



## Inside

Firm News . . . . . 3  
Recovering Attorney's Fees  
In North Carolina . . . . . 4

## Attorneys

### Estate Planning

Calvin B. Bryant  
Ann E. Hanks  
Edgar S. "Pat" Levy, III  
Cory A. Rayborn

### General Business

William P. Harris  
David B. Ashcraft  
Charles A. Alt  
Christopher M. Kroger  
Matthew C. Jobe

### Real Estate

Kim W. Gallimore  
R. Bruce Laney  
David N. Woods

### Litigation

Frank Burkhead Wyatt  
A. Doyle Early, Jr.  
William E. Wheeler  
Kim R. Bauman  
Frederick G. Sawyer  
James R. Hundley  
John D. Bryson  
Stanley F. Hammer  
Scott Fitzgerald Wyatt  
Marc R. Tyrey  
Arlene M. Reardon  
Jason E. Moss  
Martha C. Massie

To receive InBrief via email call Dan Allen at 884.4444 or email Dan at [dallen@wehwlaw.com](mailto:dallen@wehwlaw.com).

# Things To Consider When Selling Or Buying A Business

**Chuck Alt**, *General Business*, [calt@wehwlaw.com](mailto:calt@wehwlaw.com)



Chuck Alt

Are you thinking about selling your business or acquiring an on-going business? If so, there are things you should be aware of before you make a decision. The first and foremost is the method of structuring the transaction. Usually, transactions are either asset sale/purchases (with the seller being the business) or stock sale/purchases (with the seller being the shareholder(s) of the business). Both types have advantages and disadvantages for both the buyer and seller.

In an asset sale, the buyer acquires all or substantially all of the assets of the business, but normally will not assume any of its liabilities. In a consummated

stock sale, the liabilities of the business will remain with the business upon the transfer of the seller's stock to the buyer. As a result, the buyer in a stock sale has indirectly taken on the burden of the business liabilities. For that reason, with all things being equal, buyers usually prefer asset sales while sellers generally prefer stock sales. However, sellers in a stock sale must pay special attention to any personal guarantees executed for the debts of the business because the transfer of the stock will not result in release of the guarantees.

From a tax standpoint, an asset purchase is more advantageous to the buyer than a stock sale because the buyer gets a "stepped-up" tax basis on the assets being acquired. Also, an asset sale affords the parties the opportunity to agree on the assets that are to be purchased and the assets that will remain with the seller. While this is usually seen as an advantage to the buyer, the seller may also prefer an asset sale if it desires to retain ownership of specific assets.

If buyers and sellers are driven by the necessity for a simple and quick transaction, a stock purchase may be the answer. For instance, unlike an asset sale, a stock sale is not subject to bulk sale laws. Also, the necessity of obtaining third party consents to the transaction is usually more limited because many of the leases and contracts executed by the business prior

*(continued inside)*

# Selling Or Buying A Business Continued

---

to the closing will remain in effect since the business entity will remain a party to the contracts. However, the buyer needs to be aware that major contracts such as loan agreements, distributorships and leases often contain language providing that a change in ownership is an event of default under the contract. In such instances, the consent of the other parties to ownership change will have to be obtained. Also, the speed afforded by a stock sale may be further negated because, as a general rule, more due diligence steps (discussed below) are required in a stock sale.

Before entering into a formal asset sale or stock purchase agreement, it is usually good practice for the parties to sign a Letter of Intent. A Letter of Intent provides the basic framework of the agreement, including a description of what is to be purchased, the purchase price, and the expiration date of the offer to purchase. Often a Letter of Intent will include a non-disclosure agreement between the parties; this provides the potential seller some assurance that the information provided during the due diligence process will not be used other than for the proposed transaction. In most cases a Letter of Intent is non-binding; however, some of the conditions, such as non-disclosure provisions or payment of earnest money, are often made binding by the parties regardless of whether or not the transaction is consummated.

At some point prior to the closing of the transaction, the buyer should have due diligence procedures performed on its behalf. Due diligence is the process whereby the buyer inspects the business records it thinks are necessary to give it comfort to proceed with the transaction. These procedures can involve a review of such items as the minute books and stock ledgers, financial

information, insurance information, records relating to liabilities (including any on-going or pending litigation or non-compliance certificates issued by governmental authorities), major contracts and leases (including contracts with employees and leases for personal or real property), information relating to any environmental problems, warranties made to customers, and information pertaining to any intangible assets of the corporation, including trademarks, copyrights, patents, and trade secrets. This list is not all-inclusive and will depend to some extent on the type of business being acquired and whether the transaction is an asset or stock sale. For instance, in a stock sale the buyer will also want to review the corporation's facilities, including any real property owned or leased.

