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## BUILD YOUR OWN STATUTE OF LIMITATIONS? A NEW YORK COURT GIVES THE GREEN LIGHT

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Everyone is familiar with statutes of limitations under the law: simply, they provide a deadline by which a lawsuit must be commenced and if the plaintiff fails to comply with that deadline, then the court will most likely dismiss the claim. Barrels of ink have been spilled by courts writing about exceptions to the statutes, timing of when claims accrue, if the limitations period is tolled, and whether the statute even applies at all to the denominated claim. But without exception, a statute of limitations can be a very good friend to a business and, managed correctly, can even be a tool to affirmatively manage risk and exposure.

While statutes of limitation provide vital protection, six years is a long time. Memories fade. Documents are lost. Employees separate and cannot be found to come testify.

There are various ways to manage a professional service provider's exposure to its customers during this protracted period of potential liability. Contractual strategies include caps on awards, waivers of jury trials, indemnification and fee/cost shifting provisions, limitations on warranties, and many other devices.

But what if, by the terms of the written engagement letter, you could also manage the time frame of your exposure and mitigate those risks? The New York Supreme Court, Appellate Division, First Department, recently permitted an accounting firm to do just that. In the case of *Aaron v. Deloitte Tax, LLP*, 2017 NY Slip Op 03051 (1st Dept. April 20, 2017), the Court dismissed claims against Deloitte and affirmed Deloitte's contractual statute of limitations of one year for claims brought against the accounting firm.

Deloitte was hired by William Davidson in 2008 to perform estate planning in connection with Mr. Davidson's \$3 billion estate. Deloitte, in its engagement letter,

specified that "[n]o 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 ...". Deloitte allegedly created an estate plan under which the Estate would pay only an estimated \$158 million in estate taxes. Davidson executed that plan and made transfers of hundreds of millions of dollars to trusts for his chosen beneficiaries. In 2009, Deloitte cautioned Mr. Davidson that the IRS would likely challenge his estate plan. And, in fact, after Mr. Davidson died, the IRS did challenge the plan and served a notice of deficiency for \$2.7 billion against the Estate. This was eventually settled for \$457 million in 2015. Deloitte continued to provide advice and tax assistance through the IRS challenge period until the matter settled in 2015. The Estate, after settlement with the IRS, then brought claims against Deloitte for fraud, malpractice, negligent misrepresentation, and violation of section 349 of New York's General Obligations Law.

Deloitte moved to dismiss the complaint based on, among other things, that the claims brought against it were untimely due to the contractually shortened limitations period of one year in the 2008 engagement letter. The trial court agreed, finding that contractually shortened limitations periods are acceptable under New York law and that claims for malpractice for tax advice accrue on the date that the advice is given (and not, therefore, on the date that the advice results in damage to the party – presumably here the date that the Estate settled for the \$457 million).

The trial court found that the fact that Deloitte continued to give advice and perform tax related services for and to the Estate into 2015 did not extend the 2008 engagement letter's contractually limited statute of limitations under a theory of continuous representation. The trial court found, as an admittedly "nuanced distinction", that the continuous representation doctrine only tolls the statute of limitations for the claim, not the accrual of the

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claim. The Appellate Division affirmed, finding that the continuous representation tolling doctrine was not available because the statute of limitations in question here – one year – was contractual and not statutory.

As a result, the complaint seeking \$500 million in damages from Deloitte was dismissed and the plaintiff, who

may have had good claims for malpractice, went away with no recourse because those claims were barred due to the contract with the professional service provider.

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