

# The Impact of **Macroeconomic Trends** on London Market Claims

**WHITE PAPER:**  
Professional Indemnity Claims

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# I INTRODUCTION

IN THIS WHITE PAPER WE SHARE BLM'S PREDICTIONS ON HOW THE CURRENT MACROECONOMIC CLIMATE MAY INFLUENCE CLAIM TRENDS AGAINST PROFESSIONALS IN FOUR KEY SECTORS: CONSTRUCTION, PROPERTY, LEGAL AND FINANCIAL SERVICES. WE ALSO CONSIDER THE POTENTIAL IMPACT ON CLAIMS AGAINST DIRECTORS AND OFFICERS.

Professional negligence claims are, in general, counter-cyclical to the economy. A healthy economy is to a large extent a reservoir for claims that may only materialise if and when there are tougher times ahead. However, some categories of professional negligence claims are more in tune with the economy. Relevant claims statistics are hard to come by and can be unhelpful if not misleading without keeping this distinction in mind. Make of it what you will, but the intriguing graph below broadly shows how professional negligence claims relate to the rise and fall of the property market. Anyone who can accurately predict the future path of either of these two lines would have knowledge of almost limitless value.

[see footnote 1]

However, not all professional negligence claims trends are attributable, or at least directly attributable, to the economy. Economic considerations may have little or no connection to the substantive causes of claims or the trigger for claims being brought. Such considerations may only have indirect relevance, such as where legal developments or regulatory reforms are introduced - at least in part - in reaction to the economic circumstances or claims arising as a result of them. Our aim is to focus on claims trends where the link is strongest, but it would be overambitious for us to attempt a paper that in any sense claims to be exhaustive.



[Footnote 1:

The claims data is for the Royal Courts of Justice in London, consisting of professional negligence claims in the Chancery Division and other negligence claims including professional negligence for the Queen's Bench Division. The annual change data is the percentage change in average house price over the previous 12 months as at March each year based on national statistics sourced from Nationwide Building Society.]

## 2 FINANCIAL

FAILURES IN THE FINANCIAL SECTOR ARE RECOGNISED AS THE ROOT CAUSE OF THE CREDIT BUBBLE IN THE US AND EUROPE WHICH LED TO THE FINANCIAL CRISIS IN 2008 AND THE SUBSEQUENT RECESSION.

IN A POST-CRISIS WORLD, PUBLIC CONFIDENCE IN THE FINANCIAL SECTOR, AND IN THE BEHAVIOUR OF THOSE WITHIN THAT SECTOR, REMAINS VERY LOW.

While the UK's recovery is currently stable, there are a number of emerging risks. Although many of these risks are being mitigated by the sector's regulators - for example, increased underwriting standards have made mortgage lending less risky - there are many risks outside the control of the regulators which are likely to have an impact in the coming years.

### **Contraction within the sector**

The financial services sector shed 9% of its workforce over the 18 month period between September 2008 and March 2010, and has yet to recover to pre-crisis levels. Financial services employed 6% fewer people in March 2015 compared to September 2008. Automation has also exacerbated the negative impact on employment numbers of finance professionals, especially in the post-crisis period, as many financial services firms have sought to reduce costs by moving to index tracking and automated trading. An ongoing contraction within the sector may lead to fewer claims being made; however, as the sector contracts, and increasingly turns to automated solutions, new risks will arise.

### **Mis-selling, misbehaviour and mistrust**

From PPI and interest rate swaps to LIBOR rigging and FOREX manipulations, the last two decades have seen a succession of mis-selling and misbehaviour within the financial sector; which has led to fines, redress schemes imposed by the regulator and extensive litigation. The costs to the sector of such scandals have run into several billion pounds to date and this shows no sign of abating. For example, Santander announced on 29 October 2015 that it has set aside £43m to cover claims relating to the sale of wealth and investment products after the bank was fined by the regulator for advice failings.

Failings in the sector, both institutionally and on the part of individuals, are generally accepted as having been the main culprit behind the global economic crisis; and investors and the public at large remain extremely cynical of the sector. There will be a continuing focus by regulators on the protection of retail customers and small businesses, and continuing scrutiny on new products and propositions within the sector. Further, 'claims farmers' have become increasingly interested in the profits to be made in harnessing claims for mis-selling; we are likely to continue to see an increase in the interest of claims management companies and claimant firms in this sector.

