as a director of a competing business, and specialist intellectual property policies, which typically provide pursuit and defence cover. The claims may also involve cross-jurisdictional issues, with the Directive intended to harmonise the protections across the EU.



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# International arbitration

## Key developments in 2017

Third-party funding (TPF) is the hot topic in arbitration. Insurers are moving into this area with new products such as cover for enforcement of awards. But the effect is broader than that as so many disputes are dealt with by way of arbitration.

In the *Essar v Norscot* case, Norscot obtained TPF in its claim against Essar. The funder was entitled to a substantial uplift in the event of success, and indeed Norscot was successful. Norscot claimed £1.94m from Essar as the amount due to the funder as other costs under section 59(1) of the Arbitration Act 1996. The arbitrator awarded this sum to Norscot, and when challenged by Essar before the courts, the award was upheld on a number of grounds, including Essar's egregious conduct.

It has been hailed as a landmark case by funders, although that may be a slight overstatement. But it is the bigger picture that impacts insurers more generally, as we explore further below.

## What to look out for in 2018

Conflicts of interest and ethics in arbitration have generated much noise in relation to TPF. The noise will get louder as the International Council for Commercial Arbitration and Queen Mary University are due to publish a report on TPF in 2018. Insurers need to be aware of the potential impact of its recommendations and the proposed principles it espouses.

There will be a requirement for a party to disclose to the tribunal the existence and identity of funders. The current definition of funders is broad enough to include insurers. This will affect those providing before the event, after the event and liability insurance, as well as subrogated insurers.

The aim is to avoid conflicts of interest, but the application to insurers as a matter of principle and practicality has not been fully considered. What happens in a case where the existence of insurance is confidential, for example? How far-reaching is the requirement in relation to complex insurance programmes? At what point is insurance engaged?

The task force had no representation from the insurance industry on its committee, and we are already seeing arbitral institutions introducing guidance and rules that have not been thoroughly thought out when it comes to considering the insurance implications. The industry needs to be on alert.



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# International property

## Key developments in 2017

The predictions we made last year of the Atlantic hurricane season in 2017 being one of the most active and dangerous for more than a decade came to pass. This year international property was defined by hurricanes Harvey, Irma, and Maria (HIM), which have an estimated combined cost of over \$100bn in damage. Further losses also arose from the Mexican earthquakes, wildfires in California and Montana, and serious flooding in India, Nepal and Bangladesh.

The size of the losses this year, particularly HIM, has had a particularly large impact on reinsurance and retrocession layers. Further, holders of catastrophe bonds, which have seen growth in recent years, have also felt the impact of this wide-scale loss. This has added further pressure on underwriters, claims handlers, and loss adjustors, particularly through the second half of the year.

However, HIM has also provided opportunities for the use of new technology to help those working in the insurance industry. Due to the potential size of losses, insurers have been more willing to embrace insurtech, with the use of drones and satellite imaging technology to calculate and examine losses. The impact of quickly resolving losses and freeing up capital cannot be underestimated, as it affects everything from stamp size to hiring ability.

Finally, the relative weakness in the pound has proven costly this year for UK-based insurers and reinsurers, particularly as it hit its lowest point against the dollar during the Atlantic hurricane season. This only further added to the burden of costs for those (re)insurers during this tumultuous year.

## What to look out for in 2018

Many have predicted that January renewals will bring with them some hardening of rates. Although (at the time of writing) the extent of any rate rises is unclear, the picture will undoubtedly differ across lines of business and markets/geographical areas.

The prospect of rate rises brings the prospect of additional capital for new investments. This coincides with the rise of insurtech. In addition to the increase in new technologies in the claims handling and adjustment process, such as drones, satellite imaging and 3D scanners, we will also see an increase in the use of sensor technology to monitor risks, and investment into data analytics to use data for writing better risks and creating new products.

The catastrophe bond market will expand in 2018. Coupon rates will increase, particularly for riskier cat bonds. This may attract further interest for new investors. As the UK and Singapore attempt to finalise their insurance-linked securities (ILS) regime (which will allow for the creation of cat bonds), a rise in issuances can be expected in 2018. This rise, and the aftermath of HIM, will lead to new litigation for cat bond claims (and other ILS) and establish a body of law to underpin the products.

Finally, the growing cyber threat creates opportunities for products in the terrorism and crisis management markets. 2017 saw various illustrations as to how ransomware, for example, can impact a business in the absence of property damage. The demand for more nuanced products that respond to these risks will invariably grow as a result.



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# Legal practices

## Key developments in 2017

For 20 years, since the landmark case of *SAAMCo*, professional negligence defence lawyers have been relying on Lord Hoffman's judgment to limit a professional's exposure to loss. Over the years there have been myriad interpretations of the *SAAMCo* distinction between providing information to clients (where losses would be confined to the foreseeable consequences of the incorrect information) and advising clients on how to proceed (where more extensive losses would flow). A long-awaited clarification of this distinction came this year in the Supreme Court decision in *BPE Solicitors v Hughes Holland* [2017] UKSC 21.

In *BPE*, Lord Sumption confirmed the *SAAMCo* principle and clarified the difference between providing advice and providing information as a professional. He held that a professional provides advice when it considers all matters that a client may deem relevant when deciding whether or not to enter into a transaction. When a professional contributes a limited amount of material to a client who is deciding whether to enter into a transaction, it merely gives information. For example, conveyancers and valuers will not usually be advisers as the information they provide to a client is succinct and limited, whereas brokers may provide advice if they place and write a policy.

This judgment has been welcomed by professionals and their insurers. When a professional only provides information, it is for the client to look at other considerations and make a commercial decision based on all information. A claimant cannot recover in respect of its own commercial decisions.

## What to look out for in 2018

Since 4 May 2017, insurers have faced potential exposure to a damages claim by an insured if they fail to pay claims within a reasonable time and the insured consequently suffers loss. This is by way of section 13A of the Insurance Act 2015, which introduced an implied term into every insurance contract.

So far, no such claims have been reported. However, as insureds are subject to a one-year limitation period, insurers should be prepared for potential actions in 2018.

Not all delays in payment will be actionable. The Act expressly recognises the need for insurers to have reasonable time to investigate and assess a claim. Reasonable grounds to dispute the validity or value of a claim will also provide insurers with a defence.

Once claims start being made, we anticipate litigation on the question of reasonableness. A test case on the interpretation of reasonableness under the Act will be welcome.

We are also hoping to receive clarity from Parliament in 2018 regarding ground rents in leasehold properties. The current escalation of ground rents is predicted to reach crisis level and result in significant litigation, unless new legislation is introduced.



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# Life sciences

## Key developments in 2017

The new EU Medical Devices Regulation 2017/745 came into force on 25 May 2017. It is the EU's response to the high-profile medical products litigation of recent years, with which many insurers will be all too familiar. The EU had identified elements in the existing legislation (dating from the early 1990s) that meant manufacturers and patients were insufficiently protected.

The new Regulation takes effect in 2020 after a transitional period. It ushers in change designed to bring the regulation of medical devices into the 21st century. According to a House of Commons briefing paper of 20 November 2017, the current wording of the EU (Withdrawal) Bill means that the Regulation will not automatically be converted into UK law on Brexit day. However, the Medicines and Healthcare products Regulatory Agency has reported that its preparations to effect the Regulation continue, suggesting that the Regulation, or a substantially similar version of it, will be part of UK law.

