



Office of The Attorney General
State of Connecticut

**TESTIMONY OF
ATTORNEY GENERAL GEORGE JEPSEN
BEFORE THE JUDICIARY COMMITTEE
MARCH 17, 2014**

Good morning Senator Coleman, Representative Fox and distinguished members of the Judiciary Committee. Thank you for the opportunity to testify about House Bill 5570, *An Act Concerning the Applicability of Statutes of Limitations to Actions Brought by the State or a Political Subdivision of the State*. This bill would abrogate the longstanding common law doctrine of *nullum tempus occirrit regi* ("nullum tempus") by making several statutes of limitations applicable to actions brought in the name of, of for the benefit of, the state and political subdivisions of the state (including municipalities). It would apply to any lawsuits brought on or after October 1, 2014, regardless of when the claims giving rise to those lawsuits may have accrued.

I fully recognize that the decision about whether to abrogate the doctrine of nullum tempus is a policy decision that falls squarely within the legislature's authority. The purpose of my testimony is to provide accurate information and background on the doctrine and to urge caution and careful consideration of the issue and the potential fiscal implications of this or any similar proposals.

In particular, I wish to dispel some common claims made by proponents of this and similar proposals -- namely, that the doctrine is a new or foreign concept, that it is unique to Connecticut, and that the Connecticut Supreme Court's recent affirmation of the doctrine in an important lawsuit the State brought to recover taxpayer dollars for faulty construction at the University of Connecticut Law School Library will result in fewer quality contractors bidding on state work or make it impossible for contractors to obtain professional liability insurance. These claims are contradicted by the long history and applicability of the doctrine in Connecticut and other states and the lack of any shortage of insured bidders on state projects since the Supreme Court recently affirmed the doctrine.

Background

By way of background, the doctrine of nullum tempus, like sovereign immunity, is a common law rule that has its roots in English common law. Since this nation's founding, courts have consistently recognized nullum tempus based on the sound public policy it reflects, namely, that public rights and the interests of the citizens should not be harmed simply because public officials—whether due to the unique nature of government and constraints under which it operates, or otherwise—did not bring suit within the same time limitations that would apply to a private party protecting their individual interests.

In practice, *nullum tempus* holds that courts will not presume that general time limitations applicable to private parties bringing suit to vindicate individual interests apply to the government, which brings suit to protect the broader public interest. Rather, time limitations will bar suits by the government only where the legislature has carefully considered the issue and made clear by statute that the legislature believes the suspected wrongdoers' private interest in avoiding liability due merely to the passage of time outweighs the public's interest in the government protecting the public fisc by pursuing wrongdoers in vindication of public rights and property without regard to the time limitations applicable to private parties. In short, the decision whether to apply a statute of limitations to actions brought by the state: (a) is a legislative prerogative; and (b) implicates different policy concerns than statutes governing relations among private parties.

Connecticut Courts Have Long Recognized the Doctrine of Nullum Tempus

The Connecticut Supreme Court has long held that “[t]he State holds the immunities . . . belonging by the English common law to the King,” which include—for example—sovereign immunity and the related doctrine of *nullum tempus*. The Connecticut Supreme Court expressly recognized the principle encompassing *nullum tempus* as early as 1879, and declared it “elementary law that a statute of limitations does not run against the state, the sovereign power” in 1888. *Clinton v. Bacon*, 56 Conn. 508, 517 (1888). In the century that followed, the courts did not often have occasion to apply the rule, both because the rule was well established and because the government did not abuse the prerogative. When Connecticut courts did address the rule, they uniformly recognized it and applied it, as have the United States Supreme Court and the large majority of other states (though the scope and application of the rule varies from state to state). *See, e.g., State v. Bacon Constr. Co.*, 2008 Conn. Super. LEXIS 3201, *4 n.5 (Dec. 16, 2008); *State v. Brunoli, Inc.*, 2005 Conn. Super. LEXIS 2150 (Aug. 17, 2005). *See also Joyell v. Commissioner of Educ.*, 45 Conn. App. 476, 485, cert. denied, 243 Conn. 910 (1997) (noting that statutes of limitations do not generally apply to the State “unless by express terms or necessary implication such appears to have been the clear intention of the legislature, and the rights of the government are not to be impaired by a statute unless its terms are clear and explicit, and admit of no other construction.”)

The one exception to Connecticut's uniform recognition and application of *nullum tempus* was the **trial court's** decision in *State v. Lombardo Bros. Mason Contractors, Inc.*, 307 Conn. 412 (2012), in which the State sought to recover for extensive construction defects in the law library at the University of Connecticut School of Law that cost the taxpayers millions of dollars and the trial court held that the State's suit was time barred. On appeal, the State argued that the trial court's decision was an aberration contrary to long lines of Connecticut authority. The Connecticut Supreme Court agreed, unanimously holding that the “the trial court had no basis for rejecting the rule of *nullum tempus*, which this and other courts of this state expressly have recognized as part of this state's common law since the second half of the nineteenth century.” *Id.* at 426.

