UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF TEXAS

John E. Hill,	§	
	§	
Plaintiff,	§	
	§	
versus	§	Civil Action H-13-1906
	§	
Woodbury Financial Services, Inc., *et al.*,	§	
	§	
Defendants.	§	

Opinion on Summary Judgment

1. *Introduction.*

A broker sued his employer and its parent company. He says that he was improperly trained and that his employer knew that statements it made to him were false. The employer will prevail.

2. *Background.*

John Hill, a licensed-investment advisor, worked for Woodbury Financial Services selling, among other things, welfare-benefit plans. Woodbury is a broker-dealer that sells life insurance, and other investments for several companies. It is a subsidiary of the Hartford Life and Annuity Company.

In 2006, Hartford and Woodbury trained Hill to sell its investments. One thing Hill sold were "419(e) plans." Named for a section of the Internal Revenue Code, these plans are employee-benefit plans. They are funded by an employer and give its workers benefits for sickness, accidents, death, and disability.

Insurers and financial companies have been selling these plans since the mid-1990s. Under Woodbury's plans, the employer would insure the lives of its employees. A trust held the policies. This trust was funded by the employer's premiums.

The perceived advantage of these plans was that the employer's contributions would be deductible from the employer's tax. The Internal Revenue Service, however, never ruled that contributions were deductible. In 1995, it announced that contributions to welfare-benefit plans that used life-insurance policies would not be deductible under section 419A(f)(6).

Six years later, the Service listed transactions that it would not allow as deductions. The Service called these listed transactions "tax-avoidance transactions." Plans that were "substantially similar" to those listed were also prohibited.

In 2007, the Service said explicitly that contributions to most 419(e) plans were not deductible.

After buying 419(e) plans and deducting their contributions, several of Hill's clients were audited by the Service. It found that their plans were "listed transactions." It denied their deductions and assessed tax, interest, and penalties. Two of Hill's clients sued him for fraud, negligent misrepresentation, negligence, breach of fiduciary duty, and violations of the Texas Deceptive Trade Practices Act. Soon after, Woodbury fired him.

3. *Texas Insurance Code.*

Hill says that Hartford and Woodbury violated the Texas Insurance Code by misrepresenting the terms, benefits, and other aspects of the benefit plans. Hill was not a consumer within the meaning of the Act. Because he is not protected by it, he may not sue for violations of it.

4. *Limitations.*

Hill was trained in 2006. In 2007, the Service said that contributions to 419(e) plans were not deductible. Hill did not sue until May of 2013 – six years later. His claims are barred as untimely.

A. *Two Year.*

Hill says that Woodbury and Hartford negligently misrepresented the plans to him. His claims stem from omissions and misrepresentations made by Woodbury and Hartford during his training and later supervision. To be timely, Hill must have asserted these claims by 2008 – two years later.[1] He sued in May of 2013 – far too late.

Hill says that he could not have discovered Woodbury and Hartford's negligence until 2012. He must show that he could not have discovered Hartford and Woodbury's actions by exercising reasonable diligence.

In 2007, the Internal Revenue Service clarified that contributions to 419(e) plans were not deductible. Hill had been a licensed-investment advisor for more than two decades. The

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[1] Tex. Civ. Prac. & Rem. Code Ann. § 16.003.

Service's publicly available statements notified him that his clients may be liable for deducting their contributions to the plans.

Remarkably, Hill says that he could not have understood the complexities of the law well enough to discover Hartford and Woodbury's errors. His pleas of ignorance are not enough. His job required that he know the tax consequences of his investments. This is how he sold them. It defies logic to say that he did not know of published statements by the Service about the very plans he sold.

Assuming the Service's notice did not inform Hill about his potential liability, his claims are still barred. In April of 2011, Hill was sued by his client for, among other things, (1) negligence; (2) negligent misrepresentation; and (3) Texas Insurance Code violations for his having sold it a 419(e) plan. Hill exercised no care whatsoever when he was sued for exactly the same torts under similar facts. He did not investigate at all.

Hill's ignorance was completely unreasonable after he was served in April of 2011. Hill's claims for negligence, misrepresentation, and violations of the Insurance Code are untimely.

B. *Fraud.*

In Texas, a person has four years to sue for fraud.[2] This begins when the plaintiff is defrauded.[3] Only deliberate and knowing misrepresentations about material facts are actionable. Statements of opinion or predictions are not.

Hill says that Woodbury and Hartford defrauded him in 2006 when they trained him to sell plans and gave him marketing materials. He did not sue until 2013. He says that he could not have reasonably known of the fraud until after his client sued him.

For Woodbury and Hartford to have defrauded Hill, they must have known in 2006 that the 419(e) plans would not have the tax benefits that they claimed. Hill says that they knew the statements were false because the Service had said that you could not deduct contributions to the plan.

If Hartford and Woodbury knew that contributions were not deductible because of the Service's statements, Hill also should have known. An experienced financial advisor does not exercise diligence if publicly available information could have revealed the mistake.[4] Assuming

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[2] Tex. Civ. Prac. & Rem. Code Ann. § 16.004.

[3] Woods v. William M. Mercer, Inc., 769 S.W.2d 515, 517 (Tex. 1988).

[4] Shell Oil Co. v. Ross, 356 S.W.3d 924, 928 (Tex. 2011).

Hill discovered that Hartford lied to him during his training, he has not explained how he could not have discovered that fact in 2006 or 2007.

Hill's fraud claim is barred as untimely.

C. *Breach of Contract.*

In Texas, a person has four years to sue for a breach of contract.[5] This begins when there is a breach.[6]

Hill was fired in 2011. He says that Woodbury breached its employment contract with him when it (1) did not advise him of the risks associated with the plans he was selling, or (2) did not make certain that the products they sponsored complied with the Service's regulations.

These omissions occurred in 2006. The deficiencies that Hill claims were partially revealed by the Service in 2007. Because he waited until 2013 to sue, Hill's claim for breach of contract is untimely.

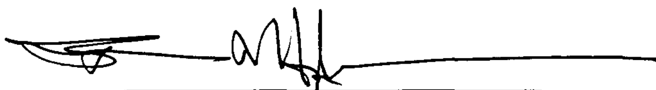
5. *Conspiracy.*

Civil conspiracy is a derivative claim, not an independent tort.[7] There must be an underlying tort to support it. Hartford and Woodbury could only be liable for conspiracy if they had participated in some other tort for which they were also liable. Because Hill's substantive claims are untimely, he has no underlying tort.

6. *Conclusion.*

Hill waited too long to sue. He will take nothing from Hartford Life and Annuity Company and Woodbury Financial Services, Inc.

Signed on August 5, 2014, at Houston, Texas.



Lynn N. Hughes
United States District Judge

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[5] Tex. Civ. Prac. & Rem. Code Ann. § 16.004.

[6] Smith v. Fairbanks, Morse & Co., 101 Tex. 24, 27 (1907).

[7] Tilton v. Marshall, 925 S.W.2d 672, 681 (Tex. 1996).