The asset sale or stock sale agreement is the formal, written agreement providing the pertinent information for the transaction. The agreement is signed after the Letter of Intent and either before or after the due diligence is performed. The agreement includes detailed information on the assets or stock to be purchased, the price and payment terms, the date the closing will take place, the representations and warranties of the seller and buyer, and certain conditions that have to be satisfied or waived for the transaction to close. If the agreement is executed before due diligence is complete, one of the conditions would be that the buyer have the option to terminate the agreement in the event the due diligence investigations return unfavorable results. The buyer would also want the closing of the agreement to be conditioned upon the attainment of the necessary third-party consents and the attainment of the financing needed to purchase the assets or stock.

The parties should also consider including various indemnification provisions in the formal agreement. For instance, the buyer should attempt to include an indemnification provision requiring the seller to protect the buyer against any inaccurate representation or warranty made by the seller. If the seller agrees to such a provision, it should attempt to limit its liability by capping its potential liability and by requiring a certain minimum amount of damages to occur before the indemnification obligations kick in. The seller may want a similar indemnification provision and may also attempt to include a provision requiring the buyer to indemnify the seller should the seller have to pay any debts of the business pursuant to any personal guarantees the seller retained despite the closing of the transaction.

These are just a few of the areas that you should be prepared to deal with when either buying or selling a business. The business attorneys of this firm are ready to help you with each part of the transaction, beginning with your decision to acquire or sell a business, negotiations over terms, the due diligence process, right through to the closing. Please don't hesitate to contact us if you feel we can be of help.

---

PLEASE BE AWARE THAT THIS ARTICLE PERTAINS TO CORPORATIONS; IF THE BUSINESS BEING SOLD IS A LIMITED LIABILITY COMPANY, PARTNERSHIP OR ANY TYPE OF ENTITY OTHER THAN A CORPORATION, THEN THIS INFORMATION WILL NOT BE FULLY APPLICABLE TO YOUR SITUATION.



# Firm News

## NEW ASSOCIATES JOIN FIRM

Our firm is pleased to announce that two outstanding new attorneys have joined our firm to allow us to better serve our clients' needs. Both Martha Massie and Cory Rayborn are recent graduates of the University of North Carolina School of Law.



Martha Massie

Martha's area of practice is in family law. In addition to her law degree, she earned B.S. and B.A. degrees from Guilford College, as well as an M.A. from UNC-CH. She is a native of Lexington, VA and enjoys horseback riding.



Cory Rayborn

Cory's areas of practice include wills, trusts, and estate planning. A native of Jamestown, he earned his B.S. degree from Duke University, followed by concentrated studies in environmental management and policy at UNC-CH. Cory is also the founder/owner of Three Lobed Recordings.



Chris Kroger

### CHRIS KROGER QUALIFIES TO SERVE AS NFL PLAYER AGENT

Chris recently passed the National Football League Players' Association agent examination and is now qualified to represent current and future players in their contract negotiations and related legal matters. Not just your average sports fan, Chris can now provide a more complete range of

services for those aspiring to play pro football. As a real team player, Chris is also currently serving our High Point Chamber of Commerce as Chair of the Governmental Issues Committee.



Ann Hanks

### ANN HANKS TO LEAD NORTH CAROLINA ESTATE ATTORNEYS

Recently, Ann was appointed by the Board of Governors, North Carolina Bar Association, to serve as this year's Chairperson of the Estate Planning and Fiduciary Law Section of that association. As such, she will work with attorneys from

across our state on continuing legal education programs and with various legislative issues affecting estate planning and probate matters.



Bill Wheeler

### BILL WHEELER NAMED OUTSTANDING LAWYER

The Society of Outstanding Lawyers of America recently honored Bill with induction into their Society for his many achievements as an attorney and active member of our community. In addition to this recognition, Bill will serve the High Point Bar Association as President-Elect for the 2003-2004 term.



Doyle Early

### DOYLE EARLY APPOINTED TO HIGH POINT EDC

The High Point City Council recently appointed Doyle to the High Point Economic Development Corporation (EDC) board of directors. The EDC is a public-private organization whose mission is to retain and expand existing business and industry in High Point, to attract new businesses to locate in High

Point, and to encourage the creation of head-of-household jobs for area residents. As a long-time advocate for progressive growth in our community, Doyle will join the EDC's efforts in promoting what we all know to be one of the greatest areas to live and work in our nation.

# Recovering Attorneys' Fees In North Carolina



Jason Moss

Company A has just won a lawsuit after years of litigation, but only after incurring significant attorneys' fees. Individual B wants to file a lawsuit but is concerned about the costs of litigation. Can Company A and Individual B recover their attorneys' fees from the opposing party?

This is a commonly asked question by many businesses and individuals that face a lawsuit. This question has grown more important during a time when the economy is sluggish and expenses are monitored closely.

