

**TESTIMONY BEFORE THE JUDICIARY COMMITTEE  
REGARDING RAISED BILL No. 5570**

**AN ACT CONCERNING THE APPLICABILITY OF STATUTES OF  
LIMITATIONS TO ACTIONS BROUGHT BY THE STATE OR A POLITICAL  
SUBDIVISION OF THE STATE**

**March 17, 2014**

Senator Coleman, Representative Fox, Distinguished Members of the Judiciary Committee: I am Donald W. Doeg, an attorney with Updike, Kelly & Spellacy, P.C. and also a professional engineer. I am the immediate past president of the Connecticut Society of Professional Engineers. I am a member of the Board of Directors of the American Council of Engineering Companies of Connecticut, an organization with over one hundred consulting engineering firms as members. I also work closely with the AIA Connecticut. I have been practicing law for more than two decades, almost exclusively in the area of construction law.

I would like to speak in favor of Raised Bill No. 5570, "An Act Concerning The Applicability Of Statutes Of Limitations To Actions Brought By The State Or A Political Subdivision Of The State." All of the organizations that I referenced above, as well as the Construction Law Executive Committee of the Connecticut Bar Association, of which I am also a member, support the passage of this bill.

The bill is being proposed in response to the recent Connecticut Supreme Court decision in State of Connecticut v. Lombardo, et al., in which the Court found that a statute of limitations for commencing litigation does not apply to the State of Connecticut. The Lombardo Court specifically indicated in its decision that if there is to be a statute of limitations applied to the State, it would have to be done through the legislature.

The raised bill would mandate that the State of Connecticut and its political subdivisions be bound by the same statutes of limitation that apply to the rest of the inhabitants of the state.

It is impossible to cover everything that should be addressed with respect to why this bill should be implemented in the three minutes allotted to me. I will try to briefly summarize some of the key background points and pressing issues.

As you know, statutes of limitation have been enacted in Connecticut and every other state to limit the timeframes under which various claims can be asserted. For instance, a claim based upon a breach of written contract in Connecticut is limited to six years after the alleged breach. These statutes have been enacted for a number of reasons including fairness and practicality. That is, if a problem arises from a breach of a contract, it should manifest itself within that six year period and a harmed party would have sufficient time to make a claim. After that timeframe, it becomes increasingly more difficult to confirm conclusively that the other factors did not intervene to cause or contribute to the harm or that building code or technology changes were not responsible for the issues. Moreover,

as time goes by documents are lost, memories fade and potential witnesses may no longer be available for a variety of reasons. Hence, it becomes much more difficult to both prove and defend older claims. On a logistical note, if there is no statute of limitations, neither the State nor anyone who did business with the State could ever get rid of a single document from a State project or risk the possibility of a spoliation of evidence claim if a future lawsuit arose. The cost of maintaining those records for perpetuity, as well as the amount storage space required, would be astronomical and a huge financial burden on all parties. Thus, the statutes of limitation are very important to all parties both in Connecticut and in all other states.

Based upon the Lombardo decision, if any entity or individual does business with the State of Connecticut, they would subsequently be exposed to litigation for perpetuity. That creates significant complications and many concerns for anyone doing business with the State, particularly for those involved in the construction industry. There appears to be no good reason that the State should not be subject to the same statute of limitations as the rest of its constituency. In fact, allowing the State to commence litigation solely at its convenience is detrimental to both the State and the potential defendants. For instance, in the Lombardo case, the problems first arose less than a year after the opening of the building, yet the State waited twelve years to assert a claim. Those intervening years resulted in documents being lost, memories fading and key individuals involved in the project no longer being available. The result will be a diminished trial that is not fair to anyone, either the State or the defendants.

One of the most noteworthy downsides of waiting to assert a claim is the risk that insurance coverage that may have once been in place to address any shortcomings may no longer exist. That hurts everyone involved. Obviously if the defendants no longer have insurance for a large matter, it would destitute firms and/or individuals. It is also detrimental to the State, since although it may ultimately win in litigation, there may be no way of collecting any recovery because it did not commence the litigation in a timely manner.

