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Environmental Planning for Business and Property Owners

Whether you are purchasing a new business, purchasing or selling property, or managing an existing business, environmental issues require special attention. As many business and property owners have recently realized, the words “discharges into the waters of the United States”, “leaky underground storage tanks”, “hazardous substances”, and “hazardous wastes” are red flags for potential environmental problems. However, what many owners don’t realize is that careful planning on their part can avoid these and other environmental issues.

Planning for environmental issues begins prior to purchasing a business or property. Environmental site assessments allow you to assess risks prior to purchase, and many times may allow you to assert the “innocent landowner” defense to any contamination that may be found after the purchase. In addition, an environmental site assessment detects the location of leaking underground storage tanks and other environmental concerns on the property.

There are two types of environmental site assessments. According to the American Society for Testing Materials (“ASTM”), a Phase One environmental site assessment consists of obtaining “specialized knowledge” about the property from parties such as present and former owners and managers. Regulatory databases, title searches, aerial photographs, and other information about the property help determine the historical uses of the property and any possible sources of contamination.

If the possibility of environmental contamination is discovered in a Phase One environmental site assessment, then a Phase Two assessment may be recommended to verify the possible contamination findings through sampling of soil and/or groundwater. Site assessments provide prospective buyers with the knowledge necessary to assess the environmental risks associated with the property. After an assessment, prospective purchasers have the options of terminating the negotiations, renegotiating a new purchase price based upon the potential devaluation of the assessed property, or requiring the seller to assume all responsibility for environmental liability and potential cleanup costs.

Pre-purchase environmental site assessments are only the first step in managing the environmental risks posed to a business or to a property owner. In addition, you should carefully consider the following environmental issues that may affect your business or property.

Consider whether your business or property discharges possible contaminants into the waters of the United States. The Clean Water Act (CWA), which governs discharge of possible contaminants, requires that point sources install and maintain filtering equipment, sample efflu-

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ents on a regular basis, and maintain records and file discharge monitoring reports with the Department of Environmental Quality (DEQ). It is important for businesses and property owners to self-disclose any discharges to DEQ, as this can deter criminal prosecution and lessen civil penalties that may be imposed by DEQ. In addition, self-disclosure and proper planning allows you to file for a National Pollution Discharge Elimination System (NPDES) permit. NPDES permits allow businesses or properties to discharge potential contaminants into the waters of the United States at negotiated, technical limits.

Also consider the possible discharges of contaminants from your business or property into the air. The Clean Air Act requires any facilities that may cause issuance of, or increase the issuance of, contaminants into the air to obtain a permit. Air quality permits require that potential emissions from the facility meet air quality standards. The permitting process allows the facility's managers and DEQ to evaluate what emissions are technically feasible for the facility, and to then establish technically-based emission limits for the facility. Meeting permit specifications may require the facility to install and maintain emission filtering equipment, monitor emissions from the facility, and report those emissions to DEQ.

In addition, you must consider how solid and hazardous wastes are handled on your property. RCRA, also known as the Solid Waste Disposal Act, requires cradle-to-grave management of hazardous wastes. The first step in coming into compliance with RCRA is determining whether the wastes that your business or property generates are hazardous. RCRA has an extensive list of hazardous wastes that it governs, but there are also a variety of solid wastes and certain hazardous wastes that, depending on their use, may be exempted from the hazardous waste qualification. The hazardous waste determination is made by referring to listed hazardous wastes and then applying the available exemption standards.

If you handle or create hazardous waste, then under RCRA you will be considered a generator of hazardous waste. Generators of hazardous waste are required to identify hazardous wastes, prepare and track a manifest identifying those hazardous wastes, ensure proper transportation of the hazardous waste, and use a treatment, storage, and disposal (TSD) facility for those wastes. Transfer of hazardous wastes to a TSD facility within 90 days is of utmost importance for any business or property owner, because any facility that stores hazardous waste for more than 90 days can be considered a TSD facility. TSD facilities are subject to extremely stringent requirements for treatment and disposal of hazardous wastes.

Last, but not least, consider the most dreaded of the environmental statutes governing property use, the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). CERCLA is better known as "Superfund" because it creates a large fund of money for cleanup of hazardous sites by imposing comprehensive liability on all persons or entities who may have contributed to hazardous substances found on a piece of property. Superfund places joint and several liability on any potentially responsible parties for the release or threatened release of hazardous substances. Potentially responsible parties can include current and former owners of the property, operators of the property, arrangers of transportation of the hazardous substances, and generators and transporters of hazardous substances. In addition, the list of hazardous substances is considerably broader than the hazardous wastes defined under RCRA.

The overwhelming CERCLA liability requires business and property owners to act responsibly in their maintenance and handling of hazardous substances. CERCLA is also the main reason that environmental site assessments are absolutely necessary prior to purchasing a business or property. CERCLA, along with the other environmental statutes, requires you as a business and property owner to take the utmost care in dealing with hazardous substances and potential pollutants that are used on, or discharged from, your property.

