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## **Testimony of CBA Construction Law Section**

### **In SUPPORT of HB1032**

#### ***An Act Concerning The Applicability Of The Statute Of Limitations To Construction And Design Actions Brought By The State Or A Political Subdivision Of The State***

#### **Judiciary Committee March 6, 2015**

The Construction Law Section of the Connecticut Bar Association (“CBA”) would like the Judiciary Committee to note the Section’s support for House Bill 1032.

The Construction Law Section of the CBA is comprised of lawyers throughout Connecticut who specialize in the practice of construction law. Many of the Construction Law Section members deal extensively and daily with issues involving public projects, specifically construction projects wherein the State of Connecticut is a contracting party. One of the members of the Section’s Executive Committee, Gary F. Sheldon, Esq., wrote an article published in the Connecticut Law Tribune describing the problems for the construction industry that H.B. 1032 is meant to address. Attorney Sheldon’s comments may be generally paraphrased as follows.

The November 2012 Lombardo Brothers decision (State of Connecticut v. Lombardo Brothers Mason Contractors, Inc., 307 Conn 412 (2012)), took many in the construction industry by surprise. Simply put, that decision held that no statute of limitations or repose applies to the state unless the statute specifically states or necessarily implies that it applies to the state. This applies to all claims by the state in any context.

The practical, adverse import of the Lombardo Brothers case on the Connecticut construction industry cannot be overstated. All participants on a state construction project are perpetually exposed to claims by the state or its subdivisions. This applies to all causes of action, not just breach of contract. If the state perceives that it has a good faith basis for a negligence or products liability claim, there is no time limitation applicable to the state’s claim. There is no time-based defense that would defeat claims brought by the state. In other words, the state operates unfettered by the time constraints that otherwise bind private parties.

One effect of the Lombardo Brothers decision is that private business, not the state, bears the risk of errors by state officials. The Connecticut Supreme Court has effectively mandated that private business be wary when entering any contract with the state.

The problems caused by nullum tempus are not limited just to claims by the state. Businesses may face stale claims even if the state does not name them as defendants. Late claims by the state may trigger indemnity claims against third parties that do not begin to run until the date of the judgment or settlement for which the party seeks indemnification. As a result, a company may find itself one of many defendants in a complex legal dispute relating to activities that took place decades ago. Similarly, the insurer or surety for each business may be subject to a stale claim for a project previously believed to be completed to the state's satisfaction.

There are strong public policies in favor of statutes of limitation and repose. By eliminating protracted and unknown potential liability, they lend certainty to contracting parties' affairs and protect against the difficulty in proof and record-keeping imposed by suits involving old claims. The benefits of time limitations would apply in the public construction context as well. Documentary records are too costly to preserve indefinitely. Witnesses disappear. Memories fade. The resolution of stale claims is more likely to be based disproportionately on litigation avoidance rather than on merit. State policy should not rely on nuisance litigation.

It is impossible to accurately value the risk of litigation exposure for an indefinite period of time. No practical document retention policy can account for eternity. A merger with a state contractor may have hidden risks. For any professional (architect, engineer, accountant, lawyer, etc.) performing services for the state, adequate long term professional liability coverage after retirement may be impossible to obtain.

Other states, including states in the Northeast such as New York, Massachusetts and New Jersey, have adopted statutes of limitations that apply in general to claims by the state or specifically to claims by the state arising out of public projects. If Connecticut does nothing to resolve the problems raised by Lombardo Brothers, the time may well be fast approaching when the state will be unable to find sufficient contractors and designers willing to bear the disproportionate and unique risks of a public construction project. The time is now at hand for the Legislature to correct this unfair situation.