Let's talk about that a bit further. I think everyone in this room feels somewhat more comfortable knowing that if something goes wrong for them like a car accident or a tree branch falling on your roof, insurance will likely be in place to protect you. Similarly, design professionals have errors and omissions insurance to protect them in case any issues arise with respect to their design. Unfortunately, based upon the Lombardo decision, this may no longer be the case for design professionals working with the State. Design professionals have what is known as "claims made" insurance policies. That is, the insurance that covers a claim is the policy that is in place at the time that the claim is first asserted. For instance, let's assume that an architect designed a project in the year 2010 and had his insurance with XYZ Company during the project. If a claim arose in 2013 and the architect was now insured by ABC Company, ABC Company would be responsible for covering the claim. The problem is that the ABC policy typically includes a retroactive date which dictates that the policy will only cover claims for work that occurred after that date. When you think about it, that is fair, no carrier would want

to take on a new client and assume responsibility for countless prior unknown projects accomplished over decades of work prior to any involvement of the new company.

The economy and other events of the last decade have further impacted this problem. Within the last decade, there have been an increase in the number of carriers offering malpractice insurance to design firms and the resulting competition of shopping for the lowest rates has led to many design firms switching carriers with some frequency. Furthermore, perhaps more than ever, design firms are splitting up, merging with others or simply closing their doors. Individual design professionals seem to be changing firms more than ever (and they may or may not be insured by their new firm for work that they performed at a previous firm). In many instances, the carrier for the new firm may not provide coverage for work performed by the firm it acquired prior to acquisition or for the work of individuals performed prior to joining their firm. Thus, when claims are made for older cases, the insurance carriers may opt to deny coverage.

The end result of this chaos is that for older claims, very often there is no insurance that covers either a design firm or an individual. However, pursuant to the Lombardo decision, the State can now pursue claims against those entities forever. Entities and individuals would have to worry about potential claims for the rest of their existence and beyond. For instance, the State could even pursue the estate of a design professional that signed drawings for a particular project.

In my many discussions over the last year and a half, some folks have indicated that this is not a reasonable outcome and the State would not do such a thing. However, I do not agree. I have a client that was the design professional for a former DPW project. That client signed its contract with the DPW in the mid 1980's and the work on the project was completed in phases in the 1990's. Yet my client is now being threatened with a potential claim on this project twenty years later and the Lombardo case was specifically referenced as giving the State the right to bring a claim at this late date. A sizeable demand was made by the State against my client. This is despite the fact that, the last that I knew, the State could not even locate a copy of its contract or many of the other project documents and thus did not definitively know my client's scope of work or the agreed upon contract terms. Moreover, virtually all of the State employees that were associated with the project are no longer around.

Another example is the letters that UConn has been sending out to design professionals and contractors that have worked on their projects over the years. I have attached a redacted copy of one of those letters to my remarks. See Exhibit A. As you can see from the paragraph at the bottom of the first page, UConn asserts that it can and will bring claims against anyone for perpetuity. Many of the letters sent out by UConn relate to projects completed in the 1990's.

There have been arguments raised that the principle of *Nullum Tempus* has always existed in the state and that the Lombardo decision merely confirmed the existing law which should have been clear to all. I disagree with that argument. I have been practicing construction law for more than two decades prior to the decision being

published and I had never seen it referenced or applied in a construction matter. Moreover, in my dealings with UConn prior to and right up to the publishing of the Lombardo decision, UConn typically requested that the parties sign a tolling agreement relating to the statute of limitations when issues were first raised so that the parties would have time to negotiate before the statute ran out. If it was clear that there were no statutes of limitation that applied to the State, surely UConn would not have been concerned about securing and frequently updating those tolling agreements. Perhaps a more glaring example of the fact that there was no clear recognition in the state that a statute of limitation did not apply to the State itself is the fact that in the Lombardo case, the judge in the trial court ruled that the applicable statutes of limitation did apply to the State despite the State's Nullum Tempus arguments.

The construction industry also believes that the lack of a statute of limitations that applies to the State reflects poorly on the State and its claims of being friendly to businesses. I have attached as Exhibit B to my testimony a chart summarizing the laws of the other states regarding this issue. All of our neighboring states, Massachusetts, New York, New Jersey and many other states from around the country have enacted legislature to impose statutes of limitation against the state. Connecticut should join that majority. Connecticut should make an effort to be business friendly and be fair to its constituents.

For all the reasons outlined above, I urge you to pass this bill.

Thank you for your consideration.