In many cases, there is a growing dissatisfaction from businesses and individuals regarding the process put in place to correct the mistake that have been made; for example, where it comes to swap mis-selling, the process followed by the banks in assessing redress is coming under increased scrutiny from parliament and there are a number of ongoing judicial reviews regarding the process, which may lead to a 'second wave' of claims.

The mistrust in the financial services sector which arose from the financial crisis has led to many investors moving their investments away from complex financial products into more tangible assets - such as art and fine wine - we may therefore see an increase in the number of claims against valuers and auctioneers in those areas.

### **The 'advice gap'**

Intended in part to restore trust and transparency within the financial services sector, the FCA's Retail Distribution Review (RDR), was one of the biggest overhauls of financial regulation since the Financial Services Act in 1986. RDR introduced extensive regulatory changes aimed at improving standards of financial advice, and to ensure that the interests of advisers and clients were aligned. The introduction of RDR meant in particular that product providers are no longer able to pay commission, and advisers must be remunerated by fees.

For many clients, this is the first time they have ever had to pay a fee directly for advice, and this, combined with distrust in the sector arising from the economic crisis, has meant that many clients are reluctant to pay to access advice. An unintended consequence of RDR, therefore, is the growing 'advice gap', where clients are unwilling (or unable) to pay for advice. The priority of the current Financial Advice Market Review (FAMR) is the 'affordable advice gap'. As the advice gap is closed, the sector is likely to grow; and new entrants to the market inevitably mean new risks, and more claims.

### **A long-stop at last**

The Financial Ombudsman Service has acknowledged that there is a problem in particular where it comes to individuals accessing advice regarding their pension funds, particularly where those funds are small and where advisers have concerns about potential long-tail liability, and the ability to obtain insurance cover for that liability. Advisers cannot be compelled to provide advice; there therefore may be some form of 'trade-off' between the sector and its regulators in order to close the advice gap. A consultation on introducing a long-stop was introduced as part of FAMR, and it has been mooted that the regulator may be willing to introduce a long-stop on

complaints against financial advisers under the DISP rules. While this is welcome news for the sector, it may lead to a temporary spike in complaints from claimants, as claims management companies actively target consumers ahead of new deadlines.

### **Advice in the digital age**

One suggested solution to bridge the 'advice gap' is the introduction of automation within the sector, commonly referred to as 'robo-advice'. Robo-advice involves the construction of complex algorithms which enable advice to be provided to customers using an automated process – for example, by proposing model portfolios based on a client's risk profile. A number of product providers are currently developing robo-advice propositions, and this trend will grow. These propositions are cheaper to operate, and may well help to close the 'advice gap' for the mass market. Where 'robo-advice' results in personal recommendations, this remains regulated financial advice, and financial institutions and advisers remain liable for that advice.

As part of FAMR, discussions are underway regarding the possibility of a so called 'safe-harbour' for advice, where, for specific areas of advice, or following specific process, banks and advisers will find their liabilities limited. Our view is that the introduction of a form of 'safe-harbour' is unlikely; if it is introduced, we expect litigation to result as the limits of those 'safe-harbours' are tested. As the process of advice becomes increasingly digitized, we also anticipate that the sector will be increasingly targeted by hacker's intent on data theft. As the trend for automation continues and propositions increase, we expect that litigation will arise as parties test the boundaries of advice in the digital age.

### **The pensions revolution**

One of the most significant developments within the sector in decades was the Chancellor's announcement in March 2014 of an unprecedented package of pension reforms. Those reforms went 'live' in April 2015; to date, over £2.5bn has already been withdrawn as a result of the new pension freedoms. As the population of the UK ages and pensioners become more engaged with the investment and performance of their pension funds, we expect to see a significant increase in claims arising from pension advice, whether that is an inability to access advice, or claims arising from mis-selling of annuities and other pension products.

The signs of this are starting to appear, for example, the continuing scrutiny of annuities, or the recent announcement that the Financial Ombudsman Service has seen a 33% surge in claims concerning Self-Invested Personal Pensions. We also expect to see an increase in pension liberation-type scams and financial crime in this area, and ensuing litigation and recovery actions as a result.

