Thank you to both our existing and new customers for placing your indemnity insurance with Zurich Professional for the current year.

Welcome to @risk, our monthly risk management bulletin. It’s about keeping you in touch with issues relevant to your professional indemnity cover with Zurich Professional; the policy in practice, important cases and new legislation which impact on the way you practice; updating you on our experience of claims and suggesting ways to manage risk.

We have a mutual interest in the prevention of claims. While some among you may have felt the chill of a poor risk performance, many will be enjoying the difference healthy attitudes to risk management can make. Managing risk is a continuous process – there’s always room for improvement but getting it right first time, the timely and error-free performance of work is what it’s all about – for you and your clients, and coincidentally for us too. We hope you will find @risk helpful.

We have sent this either to the person you have told us is the preferred contact in your firm or to the email address provided by you. Please ensure that it is brought to the attention of the person who is responsible for the management of risk in your firm, and is distributed to fee-earners and others, as appropriate.

Over 50% of our customers engage in general litigation or personal injury litigation. Of the notifications of claims and circumstances emanating from those fields, over 60% relate to missed time limits including failures in service. We last addressed issues relating to service in our April 2002 edition. The Court of Appeal in *Anderton v Clwyd County Council [2002] EWCA Civ 933* has more recently issued a stark warning of the extremely serious consequences for a claimant and his legal advisors if rules regarding service of the claim form are not complied with. The court noted that the situation becomes fraught with procedural perils when service is left until the last day or two.

“There will be very few (if any) acceptable excuses for future failures to observe the rules for service of a claim form. The courts will be entitled to adopt a strict approach, even though the consequences may sometimes appear to be harsh in individual cases.”

So, what does every litigator need to know from this case?

1. The deemed day of service fiction continues and is irrebuttable by evidence of the actual date of receipt.

2. Service of a claim form which has been sent by first class post or fax before the end of the period for service may occur after the end of that period as a result of ‘deemed service’ and therefore be invalid.

3. Deemed service can take place on a Saturday or Sunday. For example:
   - If the claim form is sent by first class post at 5.15pm on Friday it is deemed to be served on Sunday.
   - If the claim form is served by fax at 5.15pm on Friday it is deemed to be served on Monday.
   - If the claim form is served personally at 5.15pm on Friday it is deemed to be served on Monday.
4. The court has power to dispense with service of the claim form retrospectively as well as prospectively, but this is only exercisable in ‘exceptional circumstances’. It cannot be used to circumvent the restrictions on granting extensions of time for service laid down in CPR 7.6(3) and thereby validate late service.

5. The court considered the Human Rights Act 1988 and Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms but concluded that ‘justice and proportionality require that there are firm procedural rules which should be observed, and that general rules should not be construed to create exceptions and excuses whenever those, who could have easily complied with the rules, have slipped up and mistakenly failed to do so.’

The second edition of the Council of Mortgage Lenders Handbook for England and Wales becomes effective on 1 October 2002. And you’ll have to go on-line to get it from the only available source, the CML’s website at www.cml.org.uk/handbook. Look out for the many amendments which are usefully highlighted in the text. Among them:

- All searches (except those where there is a priority period) will have to be no more than six months old at completion.
- Lenders will stipulate in their Part 2 whether or not they want to see environmental or contaminated land reports. If the answer is ‘no’, then the Handbook will confirm that you do not need to make these enquiries on the lender’s behalf (although your buyer client may still instruct you to do so).
- If your enquiries reveal that work has been carried out on a property, the property must have the benefit of any necessary planning and building regulation consents. And there should be no evidence of any breach of the conditions of any consent or certificate.
- If on a leasehold property the landlord fails to acknowledge receipt of a notice of mortgage, then lenders will as a last resort instead accept suitable evidence of service on the landlord.

**Deeds of variation**

Given the endless stream of claims for failing to submit an election to the Inland Revenue within six months, Sections 52 and 120 of the Finance Act 2002 will come as a relief to solicitors and insurers alike. For deeds of variation of wills or intestacies made on or after 1 August 2002, it will no longer be necessary to submit an election to the Inland Revenue for the deed to be effective for capital gains tax and IHT purposes. However, parties will need to state in the deed that they wish this tax treatment to apply. For a checklist see form IOV2.

**Excepted estates**

The Inheritance (Delivery of Accounts)(Excepted Estates) Regulations 2002 in relation to deaths or other chargeable events on or after 6 April this year came into effect on 1 August. They now include estates where the deceased had a life interest in a small trust, as well as those where a lifetime gift of the home has been made, and also include the estates of small overseas investors.
**Excepted settlements**

Under the *Inheritance Tax (Delivery of Accounts) (Excepted Settlements) Regulations 2002* effective from 1 August last, there is no longer any need to file an account for chargeable events after 6 April 2002 in the case of most discretionary trusts. Refer to the Regs for the conditions which must be fulfilled.