# EXHIBIT A



University of Connecticut  
*Office of the Executive Vice President  
for Administration and Chief Financial Officer*

Architectural, Engineering  
and Building Services

[REDACTED]

[REDACTED]

Re: UConn 2000 Code Remediation Project, University of Connecticut, Storrs, CT  
[REDACTED]

Dear [REDACTED]

The University of Connecticut (the "University") would like to address the outstanding code discrepancies related [REDACTED] which have been identified by the University to be the  
[REDACTED]

With this letter the University is providing [REDACTED] opportunity to correct these deficiencies before the University elects to have these deficiencies repaired by others and seeks remuneration from [REDACTED] for the costs incurred. Consequently, to bring closure to this matter the University would like to meet [REDACTED] ascertain whether [REDACTED] correct the deficiencies identified by the University.  
[REDACTED]

As you are well aware, it is the University's position that as [REDACTED] for [REDACTED] the University is entitled to expect [REDACTED] would fully perform any and all obligations required of it pursuant to its contract with the University, including design of the Project in accordance with code and the acceptable standard of care.

As I am sure you are aware, the Supreme Court of Connecticut recently confirmed in State of Connecticut v. Lombardo Bros. Mason Contractors, Inc., 307 Conn. 412 (2012) that statutes setting forth the statute of limitations and/or repose do not apply to the state. Consequently, the University will vigorously pursue reimbursement for the damages that it incurs for the repair/remediation of these noted code deficiencies.  
[REDACTED]

*An Equal Opportunity Employer*

31 LeDoyt Road Unit 3038  
Storrs, Connecticut 06269-3038  
web: <http://www.aes.uconn.edu>

[REDACTED]

As noted above, we want to make clear [REDACTED] that to the extent the University incurs any costs, expenses or damages in connection with the discovery, investigation, design, engineering and remediation work undertaken or to be undertaken in connection with the code discrepancies identified above, the University will seek compensation from [REDACTED] [REDACTED] for responsibility, reimbursement and payment of same. If you haven't already, please provide notice to [REDACTED] of the noted discrepancies and provide to the University the applicable contact information.

Please contact the undersigned within two weeks of the date of this letter to respond to this letter. Failure to respond to the University within two weeks will be deemed by the University a denial [REDACTED] [REDACTED] to remediate the code deficiencies. The University will thereafter proceed to have the code discrepancies repaired by others for which it will seek compensation from [REDACTED] [REDACTED]

We look forward to hearing from you.

Very truly yours,



Brian Gore, P.E.  
Director of Project and Program Management

[REDACTED]

# EXHIBIT B

1. The following states have either entirely or substantially eliminated the doctrine of *nullum tempus* by statute, or have otherwise sought to refine its applicability by statute:

<b>California</b>	<b>Kentucky</b>	<b>Montana</b>	<b>North Carolina</b>	<b>West Virginia</b>
<b>Florida</b>	<b>Massachusetts</b>	<b>Nebraska</b>	<b>North Dakota</b>	<b>Wisconsin</b>
<b>Georgia</b>	<b>Michigan</b>	<b>Nevada</b>	<b>South Dakota</b>	
<b>Idaho</b>	<b>Minnesota</b>	<b>New Jersey</b>	<b>Utah</b>	
<b>Kansas</b>	<b>Missouri</b>	<b>New York</b>	<b>Vermont</b>	

2. **Colorado** abolished the doctrine of *nullum tempus* judicially in 1996.
3. The following states continue to adhere to some form of the doctrine of *nullum tempus* pursuant to the common law, either subject to exception or limiting the its applicability (*i.e.*, precluding municipalities from relying up the doctrine):

<b>Alabama</b>	<b>Illinois</b>	<b>Maine</b>	<b>Oklahoma</b>	<b>Wyoming</b>
<b>Arkansas</b>	<b>Indiana</b>	<b>New Hampshire</b>	<b>Pennsylvania</b>	
<b>Connecticut</b>	<b>Iowa</b>	<b>New Mexico</b>	<b>Rhode Island</b>	
<b>Delaware</b>	<b>Maryland</b>	<b>Ohio</b>	<b>Texas</b>	

4. The following states have codified the doctrine of *nullum tempus* through statute and/or state constitution:

<b>Arizona</b>	<b>Hawaii</b>	<b>Mississippi</b>	<b>Tennessee</b>	<b>Washington</b>
<b>Arkansas</b>	<b>Louisiana</b>	<b>Oregon</b>	<b>Virginia</b>	<b>Washington DC</b>

5. **Alaska** does not appear to have any legislation or case law even referring to the doctrine of *nullum tempus*.