Manufacturers will now be required to generate and maintain more data regarding the safe performance of their devices. Before products enter the market they will now be subject to greater scrutiny from Notified Bodies and, in some cases, expert committees will be formed to oversee products and testing before devices are approved.

For insurers, the beneficial effect of the Regulation will be twofold. The first is that medical devices will be subject to greater scrutiny before they are released. This assists at the underwriting stage because such products will present less of a risk. Then, if a manufacturer does face questions over the performance or safety of its device in future (or even claims), it will have at its disposal much more information to demonstrate that the product has achieved the necessary safety standard.

## What to look out for in 2018

The trial *Gee & Others v DePuy International Limited*, under a Group Litigation Order, of hundreds of claims involving metal-on-metal hips manufactured by DePuy International Limited, is expected to conclude in early 2018, with a judgment to follow thereafter.

This case follows the ground-breaking case (involving the same manufacturer) of *Wilkes v DePuy* [2016]. In *Wilkes*, the court found in favour of the manufacturer in a judgment for the modern era. Hickinbottom J was willing to accept a wide range of circumstances as relevant to take into account in determining general expectations of safety. He stated that the fact that a medical product has received regulatory approval is a circumstance that will be given considerable weight in determining whether the product is defective under the Consumer Protection Act 1987. This provides manufacturers of highly regulated products with a strong defence argument: if regulators have approved a product then it should follow that the product meets the expected safety standard.

The judgment in *Wilkes* followed a different approach taken by the court in *A v National Blood Authority* [2001] (which had been seen as surprisingly pro-claimant). Now with *Gee & Others* coming to a conclusion, insurers will await this latest decision to see if it follows *Wilkes* in emphasising the importance of taking into account the fact that a product has been approved in a highly regulated sector. This is particularly relevant as manufacturers prepare to comply with the new Medical Devices Regulation (see above).



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# Marine and shipping

## Key developments in 2017

Who would have thought marine insurance would be at the centre of the insurtech revolution in 2017?

Maersk announced in September 2017 it was collaborating with accounting firm EY and leading blockchain company Guardtime to build the world's first blockchain platform for the marine insurance sector. The platform employs Microsoft's internet-based data storage cloud platform, Azzure. Several well-known names from the insurance sector are participants in the collaboration.

Blockchain is an electronic, secure, distributed ledger, best known for enabling the use of cryptocurrency transactions. Within the ledger, the use of smart contracts converts contractual obligations into computer protocols, to facilitate, verify or enforce the contract's performance. This promises to replace bills of lading and supporting transactional documents with a secure online mechanism to buy and sell goods. Electronic trading documents are not a new concept in the shipping world. But how could blockchain optimise the marine insurance sector?

In marine insurance, blockchain technology could reduce the need for intermediaries and increase overall transparency. The purchase of insurance, quoting and binding coverage could be made visible to all stakeholders. Payment of premium could be immediate and direct to the insurer, with the policy being issued on confirmation of receipt of funds.

With marine claims, smart insurance contracts could be programmed to pay immediately on notification and verification of a loss, provided pre-set criteria are satisfied. For example, attritional partial-loss cargo claims can often be easily proven and documented (often with pre-agreed proof-of-loss documentation). Payment of the agreed value could theoretically be performed, when specific criteria are inputted into the blockchain.

Conceivably, in general average (GA) claims the blockchain could be designed to immediately issue an average guarantee the moment the platform is notified of a GA incident – therefore reducing the time taken to release cargo (and perhaps eliminating the need for slot charterers to put up GA guarantees).

Blockchain is potentially a transformational technology, albeit not yet fully embraced by the maritime industry. Currently, blockchain providers to the industry are limited, with no dominant vendors or total solution to cover the full supply chain. However, the creation of a blockchain platform and the announcement by Maersk is an important first step for the industry and should be noted and monitored.



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## What to look out for in 2018

The demand for unmanned or autonomous surface vessels (ASVs) looks set to grow in 2018.

Certain developers anticipate commercial ASVs being in widespread use within the decade. Among others, Automated Ships Ltd. and Kongsberg Maritime are developing a prototype mono-hulled ASV – the *Hrönn*, intended for offshore support operations – to enter service in 2018.

Around 75% of marine insurance claims stem from human error, according to recent insurance industry publications. The use of ASVs has the potential to improve safety, reduce costs and eliminate the potential for losses due to human error. That is attractive to hull and machinery (H&M), and protection and indemnity insurers. However, the maritime insurance sector may need to develop its standard coverage terms in response to greater commercial use of ASVs. For example, how do you identify an electronic latent defect in an automated bridge and navigation system?

And of course there is the growing risk of cyber threats. For the marine insurance sector, the market's solution to cyber risks has been the introduction of the Institute Cyber Attack Exclusion Clause CL 380, commonly incorporated to exclude cyber risk in H&M policies. With more ASVs in operation, cyber risks will become increasingly important, as new risks, such as loss of critical data links with the shore-based remote controller, become a reality. It seems questionable whether an outright cyber risks exclusion provision will be sustainable in future H&M cover agreed for ASVs.

Existing standard forms may need revision to assess whether current insured perils and policy terms work from an unmanned perspective. It is debateable how H&M wordings will develop to cover fully autonomous AVSs that are not navigated by remote control. How will the conventional claims process be affected where there is no crew aboard to report on the cause of the incident?

Finally, it seems possible that increased commercial use of ASVs could see a shift towards manufacturer responsibility and away from operator responsibility. If so, that could see both manufacturers and parts suppliers in the firing line when things go wrong on board ASVs, who may increasingly look to product liability insurers to provide the solution.

# Media

## Key developments in 2017

The Court of Appeal handed down the long-awaited judgment in *Lachaux v AOL (UK) & Others* [2017] EWCA Civ 1334 on 12 September 2017. This was the first time the Court of Appeal had considered the meaning of the “serious harm” threshold in section 1(1) of the Defamation Act 2013, which provides that “A statement is not defamatory unless its publication has caused or is likely to cause serious harm to the reputation of the claimant.” The provision was designed to strengthen the law of defamation and raise the threshold to be met in order to bring a defamation claim.

Some went as far as describing the Act as the “death of the defamation claim”, and the number of such claims issued per year did begin to decrease. Initial interpretations of the provision made it harder for a claimant to demonstrate at the outset of a claim that their reputation had been seriously harmed.

The Court of Appeal has disagreed with those interpretations, confirming that while the bar has been raised to a threshold of “seriousness”, a claimant does not have to prove that their reputation has been seriously harmed at the outset of their claim. This is likely to lead to a resurgence in defamation claims.

Fortunately, the provision relating to bodies trading for profit in section 1(2) of the Act (that in addition to serious harm, “serious financial loss” must be demonstrated) remains unaffected.

An RPC blog at the time of the decision, which discussed it in more detail, can be found here: <https://www.rpc.co.uk/perspectives/data-and-privacy/seriously-limiting-serious-harm>.

## What to look out for in 2018

The General Data Protection Regulation (GDPR) will come into effect on 25 May 2018. This will have far-reaching impacts on almost every industry, and the media industry is no exception.

