

# The Pelican Brief



Risk insights and intelligence

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## 2016 claim trends for solicitors



### Background

In our latest briefing, we asked the claims team at DAC Beachcroft to look at the most common types of problems faced by solicitors and provide tips on risk management to help avoid claims.

Litigated claims have reduced since the increase in Court fees over a year ago. Insurers also report a decrease in the incidence of claims but report that the severity of claims has worsened. Parties are willing, however, to resolve matters using

the Pre-Action Protocols in order to avoid issuing proceedings.

We continue to see the traditional types of claims involving property, missed limitation and Wills and Probate. There are a number of new types of claims materialising however, including cyber claims, under settlement of personal injury claims and an increase in regulatory investigations. This article explores the most common type of claims.

## Cyber

### Hacking Scams

Friday afternoon scams and client email hacking fraud are said to have cost £85m over the last 18 months. All firms are at risk. The amounts that can be lost in a single attack make it impossible for law firm partners to replenish the client account. Falling victim to such scams could be catastrophic for solicitors' business.

These frauds often occur in the context of property transactions. The hacker sends an email to the client purporting to be from the solicitor or to the solicitor purporting to be the client. The email informs the client that the firm's client account has changed and provides new bogus bank details or the client's bank account has changed. Unwittingly, the client or the solicitor transfers their deposit or proceeds of sale to the bogus account operated by the hacker.

Similarly, in the so called Friday afternoon scam, a fraudster rings a firm pretending to be from the firm's bank. They manage to convince the firm's employee to disclose account information and authorisation codes. This provides them with access to the client account and the ability to transfer money to their own accounts.

### Data Breaches

The massive data breach suffered by Mossack Fonseca grabbed headlines around the world and demonstrated the informational risk that solicitors' firms carry not only for their clients, but their clients' clients.

For many years cyber security commentators have warned that professional services firms, including solicitors, are high risk targets as they act as "aggregators" of sensitive information.

The Panamanian breach and other high profile data breaches in the UK have served to highlight how unacceptable it is for companies not to have a clear understanding of what data they hold, what they are doing with it, and how it is secured. This risk can only be mitigated and is impossible to eliminate completely. Therefore, solicitor firms, as with other companies, should prepare and rehearse their response to cyber and data breach incidents and should consider purchasing cyber insurance to assist them in funding the costs of investigation should the unthinkable occur.

### Cyber Top Tips

- It is important that firms know what to do if they fall victim to a scam and prepare a response plan in the event their system is attacked.
- It is important for solicitors or staff to stop communicating with the hacker or scammer. The bank must be informed by telephoning from a mobile telephone or a different landline. The firm's professional indemnity Insurer needs to be informed along with the Police's National Fraud and Cyber Crime Reporting Centre and the SRA.
- Ensure there is appropriate vetting of employees with access to confidential data and restrict those employees/officials who can access the entire internal system.
- Require employees to change passwords frequently.
- Ensure IT is properly managed and overseen by senior IT members responsible for an efficient and modern system.



# 2016 claim trends for solicitors

## Regulatory

We continue to see an increase in regulatory investigations and SDT proceedings against solicitors. This is because of the self-reporting obligations to which law firms are subject.

One of the hot topics for the SRA investigators is SAR 14.5 which provides that solicitors should not allow their client accounts to be used as a bank account by their clients.

This sounds clear enough, however, solicitors can inadvertently find themselves in breach of this rule. The key part of the rule is that money coming into and out of client account must relate to an underlying legal transaction or to some service that the firm is performing. That service must be part of the firm's normal regulated activities. So, for example, if a transaction becomes abortive and the solicitor receives legitimate funds into his client account from the purchaser, representing the consideration for a purchase that never goes ahead, the rules state that all of those monies should go back to the purchaser. If that purchaser instructs the solicitor to disburse the purchase monies to third parties then the solicitor must refuse to do so. Money that comes into client account must go back to the same entity which deposited the money no matter how good a reason not to is provided by the client.

### Regulatory Top Tips

- Ensure that all staff receive regular regulatory training and that the employees are regularly checked as being up to date. Disciplinary action should be taken if they have failed to complete training within time limits given.

