

What We Know

ARTICLES & INSIGHTS

ABOUT THE AUTHOR



Byron Saintsing leads a practice group focused on matters involving [construction law](#), commercial and business litigation, representation of [equipment lessors](#), charter schools, and education law, and commercial creditor bankruptcy. Byron has written and lectured on many topics pertaining to construction and equipment leasing, including editing materials on North Carolina's adoption of Article 2A of the Uniform Commercial Code.

Court of Appeals Decision May Spell Trouble for Creditors

August 31, 2016 | by

The North Carolina Court of Appeals has handed down a ruling that may prove worrisome for creditors. In ruling on two issues of first impression, the Court held that (1) the clock starts running on a creditor's right to bring a claim under the Uniform Fraudulent Transfer Act ("UFTA") when the transfer of the asset takes place and (2) the time limitations set forth the UFTA are a statute of repose and not a statute of limitations. The Court ruled that whether the creditor was actually aware of the fraudulent nature of the transfer of assets by the debtor was not a decisive factor.

The case is known as *KB Aircraft Acquisition, LLC v. Jack M. Berry, Jr. et al.* The Court issued its opinion on August 16, 2016. In the case, the lender had acquired an aircraft loan which was in distress and which ultimately went into default. Since the borrower resided in Florida, the lender sued in Florida to recover the amounts due under the loan. The case went on for over two years before the creditor obtained a judgment in excess of \$10,000,000 against the borrower and a guarantor. It's important to note that in 2008, around the time the aircraft loan became distressed (think Great Recession) but before the lawsuit filing in Florida, the guarantor had transferred a vacation home that he owned in North Carolina in his name only to a limited liability company which he and his wife co-owned.

The creditor promptly domesticated its Florida judgment into North Carolina. However, the judgment did not attach as a lien against the North Carolina vacation home since the home was no longer in the name of the guarantor. The creditor filed a fraudulent conveyance action requesting the transfer of the mountain home be set aside under the UFTA and that it be re-titled in the guarantor's name and subject to the creditor's judgment. The guarantor contended the creditor had waited too long to bring this action and that the clock began running in 2008 when the transfer took place. The guarantor also argued that he had provided some financial statements to the original lender which indicated that the transfer had taken place, along with the fact the creditor had conducted a title search in 2010 which also revealed the transfer. However, there was no evidence before the court that the creditor knew of the fraudulent nature of the transfer until after it obtained its judgment in Florida.

Several other courts across the country, construing the same language in the UFTA, have ruled that the clock does not begin to run until either the creditor discovers the fraudulent nature of the transfer or the creditor obtains a judgment in the underlying action. The North Carolina Court of Appeals declined to adopt either of these approaches. It also ruled that the time limitations outlined in the UFTA are a statute of repose, and therefore not subject to many of the defenses that apply to a statute of limitations. Further, as the court stated in its opinion, a statute of repose can bar claims before the claims have even accrued!

Unsuspecting creditors may be in for a rude awakening upon discovering (1) that their loan or obligation has gone into default (2) that the borrower/debtor has been fraudulently transferring assets prior to the obligation going into default and (3) that the creditor can no longer reach those assets because its claims are time barred. Based on current North Carolina law, upon discovering that such transfers have taken place, the creditor should not wait until it has litigated its underlying claim to bring an action to set aside the transfers. If they do, they may find they waited too late.

CONTACT US

919.250.2000
mail@smithdebnamlaw.com

RALEIGH OFFICE

The Landmark Center
4601 Six Forks Road, Suite 400
Raleigh, North Carolina 27609

Phone: 919.250.2000
Fax: 919.250.2100

COLUMBIA OFFICE

1720 Main St.,
Suite 104
Columbia, SC 29201

Phone: 864.751.5523
Fax: 888.784.2250