



ROBINSON & COLE LLP
ATTORNEYS AT LAW

The Lawyer's Perspective on Due Diligence and Purchase and Sale Agreements

*Rhode Island Society of Environmental
Professionals*

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Where to Begin? Due Diligence

- **Real Estate:**
 - Identify site history / conditions
 - Establish baseline conditions
 - Determine remediation options and costs
- **Business Operations:**
 - Identify compliance requirements and needs
 - Determine compliance options and costs



The Role of Attorneys in Due Diligence

- **Appropriate Scoping to Address Client's Strategic Objectives and Limitations**
- **Protect Communications**
 - **Copying an Attorney or Using “Privileged” Stamp is Not Enough - Must Relate to Legal Advice**
 - **In-House Counsel and Their “Primary Purpose”**
 - **Data / Facts vs. Strategic Discussions**
- **Use More Protective and Strategic Language**

The Importance of Contracts

- **Look Beyond Statutes and Regulations:**
 - **Business law concepts**
 - **Contractual rights and obligations**
- **Parties Can Agree (or May Have Already Agreed) to:**
 - **Forgive, assume or share liabilities**
 - **Take or not take certain actions**
 - **Allow or not allow certain actions**
 - **Establish conditions for all of the above**



Considerations for Performing Due Diligence

- **Existing Agreements**
- **Confidentiality / Report Generation**
- **Control / Ownership / Reliance**
- **Responsibility for Payment**
- **Insurance / Indemnification**
- **Access / Cooperation**
- **Time Pressures**
- **Reporting Requirements**
- **Stated Purpose for Employees / Others**



Contract Provisions – Definitions

- **Environment**
- **Environmental Laws**
- **Environmental Conditions**
- **Site (On-Site and Off-Site)**
- **Compliance with Environmental Laws**
 - **Current vs. Historic**
 - **Pre- and Post-Closing Distinctions**



Contract Provisions – Representations and Warranties

- **Releases / Spills**
- **Site Conditions (include structures?)**
- **USTs / Asbestos / Lead Paint / etc.**
- **Off-site Conditions or Liabilities**
- **Compliance (include OSHA?)**
- **Permits and Approvals – Transferable?**
- **Materiality? Knowledge? Exceptions / Schedule? Current or Former?**



Contract Provisions – Indemnities

- **Specified Known Conditions and Matters**
- **Breach of Representation**
- **Pre- and Post-Closing Impacts**
- **Pre- and Post-Closing Compliance Issues**
- **Materiality / Trigger / Knowledge?**

Contract Provisions – Limitations

- **Carve Outs**
 - **Materiality / trigger**
 - **Knowledge**
 - **Exceptions / schedules**
- **Limitations or Alternatives**
 - **Basket / cap**
 - **Cost sharing**
 - **Sunset to liabilities**
 - **Independent statutory claims**



Contract Provisions – Dispute Resolution

- **Technical Disputes**
- **Contractual Disputes**
- **Options for Resolution:**
 - **Litigation**
 - **Mediation**
 - **Arbitration**
 - **Jurisdictional Requirements / Applicable Law**



Ethical Considerations

- **Identify the Parties and Players**
 - **Client**
 - **Adverse Parties**
 - **Third Parties**
- **Understand and Preserve Legal Privileges**
- **Watch for Conflicts That May or Will Arise (e.g., Pre- and Post-Deal Employees)**
- **Remain Aware of Divergent Interests of Others**



Questions?

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