### **An increase in interest rates**

The Bank of England's base rate has been 0.5% since 2009, the lowest ever in nominal terms. This has led to a lower savings rate: although the savings rate initially increased to 11.6% in the early stages of the financial crisis, it is currently at its lowest level since records began in 1997. As the price of housing has increased, disposable income growth has not increased to the same extent, and the savings rate of many UK households is as low as 5%. Savings act as a buffer for unexpected shocks, such as increased interest rates - something which is expected in the next 18 months.

With savings rate at a record low, if interest rates rise the fragility of many households' living situation will be revealed, particularly where it comes to mortgage repayments. Those paying down debt will face larger repayments, with potential repercussions for mortgage providers and advisers. The Bank of England has, in a post-crisis environment, taken on a more regulatory role, and has selectively targeted areas that threaten financial stability such as increased household debt due to mortgage lending, by introducing the Mortgage Market Review (MMR).

However, a rise in interest rates may coincide with large numbers of interest-only mortgages coming to the end of their 20-year or 25-year term. While many banks - such as RBS - have already been fined and gone through review processes, if interest rates rise over the next 18 months we expect claims arising from pre-MMR mortgage miss-selling to increase as a result.



### 3 CONSTRUCTION

GIVEN THE COMPLEXITY OF MANY BUILDING PROJECTS, THERE HAS ALWAYS BEEN, AND ALWAYS WILL BE, IN AN ADVERSARIAL CONTRACT ENVIRONMENT, CLAIMS AGAINST CONSTRUCTION PROFESSIONALS FOR ALLEGED LATE AND INCORRECT DESIGN, AND FOR ALLEGED BREACHES OF CONTRACT ADMINISTRATION OR PROJECT MANAGEMENT DUTIES. AS THE CATEGORIES OF CONSTRUCTION PROFESSIONALS BROADEN, FOR EXAMPLE TO LATENT DEFECT TECHNICAL AUDITORS, SO DO THE CLAIMS AGAINST THEM. WHEREAS THIS WILL CONTINUE, THERE IS NO DOUBT THAT THE ECONOMIC CRISIS DIRECTLY IMPACTED CLAIMS AGAINST CONSTRUCTION PROFESSIONALS.

Output in the construction industry fell faster than the whole of the rest of the economy in 2008. This continued in 2009, with broadly flat growth in 2010 and 2011. There was a further contraction in 2010, with a partial recovery commencing in 2013, which continues today. Construction professionals were affected in line with all parts of the industry, with their fees significantly reduced.

Anecdotally, some worked at a loss to keep work coming in. The significant reduction in fees affected the quality of the service offered in some instances, as 'corners were cut' to save cost and where less experienced staff were used as firms had to reduce numbers to survive. Fee rates have now picked up - and consequently the ability to take on new staff - but many construction professionals report that they are still not back to pre-crisis levels, so the risk of underservicing and/or poor servicing remains. Local authority appointments which have adopted key performance indicators are particularly susceptible to allegations of a failure to meet required service levels.

Late payment, although a perennial issue, was worse during the crisis. This resulted in claims as fee recovery claims were inevitably met with defensive allegations of negligence. Both the EU (with the Late Payment Directive) and parliament (through a variety of initiatives) are seeking to tackle late payment and have 30 day payment periods as the norm, but late payment and the resultant defensive allegations of negligence remain a major driver of claims. Despite the partial recovery, it is reported that actual payment times have not returned even to their pre-crisis levels.

Another direct consequence of the crisis was that many existing projects were put on hold and new projects could not secure funding. Consequently a large number of construction professionals looked abroad for work, leaving a skills shortage in the UK market. The skills shortage in engineering remains particularly acute despite the success of major local infrastructure projects. Many of the firms that looked to foreign markets during the crisis have been involved in disputes over late payment, with defensive allegations of negligence. While international arbitration remains the preferred form of dispute resolution, dispute boards are becoming increasingly popular.

Latent demand for property released during the crisis (when house prices fell dramatically), the holding of the Bank of England's base rate at 0.5% since 2009 and the launch of the 'Help to Buy' mortgage subsidy scheme, has contributed to pent-up demand in the housing shortage in the UK. In terms of publicly-funded housing, local authorities only build about 2,000 dwellings per year in England now, whereas the figure was 130,000 per year in the 1970s.

