

## Is It Too Late? Recent Appeals Court Decision Warrants Careful Consideration of Statute of Limitations Defense in Accounting Malpractice Actions

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By Peabody & Arnold on March 28, 2018

On March 9, 2018, a three justice panel of the Appeals Court affirmed that an accounting malpractice claim was properly dismissed based on the statute of limitations. In Stotsky-Hilman vs. Dietrich, No. 17-P-891, 2018 WL 1220761 (Mass. App. Ct., Mar. 9, 2018), the panel affirmed summary judgment in favor of the certified public accountant and his firm on claims of breach of contract, negligence, and unfair and deceptive trade practices under G.L. c. 93A.

The case arose out of business valuations. In January of 2008, a certified public accountant, Mr. Dietrich, and his firm were engaged on behalf of the plaintiff, Sharon Stotsky-Hilman, to prepare a valuation of her medical practice for her pending divorce case. The engagement letter required the valuation to be prepared in conformance with the Business Valuation Standards of the American Society of Appraisers. Mr. Dietrich agreed to perform the valuation on an hourly basis and estimated that it would cost approximately \$14,000. Mr. Dietrich prepared his valuation and revised it on several occasions. On May 18, 2011, a judge of the Probate and Family Court rejected Mr. Dietrich's valuation and divided the marital estate. Mr. Dietrich sent invoices for his services. By June 30, 2011, he had billed approximately \$113,000 for his services. The plaintiff sued Mr. Dietrich and his firm on October 22, 2015 alleging, *inter alia*, that the services were deficient and the billing was excessive.

The panel at the Appeals Court held that the plaintiff's claims were time barred. It rejected the plaintiff's attempt to circumvent the statute of limitations on the basis that the contract claims were distinct from the tort-based malpractice claims. The panel acknowledged that contract and tort claims against certified public accountants are generally subject to a three-year statute of limitations. Even if G.L. c. 260, §4 did not explicitly bar the plaintiff's contract claims, the panel agreed that it would have reached the same result if it looked at the gist of the action. The gist of the lawsuit was a tort-based malpractice claim; specifically, the plaintiff was alleging that the accounting services were so inept that they were rejected by the court and caused the plaintiff to pay more than she otherwise would have paid in the divorce. The panel further reasoned that unlike a contract action, the engagement letter did not impose a higher standard of care than "the standard of reasonable care required of members of [the] profession" or promised a specific result. The panel went on to hold that even though G.L. c. 93A claims are subject to a four-year statute of limitations, there was no genuine issue of material fact demonstrating that the plaintiff had notice of the overbilling in June of 2011.

The lessons from this case are clear. Experienced practitioners should examine the possibility of a statute of limitations defense in accounting malpractice claims with their clients as early as possible. The Appeals Court's decision to issue an unpublished disposition reflects an opinion that cases involving the statute of limitations in the accounting malpractice context may no longer involve "substantial question[s] of law." As such, the proper preparation, investigation, and use of the statute of limitations defense may lead to an early claim resolution.