Revised leaflets and new forms (the old version of form IHT200 will not be accepted after 1 October 2002) are available from the Revenue stationery orderline (0845 234 1000) and the Revenue website: [www.inlandrevenue.gov.uk](http://www.inlandrevenue.gov.uk) Further information can be obtained on the Revenue helpline, tel: 0115 974 2400.

One of our insureds has informed us of the revival of a scam which last did the rounds in 1999. Fraudsters claiming to be from the Christian Bookshop are dispatching invoices to law firms requesting payment from deceased clients’ estates for a hardback New Testament Bible and ‘Jesus, King of Faith’. The invoice for £35.98 states that the books have been ordered but not paid for. Don’t fall for it.

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**Consignia plc v Russell Sealy (2002) EWCA Civ 878.**

Mr Sealy, a postman, had been summarily dismissed on 9 July 2000. Under s111(2) of the Employment Rights Act 1996, his complaint of unfair dismissal had to be presented to the employment tribunal either:

‘before the end of the period of three months beginning with the effective date of termination’ or

‘within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period’.

Mr Sealy posted his application by first class post on Friday 6 October 2000. The three month time limit expired on Sunday 8 October 2000. The application was received on Tuesday, 10 October. On the face of it, out of time. However, the tribunal allowed the claim to proceed on the ground that it was not practicable for Mr Sealy to have presented his complaint within time; when he posted the IT1 first class on Friday, he had a reasonable expectation that it would be delivered the next day, and, given that the office was closed over the weekend, delivery first thing Monday was acceptable. Mr Sealy’s former employer, Consignia, appealed to the Employment Appeal Tribunal and thereafter to the Court of Appeal which remitted the case to a differently constituted tribunal to reconsider the issue of ‘reasonable practicability’.

The court laid down comprehensive guidance relating to the presentation of an application to the employment tribunal by post and commented that it would be helpful if the effect of the guidance could be incorporated in the booklet published by the Employment Tribunal Service to prospective applicants. Given that over 70% of claims notified to us arising out of employment litigation are for missed time limits, including late applications, we make no apology for setting out the guidance in full.

1. Section 111(2) of the Employment Rights Act 1996 speaks of ‘presenting’ a complaint to a tribunal. It is now well established that a complaint is ‘presented’ when it arrives at the Central Office of Employment Tribunals or an Office of the Tribunals (‘the Office’).

2. If a complainant or his/her agent proves that it was impossible to present a complaint in this way before the end of the time prescribed by s111 (2)(a) – for example because the Office was found to be locked at a weekend and it did not have a letter box- then it will be possible to argue that it was not reasonably practical for the complaint to be presented within the prescribed period.
(3) If a complainant chooses to present a claim by sending it by post, presentation will be assumed to have been effected, unless the contrary is proved, at the time when the letter would be delivered in the ordinary course of post (see, by analogy, section 7 of the Interpretation Act 1978).

(4) If the letter is sent by first class post, it is now legitimate to adapt the approach contained in CPR 6.7 and conclude that in the ordinary course of post it will be delivered on the second day after it was posted (excluding Sundays, Bank Holidays, Christmas Day and Good Friday, being days when post is not normally delivered).

[But see Anderton v Clwyd County Council on page 1 above in which a differently constituted Court of Appeal, exactly two weeks after this judgment, concluded that Saturdays and Sundays are not excluded from the calculation of the day of deemed service by first class post. In light of this conflict, Mr Sealy has applied to appeal to the House of Lords. We shall keep you posted. See also (8) below.]

(5) If the letter does not arrive at the time when it would be expected to arrive in the ordinary course of post, but is unexpectedly delayed, a tribunal may conclude that it was not reasonably practical for the complaint to be presented within the prescribed period.

(6) If a form is date-stamped on a Monday by a Tribunal Office so as to be outside a three-month period which ends on the Saturday or Sunday, it will be open to a tribunal to find as a fact that it was posted by first class post not later than the Thursday and arrived on the Saturday, alternatively to extend time as a matter of discretion if satisfied that the letter was posted by first class post not later than the Thursday.

(7) This regime does not allow for any unusual subjective expectation, whether based on inside knowledge of the postal system or on lay experience of what happens in practice, to the effect that a letter posted by first class post may arrive earlier than the second day after it is posted. The 'normal and expected' result of posting a letter must be objectively, not subjectively, assessed and it is that the letter will arrive at its destination in the ordinary course of post. As the present case shows, a 'complainant knows that he/she is taking a risk if the complaint is posted by first class post on the day before the guillotine falls, and it would be absurd to hold that it was not reasonably practical for it to be presented in time if it arrives in the ordinary course of post on the second day after it was posted. Nothing unexpected will have occurred. The post will have taken its usual course.'

(8) For the avoidance of doubt, the strict litigation rule in Godwin v Swindon BC [2001] EWCA Civ 1478 as to deemed service does not apply in employment tribunal cases. If in such a case a complainant takes a chance and the letter containing the complaint happens to arrive at the Office on the day after it was posted and therefore within the permitted three-month period, it will have been presented in time.