The current Data Protection Act 1998 already provides for a “journalism” exemption at section 32, and the GDPR allows member states to enact their own exemptions for reasons of freedom of expression. The Government, in the new Data Protection Bill, has broadly maintained the section 32 exemption, expanding its application to apply to the new rights afforded to data subjects. But the wording of the new exemption has not been finalised and is likely to be subject to further scrutiny before the Act is agreed.

Furthermore, the “right to be forgotten”, which allows individuals to ask for their personal data to be erased in certain circumstances, will be enshrined in legislation. Media companies may therefore expect to see a rise in such requests being made, especially in relation to historic articles.

Data protection claims are increasingly used as “bolt-ons” to claims against the media for defamation or misuse of private information, often to try and side-step the various thresholds required to be met for either of those claims. Media defendants are increasingly having to deal with this aspect of such claims, and a higher awareness and strengthening of individuals’ data protection rights as a result of the GDPR is likely to lead to a further increase.



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# Medical malpractice

## Key developments in 2017

The tragic story of Charlie Gard is sadly not that uncommon, with many “best interests” cases being heard in the courts over the years. But what made Charlie’s such a key story in the 2017 medico-legal world? Answer: the powerful use of social media to bring about public pressure, new evidence (although ultimately unsuccessful) and a second hearing.

Born with an extremely rare genetic condition, Charlie was under the care of Great Ormond Street Hospital (GOSH) when it concluded that Charlie’s life support should be switched off. His parents objected, arguing for treatment in the United States. GOSH applied to the High Court, which decided it would be in Charlie’s best interests to end life support. The Court of Appeal, Supreme Court and European Court all reached the same decision.

And this is where the power of social media really began to impact legal process – not only were the public immersed in the case, but so too were the Pope, and Donald Trump (who Tweeted about Charlie). The US doctor (Professor Hirano) who had offered therapy to Charlie then co-signed a letter that suggested unpublished data showed that therapy could help.

It was this new evidence that prompted a further application by GOSH, leading to a fresh hearing. Professor Hirano’s evidence was undermined when he admitted he had not examined Charlie. Sadly, when Professor Hirano did examine Charlie he accepted that therapy would not help. Charlie was transferred to a hospice and passed away the next day.

In this case, the dissemination of information via social media created an extraordinary response, with protests outside the Royal Courts of Justice and death threats to GOSH staff, counsel and the judge. This was unprecedented, but the case will not be the last case to capture the public’s attention, and we can expect the powerful use of social media to continue to impact on the medico-legal world.



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## What to look out for in 2018

In the wake of the Ian Paterson “rogue surgeon” scandal (in which RPC acted for the private healthcare organisation involved), and amid increasing public pressure, the Health Secretary, Jeremy Hunt, promised “a comprehensive and focused inquiry to ensure that any lessons are learned in the interests of ensuring patients are protected in the future.” The inquiry, if commissioned, is likely to look into the workings of private hospitals, the relationship between the public and private sector, and the role and responsibilities of private practitioners. One of the key areas of focus is expected to be the indemnity position of individual doctors, many of whom rely on defence organisations.

This cost for medical defence organisations has long been seen as high (perhaps even prohibitively so) – and is increasing, particularly as a result of the change to the discount rate. Perhaps this is best evidenced by Jeremy Hunt’s latest announcement that clinical negligence claims against GPs will soon be covered under a Government-backed scheme (in an attempt to reduce the number of GPs leaving practice due to rising insurance premiums).

Perhaps the Government-backed scheme for GPs is the first incremental step towards a more seismic change in 2018 for the medico-legal and insurance world. Whether it is paving the way for more open market opportunities in insuring individual practitioners, or whether private hospitals will seek to cover individuals under the organisation’s entity insurance (at an increased premium to themselves), it is something insurers, providers and practitioners all need to think very carefully about.

# Miscellaneous professional indemnity

## Key developments in 2017

With over 500 types of professionals now purchasing professional indemnity (PI) insurance, from arborists to zoologists, miscellaneous PI is firmly settled as a class in its own right. What was pioneering five years ago is now a firm fixture in the insurance market, with virtually every major insurer providing products in this arena.

Last year we reported that we expected claims in this area to be difficult to handle, due to the very nature of a class where businesses are not governed by regulatory or representative bodies. This has been borne out in 2017. Experts are difficult to source. There is no recognised body of experts, and claims – even poor ones – are therefore difficult to defend. For example, this year we settled a claim against a cow nutritionist for a nominal figure, despite the sum claimed being £3m. However, each side incurred £30,000 or more in expert fees, in addition to significant solicitor fees. The claimant's victory was therefore perhaps a pyrrhic one.

This highlights the necessity for insurers, when placing risks, to get under the skin of a business, to understand how it might develop – and to consider how claims might arise, how they may be defended, and the difficulties involved in dealing with spurious or vexatious claims (which can have value).

## What to look out for in 2018

It is, as always, difficult to spot trends in a class as diverse as miscellaneous PI. This was a class invented by the insurance industry and often thought of as a cash cow; few claims were brought and most risks were essentially benign.

However, we anticipate that claims in this area will increase as claimants and their solicitors become more savvy and realise there is now a wide world of insured professionals to claim against. The internet remains awash with solicitors advertising their willingness to take those instructions. As more and more emerging professions use the fact that they have insurance in pitches, the knowledge of its existence spreads among the general public and, as a result, we expect to see more and more unsophisticated claimants “giving it a go.”

There is also a concern among risk and insurance managers that it can be difficult to explain the value of insurance to their executive boards. This may explain the perception that this class is becoming more commoditised and that insurers may be giving away more cover than in previous years. At a time when, arguably, brokers rule the roost (an estimated 80% or more of all UK professional indemnity premium is placed through brokers), we anticipate that this will only increase, as policies become more akin to general civil liability policies and brokers put pressure on insurers to increase the scope of cover for reduced premiums.

This is a class of business that particularly benefits from insurers and brokers adopting a collaborative approach to find policies that meet all parties' needs – which, for unsophisticated insureds, may well lie in advisory and value-added services including legal, media, and IT support.



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# Pensions and actuaries

## Key developments in 2017

2017 was another year of intense scrutiny for pensions: by the press, the Government, the Financial Conduct Authority (FCA), The Pensions Regulator and the courts. In relation to the latter, we saw a wealth of new case law on issues such as closing schemes to future accrual, employer debt, exoneration clauses, overpayments and more.

One area of particular attention has been the issue of retail prices index (RPI) v consumer prices index (CPI) in revaluation of deferred pensions and indexation of pensions in payment. We saw three judgments on this issue alone. Certainly the statutory change to the use of CPI in 2011, which can apply retrospectively (subject to scheme rules), has given rise to numerous claims that we have seen and can affect a range of professionals involved in pension schemes, including: actuaries valuing benefits; solicitors amending scheme rules; auditors verifying administration and scheme deficits; and administrators calculating and paying benefits.

In relation to personal pensions, Self-Invested Personal Pension (SIPP) administrators and trustees continue to face complaints and claims in respect of non-mainstream investments. With the collapse of many introducer firms that advised on transfers into SIPPs, the FCA and Financial Ombudsman Service appear to have turned their attention well and truly to SIPP firms. In this context, the notorious case of Berkeley Burke, which perhaps began this particular focus on SIPP firms' potential liability for a client's investment choices held within a SIPP, is still under challenge in the courts. One decision went against Berkeley Burke earlier in the year but its primary judicial review challenge is apparently still ongoing.

