

**TESTIMONY BEFORE THE JUDICIARY COMMITTEE
REGARDING RAISED BILL No. 1032**

**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**

March 6, 2015

Senator Coleman, Representative Tong, 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 Construction Law Executive Committee of the Connecticut Bar Association. 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. 1032, "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." In addition to the organizations that I referenced above, I am a member of a coalition of design and construction industry members, representing all aspects of the design and construction industry in Connecticut. All of these organizations 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. In the Lombardo matter, problems were initially experienced within a year after completion of the Law School, yet the State did not commence litigation until twelve years after the project was completed. If this was a private project, the various statutes of limitation that would have been applicable to the claims would have expired at least five and as many as nine years previously and the claims would have been barred. However, the Lombardo Court ruled that the statutes of limitation that applied to everyone else in the State did not apply to the State itself. That 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.

We began our substantive legislative efforts on this matter last year. We were successful in getting the bill approved unanimously by this committee, but unfortunately, the bill

was not brought to the house floor for a vote. In addition to the complications of a short session, last year's bill met some opposition late in the process by one or more state agencies regarding some of the components of the bill. We did not have time to work out those issues prior to the close of the session.

Since the close of the session the coalition that I referenced above has been working closely with the State to attempt to come to an agreement with the State Agencies, the Attorney General's office and the Governor's office regarding the concepts of the bill. While not finalized, I believe that the parties are in agreement with the key fundamental concepts of a proposed statute and we are now attempting to work out specific proposed language for the statute.

There are a number of factors that should be considered in support of this bill. These include reasonableness of a statute of limitations, insurance/bond coverage (or lack thereof), cost to the parties for an indefinite statute of limitations, fairness and making Connecticut business friendly.

There does not appear to be a good reasonable basis, when considering all factors, not to have a statute of limitation that applies to the State. 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, uncertainty and many concerns for anyone doing business with the State, particularly for those involved in the construction industry. On a practical note, it should be recognized that most problems that arise relating to a newly completed project will become evident within two or three years after completion. That is, once the building or highway improvement goes through a couple of complete season cycles, most problems will become evident. For instance, if the building is completed in the summer, heating problems typically do not manifest themselves until the following winter. Leaks in roofs can manifest themselves based upon different weather conditions, and typically do so within the year after completion, just like they did at the Law School in the Lombardo case. The private industry in Connecticut has statutes of limitation from two to seven years, depending upon the legal theories alleged, and no one is complaining that they are not sufficient timeframes in which to detect problems. In fact, some other states have shorter statutes of limitations. As such, imposing a statute of limitations upon the state is not an unreasonable measure.

Statutes of limitation are enacted for a variety of reasons. One of those reasons is that after a period of time, it becomes increasingly difficult to properly and fairly try a case. Witnesses' memories fade or witnesses simply relocate or pass away. Documents are misplaced or lost. Codes and standards change. For these and many other reasons, statutes of limitations have been imposed to give all parties a chance for a fair resolution of claims. Without a statute of limitations, the result will be a diminished trial that is not fair to anyone, either the State or the defendants.

Insurance and bond coverage is a critical issue for both the State and those it contracts with. If something goes wrong, all parties want to make sure that there is insurance

and/or bonds in place to address the problems. If there is no statute of limitations, there is a very real possibility that insurance and/or bond coverage will not be available for older claims. That is, by waiting to assert a claim the State takes the risk that insurance or bond 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 or bonds 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.

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 practiced 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.

It is also important to note that there is a significant cost to all parties if there is no statute of limitations for state projects. With no statute of limitations, all parties, including the State, would be forced to maintain their project records for those projects forever and could never get rid of a single document from a State project or risk the possibility of spoliation of evidence claims if a future lawsuit arose. Many of my architectural clients have many boxes of project records (sometimes 60-80 banker's boxes or more) in addition to dozens of thick rolls of drawings for projects. There are also copious electronic records, both CAD drawings and electronic correspondence such as e-mails. The state should have similar amounts of documentation. The cost for storage for a single such project is significant for each and every party and will last forever. That does not reflect the issue of having to address the problem that the electronic documents will probably have to be upgraded (either due to obsolete hardware, software or both) every few years or those records will be lost. Who will bear that enormous cost? If the State has to bear this cost for hundreds of projects completed each year, the costs will be staggering.

Finally, 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 A 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

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:

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

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):

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

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

Arizona	Hawaii	Mississippi	Tennessee	Washington
Arkansas	Louisiana	Oregon	Virginia	Washington DC

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