

FIDELITY AND SURETY

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IN THIS ISSUE

Timothy T. Corey and Peter J. Martin of Hinckley Allen discuss a recent Connecticut trial court case explicitly extending the doctrine of nullum tempus to a municipality holding that an ordinary statute of limitations did not bar an untimely lawsuit brought by a city, the affect the decision may have on the construction industry and steps construction professionals can take to mitigate against the risk of no time limitation to suit.

Fear and Loathing: The Application of *Nullum Tempus* to Municipalities



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The legal doctrines of *nullum tempus occurrit regi* (“no time runs against the king”) and *nullum tempus occurrit reipublicae* (“time does not run against the state”) jointly stand for the proposition that the sovereign is not subject to ordinary time limitations – such as statutes of limitation and repose and laches – that operate to time bar untimely lawsuits brought by private litigants. For those jurisdictions that apply *nullum tempus*, limitation periods do not apply to the state and, as a result, the state can sue a contractor or designer ten, fifteen or twenty years after project completion. As unfair or inequitable as the application of the doctrine may be, that is the rule of law in many jurisdictions. But, what about municipalities? Does *nullum tempus* extend to towns and cities in those states in which *nullum tempus* has been adopted? This article will discuss *nullum tempus*, its application to municipalities, including a recent Connecticut trial court decision, the impact on the industry and steps that can be taken to avoid potential limitless liability.

Nullum tempus as it is commonly referred is an ancient doctrine originating from the English common law. “The rule of *nullum tempus* ... has existed as an element of the English law from a very early period. It is discussed in Bracton, and has come down to the present time.” *United States v. Thompson*, 98 U.S. 486, 489, 25 L. Ed. 194 (1879). Sir William Blackstone wrote that:

[T]he law also determines that in the king can be no negligence, or laches, and therefore no delay will bar his right. *Nullum tempus occurrit regi* has been the standing maxim upon all occasions; for the law intends that the king is always busied for the public good, and therefore has not leisure to assert his right within the times limited to subjects.¹

The majority of jurisdictions throughout the nation have adopted *nullum tempus*.² In one of the most recent *nullum tempus* cases, the Connecticut Supreme Court reaffirmed the application of *nullum tempus* in *State v.*

¹ Sir William Blackstone, *Commentaries on the Laws of England in Four Books*, Vol. 1, 1753, pp. 247-248.

² See *United States v. Peoples Household Furnishings, Inc.*, 75 F.3d 252, 254 (6th Cir.) (“[t]he ancient rule quod nullum tempus occurrit regi—that the sovereign is exempt from the consequences of its laches, and from the operation of statutes of limitations—has enjoyed continuing vitality for centuries”); *District of Columbia Water & Sewer Authority v. Delon Hampton & Associates*, 851 A.2d 410, 413 (D.C. 2004) (“[t]he prevailing modern view in the United States is that a state government is entitled to the *nullum tempus* exemption as a matter of common law”); *State v. School District*, 34 Kan. 237, 242, 8 P. 208, 209 (1885) (“[I]t is universally held by courts that no statute of limitations will run against the state or the sovereign

authority unless the statute itself expressly so provides, or unless the implications of the statute to that effect are so strong as to be utterly unavoidable. It requires no citation of authorities to sustain this proposition.”); *County of St. Charles v. Powell*, 22 Mo. 525, 527-528 (1856) (*nullum tempus* “is to be found in the great public policy of preserving the public rights, revenues and property from injury and loss by the negligence of public officers”); but see *State v. Yellow Jacket Silver Mining Co.*, 14 Nev. 220, 230 (1879) (“If the state neglects to prosecute for the period which protects individual claims, it loses the demand in the same manner as individuals do.”); see also Jared Cohane and Peter J. Martin, *The Modern Problem of Limitless Liability in Public Contracting Afforded by the Ancient Doctrine of Nullum Tempus Occurrit Regis*, *Journal of the American College of Construction Lawyers*, Vol. 7.

Lombardo Bros. Mason Contractors, Inc., 307 Conn. 412, 54 A.3d 1005 (2012). Connecticut's highest court held that statutes of limitations and other time limitations do not apply to the state, despite the fact that the state filed suit more than twelve years after project completion, well after the applicable limitation periods and with actual knowledge of the claimed construction defect shortly after project completion.

After the *Lombardo* decision, many Connecticut construction industry pundits pondered whether *nullum tempus* is also applicable to Connecticut municipalities. The answer is likely yes. In a recent trial court decision, *City of Hartford v. Con-Way Freight, Inc.*, Conn. Super. Ct., Judicial District of Hartford, Docket No. HHDCV136046452S, 2014 Conn. Super. LEXIS 2721 (Oct. 30, 2014, Huddleston, J.), the Superior Court held that the statute of limitations does not apply to a municipality acting within its delegated governmental capacity. This is the first post-*Lombardo* case in Connecticut to extend *nullum tempus* to a municipality. In *Con-Way*, the City of Hartford sued the defendant owner of a tractor-trailer truck that struck several city owned utility and traffic poles. The City filed suit more than three years after the accident, and beyond the applicable statutes of limitation set forth in Conn. Gen. Stat. § 52-584 and § 52-577. The defendant moved for summary judgment arguing the suit was

time barred. The trial court denied the motion. Relying on *Lombardo*, the Connecticut Superior Court explicitly extended *nullum tempus* to the City and denied the motion.