## What to look out for in 2018

2018 looks set to be the year of The Pensions Regulator. 2017's Green Paper proposed various new powers for The Pensions Regulator, including: a power to separate schemes from the sponsor or wind schemes up in certain circumstances; increased powers in the area of corporate restructuring; the imposition of an overall duty to co-operate with The Pensions Regulator; and a power to interview parties supported by sanctions for non-compliance. In addition to the Green Paper proposals, The Pensions Regulator's corporate plan identifies an intention to deliver more interventions more quickly where defined benefit (DB) schemes are underfunded or avoidance is suspected. The Pensions Regulator has actively targeted a 90% increase in the number of schemes with which it will formally engage ahead of formal valuation and a 25% increase in DB enforcement cases. The Pensions Regulator is very clear that it will use its powers more frequently, more quickly.

In the personal pension space, 2018 is set to see pension transfers return to the top of the FCA's agenda. There has been a huge increase in pension transfer advice, driven by the introduction of the pension freedoms and historically high transfer values from DB schemes. The results of the FCA's review of pension transfer advice files has indicated that only 47% of transfer advice was demonstrably suitable. The combination of these two factors means we can expect increased scrutiny of pension transfer advice, as well as a revamp of the FCA's rules on pension transfers in the early part of 2018. Will we see another industry-wide Pension Review? We suspect not, but anticipate that the FCA will carry out further targeted investigations into individual firms – and that section 166 reviews and/or past business reviews for those firms may well follow.



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# Political risk and trade credit

## Key developments in 2017

With a strengthening in the commodities markets, 2017 has been a relatively more benign year than 2016 from the perspective of trade credit insurers – and this seems to have been a trend reflected on the claims side. 2017 has also seen a rise in demand for political risk and trade credit (PR/TC) insurance in developed markets, as opposed to emerging markets, in light of the growth of populism and economic protectionism exhibited, most notably, this year by the United States, Russia and India.

A particular driver is the uncertainty for businesses based in UK that trade with the EU, concerned about the potential terms of any interim trade deal and supply chain disruption. Many are looking at setting up subsidiaries and branches in the EU as a solution. Many are also asking whether the UK's departure from the trading bloc will lead to an increase in protectionism from the EU or its member states.

Aside from Brexit's impact as a driver for the purchase of PR/TC insurance, it is important to consider whether Brexit will have any impact on policy terms. In particular, many policies and the underlying agreements that they insure feature London arbitration as the appropriate dispute resolution forum. It will be of interest to insurers to remember that the enforceability of awards will remain unaffected as the UK is signatory to the New York Convention.

Elsewhere, international creditors are increasingly availing themselves of India's new National Company Law Tribunal (NCLT) process under the Insolvency and Bankruptcy Code 2016, in attempts to recover outstanding receivables from Indian companies carrying huge domestic debt and that have consequently been classified as non-performing assets in the Indian banking system. The process has brought mixed results throughout 2017, and interested parties will await the year-end deadline given by the Reserve Bank of India for those companies to seek a debt resolution or be referred to the NCLT.

## What to look out for in 2018

Almost all parties involved in cross-border trade are examining possible areas where blockchain technology can facilitate the sale of goods from seller to buyer and reduce the associated costs and risks. These range from banks to insurers to shipping companies such as Maersk who, in collaboration with IBM, has been piloting the use of blockchain technology to provide a digitised supply chain.

The provision of an incorruptible ledger providing true records that cannot be falsified or manipulated will be key to reducing fraud in international trade. Once this technology can be harnessed and implemented by parties in the supply chain, it should eliminate frauds based on manipulation of records, such as: the generation of duplicated warehouse receipts; the use of forged bills of lading; and fresh air exports. As the veracity of underlying transaction documentation has often presented challenges for the trade credit sector, these advancements will directly benefit trade credit insurers.



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# Power

## Key developments in 2017

The UK Government's second Contract for Difference auction in September 2017 saw two developers win rights to build offshore wind farms for a record low of just £57.50/mwh.

This has been reported as a landmark event in showing that offshore wind is now cheaper than nuclear and gas power in the UK, and that offshore wind is a mature technology that can produce cost reductions.

It can certainly be seen as evidence that the UK Government is now looking at renewables as a major part of the UK's power source mix, although it has also been noted that solar power continues to be excluded from the auction (despite securing a low price in the past).

The need to move away from fossil fuels to comply with the Paris Agreement (2017 also saw the annual COP Climate Change Summit take place in Bonn) and the underlying need to reduce CO2 omissions can be expected to continue to drive a move towards renewables.

While progress is being made on price as a key factor in limiting the switch to renewables, as the technologies have developed, unreliability of supply remains an issue which can make renewables less attractive. It has consequences for other forms of power generation, which are being required to supplement the base load and to meet requirements for which they were not designed. As we move further down the renewable road, insurers will need to be aware of the increasing risks of turbine failure.

## What to look out for in 2018

The move away from fossil fuels and the changing energy mix is also leading to governments around the world continuing to look at the role of nuclear power.

The recent trend has been that the construction of new reactors (either under way or planned) has been concentrated in China, India and Russia – and, to a lesser extent, Japan and South Korea. China and India face the most pressing question of how to generate sufficient energy to meet the demands of their expanding economies while reducing reliance on fossil fuels, and investment in nuclear is forecast to continue in non-OECD countries.

However, the construction of new nuclear plants remains under consideration in countries where the appetite for nuclear power has reduced in recent years.

In the United States, the passing of the Advanced Nuclear Technology Act of 2017 and Interim Consolidated Storage Act of 2017 (dealing with nuclear waste) may be seen as paving the way for new reactors, and President Trump's administration might be expected to be sympathetic to a potential means to greater energy security.

The increased use of nuclear power also involves extending the life of existing facilities beyond the design life – an issue for countries such as France, Russia, the United States and the UK with their well-established nuclear sectors. For insurers this provides obvious risks, but more developments may be anticipated on this front.



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## Procedure, damages and costs

### Key developments in 2017

The judicial drive to reduce the cost of litigation continues. In July 2017, Lord Justice Jackson's report to extend fixed costs was published. The original suggestion of a "one size fits all" costs regime for all claims worth up to £250,000 has been shelved for a more structured approach.

The proposals include fixed recoverable costs for all fast-track cases and for those claims allocated to a new intermediate track (ie cases worth up to £100,000 that can be tried in three days or fewer with no more than two expert witnesses per party). The new intermediate track has simpler procedural rules, with restrictions on the length of documents and limited disclosure. The fixed costs range from £4,955 for the entire case (up to and including trial) for a £20,000 fast-track claim to £32,950 for a complex intermediate-track case. These include counsel's fees.

Claims for between £25,000 and £100,000 will fall outside the intermediate track when there are factors such as reputation or public importance in play, and the court will have discretion to allocate claims to the multi-track when there are other reasons to do so. No doubt, this will be fertile ground for dispute between the parties. The proposals also include a voluntary pilot of a capped costs regime for business and property cases up to £250,000.

The Rules Committee is considering these proposals and we may see implementation in 2018. However, the reality is that parties will still have to pay the true cost of litigation. The winner though will not be able to recover those costs from the loser.