Debt accrued by local authorities adds to the debt figures of central government, so new building is largely left to private developers. This has led to an increase in the number of speculative developments at the lower end of the market and for first time buyers, where developers are seeking to maximise their profit from relatively small margins. This has led to an increase in claims against construction professionals where poor quality work has resulted in claims against the developers, who have sought contribution from the contractors and professional teams.



As the developments are subject to the Defective Premises Act 1972, providing the work is so bad that the flats are not fit for habitation, every person who acquires an interest in the flat as a dwelling has a right of action, even if a collateral warranty was not executed in their favour.

Long-term trends also remain factors in claims against construction professionals. The construction market leading into the crisis was characterised by a number of key features.

Firstly, the economy was growing strongly (averaging quarterly growth rates of 1%-2% between Q1 2000 and Q1 2008).

The Private Finance Initiative (PFI) was being used to procure a significant number of complex public projects like schools and hospitals. Private consortia agreed to use private sector funding to build, operate and maintain public projects or services over the lifetime of a contract - typically 23-30 years - in exchange for payment.

However, private funding dried up during the crisis and central government had to provide bridging finance in many instances. Data released by HM Treasury in 2012 showed that 719 then current PFI projects with a capital value of £54.7 billion had a total repayment cost of £301 billion over the lifetime of the projects. Consequently, the PFI model was changed to PF2 in 2013 to seek to deliver better long-term value for money and there has been an increase in claims against the parties involved - including construction professionals - in an attempt to claw back cost overruns.

Procuring the main contractor to design and build (rather than just build) projects has been increasing since the mid-1990s. However, design and build contractors frequently seek to pass on their design and related liabilities to consultants back to back or in some form of increased liability for construction professionals, irrespective of whether the consultant's PI insurance will provide cover.

New types of claims have emerged as a result. This trend has been exacerbated by consultants often being novated to the contractor after preparing the Employer's Requirements, but treating the consultant contractually as though they had been employed by the contractor from inception.

The advent of alternative energies (eg. wind farms), together with the increase in design and build, has led to an increase in claims arising from the juxtaposition of apparently absolute obligations and reasonable skill and care obligations in appointments, potentially affecting exclusions for fitness for purpose, etc.

Central Government has mandated the use of Level 2 building information modelling (BIM) on its projects by 2016. The aim is to reduce the capital cost and carbon burden from the construction and operation of the built environment by 20%. While it is expected that there are no PI insurance barriers to the adoption of BIM Level 2, it is anticipated that the novelty of working in a BIM Level 2 environment will result in an increase in claims, at least initially. BIM Level 3 will be likely to give rise to new contractual, intellectual property and other legal challenges which are likely to result in construction professionals being at a greater risk of claims. It remains to be seen how PI insurance will respond to BIM Level 3.

From 1998, the advent of the statutory adjudication of 'construction contract' disputes to provide a provisionally binding decision within 28-42 days has impacted how claims against construction professionals are pursued. Although parties cannot opt out of a referral to adjudication, insurers were initially - and quite rightly - reluctant for disputes to be adjudicated due to the tight timescales and the fact that (subject to jurisdictional and natural justice challenges, which are robustly dealt with by the courts) an adjudicator's decision is binding regardless whether the decision is correct as a matter of law.



The harm done by a bad decision is compounded by there being no right of appeal, with only a right to seek a final determination by litigation or arbitration. Early in the process even some judges expressed the view that professional negligence disputes are unsuitable for determination by adjudication, but the process has matured and professional negligence disputes are regularly decided by adjudication. The number is likely to increase and, fortunately, the quality of adjudicators' decisions has improved.

The extension in 2011 of the right to adjudicate oral and partly-written construction contracts has increased the scope of disputes that may be referred to adjudication, although the exclusion of contracts with a residential occupier remains. The Technology and Construction Court (TCC) has noted that there was a significant reduction initially in the number of claims being litigated as a consequence of the success of adjudication. Nevertheless, the annual reports for the TCC High Court in London show the number of professional negligence actions increasing from 11 in 2005/06, to 23 in 2013/14.

One of the procurement methods, Integrated Project Insurance (IPI), currently being trialled by central government, may impact positively by reducing claims, if it proves a success. IPI uses a collaborative multiparty alliancing contract, in which the alliance members - who include the consultants and contractor from the outset and their supply chains - waive the right to claim against each other except for a limited number of claims, the most notable being wilful default.