This is the briefest of overviews of this complicated topic, designed to provide only a starting point for you to develop a plan for dealing with the environmental issues that affect your business or property. We can provide more detailed information and assistance in developing a plan for your business.

-Scott D. Peterson, Esq.

TEN SECRETS OF NEGOTIATING THE DEAL

In many aspects of business, it is necessary for a company or individual to negotiate certain items. There are many different strategies and techniques which can be utilized, depending on the situation. We have outlined ten of these "secrets for negotiating the deal" below.

1. Reasonable Expectations - The most difficult aspect of any deal is establishing the purchase price. An initial asking price which is much too high or an initial purchase offer which is much too low may be interpreted as so unreasonable as to preclude further discussions. For example, a common seller's mistake is to apply an earnings per share multiple for similar publically held companies. As a result, the seller has unreasonably high expectations and prospective buyers are scared away. Negotiations are most productive when both sides have reasonable expectations, although differences may still occur as to the appropriate purchase price. However, if a party has unreasonable expectations, the negotiation ends before it begins.

2. Hold Your Tongue - One of the ten commandments of negotiating is to let the other side make the initial offer. The initial offer begins to set the boundaries within which the purchase price will be negotiated and keeps more options available to you as you negotiate. It is important to research and explore facts and reasons which might support your position with respect to purchase price, as well as the other party's position. The good negotiator will hold his tongue and let the other party commit to a position.

3. KISS - The negotiation of every deal should begin with a kiss. In other words, "Keep It Simple, Stupid". Most deals involve the execution of a non-binding letter of intent. There has been a lot of effort in recent years to create a binding initial agreement, at least for the buyer. Sometimes the buyer may insist on an option as opposed to a letter of intent so that the seller is obligated so long as the basic terms of the option are met. In any case, at this point in negotiations, the emphasis should be on the major factors. Is the deal a purchase of stock or assets? What is the purchase price? Will the buyer purchase inventory? Will the buyer assume liabilities? Initial negotiations of the deal should avoid focus on smaller issues, as this might result in a failure to reach agreement on the major issues such as purchase price.

4. Marriage or Legal Separation - A major factor which influences the negotiation stance of the parties is whether the principals expect to have a continuing relationship after the deal is closed. For example, if the buyer is relying on future services of the seller to reveal and exploit trade secrets, the buyer must be careful not to take advantage of or otherwise abuse the seller. If the deal is too one-sided, the seller will eventually discover this fact and future cooperation will be jeopardized. If the seller is going to be paid cash at closing and walk away from the business, he can probably afford to negotiate as tough a deal as possible, and it is clearly "buyer beware". However, if the seller anticipates significant future benefits from the deal, such as substantial employment or consulting compensation or additional payments on the purchase price due to a satisfaction of future contingencies, the seller will want to make sure that the transaction is more of a marriage than a legal separation.

5. Secrecy - It is often desirable to have negotiations involve a high degree of secrecy. Parties may enter into a confidentiality agreement which allows each side to disclose confidential information, while requiring that the confidential nature of such information be respected. Negotiations may be conducted off premises or after business hours so that employees, customers and suppliers do not become aware that a deal is in the works. Not all deals are concluded successfully, and a slip of the tongue can result in difficulties for an ongoing business. For example, if employees become aware that the business is for sale, they are apt to be nervous about their jobs. Employees may seek other alternatives, and they become easy prey for competitors who might become aware of pending negotiations.

6. Promises, Promises, Promises - In every deal, both sides make contractual representations and warranties with respect to their businesses. These are normally much more substantial for the seller who must, for example, represent that the financials that have been provided are true and accurate. To the extent possible, the seller should avoid giving absolute representations and warranties, but instead make them "subject to best knowledge after inquiry". The buyer should be reasonable in terms of demanding absolute representations and warranties. For example, a representation or warranty that "there exists no factual basis for any claims against the company" would be unfair since the seller has no way of knowing what facts may exist.

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The seller could, however, represent that no claims have been made and that he has no knowledge of any potential claims.

7. Backing Up Promises - The seller almost always has to back up his promises by agreeing to indemnify the buyer if the promises turn out badly. Indemnification comes in a variety of arrangements. The buyer may insist on a hold back where part of the purchase price is retained or put in escrow to cover seller's indemnification obligations. The seller should attempt to limit the period of time that the buyer has to bring a claim for indemnification. The obligation to indemnify should correspond in length to how long it may reasonably take a party to discover a problem. In a sense, this time limitation functions like a statute of limitations, so that if a claim is brought within the time limited period, it is considered timely even if it then takes a lengthy period to resolve.

8. The Art of Balance - Negotiations inevitably involve give and take. You must leave room to compromise as you negotiate. This requires careful balance so that the positions taken result in additional negotiations as opposed to scaring off the other side. One way to maintain balance is to analyze the transaction from the other party's side. What does the other party seek to accomplish by the transaction, and what are the risks to the other party? Successfully evaluating the other side's position can be a powerful tool in negotiations. For example, if the other side absolutely must acquire your business in order to remain competitive, you have a very strong negotiating position. On the other hand, if there is no urgency associated with the transaction and there are many other acquisition targets for the buyer, the seller's negotiating position may be substantially weaker.