### What to look out for in 2018

The next proposal to reduce litigation costs is a sweeping reform of the rules governing disclosure (often the most expensive part of case preparation). This may be far more effective in reducing the true cost of litigation than the expansion of fixed costs. The reform recognises that advances in technology mean the current rules need to be updated to reflect electronic, rather than paper, disclosure and, in turn, to ensure that England and Wales remains attractive to litigants (especially with Brexit looming).

The proposals, published on 2 November 2017, include the abolition of standard disclosure as the default (though it can still be ordered) and removal of the automatic entitlement to search-based disclosure. Instead, the parties will be required to give basic disclosure with their pleadings and engage prior to the first case management conference to agree the extent of the disclosure that is necessary to resolve the claim. The judiciary is encouraged to become more involved in assessing the most appropriate method of disclosure, rather than simply approving what the parties agree.

To address concerns that disclosure is fundamental to procedural fairness, each party will be subject to a core duty requiring them to disclose known documents that adversely affect their case, regardless of what disclosure order (if any) is made.

There is a consultation process until February 2018 and then the new draft rules (as revised) will go to the Rules Committee. If approved, there will be a pilot scheme in the business and property courts before being rolled out to all cases.



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# Product liability

## Key developments in 2017

In August, the London Fire Brigade (LFB) sent an open letter to the Prime Minister asking for changes to be made in relation to the safety of white goods. The LFB is concerned about the number of people across the UK continuing to use faulty white goods. There have been a number of significant fires in recent years caused by white goods – indeed the initial cause of the Grenfell Tower fire in June is believed to have been a faulty fridge freezer.

In its letter, the LFB calls for a single register for UK product recalls, so consumers can check their white goods easily. It is estimated that the success rate for electrical product recalls is currently only between 10% and 20%. The LFB also asks for higher standards to be implemented in the manufacturing of white goods. The letter specifically requests that manufacturers cease to produce fridges and freezers with flammable plastic backing. The UK industry watchdog Which? has also called for change, stating that the current British standards are deficient and inadequate.

In further recommendations, the LFB says all appliances should be marked with a model or serial number so they can be identified in a fire, and that producers and distributors should be made to improve their assessments of white goods' safety, specifically to take into account the risk of a fire starting while people are asleep.

## What to look out for in 2018

The Government has recently published its Automated and Electric Vehicles Bill, which would extend compulsory motor insurance, as provided for under the Road Traffic Act 1988, to cover product liability for motorists using autonomous vehicles.

The legislation will mean a single insurer will cover both the driver's use of the vehicle and the automated vehicle technology. There had been concern that confusion would arise if there was an incident involving an autonomous vehicle as to whether to pursue the driver or the manufacturer, which in turn would lead to a delay in innocent parties receiving compensation.

Under the Bill, when an automated vehicle is determined to have caused a crash, the victim will have a direct right against the insurer. The insurer will in turn have a right of recovery against the responsible party, which could include the vehicle's manufacturer.

The Bill is currently at the report stage in the House of Commons and could become law during 2018, although the Secretary of State would need to confirm its commencement date. We suspect this will be reasonably soon after.

With the increasing development of autonomous vehicles, and their imminent use on the road, it is unlikely to be long before we start to see the first claims arriving.



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# Property and business interruption

## Key developments in 2017

The judgment in *Leeds Beckett University v Travelers Insurance Company Ltd.* [2017] EWHC 558 is a useful summary of the legal principles that apply when considering what constitutes “accidental damage” and application of the standard exclusions in property policies for gradual deterioration and defective design.

The university lost its claim for damage caused by disintegration of concrete blockwork. The Technology and Construction Court held the damage was not accidental because the building was built on a watercourse with no design addressing the foundations’ exposure to water. The court commented that the gradual deterioration exclusion would apply, suggesting that such exclusions are not simply a reflection of non-fortuitous loss but can apply where external influences cause deterioration.

The judge also gave an indication as to how an English court would apply a “subsequent damage” proviso, expressing the view that subsequent damage had to be a reference to different damage, namely damage which could be distinguished in some way from the damage originally caused and had to be caused by a new or different cause (and one which was not itself) excluded.

In an important decision for insurers writing property owners insurance, the Court of Appeal confirmed that private individuals who buy residential let insurance are not “consumers” and as such any issues involving non-disclosure/misrepresentation fall to be considered by reference to the Insurance Act 2015 or the Marine Insurance Act 1906, rather than the Consumer Insurance (Disclosure and Representations) Act 2012 (*Ashfaq v International Insurance Company of Hannover plc* [2017] EWCA Civ 357).

## What to look out for in 2018

We await the first cases to apply the Insurance Act 2015 with particular regard to section 11, which prevents insurers from relying on a breach of warranty if the breach did not increase the risk of the type of loss that occurred.

The EU Withdrawal Bill is expected to be passed in 2018 but it remains to be seen how the Government will tackle the adaption of insurance legislation and other relevant areas such as consumer contract regulation. Any proposed changes to product liability legislation will be of particular interest in light of recent concerns surrounding fires caused by tumble dryers.

The final report of the Independent Review of Building Regulations and Fire Safety is due in spring 2018. The Review’s recommendations may have implications for insurance policies to ensure customers are using best practice to prevent the start and spread of fire.



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# Regulatory

## Key developments in 2017

2017 saw consultation on three major regulatory changes: the Senior Managers and Certification Regime (SM&CR), the Insurance Distribution Directive (IDD) and the General Data Protection Regulation (GDPR).

In July, the Financial Conduct Authority (FCA) and Prudential Regulation Authority (PRA) published three consultation papers outlining their plans for extending the SM&CR – which currently only applies to banks, building societies, credit unions and PRA-designated investment firms – to all financial services firms, including insurers and intermediaries. The FCA has announced its intention to publish a policy statement in summer 2018 that will set an implementation date (expected to be in 2018).

The requirements of the IDD, which replaces the Insurance Mediation Directive, were set out in three consultation papers during 2017. The FCA is currently considering feedback on the last, CP 17/33, and publication of final rules is expected in January 2018 – only just ahead of the current deadline for implementation on 23 February 2018. This date may now be delayed, following suggestions (in Europe and here in the UK) that the sector is not ready to implement such complex and significant changes.

IDD arrives amid increased regulatory scrutiny of the insurance distribution chain, following a series of thematic reviews since the FCA took over in 2013. Though it will not publish a final report next year, the FCA has announced its Wholesale Insurance Broker Market Study, which will focus on market power, conflicts of interest and broker conduct.

The Information Commissioner's Office has consulted more than once during 2017 on the GDPR, most recently on guidance on contracts and liabilities between controllers and processors. This guidance is expected in late 2017 at the earliest. A Data Protection Bill to achieve GDPR's implementation is currently making its way through Parliament, prior to GDPR's introduction in May 2018. The threat from a newly empowered regulator to impose very substantial fines for data breaches is rightly the focus of many regulatory change projects.

## What to look out for in 2018

2018 will be an eventful year for those in the insurance industry. The coming into force of SM&CR, IDD and GDPR will introduce increased accountability for individuals and firms, with conduct rules requiring compliance with new prescriptive rules. We recommend firms consider regulatory change in the round, looking for synergies and efficiencies between their projects.