It can be seen therefore that although the economy has had and will continue to have a significant impact on claims against construction professionals, there are other long terms factors which will influence the future of such claims.



## 4 PROPERTY

### ANOTHER PROPERTY BOOM?

Property prices, especially in London and the South East, have continued to increase. Property remains an attractive investment. However, two possible factors could bring this crashing down again:

#### i) If supply starts to meet the demand

The government has promised to build hundreds of thousands of new properties. This could halt the rapid increase in property prices, which would mean more people could afford to purchase, which in turn will bring down rental prices.

#### ii) An increase in interest rates

While it is predicted this may still be a few months away, it would make mortgage payments more expensive. Coupled with a slowdown in the increase in property prices and rental incomes it could once again lead to a property crash and lenders looking more closely at the transactions and the legal advice provided.

#### Planning

There is a very well documented and publicised shortage of housing. At present there is less than four years' supply. This is driven by a number of factors, such as an increase in population, a relatively stable economy in the UK compared with the rest of Europe, restrictive planning law and a lack of labour force. The current vagaries of the planning system make it very difficult to see how this shortage is to be dealt with in the absence of significant changes to the planning rules.

However, this has to change if we are to keep up with population growth - which itself is driven by a number of factors including an ageing population, and increased immigration. This means that planning changes in respect of developable land both have recently been and are bound to be announced in the near future, for example, a raft of changes will be introduced by the Housing and Planning Act Bill 2015.

One of the consequences of this could be a rise in claims against surveyors whose job it is specifically to advise in relation to planning, prior to the purchase of land. Surveyors will need to be aware of both current and future changes coming into effect. We saw a huge number of claims in the previous development 'boom' driven by surveyors' lack of awareness of changes who therefore failed to advise purchasers/developers of changes coming into effect.

Alternatively, sellers' agents face the risk that they fail to advise sellers of the effect on value of land driven by the changes and therefore the, a) timing of sale and b) category of purchaser who will pay the most for land.

This will also have an effect on the valuation of land, e.g. undervaluing land in circumstances where the valuer is unaware of the planning changes coming into effect.

Relaxed planning laws in order to deal with the housing crisis, for example - in terms of extending own property - extensions or additional floors for private letting, could result in a spate of claims against party wall surveyors. These are likely to be, for example, for failure to meet deadlines, failure to properly prepare a schedule of condition, failure to properly arrange money held in escrow.

#### Drafting

The NHS and a number of other public bodies including local authorities are holding huge developable land banks. There are a number of possibilities that could occur as a result of the release of this land for development and the number of structures available to these bodies for maximising value. One of these could be the straight

sale of the land, in which case valuers are inevitably exposed. In addition, there is also the possibility that these owners may choose more complex sale structures, including option agreements. Solicitors drafting these agreements may well be exposed to potential drafting claims.

Additionally, changes in consumer behaviour have resulted in a huge rise in pop-up tenancy arrangements. These are extremely flexible arrangements for landlords, for example, in land which is being developed and would otherwise not achieve income. However, again, this is new and unfamiliar territory for solicitors and therefore errors are likely to occur in drafting.

#### **Surveyors/Valuers**

Interest rates will rise as the economy recovers. Household savings are at a very low rate. According to the Office for National Statistics, household debt has increased and savings are at the lowest rate since records began. It is therefore extremely unlikely that homeowners on interest-only mortgages have been putting away the amount saved on reduced mortgage payments since rates plummeted in 2009. This means that high levels of default are likely should the interest rate rise, and those homeowners are unlikely to be worth pursuing following repossession in circumstances where there is a shortfall. Banks then only have worthwhile recourse to valuers (and possibly solicitors) to make a recovery.

Despite the fact that the Royal Institute of Chartered Surveyors' Guidance has tightened recently and as a result of the recent spate of post-2007 claims, successful claims usually only arise in situations where valuers do not follow the guidelines. Claims will arise as a result and, irrespective of their success, they are expensive to defend.

#### **Buy-to-let**

Buy-to-let transactions have risen by 40% since 2008, prompting the Bank of England to issue a warning statement. In terms of professional indemnity, managing agents - who remain unregulated - will see a rise in issues such as personal injury in tenanted property, tenant referencing claims and management claims, amongst others.