## Property/Transactional Work

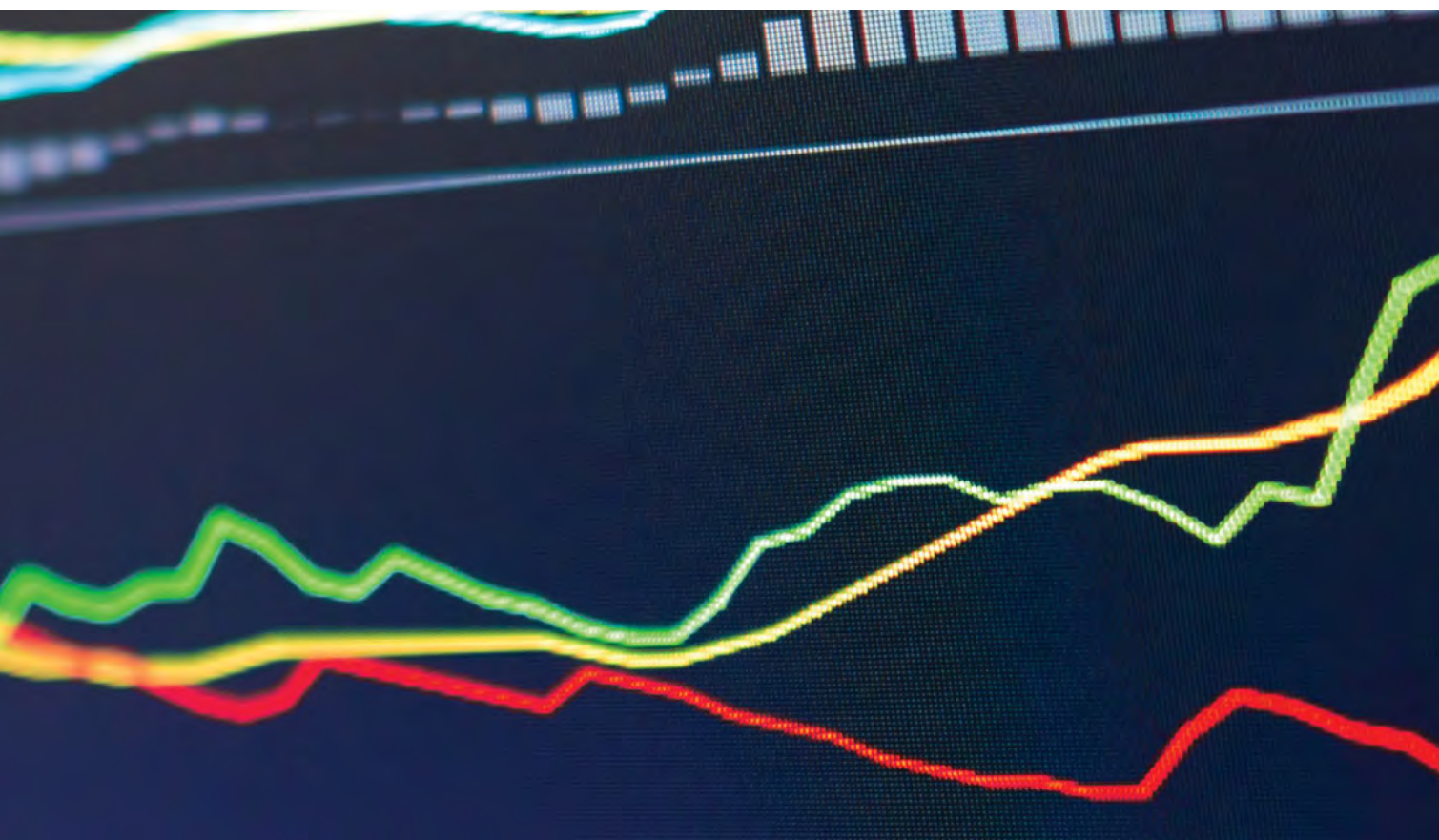
Our experience tells us that there are two areas a firm should concentrate on in order to avoid claims. The first is its client care letter and the scope of the retainer. The second is attendance notes showing the advice given to the client.

The recent decision of *Caliendo and Another v Mischcon De Reya* highlighted this problem. The lesson to take from that case is that all solicitors should ensure that a written retainer letter is prepared for each instruction, clearly excluding liability to any third parties. It is important to set out carefully and clearly who the client is on all occasions. Where there are unrepresented parties, particularly in transactional work, they should be advised to obtain independent legal advice and always bear in mind that failure to implement simple best practices will result in uncertainty and could potentially lead to costly litigation.

The importance of attendance notes is clear. Conveyancers/commercial property/lawyers and those involved in transactional work are statistically the most likely to forget to make notes. Solicitors can only position themselves to defend actions brought against them with proper evidence and attendance notes are vital.

### Property/Transactional Work Top Tips

- Client specific and a detailed client care letter should be produced on every new instruction.
- Fee earners involved in transactional work should be encouraged to prepare file notes like litigators do.





## Litigation

We have seen an increase over the last 12 months in claims against solicitors for under settling personal injury litigation. A number of firms advertise for these claims.

An example of this type of claim is Vibration White Finger claims and the associated class actions. Others include a general failure to obtain sufficient damages for the type of injuries suffered or a failure to appreciate the full extent of that injury.

### Litigation Top Tips

- Ensure that full instructions are taken from the client at the outset of the matter in relation to the full extent of his/her injuries including the effect on all aspects of everyday life and any ongoing new symptoms that the client complains of during the retainer.

## Matrimonial Proceedings

We have seen an increase in claims against solicitors in the context of ancillary relief proceedings and a substantial amount of these claims relate to pensions. This is likely to be as a result of changes relating to pensions and the lack of proper advice provided by some solicitors in relation to those changes.

Another common complaint also relates to solicitors' costs. It is important that regular updated advice is provided in relation to costs in the context of the amounts at stake in ancillary relief proceedings so that clients can make proper decisions about whether to settle or continue to fight.

### Matrimonial Proceedings Top Tips

- Advice in respect of costs should be regularly updated and kept under review.

## Tax Advice

We are all aware of the Government's approach towards tax avoidance schemes. The Chancellor said in 2012 that tax avoidance was morally repugnant and it has meant that the issue of tax avoidance is very much in the public eye. It was envisaged a few years ago that there would be a tsunami of litigation against professional advisors who were involved in such schemes. This has not happened, probably because of a delay in hearing from the Revenue with a determination in relation to the legality of the schemes. We may well see an increase over the coming year.

Solicitors become involved when they draft the scheme documentation and approve promotional documents such as information memoranda and in the administration of schemes. The schemes, however, can include a large number of Claimants and lead to group litigation. As a professional, we need to be aware of the potential impact of such claims on our practices.

### Tax Advice Top Tips

- Ensure that anyone giving such advice is properly trained and experienced in this area.

## Wills and Probate

We have seen an increase in claims by disappointed beneficiaries relating to Estate Planning and Inheritance Tax advice and record keeping. Full reporting to clients in these matters is essential in order to try to avoid claims.

Theft by rogue employees is also a common feature of claims we are dealing with. We encourage firms to ensure that files are supervised and audits take place periodically to identify such problems at an early stage and eliminate what can turn into large scale frauds.

### Wills and Probate Top Tips

- File audits should regularly take place along with appropriate supervision.

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