The full SM&CR will be applied to insurers, who will thereby be treated like banks. The largest brokers will be subject to the full "enhanced" regime, with the rest of the intermediary community subject to the less demanding "core" regime. The regime will affect almost all of those working in financial services. For example, the new conduct rules will apply to all employees of financial services firms except for purely "ancillary" staff. When combined with the other changes, we expect the SM&CR to be more transformative for firms' culture and conduct than the existing Senior Insurance Managers Regime.

The IDD rules seek to strengthen consumer protection and will apply to all persons who distribute insurance. Implementation will require firms to consider their entire governance and culture arrangements to adopt, for example, the new customers' best interest rule. Achieving compliance will require a top-down approach, from board level through to front-line staff "on the ground". Firms will also need to examine their distribution chains and end-user product information (which will need to include an insurance product information document).

The GDPR will introduce new requirements for insurers. Changes include an increase in the potential fines that companies will face for breaches, the fact that controllers will need to provide more information to data subjects, and new obligations regarding consent and accountability.



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# Reinsurance

## Key developments in 2017

2017 has seen some signs that cyber reinsurance could emerge as a new class of risk, with specialist reinsurance cover now available in the market for certain types of cyber-related loss. Specialist teams offering a small but increasing number of products are beginning to grow as reinsurers attempt to position themselves to gain a share in a market that could continue to expand as the scale of cyber risk increases. Products have emerged partly in response to a number of large-scale attacks that have had a global impact in 2017, including the WannaCry and NotPetya ransomware variants.

Business interruption and loss of data are the main two types of insurable loss that insurers need to protect against in the event of wide-scale attacks. Ransomware is increasingly designed to act in a way that rapidly infects global business networks across all industries. Combined business interruption costs that can result from an individual ransomware variant can reach hundreds of millions of pounds. Insurers can be exposed to these costs through silent cyber exposures, where they are liable to an insured business through, for example, a property or professional indemnity policy that does not contain applicable data or cyber exclusions.

As cyber risk increases in scale and global reach, insurers' books of exposure to cyber (both affirmative and silent) is likely to continue to grow. We expect that the cyber reinsurance market will continue to grow in response as insurers look to mitigate their risk in the likely event of further large-scale cyber attacks.

## What to look out for in 2018

Catastrophe global (re)insurance losses are anticipated to exceed \$100bn in 2017 and could possibly reach as much as \$190bn. There has been a busy hurricane season in the Caribbean with hurricanes Maria, Irma and Harvey all representing major loss events. Higher end loss estimates for hurricane Maria are at \$85bn alone, with a further \$50bn and \$25bn in losses expected from Irma and Harvey respectively. Other notable loss events in the year have included high-magnitude earthquakes in Mexico and recent widespread wildfires in California. These losses, combined with catastrophic losses from various other events in the first half of the year, are anticipated to result in overall 2017 losses for some reinsurers.

Despite the impact of hurricane Maria and other catastrophes, global reinsurance rates are most widely predicted not to harden in 2018. An overall fall in rates of up to 7.5% at January 2018 renewals is predicted, due to continued strong competition in the market. Competition from both traditional reinsurers and from the growing threat from insurance-linked securities (ILS) is contributing towards the softening of rates. ILS fund managers are raising capital from existing and new investors, and new ILS start-ups are due to launch in early 2018, which will provide further competition. It is expected that new capital could offset what has been lost or trapped by the 2017 catastrophe losses.

The effect of the 2017 catastrophe losses might instead be to push up premium prices on a more localised basis in reaction to the losses. Premiums are expected to rise up to 50% in some lines of business (including property and casualty reinsurance) in the United States.



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# Surveyors

## Key developments in 2017

The Supreme Court handed down its judgment on 29 November 2017 in the case of *Tiuta International Ltd. v De Villiers Chartered Surveyors*, on appeal from the Court of Appeal.

Readers may recall that the point under appeal was causation, and the issue arose as a result of the manner in which the lender, Tiuta, structured a re-mortgage. Tiuta had obtained an original valuation from De Villiers and had advanced a loan based on that valuation. It subsequently obtained an updated valuation from De Villiers but, rather than amending the original loan terms based on the revaluation, Tiuta redeemed the original loan and replaced it with a new loan.

At first instance, the court held that De Villiers was not liable for the majority of the loss, because it had been “caused” by the original loan, not the second loan (Tiuta did not criticise De Villiers’ original valuation). Following its earlier decision in *Preferred Mortgages Ltd. v Bradford & Bingley Estate Agencies Ltd.* [2002], the Court of Appeal decided otherwise, and held De Villiers liable for the whole loss.

The Supreme Court has, fortunately, restored order and has found that De Villiers can only be liable for the additional (modest amount of) money lent in reliance of the second valuation, and not the monies that Tiuta had already lent in reliance of the original valuation.

The Supreme Court concluded: “different considerations might arise were it to be alleged that the valuers were negligent in relation to both facilities.” We will no doubt see such a case before the courts next year...

## What to look out for in 2018

For over a year now, the Royal Institution of Chartered Surveyors has been working with relevant stakeholders, including RPC, to produce an update of the guidance note first published in 2013, which covers liability and insurance in residential and commercial valuation work.

The updated note is to be published in early 2018. The underlying message of the guidance note is that, while the economic conditions may be less challenging than they were in the period following the so-called credit crunch (although that may change as interest rates rise and the economy works through the implications of Brexit), valuers should still be ensuring their risk management is robust. This includes putting in place – and continuing to keep updated – carefully drafted terms and conditions, designed to protect their own interests (and, by extension, those of their professional indemnity insurers).



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# Technology and cyber

## Key developments in 2017

A number of cryptolocker ransomware attacks frequently made news headlines in 2017. Examples of high-profile ransomware include the WannaCry, Not Petya and Bad Rabbit malware variants. These incidents had a global impact, with ransomware deployed on a mass scale.

Ransomware is not just limited to high-profile global incidents. The threat of ransomware attacks to businesses is highlighted by the increased number of notifications of attacks being made under cyber policies through our breach response service, ReSecure, over the past 12 months. Ransomware represents a day-to-day threat to all sizes of business across all industries, with the ransomware variants mentioned above, and many others, affecting 17% of all businesses in the UK in the past year.

Attacks can present a huge burden to businesses and usually prevent them operating while the attack is underway. The length of disruption and the loss of work product will depend on the robustness of the response to the incident and the extent to which the insured's data has been backed up. Delays in notifying incidents to cyber insurers and triggering breach response services can increase losses to the insured.

We are also increasingly dealing with incidents where ransomware causes the insured to discover there has been a potential data breach, either as part of the same attack or caused by the same underlying vulnerability to its systems. This puts further pressure on the insured, as it must then consider notifying data subjects and regulators.

## What to look out for in 2018

Businesses will have increased obligations to safeguard data in the event of cyber attacks once the European General Data Protection Regulation (GDPR) comes into effect in the UK from 25 May 2018. GDPR is a comprehensive and fundamental overhaul of EU data protection law that introduces an accountability principle, whereby data controllers and processors will be responsible for complying with data protection principles.

To become GDPR-compliant, businesses will need to ensure that data controllers are aware of their new responsibility to report personal data breaches to the relevant supervisory authority within 72 hours and to inform data subjects for which the breach will pose a high risk.