#### **Right to buy**

There has been a huge renewed emphasis on right to buy, promoted by the current government (and reinforced in the Autumn Spending Review), which is likely to prompt an increase in the number of mis-selling or negligence claims against solicitors and brokers, for failing properly to explain mortgage conditions or interest rates, repayments or onerous terms. There are currently two right to buy 'mis-selling' claims test cases: *Goldsmith v Williams* and *Mathew v Mathew*. Depending on the outcome of these cases, a spate of claims may follow.

#### **Leasehold enfranchisement**

According to firms who undertake transactional property work, leasehold enfranchisement remains a very busy area of the market. This is perhaps a result of lending being at a low ebb, with an increased likelihood of achieving mortgage to buy freehold title when long leasehold is owned. Deadlines are both tight and strict in terms of the process for enfranchisement, with claims relatively easy to bring for solicitors acting either for the leaseholder or the freeholder, as breach is easy to determine.

#### **Compulsory purchase**

The HS2 project is likely to result in huge swathes of compulsory purchase orders, giving rise to a fairly complex legal debate about the value of land. In circumstances where value is not determined by a tribunal, there is potential for claims against surveyors, in circumstances where they fail to advise those subject to compulsory purchase orders as to the full value of their property.

## 5 LEGAL

IT IS GENERALLY ACCEPTED THAT THE CREDIT BUBBLE LED TO THE FINANCIAL CRISIS IN 2007/08 AND THE SUBSEQUENT GREAT RECESSION. WHILST THE UK'S RECOVERY IS CURRENTLY STABLE, THERE ARE A NUMBER OF RISKS THAT REMAIN TO THE LEGAL SECTOR.

Claims from lending institutions (which in 2007 and 2008 were the vast majority of claims) have fallen away. This is due to a mixture of better underwriting practices, a rise in property prices and low interest rates. In the event of another property crash caused either by an increase in supply or an increase in interest rates, lenders could once again look at the advice received from their legal advisers in the same way as they will scrutinise the advice by their valuers.

In addition to this threat, we anticipate claims arising in the following areas:

### ***An increase in demand for legal services***

As the UK economy grows, demand for legal services – particularly in the corporate and commercial sector – will increase. During the recent downturn, recruitment in many firms (particularly at trainee and NQ levels) slowed; and many firms may face skills shortages as they attempt to expand to meet demand. Whilst our view is that claims in the sector are likely to stagnate or even fall as a whole, increased activity in the corporate and commercial sector could lead to an upswing in claims in this area; and those claims that are made are likely to be for significant sums.

In the consumer market, increased demand for legal services is coupled with a public that is more aware of its consumer rights and is therefore more prepared to bring claims against their legal advisers. This has led to an increase in complaints and civil claims across the board from consumers. Further, the types of services demanded by clients are changing: law is a global business, and in an international economy clients are increasingly seeking legal services providers who can deal with multi-jurisdictional work across geographical boundaries. The increasing globalisation of the sector will present further challenges; for example, legal services providers may become more susceptible to risks of money laundering.

### ***A rapidly changing and consolidating marketplace***

The legal services sector is a rapidly changing and consolidating market. Over recent years there has been an increasing amount of commoditisation in the sector – both as a result of the economic pressures exerted by the downturn and as a result of regulatory changes to the sector, such as the introduction of alternative business structures and multi-disciplinary partnerships.

In tandem with the increased use of a variety of business structures, we are seeing changes to business models, and a move away from the traditional 'hourly rate' to fixed and capped fees. From reforms to legal education and training, to increases in new methods of working; from the use of new technology to the outsourcing of key functions and the creation of 'outpost' offices by major firms, the rapid pace of reform within the sector is likely to result in claims as new systems and processes are tested to their limit.



### ***Reform to the Legal Sector***

The sector has also been subject to political and regulatory changes, such as reforms to criminal legal aid. Whilst historically this has not been a prevalent area for claims against solicitors, as pressure on fees increase we anticipate an upswing in claims in this area. Following the Jackson reforms pursuing personal injury claims has become less attractive financially for claimant solicitors; and those firms that continue to deal with personal injury claims are doing so at reduced rates. This has led to work being assigned to inexperienced and junior staff – which will lead to mistakes, and to claims. This is even more acute when coupled with the court's less sympathetic approach to adherence to the court rules. We have identified two areas in particular:

### ***Under settled personal injury claims***

Following the Jackson reforms pursuing personal injury claims has become less attractive financially for claimant solicitors. A number of claimant law firms are turning their attention to pursuing solicitors who had previously dealt with such claims to allege that the personal injury claims were under settled.