Many Other States Currently Recognize the Doctrine of Nullum Tempus

The vast majority of other state courts have, at some point or another, recognized the common law rule of *nullum tempus*. Others have either not had occasion to rule upon the question or have not had an occasion to do so in a very long time. Still others have chosen to abrogate the doctrine by statute in certain respects. In other states, like Connecticut, courts have

recognized the common law rule and the legislature has chosen not to abrogate it or to abrogate it in only limited respects. The following is a **non-exhaustive** list of other states in which the doctrine **recently** has been recognized by the courts and not abrogated in significant respects by statute. Because many states have either not had occasion to rule on the question or have not done so recently, **one should not infer that any state not appearing on this non-exhaustive list does not recognize nullum tempus at common law or has abrogated it by statute.**

Alabama: The Alabama Supreme Court has recognized nullum tempus as to the state, but not municipalities. It appears the doctrine has been recognized since at least the early 20th century. *Bd. of Sch. Com'rs of Mobile County v. Architects Group, Inc.*, 752 So. 2d 489, 491-92 (Ala. 1999). We are not aware of any statutory exception to nullum tempus in the construction context; the only ones we found in the civil context put limitations on the state's ability to recover fees and taxes, debar attorneys and bring suit against sheriffs for improper conduct. Ala.Code § 6-2-35; Ala.Code § 6-2-37; Ala.Code § 6-2-33.

Arizona: The Arizona Supreme Court has recognized nullum tempus and the legislature has partially codified it. The only statutory exception appears to be in suits involving navigable waters. A.R.S. § 12-529.

Arkansas: The Arkansas Supreme Court has recognized nullum tempus for a long time. The legislature does not appear to have abrogated the doctrine, and its limitations statute for construction appears to exclude the state (in that "person" is defined to include businesses but not governmental entities). A.C.A. § 16-56-112.

Hawaii: The Hawaii Supreme Court has recognized nullum tempus for a long time. The legislature has codified the principle. HRS § 657-1.5. We see no statutory exceptions.

Iowa: The Iowa Supreme Court has recognized nullum tempus for at least several years. We are unaware of any legislative abrogation of the doctrine.

Maine: The Maine Supreme Court has recognized nullum tempus for at least several years. We see no legislative abrogation of the doctrine and the limitations period for claims against design professionals does not expressly include the state (though it does provide that a contractual time limitation will control). 14 M.R.S.A. § 752-A.

Maryland: Maryland's highest state court has recognized nullum tempus for at least several years. We see no legislative abrogation of the doctrine.

Mississippi: The Mississippi Constitution codified nullum tempus in the civil context in 1890 and that provision remains in effect. MS Const. Art. 4, § 104.

Missouri: The Missouri Supreme Court has recognized nullum tempus under the common law. The legislature has created an exception for adverse possession cases, among others, (V.A.M.S. 516.360), but the construction limitations period does not expressly apply to the state. V.A.M.S. 516.097.

New Hampshire: We do not see any statutory changes that would impact the application of nullum tempus generally.

New Mexico: The New Mexico Supreme Court has recognized nullum tempus for at least the last few decades. We see no change in the case law. Although the legislature enacted a statute that abrogates nullum tempus as to "bodies politic," the New Mexico Supreme Court has indicated that the abrogation does not apply to the state, *Bd. of Ed., Sch. Dist. 16, Artesia, Eddy*

Cnty. v. Standhardt, 458 P.2d 795, 801-02 (N.M. 1969), and the provision providing for limitations on construction actions does not include language expressly including the state. N.M.S.A. 1978, § 37-1-27.

North Carolina: In 1868, the legislature enacted a statute providing that “[t]he limitations prescribed by law apply to civil actions brought in the name of the State, or for its benefit, in the same manner as to actions by or for the benefit of private parties.” *Rowan County Bd. of Educ. v. U.S. Gypsum Co.*, 332 N.C. 1, 6, 418 S.E.2d 648, 652 (1992). Though on its face that appears to be a clear abrogation of nullum tempus, the North Carolina Supreme Court has continued to apply the doctrine and in *Rowan* applied it in a construction case on the theory that the legislature had acquiesced in the court’s interpretation of the statute by not making a more explicit abrogation of nullum tempus. The statutory language remains the same and *Rowan* has not been overturned, so nullum tempus has applied to construction in North Carolina since at least 1992.

Ohio: The Ohio Supreme Court has recognized nullum tempus for at least the last few decades. We are unaware of any legislative abrogation, and the statutes providing for limitations on product liability and construction actions do not expressly include the state. R.C. § 2305.10; R.C. § 2305.131.

Conclusion

Nullum tempus is not new or unique to Connecticut or other states. It is grounded in sound policy and the judicial recognition of the distinctions between private and public actors. Nevertheless, as stated at the outset, the question of whether to abrogate nullum tempus is a policy decision for the legislature to make. Because of the significant fiscal implications associated with that question, the legislature should proceed with caution and care. In addition to deciding whether to abrogate nullum tempus, it should consider whether the doctrine should be abrogated in its entirety and retroactively, as the current proposal would do, or instead in a more limited manner and on a prospective basis. I hope this testimony is informative and helps guide this Committee in its consideration of this important issue.