Failure to comply with the new notification timescales could result in substantial regulatory fines of up to the higher of 2% of global turnover or €10m. Such a fine could potentially apply even if there had been no other breach of the requirements in the GDPR. Simply failing to notify within the prescribed time is itself a breach. Indeed, breaches of other parts of the GDPR could lead to even higher maximum fines.

The key challenge for those affected by data breaches will be to have information within 72 hours to assess whether a notification is needed and, if so, what it should contain. The time limit is extremely tight and, in practice, is likely to be a challenge for even the most efficient breach recovery plans. Breach response services, and the cyber insurance policies that fund them, are likely to be a vital source of assistance in meeting this challenge.



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# Asia

## Key developments in 2017

The soft insurance market across much of Asia has continued throughout 2017, although with a slight hardening on certain lines of business in specific jurisdictions. There has been growth in the purchase of products intended to respond to increasing transnational risks, particularly in the cyber and terrorism sectors.

Cyber security is also becoming increasingly topical. Hong Kong and Singapore in particular are widely recognised as “hot spots” for cyber related crimes. At the end of 2016, the Hong Kong Productivity Council reported a 23% rise in security incidents in Hong Kong. Similarly, the Cyber Security Agency of Singapore recently announced that the number of cybercrimes had nearly doubled between 2014 and 2016. Governments are now responding with new legislation to tackle the threat; 2017 saw the introduction of new cybersecurity laws in Singapore and China and guidelines from the Hong Kong Securities and Futures Commission (SFC) aimed at reducing cyber risks associated with internet securities trading.

The region experienced a number of natural catastrophes including typhoons in Vietnam and Japan, earthquakes in Indonesia and South Korea (and, more recently, Mount Agung, one of Indonesia’s many active volcanoes, erupted in Bali, leading to the temporary closure of surrounding airspace). In Hong Kong and Macau, the estimated cost to Hong Kong-based insurers of typhoons Hato and Pakhar is in the region of HK\$1bn in physical damage and business interruption losses. Although the region as a whole remains highly susceptible to natural catastrophes, comparatively low levels of insurance penetration (by global standards) mean that the losses to the global market from such events are often not as significant as might otherwise be the case.

A new Mediation Bill was passed in Singapore in January 2017. Under the new Act, a mediated settlement agreement can now be recorded as an order of court with the consent of all parties (making the settlement directly and immediately enforceable as an order) and parties may apply to the court for a stay of proceedings pending the outcome of mediation.

The Singapore Civil Law Act was amended on 1 March 2017 to allow for third party funding in arbitration and related proceedings in Singapore. Hong Kong is also seeing more high-profile cases involving litigation funding, mostly in a liquidation context. However, changes are also set to be made to litigation funding in arbitration. The proposed amendments to the Arbitration Ordinance and the Mediation Ordinance

will set out the standards and practices that third party funders have to follow, including financial and ethical standards. These changes bring Hong Kong and Singapore into line with a number of other major arbitration centres, such as London and Paris, by permitting third party arbitration funding.

The SFC in Hong Kong has been increasingly using its powers under the Securities and Futures Ordinance to seek redress in civil actions before the courts, often seen as being akin to a class action on behalf of harmed investors. The SFC has made it clear that it sees providing a means of collective redress as part of its remit (given Hong Kong does not have a class action system).

In the construction insurance sphere, there has been a marked increase in claims made by contractors under professional indemnity mitigation extensions under annual or project specific policies, because of the actual or perceived broader cover available. This regional trend, most evident in Hong Kong, mirrors a similar trend in Australia. The wide language in such provisions often allows insureds to claim “expenses necessarily and reasonably incurred” to mitigate a breach of professional duty that would otherwise result in a claim. Insureds are increasingly seeking to bring such claims where a project may have been designed poorly or priced incorrectly. Insurers, in certain circumstances, are therefore essentially being asked to fund a design that is better than the one the parties originally contracted for, subject to the “reasonable and necessary” requirement.

2017 also saw the independent Insurance Authority (IA) replace the Office of the Commissioner of Insurance as the Hong Kong insurance regulator and supervisory body. The IA’s aim is to ensure greater protection for policyholders, while at the same time encouraging the sustainable development of the sector. The introduction of the IA is part two of a three-stage regulatory reform process that, over the next two years, should also see the IA take direct control over insurance intermediaries from existing self-regulatory organisations. The introduction of a new regulator is a significant development for the Hong Kong insurance industry. More efficient and streamlined regulation should facilitate not only the development of the sector as a whole but also the growth and evolution of insurtech. It does, however, mean that insurers and brokers alike may need to consider their internal controls and policies in light of the changes.

The insurtech spotlight has intensified in 2017, with the introduction by the IA of a pilot (or “sandbox”) scheme allowing insurers to test new technologies and products in a controlled environment. Similarly, in September the IA announced a new agreement with the UK Financial Conduct Authority, whereby the two regulators will collaborate through information sharing and business referrals to support fintech innovation.

The IA and the Hong Kong Monetary Authority have reached a similar agreement with the Dubai Financial Services Authority.

The emergence of these types of agreements is becoming a trend across the region, with regulators in Singapore, Malaysia, the Philippines and Thailand (to name a few) seeking to collaborate with counterparts in other jurisdictions. This reflects the increasing importance of these technologies, which look set to transform the way financial and insurance industries operate in the coming years.

Reinsurers are still coming to grips with the Philippines Insurance Commission's Directive no. 2016/08 stating that claims control clauses violate section 249 of the Philippines Insurance Code (and are therefore not valid). More broadly, the Philippines has also seen significant growth in the micro-insurance and parametric insurance market, with regulatory changes in this sphere now widely anticipated.

The new class action regime is now in effect in Thailand, but only a handful of cases have been filed to date. Recent legislative changes are also likely to reduce the risk of criminal liabilities for directors. More broadly, restrictions on foreign shareholdings are gradually being relaxed. The Thai regulator has also reiterated its commitment to the relaxation of policy filing and approval requirements, which is likely to take place over the next couple of years. This will enable non-admitted insurers and reinsurers to work with Thai cedants using those (re)insurers' preferred market wordings.

Following recent legislative changes in Vietnam, compulsory retentions and limits on overseas reinsurance placements have now been amended. As a consequence, foreign (re)insurers operating in Vietnam face greater restrictions in transferring premium to associated companies through overseas reinsurance placements. The new Rules of Arbitration of the Vietnam International Arbitration Centre took effect on 1 March 2017, replacing the 2012 rules. The new rules are primarily focused on addressing cost-related issues and speeding up proceedings.

The new Malaysian Companies Act came into force on 1 January 2017. It aims (among other things) to simplify company incorporation and decision-making, and enhance corporate governance and responsibility. Notably, the Act has introduced tougher sanctions for breaches of directors' duties, with a new maximum fine of 3m Malaysian ringgit and a 10-year term of imprisonment. The Act has retained previous restrictions that prevent companies from indemnifying their directors in respect of negligence and breaches of duty, and it has introduced new restrictions on companies obtaining directors and officers (D&O) policies for their directors'

liability to third parties. This will undoubtedly have an impact on the already narrow market for D&O insurance in Malaysia.

