



**THE SURETY & FIDELITY ASSOCIATION
OF AMERICA**

Joint Committee on Judiciary

March 17, 2014

Statement in Support of House Bill 5570

The Surety & Fidelity Association of America ("SFAA") is a non-profit corporation whose member companies collectively write the vast majority of surety and fidelity bonds in the United States and in Connecticut, including bonds that secure public construction projects. SFAA is a licensed rating or advisory organization in all states and is designated by state insurance departments as a statistical agent for the reporting of fidelity and surety experience. In Connecticut, SFAA is licensed by the Connecticut Insurance Department as an Advisory Organization. SFAA supports the passage of H.B. 5570.

In *State v. Lombardo Brothers Mason Contractors, Inc.*, 307 Conn. 412, 54 A.3d 1005 (Conn. 2012) the State sued 28 defendants, including two sureties, in 2008 for damages allegedly caused by water intrusion which the State had known about since 1996. The Court held that under the common law doctrine of *nullum tempus occurrit regi* (no time runs against the king), the various statutory and contractual time defenses asserted by the defendants did not apply to the State. The Court stated:

As we have explained throughout this opinion, it is not for this court to decide whether *nullum tempus* is sound policy generally or whether the interests it serves are more important than those served by the enforcement of contractual repose provisions. That decision rests solely and exclusively in the hands of the legislature, and, to date, the legislature has not seen fit to abrogate the doctrine of *nullum tempus*.

(307 Conn. at 465-466; 54 A.3d at 1038).

H.B. 5570 is the opportunity for the legislature to take up the Court's invitation and address the public policy noted by the Court. This bill would create a limited abrogation of the *nullum tempus* doctrine to allow application of certain statutes of limitation and repose to the State and its subdivisions. The absence of any limitations period for actions brought by the State, as enunciated in the *Lombardo Bros.* decision, will significantly increase a surety's risk and exposure. Greater uncertainty and risk lead to tightened underwriting requirements, which hurts bond availability. Small contractors, including minority and women owned businesses, are especially affected negatively. H.B. 5570 will provide greater certainty to the surety as to the duration of its risk, and bond availability will be enhanced.

A surety bond is a three party agreement by which the surety secures an obligation owed by one party (the principal) to another (the obligee). Common examples of surety bonds are the performance and payment bonds written to secure public construction projects. The performance bond secures the contractor's obligation to perform the contract fully. The payment bond secures the contractor's obligation to pay its subcontractors and suppliers. In recognition of the public benefits available under performance and payment bonds, the federal government and all 50 states have laws that require public works contracts be secured with performance and payment bonds. *See, e.g.*, Conn. Gen. Stats. §§ 49-41 *et seq.*; 40 U.S.C. §§ 3131 *et seq.*

A surety asked to provide a bond has to evaluate the ability of the bond principal to meet its future, bonded obligations. As those obligations extend further into the future, the surety's underwriting process becomes less and less certain. Thus, the presence or absence of an

enforceable limitations period will affect surety's ability to evaluate the risk it is asked to undertake.

In addition to the considerations of avoiding stale claims and assuring the availability of witnesses and records applicable to all litigants, the absence of an enforceable limitations period negatively impacts the surety's ability to provide the bond. That is, the surety cannot be confident its principal will be able to meet its contractual obligations for an indefinite future period. In the context of surety underwriting, increased uncertainty means increased risk. To compensate for the increased risk, sureties typically tighten their underwriting standards. As a result, some contractors, particularly small contractors, may have greater difficulty in obtaining bonding, and competition on public jobs may decrease.

The *Lombardo* decision is an excellent example of the unreasonable exposures that contractors and/or sureties will face if state and local governments are not subject to a period of limitations or repose. This open-ended, indefinite liability was applied even to a contractor whose contract explicitly incorporated a period of repose. The trial court (which held that the state was subject to the limitations and repose statutes) saw the dangers of indefinite exposure. It stated:

If the court adopts the state's argument . . . the question becomes when, if ever, will the state be prohibited from bringing a claim against a contractor for construction work on a state building? Will the state be able to bring a claim twenty-five years after the building was completed? Fifty years? One hundred years? When asked at oral argument, the state's position was that the claim could be brought at any time. This slippery slope is, to this court, a major public policy concern. In the construction field, buildings do not last forever. If the state is not bound by any statutes of limitations, it will have an unlimited time period to commence lawsuits against contractors and subcontractors.

51 Conn.Supp. 265, 302; 980 A.2d 983, 1006 (2009). H.B. 5570 would avoid the public policy concerns envisioned by the trial court. When a surety writes a bond for a contractor, it is making a judgment about the contractor's financial and operational viability for the duration of the obligation. As the duration of the exposure becomes longer, and the surety must predict the strength of the contractor's operation for periods of time well into the future, the certainty of the judgment is lessened and the surety's risk increases. No one can predict a contractor's financial position 25, 50, or 100 years into the future.

Passage of H.B. 5570 will bring greater certainty to contractors and subcontractors on public projects, and to their sureties, will help contractors qualify for bonds, and will reduce the cost of public construction in Connecticut. SFAA urges the General Assembly to enact this bill.