For the Connecticut construction industry, the *Con-Way* holding is deafening. However, it should not be all that surprising. In *Lombardo*, the Connecticut Supreme Court recognized prior court decisions which held that actions by the state and subdivisions of the state, which include municipalities, are not subject to statutes of limitations. Specifically, *Lombardo* cited *New Haven v. Torrington*, 132 Conn. 194, 204, 43 A.2d 455 (1945), in which the Connecticut Supreme Court previously held that “[i]t is also fortified by the principle that, as respects public rights, a municipality acting in its delegated governmental capacity is not impliedly within the ordinary limitation statutes.” In any event, the *Con-Way* decision brings to light what many in the Connecticut construction industry critical of *Lombardo* long fear and loathe: that otherwise untimely construction and design defect claims brought by municipalities against contractors and designers, their sureties and insurers, may not be time barred.

The national jurisprudence on *nullum tempus* application to municipalities is divided.³ Some courts have attempted to limit *nullum tempus* by applying it only when

³ See, e.g., *San Marcos Water Dist. v. San Marcos Unified Sch. Dist.*, 190 Cal. App.3d 1083, 235 Cal. Rptr. 827, 830 (1987) (*nullum tempus* does not apply to municipalities); *Enroth v. Memorial Hosp. at Gulfport*, 566 So.2d 202, 206 (Miss. 1990) (*nullum tempus* applies to state and political subdivisions);

Board of Educ. Sch. Dist. 16 v. Standhardt, 458 P.2d 795, 801 (N.M. 1969) (*nullum tempus* does not apply unless the action is vindicating public right); *Lakeville Township v. Northwestern Trust Co.*, 74 N.D. 396, 22 N.W.2d 591, 592 (1946) (*nullum tempus* does not apply to municipalities); *City of Medford v. Budge-*

a municipality is performing a governmental function, such as in *Con-Way*, or enforcing a public right. However, any such limitation is often swallowed by the rule since a municipality is rarely ever not performing a governmental function and enforcing public rights.

Equally troubling, courts have not applied the governmental function standard consistently. For example, the District of Columbia appellate court in *District of Columbia v. Owens-Corning Fiberglas Corp.*, 572 A.2d 394, 407 (D.C. App. 1989), applied *nullum tempus* and permitted the District of Columbia to sue to recover costs to remediate asbestos after the statute of limitations expired, while at the same time holding in other cases that removing snow and operating a public swimming pool constitute proprietary functions, not governmental ones. See *Smith v. District of Columbia*, 89 U.S. App. D.C. 7, 10, 189 F.2d 671, 674 (D.C. Cir. 1951); *Thomas v. Potomac Electric Power Co.*, 266 F. Supp. 687, 692 (D.D.C. 1967). Similarly, the Oklahoma Supreme Court in *Oklahoma City Mun. Improvement Auth. v. HTB, Inc.*, 1988 Okla. 19, 769 P.2d 131, 132 (1988), permitted an otherwise time barred suit to proceed against the designer and contractor on a municipal public water pipeline project because “adequate drinking water” is a vested public right. To the contrary, the Colorado Supreme Court in *City of Colorado*

Springs v. Timberline Associates, 824 P. 776 (Col. 1992), refused to apply *nullum tempus* where a municipality waived sovereign immunity. Such inconsistent applications and confusing results create further uncertainty for the construction industry working in the public sector.

Since potential exposure for defects on a municipal construction projects could arguably run indefinitely, municipal contractors and designers, like their state counterparts, are at risk for stale claims long after ordinary statutes of limitations and repose expire. Such risks will increase construction costs as contractors and designers will factor the risk of infinite liability into bid prices, and insurance and bonding premiums will increase. These increased costs will ultimately be passed along to taxpayers. Worse, some speculate that sureties and insurers adverse to undertaking limitless liability will not write bonds and policies for public projects thereby bringing public construction to a grinding halt.

The question is what can be done to protect against the risk of infinite liability where *nullum tempus* has been adopted? Unfortunately, there is not much that can be done other than to mitigate risk. Contractors and design professionals as well as their sureties and insurers must be aware of and account for these risks before doing business

McHugh Supply Co., 91 Ore. App. 213, 754 P.2d 607 (1988) (*nullum tempus* applies to municipalities); *Washington Pub. Power Supply Sys. v. General Elec. Co.*, 3 Wash.2d 288, 778 P.2d 1047, 1049 (1989)

(*nullum tempus* does not apply unless exercising sovereign powers).

with states and municipalities in jurisdictions that have adopted *nullum tempus*. Obtaining proper insurance with extended tail coverage is critical to ensure that potential liability is covered well beyond the ordinary limitation period. Maintaining project records in long-term storage or otherwise may be well worth the costs in the event of litigation. As memories fade and personnel move-on, project records will be more valuable than ever in defending stale claims. Finally, construction industry trade groups can lobby legislators. Indeed, the only way to truly avoid the risks of *nullum tempus* is through legislative change.

In Connecticut, trade industry groups have lobbied the legislature since *Lombardo* to pass a law abrogating *nullum tempus* and legislating a statute of limitations applicable to the State and its subdivisions. During the 2014 legislative session, House Bill 5570 was introduced by Representative Sampson (R-80th Dist.) and referred to the Judiciary Committee. Like other states that have legislatively abrogated *nullum tempus*, the Bill sought to apply the same statute of limitations and repose applicable to private litigants to claims brought by the State and its subdivisions. After a public hearing was held at which many industry members attended and testified in favor of abrogation, the Bill was re-drafted to a ten year statute of repose for claims brought by the State and subdivisions against design professionals only. The Bill was never called for a vote in the House.

For the 2015 legislative session, Connecticut trade industry groups are at it again and have promised to introduce a similar bill – hopefully, this year, with more success. For now, however, states and likely municipalities in jurisdictions like Connecticut that have adopted *nullum tempus* need not rush to the courthouse to preserve claims. But, for those in the construction industry building and designing public works projects at risk of potential limitless liability because of *nullum tempus*, Hunter S. Thompson said it best: “the real world is a risky territory for people with generosity of spirit. Beware.”

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