Paradigm

INTERNATIONAL SOCIETY OF PRIMERUS LAW FIRMS

FALL 2013

Finding the Best Lawyer for You

Helping Clients Find the Right Lawyer: Innovation in Client Service

Current Legal Topics:

North America • Europe, Middle East & Africa

Latin America & Caribbean • Asia Pacific

Timothy D. Boldt

Contractors Beware: The King Can Always Sue You

If you are considering a contract with the state of Connecticut (or just about any other state), stop before you sign, and make sure you understand the meaning of *"Nullum tempus occurrit regi,"* an ancient common law rule which means *no time runs against the king*. In *State v. Lombardo Bros. Mason Contractors, Inc.*,[1] the highest Court in Connecticut ruled that the State can take as long as it pleases to commence a lawsuit against any private party that provides goods or services to the state, including contractors. Although contractors are bound by State laws that limit the time for commencing a lawsuit against the State of Connecticut, the State, on the other hand, is no more bound by such rules than a medieval English king would have been. As explained by the Court, the doctrine stems from the presumption that the king was "daily employed in the weighty and public affairs of government," and as such, should not "suffer by the negligence of his officers, or by their contracts or combinations with the adverse party."[2] Although many presumed the doctrine to be dead, make no mistake, it is alive and well.

In *Lombardo Bros.*, the State of Connecticut entered into contracts for the design and construction of a university library. The project was completed in 1996.[3] Water intrusion problems were quickly discovered and became progressively worse.[4] After four years of monitoring and observing, the State hired forensic engineers to conduct a multi-year investigation.[5] They concluded that the water intrusion was caused by design and construction defects related to roof parapets, structural steel, exterior wall cavities, flashing, windows and the HVAC system.[6] Rather than immediately seek remedies under the applicable design and construction contracts, the State retained a new design professional and different contractors to perform renovation work at a cost of $15 million.[7] In 2008, 12 years after completion of the initial project, the State filed a lawsuit against 28 parties involved in the design and construction of the original project, including its design professionals, construction manager and contractors.

The trial court dismissed the action based on the failure of the State to timely commence suit. In doing so, the court rejected the State's argument that the doctrine of *nullum tempus* applied under Connecticut common law and otherwise held that it was unfair and incompatible with a strong policy favoring deadlines for lawsuits. On appeal, the Connecticut Supreme Court overruled the trial court, finding in favor of the State's need to protect "the public fisc by allowing the government to pursue wrongdoers in vindication of public rights and property without regard to the time limitations applicable to other parties."[8]

Not only did the Court recognize the doctrine of *nullum tempus*, it ruled that the State's sovereign right to an unlimited time to commence a lawsuit cannot be waived, even by the express terms of a contract. Any such terms are unenforceable.[9]

Timothy D. Boldt is a commercial litigator and counselor, focusing on the unique needs of contractors, sureties and construction managers. He works with clients through all aspects of dispute resolution, including compliance with complex contractual and statutory claims procedures, informal and formal mediation, arbitration and litigation in New York's state and federal court systems. Although Mr. Boldt is a New York attorney, he handles matters wherever clients have disputes.

Ernstrom & Dreste, LLP
180 Canal View Blvd., Suite 600
Rochester, New York 14623
585.473.3100 Phone
585.473.3113 Fax
tboldt@ed-llp.com
www.ernstromdreste.com

Although the *Lombardo Bros.* decision does not have any immediate impact on contractors entering into agreements with states other than Connecticut, the case is unsettling. *Nullum tempus* has not been specifically abolished in the overwhelming majority of states, either by court or by legislature.[10] Furthermore, the Supreme Court held in *United States v. Nashville, Chattanooga & St. Louis Railway Co.*[11] that "[i]t is settled beyond doubt or controversy—upon the foundation of the great principle of public policy, applicable to all governments alike, which forbids that the public interests should be prejudiced by the negligence of the officers or agents to whose care they are confided—that the United States, asserting rights vested in them as a sovereign government, are not bound by any statute of limitations, unless Congress has clearly manifested its intention that they should be so bound."[12]

Currently, it appears that only four states have specifically abolished the doctrine of *nullum tempus*. South Carolina and West Virginia have abolished it by statute.[13] Colorado and New Jersey have abolished it judicially.[14] It remains to be seen whether other states will use Lombardo Bros. to avoid the limitations periods, even in the face of express contract terms.

The obvious impact of *Lombardo Bros.* is that contractors and their sureties and insurers are exposed to endless potential liability when contracting with the State of Connecticut and possibly other states. Insurance and bonding costs are likely to increase immediately. Additionally, there are a host of other concerns which should lead contractors to reevaluate internal policies and procedures. How does a contractor protect itself from an unending risk of liability? How long should contractors save documents from public works projects? Should project managers be required to keep detailed project diaries? Should post-project debriefings occur with a risk management team? Are there other contractual mechanisms that can provide limitations-type protection, for example, a claim waiver similar to those signed by contractors as part of the payment application process?

Contractors, and the organizations that advocate on their behalf, should address this issue with state legislatures and seek legislation abolishing *nullum tempus* in order to prevent results like that in *Lombardo Bros.*

1 307 Conn. 412 (2012).
2 *Id.* at 429-430.
3 *Id.* at 421.
4 *Id.*
5 *Id.*
6 *Id.*
7 *Id.*
8 *Id* at 438.
9 *Id.* at 458.
10 *Id.* at 427 "This view was then shared by virtually every court in the country."
11 118 U.S. 120, 125 (1886).
12 *State v. Lombardo Bros. Mason Contractors, Inc.*, 307 Conn. 412, 427 (2012). Ft nt. 20.
13 *See State ex rel. Condon v. Columbia*, 339 S.C. 8, 16–17, 528 S.E.2d 408 (2000); *State ex rel. Smith v. Kermit Lumber & Pressure Treating Co.*, 200 W.Va. 221, 227–28, 488 S.E.2d 901 (1997).
14 *See Shootman v. Dept. of Trans.*, 926 P.2d 1200, 1207 (Colo.1996); *New Jersey Ed. Facilities Auth. v. Gruzen Partnership*, 125 N.J. 66, 69, 592 A.2d 559 (1991).