

North Carolina Court Clarifies Deadlines to Set Aside Fraudulent Conveyances

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Recently, the North Carolina Court of Appeals, in the case of [KB Aircraft Acquisition, LLC v. Berry, et al.](#), clarified the time limit for bringing claims under the North Carolina Uniform Voidable Transactions Act (“UVTA”). In [KB Aircraft](#), the Court held that the term “transfer” in the UVTA refers to the actual date on which an asset is transferred, disposed of, or parted with, rather than the date on which a creditor discovers the transfer’s fraudulent nature. The Court also held that the statute is one of repose, not limitation, meaning that the creditor must affirmatively show that the time has not run to bring a UVTA claim instead of putting the burden on the debtor to show the time has run. [KB Aircraft](#) is a warning to creditors to scrutinize changes to their obligors’ personal financial statements and, when they discover a potential voidable transfer, not to tarry before pursuing a claim.

The UVTA addresses different voidable transfers – what used to be called “fraudulent transfers.” The UVTA provides that claims to void transfers voidable as to present or future creditors will be extinguished if not brought within four years after the transfer is made. A “savings clause” allows a claim to be filed within one year after the creditor discovers the transfer or could have reasonably discovered it, but only if the debtor acted “with the intent to hinder, delay, or defraud” the creditor. Lawsuits to void transfers voidable as to present creditors are extinguished if not brought within four years after the transfer is made, regardless of the debtor’s intent.

In [KB Aircraft](#), Jack Berry guaranteed a \$10 million loan to one of his companies, BerryAir. The loan was assigned to different entities before being acquired by KB Aircraft. In October 2008, when Berry and BerryAir had defaulted on the loan and were negotiating a modification, Berry formed a Florida limited liability company (“Florida LLC”) and transferred property he owned in Blowing Rock, North Carolina, to the Florida LLC. At the time of the transfer, Berry stated on his personal financial statement that the property was valued at over \$4 million. The special warranty deed transferring the Blowing Rock property to the Florida LLC stated “[t]his transaction is between related parties and there is no consideration being paid.” This language signaled a no-brainer voidable transfer under the UVTA, which prohibits transfers in which the debtor does not receive reasonably equivalent value.

In 2008, on his personal financial statement provided to his lender, Berry listed his ownership of the Blowing

Rock property. His 2009 and 2010 personal financial statements reflected that he had transferred the property to an LLC, that the LLC owned the property, and that he had an ownership interest in the LLC.

In 2010, after further defaults, KB Aircraft sued on the loan in Florida, obtaining a \$10 million judgment against Berry and BerryAir. KB Aircraft domesticated its judgment to Watauga County, North Carolina – thereby attempting to obtain a lien on the Blowing Rock property – but could not enforce the judgment lien against the property because Berry no longer owned it. It is unclear why KB Aircraft omitted any fraudulent transfer claim in the Florida lawsuit. Its decision not to do so would prove fatal.

In December 2013, KB Aircraft filed a second suit in North Carolina against Berry and the Florida LLC, alleging a claim for fraudulent transfer under the UVTA. KB Aircraft asked the court to set aside the transfer to the Florida LLC, return title to the Blowing Rock property to Berry, and subject it to KB Aircraft's judgment lien. The trial court held that KB Aircraft's claims were time-barred because it had waited too long to sue. The Court of Appeals affirmed the trial court.

The Court of Appeals held that, as to all transfers, the limitations period begins to run at the time of the transfer upon which the claim is based, or at the time the claimant should reasonably have known of the transfer. Applying the UVTA to the facts in KB Aircraft, the clock began to run in October 2008 when Berry transferred title to the Blowing Rock property to the Florida LLC. The right to bring a claim to void the transfer was extinguished four years later in October 2012.

Turning to the "savings clause," KB Aircraft had one year to file suit from when it discovered, or could have reasonably discovered, the transfer. KB Aircraft purchased the loan in September 2010 and conducted a title search of Berry's property in December 2010. The title search report explicitly showed that Berry had transferred the Blowing Rock property to the Florida LLC in 2008. The trial court and Court of Appeals held that the latest possible time when KB Aircraft discovered or could have reasonably discovered the transfer was December 2010. Therefore, under the savings clause, the claim expired in December 2011.

The Court of Appeals also held that the UVTA is a statute of repose. A statute of repose is a more rigid deadline than a statute of limitations and it is a condition precedent to suing. In other words, a creditor must allege that the claim is within the time limitation to establish a prima facie case. The Court of Appeals held there are no exceptions for equitable remedies, such as voiding of the transfer, thereby denying a tardy creditor, such as KB Aircraft, from arguing it would be unfair to enforce the UVTA under particular circumstances.

KB Aircraft offers two lessons for lenders: First, exercise reasonable diligence to discover potential fraud or misrepresentation by your obligors that could give rise to a voidable transfer claim. Berry may not have notified his lender when he recorded the deed transferring the Blowing Rock property, but he disclosed the transfer on his next personal financial statement. This should have been the point when KB Aircraft addressed the situation. Second, don't delay. KB Aircraft's first suit against Berry was filed in plenty of time to assert a valid claim under the UVTA, but KB Aircraft chose not to assert the claim. It is much easier to obtain a judgment under a note and guaranty in payment default than it is to recover on a claim under the UVTA. But here, absent other sources of recovery, KB Aircraft should have added this claim to the lawsuit.

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