

## **Estate Planning and Client Engagement Letters: Deloitte's \$500 Million Sentence**

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Accounting firms very often question the need to include certain provisions intended to limit their liability to their clients and sometimes ask whether the provision is even enforceable. Whether the provision will be enforced is uncertain due to the very limited case law addressing liability-limiting provisions in accountants' client engagement letters, and there could be variations in enforcement from state to state. Nevertheless, it is important to include the provisions, even if enforcement is uncertain, because the provision might just be accepted and never challenged, thereby serving its purpose, even if a court strikes it down after a legal challenge.

One of the more important liability-limiting provisions is limiting the client's time to sue the accountant to a fixed period (usually one year) measured from when the services are provided. These provisions serve the dual purpose of shortening the lengthy statute of limitations in some states and defining exactly when that period starts to run. Our provision sets forth that the period starts to run at the time the services are provided rather than when the client knows or should know about a claim, which could be years and sometimes decades later.

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A picture may be worth a thousand words, but a similar single-sentence provision in an engagement letter saved Deloitte Tax LLP from having to defend a \$500 million malpractice suit filed in New York against the multinational professional services firm. A [New York court](#) dismissed the lawsuit and affirmed the validity of the one-year limitations period. However, unlike the provision we generally recommend, the Deloitte provision indicated the one-year period started to run from when “the cause of action accrued.” Since New York law holds that such claims accrue at the time the advice is given, the court held that Deloitte’s provision shortened the time period to sue the accountant to one year from the time the advice was given. In effect, our provision would reach this result even in states that do not have the same highly favorable point of accrual.

## **Facts of the Case**

Deloitte was engaged in 2008 by billionaire William Davidson to modify his estate plan, and Deloitte provided advice until shortly before Davidson’s death in March 2009. Deloitte was then engaged to assist with the administration of the Estate, including providing advice on a variety of tax issues, some of which related to the modifications put in place prior to Davidson’s death.

Not surprisingly, the IRS scrutinized the Davidson Estate filings, but somewhat surprisingly concluded that the Estate owed billions more than was reported on the Estate’s returns. Those conclusions were contested by the Estate, which ultimately settled with the IRS for approximately \$500 million in July 2015. Deloitte continued working with the Estate until September 2015, when the Estate brought an action against Deloitte in New York seeking to recover the \$500 million paid to settle with the IRS.

The Estate alleged, among other things, that Deloitte was reckless and negligent in the estate planning advice provided to Davidson. Deloitte filed a motion to dismiss the complaint in its entirety, arguing that the claims were time-barred based on the limitations provision in their engagement letter with Davidson. The critical language in the engagement letter stated:

No action, regardless of form, relating to this engagement, may be brought by either party more than one year after the cause of action has accrued, except that an action for nonpayment may be brought by a party not later than one year following the date of the last payment due to the party bringing such action.

New York law provides that parties to a contract can shorten the statute of limitations, so the plaintiffs did not dispute the validity of the provision shortening the statute of limitations to one year. Instead, the plaintiffs argued that the doctrines of continuous representation and equitable estoppel deferred accrual of the causes of action until Deloitte stopped providing services to the Estate. The plaintiffs, focusing on the services Deloitte provided after Davidson’s death during the administration of the Estate and resolution with the IRS, argued that the claims did not accrue until services stopped in September 2015.

## **The Decision**

On August 22, 2016, the Supreme Court of the State New York, New York County dismissed all claims against Deloitte, holding that they were time-barred under the one-year limitations provision in Deloitte’s engagement letter. After confirming that New York law permits parties to shorten the limitations period by contract, the Court focused on “accrual” of the claims, since that is the point from which the one-year period is measured under the engagement letter provision.

For the malpractice claim, the Court pointed to the longstanding New York law holding that a

malpractice claim against an accountant based on allegedly faulty tax advice accrues at the time the advice is given, which in this case predated Davidson's death in 2009 ? more than six years prior to commencement of the action. The Court also ruled that the representation of the Estate after Davidson's death did not save the claims through application of the continuous representation doctrine because the provision in the engagement letter expressly barred any tolling. Finally, the Court ruled that equitable estoppel did not apply because Deloitte did nothing to conceal the Estate's tax problems.

## Takeaways

- Well-drafted engagement letter provisions that shorten or otherwise limit the time a client has to commence suit can be strong risk management tools that will be upheld by at least some courts. The strength and enforceability of the provision will vary from state to state, but New York is not unique in holding that these provisions are enforceable.
- Shortening the time period to commence a suit to as little as one year is possible.
- If your jurisdiction does not measure accrual from the time the services are provided, as it is in New York, adding language measuring the commencement of the contractual limitation period from the time the services are provided is a possible solution, depending on the law in your state.
- If drafted properly, the provision can eliminate any tolling or extension of the limitations period based on additional or subsequent services that may be provided.

The purpose of the statute of limitations in the context of professional malpractice is to allow an accounting firm a degree of certainty that past services will not lead to stale complaints in the distant future. Accountants can increase that certainty, limit the future period and protect themselves from stale complaints in the distant future by incorporating a limitation provision into their engagement letters.

For Deloitte, a single sentence in its engagement letter limiting the time period for all claims to one year was worth \$500 million.

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