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Statute of Limitations

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The Doctrine of Nullum Tempus, and Its Impact on Statutes of Limitation and Statutes of Repose

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The common law doctrine of *nullum tempus occurrit regi* — generally translated to mean "time does not run against the king" — when applicable, may preclude the running of statute of limitations periods against government entities as plaintiffs. In practical effect, this can mean that contractors doing business with the government may not be able to assert defenses based on otherwise applicable statutes of limitations or statutes of repose and may, in effect, be exposed to indefinite potential liability.

The doctrine of *nullum tempus* has long been recognized in American jurisprudence. *See United States v. Thompson*, 98 U.S. 486, 489–90 (1878):

The rule of *nullum tempus occurrit regi* 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. It is not necessary to advert to the qualifications which successive parliaments have applied to it.

The common law fixed no time as to the bringing of actions. Limitations derive their authority from statutes. The king was held never to be included, unless expressly named. No laches was imputable to him. These exemptions were founded upon considerations of public policy. It was deemed important that, while the sovereign was engrossed by the cares and duties of his office, the public should not suffer by the negligence of his servants. "In a representative government, where the people do not and cannot act in a body, where their power is delegated to others, and must of necessity be exercised by them, if exercised at all, the reason for applying these principles is equally cogent."

When the colonies achieved their independence, each one took these prerogatives, which had belonged to the crown; and when the national Constitution was adopted, they were imparted to the new government as incidents of the sovereignty thus created. It is an exception equally applicable to all governments.

For a 50-state survey of the doctrine of *nullum tempus*, *see* US Law Network, Inc., Nullum Tempus Compendium of Law, *available at* http://newsmanager.commpartners.com/linktrack.php?url=http%3A%2F%2Fweb.uslaw.org%2Fwp-content%2Fuploads%2F2013%2F08%2FNullum_Tempus_Compendium_of_Law.pdf.

The application of the doctrine of *nullum tempus* to "ordinary" statutes of limitation is generally well established. The law has, however, been in flux in recent years, and some state legislatures have limited or eliminated *nullum tempus* by statute.

There is not as much case law dealing with the application of *nullum tempus* to statutes of repose. It is sometimes argued that, while a statute of limitations is a procedural device that limits the time within which an accrued claim must be asserted, a statute of repose, by contrast, operates to extinguish the underlying cause of action as of a certain time, regardless of whether any claim had then accrued or not. Because, as it is argued, the statute of repose extinguishes the underlying substantive right, *nullum tempus* should have no bearing.

Statutes of repose with respect to claims related to design and construction have been enacted in many jurisdictions. For a 50-state survey of statutes of repose, *see* American Institute of Architects, Statute of Repose State Law Compendium (Revised Jan. 2011), *available at* http://newsmanager.commpartners.com/linktrack.php?url=http%3A%2F%2Fwww.aia.org%2Faiaucmp%2Fgroups%2Faia%2Fdocuments%2Fpdf%2Faias078872.pdf.

In the remainder of this article, we review how some courts have addressed questions involving the application of *nullum tempus* to statutes of limitations and statutes of repose as they apply to construction-related claims asserted by government entities.

Washington

In *Bellevue School District No. 405 v. Brazier Construction Co.*, 691 P.2d 178 (Wash. 1984), the Washington Supreme Court held that *nullum tempus* barred the application of both the statute of limitations and the "builder limitation statute" — the then-current statute of repose (codified at Wash. Rev. Code § 4.16.310). The court held that statutes of limitations do not apply to the state, by virtue of Washington Revised Code section 4.16.160, which expressly provides in part that "there shall be no limitation to actions brought in the name or for the benefit of the state, and no claim of right predicated upon the lapse of time shall ever be asserted against the state. . . ." *Bellevue*, 691 P.2d at 181.