The general rule in North Carolina is that a prevailing party in a lawsuit cannot recover its attorneys' fees from the opposing party. As opposed to other countries that allow the recovery of attorneys' fees, such as England and Australia, the United States has adopted a different rationale: requiring an unsuccessful party to pay the attorneys' fees of its opponent would discourage parties from protecting their rights in court. According to the American point of view, if a party is faced with the prospect of paying the attorneys' fees of its opponent, that prospect may deter a party from filing claims that

are justified and need to be redressed by the court system. The American rationale also finds support in the notion of equal access to the courts, which is embodied in the North Carolina Constitution.

The harsh results that occur under the British and Australian "loser pays" system can be seen in the following case. In England, Pauline Hughes brought an action against her husband's treating physician after her husband died during gall bladder surgery. After Ms. Hughes won the case at trial, the physician appealed. On appeal, the physician did not argue any bad faith or malicious conduct by Ms. Hughes in bringing the action. The English court of appeals overturned the verdict. Because England adheres to the "loser pays" rationale, the court also ordered Ms. Hughes to pay the physician's attorneys' fees of \$144,000. Ms. Hughes already owed her own attorneys \$146,000. Thus, after the appeal, Ms. Hughes owed \$290,000 in legal fees. Although this is a harsh scenario, it demonstrates why the United States has resisted England and Australia's lead.

Thus, in the examples set forth in the opening of this article, Company A must bear its own legal fees, and Individual B will need to evaluate his claim with an attorney before proceeding with litigation. But Company A says, "In my lawsuit, there was an agreement providing that the losing party in litigation had to pay the legal fees of the prevailing party." Unfortunately for Company A, parties to an agreement cannot alter the general rule stated above. North Carolina courts have consistently refused to enforce agreements that require one party to pay the legal

expenses incurred by another party in litigation.

However, there are exceptions to the general rule that may provide relief to some businesses and individuals. A party to a lawsuit can recover its attorneys' fees if the legislature has enacted a statute that specifically allows it. While this sounds like welcome news to a prevailing party, the statutes that allow for the recovery of attorneys' fees are few, and, in many cases, the decision to allow the recovery of attorneys' fees rests in the discretion of the presiding judge.

The following is a list of frequently encountered statutes that allow a prevailing party to recover attorneys' fees in North Carolina:

**Unfair Trade Practice Claims:** North Carolina has enacted the Unfair and Deceptive Trade Practices Act. This act allows a party to recover damages for the harm caused by the unfair business practices of another company or individual. In addition, this statute allows a prevailing party to recover its attorneys' fees if (1) the opposing party willfully engaged in the unfair act and (2) there was an unwarranted refusal to resolve the matter which constitutes the basis of the suit. Moreover, if a litigant files a frivolous or malicious unfair trade practices claim, the defending party may recover its attorneys' fees.

**Notes or Evidence of Indebtedness:** North Carolina upholds agreements to pay attorneys' fees that are contained in notes, conditional sales contracts, or other evidence of indebtedness. However, the extent of attorneys' fees that may be collected cannot go beyond 15% of the outstanding balance.

**Personal Injury or Property Damage Suits:** In cases involving personal

*(continued on back)*

# Recovering Attorneys Fees, Continued

---

injury or property damage, the plaintiff may recover attorneys' fees if the plaintiff recovers a judgment for \$10,000 or less.

**Frivolous Actions:** A North Carolina judge can award attorneys' fees to a party who defends an action that does not have a credible basis in law or fact.

**Wills and Trusts Litigation:** In litigation involving the interpretation of wills or trusts, a judge has the authority to award attorneys' fees. However, unlike most attorneys' fees statutes, the court can award attorneys' fees to both the prevailing and the unsuccessful party, as long as the

arguments advanced by that party have substantial merit.

**Employment Discrimination Claims:** The United States Congress has enacted numerous laws that prohibit discrimination in the workplace on the basis of race, national origin, sex, age, or physical disabilities, among others. In general, these laws are codified as Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, and the Age Discrimination in Employment Act. If a plaintiff successfully brings an employment discrimination claim against an employer, these statutes allow the plaintiff to recover attorneys' fees from the employer.

While the general rule in North Carolina is that a successful litigant cannot recover its attorneys' fees from the opposing party, there are some of the statutes that allow a party to recover attorneys' fees. There are additional statutes that could cover your specific areas of need. Before you initiate or defend a lawsuit, you should consult our attorneys to see if a specific attorneys' fees statute applies to your situation.



---

*In Brief* is published quarterly by Wyatt Early Harris Wheeler LLP. The purpose of this newsletter is to provide general information about legal developments. As the information presented is not a comprehensive treatment of the subject matters covered, readers are encouraged to seek specific legal advice before taking any action.

---



**WYATT EARLY HARRIS WHEELER**  
ATTORNEYS AND COUNSELLORS AT LAW

1912 Eastchester Drive  
High Point, NC 27265

RETURN SERVICE REQUESTED