

BUYING A BUSINESS IN A RECESSION

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The economic distress of the current recession has made Sellers out of some businesses that had not expected to be in that position, and conversely has made prospective Buyers out of others.

Here are four important points to consider when buying a business in this recession:

1. Public Record Search on the Business.

A thorough public record search on the Seller business is now more important than ever. Sellers in this economy are more likely to have outstanding tax liens and creditor judgments against them on record that need to be extinguished before the Buyer can get good title to assets being purchased. Sellers rarely disclose these embarrassing matters voluntarily. Buyers need to be sure that assets are transferred free and clear of all liens and encumbrances and that the Seller pays all costs associated with removing liens from the public record.

2. Public Record Search on the Individual Owners.

A public record search on the Seller's individual owners is often informative and helpful in understanding the owners and their motivation in selling their business. Outstanding judgments, liens, criminal proceedings and ongoing litigation against an individual owner are more likely in the current economy and can have a big impact on a Buyer's decision whether to pursue a deal at all and on what terms.

3. Seller Financing Is Back.

With Buyers' limited ability to borrow funds for acquisitions, Buyers and Sellers are rediscovering seller financing to get deals done. Buyers need effective escrow and set off provisions that allow them to withhold payments when and if problems crop up after closing.

4. Noncompetes Take On Additional Importance.

Sellers in this recession frequently are getting out of the business not because they want to, but because they have to. Consequently they typically are not interested in retiring to a golf course, but want to get back in business for themselves as soon as they can, which means an increased threat of unfair competition for the Buyer. The NC Court of Appeals has issued at least two opinions this year further narrowing the ability to restrict competition and solicitation of prospects by potential competitors. Buyers need to get enforceable noncompetition and nonsolicitation agreements from Sellers.

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