As to the statute of repose, the contractor in *Bellevue* argued that the statute was a "non-claim" statute — e.g., a statute that both created a right and also limited the time during which that right could be exercised. The court held that the statute of repose was not a "non-claim" statute because it created no new right, but was simply a statute defining the period within which a claim must be asserted — in essence, a period of limitations. The only difference between the statute of limitations and the builder limitation statute (the statute of repose) was, the court noted, the point at which the limitation period begins to run.

The legislature responded to *Bellevue* in 1986 with amendments to sections 4.16.160 and 4.16.310. These amendments expressly provide that the state is subject to the construction statute of repose. *See Washington State Major League Baseball Stadium Public Facilities Dist. v. Huber, Hunt & Nichols-Kiewit Constr. Co.*, 296 P.3d 821 (Wash. 2013). As amended, section 4.16.310 (the statute of repose) provides as follows:

Any cause of action which has not accrued within six years after such substantial completion of construction . . . shall be barred. * * * **The limitations prescribed in this section apply to all claims or causes of action . . .**

brought in the name of the state which are made after June 11, 1986. (Emphasis added.)

The principal issue in the *Washington State Major League Baseball* case was when the cause of action accrued. Section 13.7 of the contract provided that, with respect to claims arising from acts or omissions occurring prior to substantial completion of the project, "any alleged cause of action shall be deemed to have accrued in any and all events not later than such date of Substantial Completion." In light of this provision, the court concluded that the cause of action accrued within the six-year period of repose, which was, in the court's words, "the end of the statute of repose inquiry." *Id.* at 826. Because by agreement of the parties in section 13.7 of the contract, the claim accrued during the six-year period of repose, the court held that the statute of repose was satisfied, and under section 4.16.160, there was no other period of limitations applicable to the state.

Oklahoma

Nullum tempus was expressly recognized by the Oklahoma Supreme Court in 1913 in the case of *Foot v. Town of Watonga*, 130 P. 597 (Okla. 1913). In *Oklahoma City Municipal Improvement Authority v. HTB, Inc.*, 769 P.2d 131 (Okla. 1988) the court addressed the interplay between *nullum tempus* and the statute of repose. There, the claim by the municipal authority against the contractor (for alleged defective construction of a water pipeline) was asserted more than 10 years after substantial completion of the improvement. The contractor argued that the claim was barred by the 10-year statute of repose (Okla. Stat. title 12, § 109) and also argued that the construction and operation of a water system was a proprietary function and not a governmental function. Taking the issues in reverse order, the court held that, while the operation of a waterworks is a proprietary function, that is not the test for the application of the doctrine of *nullum tempus* in Oklahoma. Rather, the test in Oklahoma turns on whether the rights to be enforced are public rights — and held that the rights at issue were public rights, and therefore *nullum tempus* applied. On the second issue, the court applied reasoning similar to that in *Washington State Major League Baseball*. The court held that the cause of action had accrued and vested within the time prescribed by the statute of repose, and the plaintiff's failure to comply with the separate statute of limitations was excused under the doctrine of *nullum tempus*.

Virginia

In Virginia, the Supreme Court has held that the doctrine of *nullum tempus* does not apply to claims that have been extinguished by the running of the statute of repose. *Commonwealth of Virginia v. Owens-Corning Fiberglas Corp.*, 385 S.E.2d 865 (Va. 1989). *Nullum tempus* has been codified in Virginia in Code of Virginia section 8.01-231, which provides that "[n]o statute of limitation which shall not in express terms apply to the Commonwealth shall be deemed to bar any proceeding by or on behalf of the same." The Commonwealth argued that *nullum tempus* should apply to the statute of repose as well as the statute of limitations. The court held that, unlike a statute of limitations, when the statute of repose has run, a substantive right of repose is created, which the legislature may not abridge. *Owens-Corning*, 385 S.E.2d at 868.