### ***Under settled matrimonial claims***

We have seen an increase in claims of this nature. Typically, it is alleged that the solicitor failed to advise a wife about her rights regarding her husband's pension and to obtain a pension sharing order to provide an income in the future. Breach of duty and causation is often tricky. Whilst the quantum tends to be relatively low, the volume and claimant costs can still lead to sizeable outlay for insurers.



## 6 DIRECTORS & OFFICERS

### *2015/16 may see a hardening market for D&O?*

As the economic recovery continues and capital is reinvested to find better returns, there may well be a reduction in Market capacity which will bring a hardening to the market. The outlook is for an increasingly regulated business environment, with an increase in enforcement activity, has driven an increased demand for cover. However, this has not translated into a hardening of rates to date, and overcapacity and broad provisions of cover have been a part of underwriters' day to day reality.

### *Increased possibility of UK class actions?*

There appears to be a gradual changing of consciousness when it comes to class actions - it will be easier to bring collective actions in the UK not only by inclination but also by ability. The Consumer Rights Act 2015 provides the legislative framework in the UK for claimants to bring class actions for the first time. Whilst these actions are restricted to competition breaches they may be indicative of wider changes to the UK litigation landscape which may have significant implications for D&O market in the UK. The Volkswagen emissions scandal for example is likely to be the first possible class action as a result of the new legislation. At the same time, the potential areas of liability and the claims could equally be used as a marketing tool by insurers to encourage an even greater uptake of D&O insurance.

### *Regulation, Regulation, Regulation*

The FCA continues to be a leaner, meaner and more streamlined version of its predecessor the FSA. UK authorities are actively encouraging a culture of self-reporting and whistleblowing. New FCA rules are likely to take effect late in September 2016 and encourage employees of deposit-taking firms with assets of more than £250m (for example banks and building societies) to alert authorities when they detect poor practice and conduct.

Increases in regulatory claims following formal or official investigation are likely to follow suit. Insurers and insureds may wish to revisit wordings to ensure the correct scope of cover is provided. Any settlement with a regulator or an admission of misconduct in a whistleblower report may trigger exclusions under a D&O policy dependent on the facts and specific policy wording.

The introduction of Deferred Prosecution Agreements (DPAs) will increase the risk of claims against directors and officers in the UK. DPA's may be entered into by the entity concerned which encourages Regulators to bring individual prosecutions with additional evidence. The Serious Fraud Office (SFO) has already begun inviting firms to take the opportunity to enter into DPA negotiations and assuming the SFO has adequate resources to pursue cases is likely to see an increase in notifications to D&O policies as individuals become the target for corporate errors.

The new EC Data Protection Regulation is scheduled to come into effect sometime next year and potentially provides a new arena for Directors and Officers to be scrutinised by both shareholders and regulators alike.

## 7 CONCLUSION

WHILE THERE IS NO DOUBT THAT THERE HAS BEEN A DIRECT CORRELATION BETWEEN THE ECONOMIC CRISIS AND THE LEVELS OF CLAIMS ACTIVITY AGAINST PROFESSIONALS, THE FACT THAT THE MACROECONOMIC CLIMATE HAS IMPROVED DOES NOT NECESSARILY MEAN THAT THE NUMBER OF CLAIMS MADE AGAINST PROFESSIONALS WILL FALL IN THE SHORT TO MEDIUM TERM.

While we expect to see a fall in the numbers of claims in certain areas, we also expect to see new types of claims emerging both as a result of a rapidly changing global marketplace with an increased dependence on information technology and as a result of regulation and investment put in place by the government to counter the effects of the economic crisis.

As a key influencer, the insurance industry has the opportunity not only to react to claims trends as they emerge but to shape the future of those trends, whether that is by co-ordinating industry response to consultations or by targeting particular claims in order to influence the legal landscape in readiness for the next wave of claims.





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