Many carriers are seeing the Crop Agricultural Insurance Scheme in India as a new and lucrative line of business. However, there appear to be significant risks associated with inflated and fraudulent claims. To tackle these crop frauds, the government is introducing a new online insurance enrolment system.

Changes to the limitation regime in China were introduced through Article 188 of the General Provisions of Civil Law. As of 1 October 2017, the general limitation period for civil claims (relevant to subrogated recoveries) will be three years unless otherwise stipulated by law. This does not affect the limitation period for coverage disputes, which is still two or five years depending on the type of claim for which indemnity is sought under the relevant policy. In an attempt to clean up the industry, the China Insurance Regulatory Commission also launched a new set of rules in January 2017 as part of its efforts against overbearing shareholders, funding term mismatches and risky acquisitions.

### What to look out for in 2018

Now that the IA has gone live in Hong Kong, the effect of increased regulation will be felt across the industry and will potentially increase exposure for insurance agents and brokers (who are currently self-regulated). Insurtech also seems set to take off in a big way in Singapore, Hong Kong and across the region generally. In the Philippines, ongoing policies aimed at increasing capitalisation of insurance companies may lead to further consolidation, and the coming into force of the Philippines competition law (and a very proactive Competition Commission) will have an impact on insurance M&A transactions.

More broadly, trade credit, political risk and political violence insurers will be given plenty of food for thought by the risk of tensions escalating with North Korea, on-going disputes in the South China Sea; the continuing risk of a hard landing for the Chinese economy, upcoming elections in Malaysia and Indonesia, and delayed elections in Thailand.

If certain scientific predictions of an increase in the number of large earthquakes in 2018 come true, this could have devastating effects in a region so prone to natural catastrophes. In addition, new technologies coupled with the rising risk of data security hacks and implementation of cyber risk management by companies will fuel current growth in the provision of cyber insurance across Asia.



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# Latin America

## Key developments in 2017

The trend for implementing stricter and tighter rules on adjusting losses continued in many Latin American countries in 2017. This trend has an impact on handling complex losses.

Chile was the first country to impose a strict time frame for the adjustment of a claim. Some people believe the Chilean insurance market is one of the most advanced in the region. Nonetheless, Chilean insurance law imposes almost unworkable deadlines for the adjustment of complex claims. For example, insurers (and, arguably, their reinsurers) have only 10 days to challenge the conclusions of the adjuster's final report. This is a very short period if the placement is a pure fronting (requiring reinsurers to obtain a translation of the adjuster's conclusions before they can make any determination).

Peru approved a law in 2013 that imposed strict time limits, resulting in a drastic reduction of the adjusting process. Without establishing a channel of direct communication with cedants, it is very likely that reinsurers will fail to comply with some of those short deadlines.

Ecuador is one of the most challenging jurisdictions for (re)insurers in Latin America in terms of handling contentious claims. (Re)insurers' failure to comply with the strict deadlines set by Ecuadorian insurance law may result in economic penalties or revocation of their licence to trade.

## What to look out for in 2018

The time frames introduced by Chile, Peru and Ecuador will continue to present huge legal and practical challenges in 2018 to all parties involved in adjusting major losses, such as contractors all risk, delay in start-up and financial institutions' claims. As far as we are aware, they are yet to be challenged in court.

In our opinion, this trend in imposing difficult deadlines is evidence that there remains a significant misunderstanding between the London and the Latin American markets. Reinsurance is a complex business that involves several parties at several levels: insureds, reinsurers (leaders and followers), local brokers, cedants, reinsurance brokers, adjusters, forensic accountants and lawyers. To suggest that a determination is possible in complex cases within some of the time limits set by local laws shows a lack of understanding of how international reinsurance works.

Claims protocols are of great help to deal with short deadlines imposed by Latin American jurisdictions. We will continue in 2018 to advise clients of the benefits of their implementation. Claims protocols provide certainty to the insured and the insurer (and reinsurers) as regards what documents the insured needs to provide to the adjuster (or the insurer) following the occurrence of a loss. As such, we may say that a deadline is not triggered if there are still some documents that need to be submitted.

In addition to the recommendation above and according to our experience over the years, there is nothing better than teamwork – including claims handlers, adjusters and lawyers – to beat the short deadlines to adjust complex losses, and this is not limited to Latin America. It is therefore crucial, now more than ever, to choose the correct expert, and ideally adjusters and lawyers who understand the benefits of working together as a team.



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## US

### Key developments in 2017

Parts of California were devastated in 2017 by some of the largest wildfires ever recorded in the state.

Wildfires in northern California in October caused \$9.4bn in insurance claims, according to the state insurance commissioner. And when losses from wildfires in southern California are added in, total insured losses from natural disasters in 2017 could reach a record high.

This has led to a variety of first- and third party claims stemming from vast property losses and personal injury.

### What to look out for in 2018

With claims for losses caused by the wildfires set to continue in 2018, insurers will need to be aware of the following practical considerations when handling California wildfire claims.

Wildfire claims can touch on any of: first-party coverage issues; subrogation; and other third party claims for everything ranging from personal injury to wrongful death, property damage, product liability, statutory claims, allegations of constitutional takings, and professional negligence claims against brokers and agents regarding the policies they procured.

Such claims also implicate governmental rights to seek reimbursement for public funds spent on responding to wildfires. Both the state and federal governments have the right to seek recovery of fire-related costs. The California Health and Safety Code allows the state government to seek recovery for the costs of fire suppression and investigation, as well as administrative expenses, associated with any fire caused by negligence or a violation of law. Likewise, the federal government is permitted to seek reimbursement under these statutes and/or under the common law for claims against private parties.

With regard to coverage issues, fire insurance policies in California are governed by the Insurance Code. Insurers must use a standard form for such policies, which provides coverage for, among other things, all loss caused by fire or lightning. These and other statutory requirements bind insurers, even if the policy provides otherwise.

Insurance policies must be interpreted broadly to afford the insured the greatest possible protection, while a policy's exclusions must be interpreted narrowly against the insurer. All policy exclusions must be conspicuous, plain and clear.

Issues of causation for fire-related claims are governed by the efficient proximate cause doctrine. The doctrine provides that, when there were contributing, non-covered causes for a fire-related loss, insurers must cover the entire claim if a covered loss was a proximate, rather than a remote, cause.

Finally, the amount of indemnity owed under the policy depends on whether it is a valued policy (in which the value of the subject matter of the policy is agreed on ahead of time) or an open policy (in which no value is set). Under a valued policy, the insurer owes the amount necessary to repair or replace the structure or items up to the set amount. Under an open policy, the insurer owes the fair market value or limit of insurance for a total loss (whichever is less), or the cost of repair for a partial loss.

Third-party claims can include personal injury and wrongful death allegations, and attendant non-economic damages claims that are not capped by any law in California. These cases require the strategic evaluation of jury pools, the scope and prognosis of bodily injuries, and other issues impacting the client's possible exposure on these potentially sweeping claims.

Third-party claims can also include allegations of professional negligence against insurance brokers and agents, asserting that proper coverage was not obtained. Unlike first-party claims against carriers, these claims benefit from a more defence-friendly general rule that "an insurance agent does not have a duty to volunteer to an insured that the latter should procure additional or different insurance coverage." Such claims also benefit from a shorter and stricter statute of limitations than those applicable to first-party claims.

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