New Jersey

In New Jersey, the statute of repose now applies to claims asserted by government entities (with four exceptions), as discussed below. The path to this result has had some twists and turns. *Nullum tempus* was the established law of New Jersey until 1991. In *New Jersey Educational Facilities Authority v. Gruzen Partnership*, 592 A.2d 559

(N.J. 1991), the New Jersey Supreme Court abrogated the doctrine as a "legal relic," stating that "[a]s a matter of logic, it would seem that an entity which would not be protected by sovereign immunity would also not be entitled to benefit from *nullum tempus*."

Two years later, in *Rutgers University v. The Grad Partnership*, 634 A.2d 1053 (N.J. Super. App. Div. 1993), the Appellate Division held that, notwithstanding the abrogation of *nullum tempus* in *Gruzen*, the doctrine should continue to apply to Rutgers as the doctrine existed at the time that Rutgers commenced the litigation. The court held that "statutes of limitation are statutes of repose" and concluded that "we can find no rational basis for precluding the application of *nullum tempus* to [the statute of repose] as of the time the State commenced its action." *Id.* at 1056.

The next development came in *State of New Jersey v. Cruz Construction Co.*, 652 A.2d 741 (N.J. Super, App. Div. 1995). Even though *nullum tempus* had been abrogated in *Gruzen*, the court in *Cruz* held that, since the statute of repose (N.J.S.A. § 2A:14-1.1) did not by its express terms apply to the state, "it logically follows that *nullum tempus* cannot be deemed to have been altered by the enactment of the statute." The court held that the claims of the state were not barred by the statute of limitations.

The question was finally resolved in 1997, when the legislature amended section 2A:14-1.1 to make it clear that the statute of repose applies to both private citizens and government agencies (with four enumerated exceptions):

§ 2A:14-1.1. Damages for injury from unsafe condition of improvement to real property; statute of limitations; exceptions; terms defined

a. No action, whether in contract, in tort, or otherwise, to recover damages for any deficiency in the design, planning, surveying, supervision or construction of an improvement to real property, or for any injury to property, real or personal, or for an injury to the person, or for bodily injury or wrongful death, arising out of the defective and unsafe condition of an improvement to real property, nor any action for contribution or indemnity for damages sustained on account of such injury, shall be brought against any person performing or furnishing the design, planning, surveying, supervision of construction or construction of such improvement to real property, more than 10 years after the performance or furnishing of such services and construction. **This limitation shall serve as a bar to all such actions, both governmental and private**, but shall not apply to actions against any person in actual possession and control as owner, tenant, or otherwise, of the improvement at the time the defective and unsafe condition of such improvement constitutes the proximate cause of the injury or damage for which the action is brought (emphasis added).

b. **This section shall not bar an action by a governmental unit**:

(1) on a written warranty, guaranty or other contract that expressly provides for a longer effective period;

(2) based on willful misconduct, gross negligence or fraudulent concealment in connection with performing or furnishing the design, planning, supervision or construction of an improvement to real property;

(3) under any environmental remediation law or pursuant to any contract entered into by a governmental unit in carrying out its responsibilities under any environmental remediation law; or

(4) Pursuant to any contract for application, enclosure, removal or encapsulation of asbestos (emphasis added).

North Carolina

The North Carolina Supreme Court has held that "*nullum tempus* survives in North Carolina and applies to exempt the State and its political subdivisions from the running of time limitations unless the pertinent statute expressly includes the State."*Rowan County Board of Education v. U.S. Gypsum Co.*, 418 S.E.2d 648 (N.C. 1992). It was also argued that the construction and maintenance of local public schools is a proprietary function and not a government function. Although the court acknowledged the viability of the proprietary/governmental distinction with respect to the application of *nullum tempus* in North Carolina, the court held that the operation of public schools (and libraries) are government functions and, therefore *nullum tempus* applied.

Conclusion

The doctrine of *nullum tempus* and its application to statutes of limitations and statutes of repose vary state by state. Contractors are cautioned to review the specific law of any state in which they are doing business.

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