

# 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.

## Warning to Creditors: The Clock Is Ticking

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In a case of first impression, the North Carolina Court of Appeals recently held that a creditor's fraudulent conveyance claim was time-barred, even though the creditor did not know about the fraudulent nature of the transfer. The Court of Appeals elected to adopt the minority position held by other courts across the country which have reviewed when the statute of limitations begins to run on a claim under the Uniform Voidable Transactions Act, formerly known as the Uniform Fraudulent Transfer Act ("UFTA").

The case of *KB Aircraft Acquisition, LLC v. Jack M. Berry and 585 Goforth Road, LLC* involved a workout of a distressed aircraft loan. Mr. Berry, a guarantor of the loan, owned a vacation mountain home in North Carolina. The value of the house was substantial and it was not encumbered by any debt. In 2008, the aircraft loan went into default. The creditor worked with the borrower from 2008-2010 to restructure the loan, modifying the loan on four separate occasions in an attempt to give the borrower breathing room to service the loan. Unbeknownst to the lender, Mr. Berry transferred his mountain house to a limited liability company, 585 Goforth Road, LLC, ("LLC") at the beginning of the workout negotiations. The LLC was owned by Mr. Berry and his wife. Mr. Berry would later testify that this mountain house was the sole remaining asset in his name and that he intentionally transferred the mountain house out of his name so that he would have no assets in his name. Each of the modification agreements provided, among other things, there had been no material change in the financial condition of the borrower or the guarantor Mr. Berry.

The borrower ultimately defaulted after the fourth modification of the loan in 2010. The loan was sold to a new lender. The new lender conducted a title search after it acquired the loan and discovered the transfer. It immediately filed suit against the borrower and the guarantor in Florida on the underlying claims for default on the aircraft loan. Following three years of litigation, the new lender ultimately obtained a judgment in Florida against the borrower and Mr. Berry as the guarantor in excess of \$10,000,000 in 2013. The new lender immediately domesticated the Florida judgment in North Carolina

and after that filed a separate action under the UFTA to set aside the conveyance of the mountain house.

The trial court in North Carolina dismissed the case as not being brought timely. On appeal, the North Carolina Court of Appeals upheld the dismissal. The Court of Appeals held that a literal reading of the UFTA dictated that the clock started running on the new lender's fraudulent conveyance claim at the time of the transfer of the property. It refused to adopt the reasoning of many other courts across the country that have construed the very same statutory language to mean the clock does not start running until the creditor knows about the fraudulent nature of the transfer.

Previously North Carolina's courts had held that mere recording of a deed which served to transfer real estate was not sufficient to put a creditor on notice that the transfer was fraudulent. However, the Court of Appeals held that those cases were not applicable to the time limitations outlined in the UFTA.

So, what is the takeaway for creditors who litigate such claims in North Carolina? Creditors cannot sit back and wait for their underlying claims to be fully adjudicated before investigating, and if warranted, taking action to set aside suspect conveyances. If they do, they run the risk of "winning the battle but losing the war" by being unable to have fraudulent conveyances of assets set aside in order to collect the judgment they have obtained.

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#### CONTACT US

919.250.2000  
mail@smithdebnamlaw.com

#### RALEIGH OFFICE

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

Phone: 919.250.2000  
Fax: 919.250.2100

#### CHARLESTON OFFICE

171 Church Street  
Suite 120C  
Charleston, SC 29401

Phone: 843.714.2530  
Fax: 843.714.2541