9. The Done Deal - A done deal is a done deal when it's a done deal. In other words, the deal isn't done until the funds are deposited in the seller's account and even then, there may be issues of hold-back, representations and warranties, and indemnification. The main point is not to be so committed to the deal that you lose negotiating strength. Once the buyer determines that the seller is absolutely committed to the transaction, the buyer can win numerous contractual concessions because the seller is afraid to lose the deal. Remember, negotiations always continue right up to the time of closing. Issues may develop during the due diligence period which one party may use to modify the terms of the deal.

10. Use the Assistance of a Professional Negotiator - The best deals are normally negotiated by the principals, but with help from professionals. Professionals, such as accountants and legal counsel, may be helpful in providing guidance as to value, terms and the art of negotiating. Owners can rely on the judgment of experienced negotiators with respect to positions to take and concessions to make. Sometimes the buyer will attempt to isolate the seller from advisors such as legal counsel. Situations such as this may be impossible to avoid, but should alert the seller to the fact that the buyer is trying to isolate the seller for a reason. The seller should be very cautious about making any commitments without thinking about the proposal and consulting advisors, including legal counsel. This removes the emotional element from various issues and also brings legal experience to bear on issues such as representations, warranties and indemnification.

Negotiating the deal is an art form. There is no tried and true formula; each and every deal is different. These "secrets of negotiating the deal" are not really secrets at all. They are just common sense approaches based on experience.

-David A. Ludtke, Esq.
-Britt J. Ehlers, Esq.

Rembolt Ludtke LLP
is pleased to announce that
Scott D. Peterson
and
F. William Schellpeper III
have become associated with the firm.

Mr. Peterson is a graduate of the University of Nebraska-Lincoln (B.S., 2001) and the University of Arizona, James E. Rogers College of Law (J.D., *cum laude*, 2004). Mr. Peterson's practice will be concentrated in civil litigation, agricultural law and environmental law.

Mr. Schellpeper is a graduate of the University of Nebraska-Lincoln (B.A., 2001) and Creighton University School of Law (J.D., *cum laude*, 2004). Mr. Schellpeper's practice areas will include entities formation and governance, commercial transactions, and creditor's rights.

PURCHASE AND SALE AGREEMENTS

Purchase and Sale Agreements ("Purchase Agreements") typically express the complete agreement between buyer and seller, and are the main reference point on the parties' rights and obligations. Purchase Agreements also act both as an agreement and as a checklist of the parts of the arrangement.

Regardless of the size of the transaction, most Purchase Agreements contain certain common elements: (i) introduction; (ii) description of the transaction; (iii) conditions; (iv) representations and warranties; (v) covenants; (vi) miscellaneous provisions (sometimes called "boilerplate") and (vii) signatures.

The **INTRODUCTION** identifies the parties, briefly describes the business, the transaction and often tells how the parties got there.

The **TRANSACTION** section describes what is being purchased and sold (for example, stock or assets), how much is to be paid for it and how payment will be made, and when the transaction will occur (closing date).

CONDITIONS are those things that either must happen or must not happen before the transaction can be completed, and can vary quite a bit from transaction to transaction. Typical conditions include requirements that the business remain intact pending closing, that certain third parties consent, and that the buyer obtain financing for the purchase. Some conditions may be waived by the parties.

REPRESENTATIONS AND WARRANTIES are promises as to the existence or nonexistence of certain facts, and often include such items as the corporate existence of the parties and authorization of the transactions, that the seller owns what is being purchased and sold, and that the financial information is accurate. These sections are often used as disclosure checklists. Sometimes not all of the representations and warranties contained in a typical agreement are true, so the party making them is expected to say what is true and what isn't.

COVENANTS are the parties' ongoing obligations to each other as a result of the transaction: those things that the parties agree that they will do and that they will not do. This section often includes or refers to security for a transaction where all of the price is not being paid at one time, how the business will be conducted after it is purchased, and one party's obligation to indemnify the other under various circumstances (such as a breach of representation and warranty).

MISCELLANEOUS provisions provide assistance in interpreting the Purchase Agreement. These include whether the writing constitutes the entire agreement between the parties, which state's law governs (in multi state transactions), what happens if part of the agreement cannot be enforced, and how notices are to be made under the Purchase Agreement. They also include what happens, for example, if the transaction is terminated before closing.

The **SIGNATURE** section is evidence that each party agrees to the provisions of the Purchase Agreement.

The above is not intended as a complete outline of a Purchase Agreement, but only to give an idea of some of the provisions which may be included in such an agreement. Purchase Agreements vary widely depending on the circumstances of the transaction.

-Robert L. Nefsky, Esq.

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HAVE YOU ADOPTED YOUR NEW FLSA POLICIES YET?

As most employers know, on August 23, 2004, the U.S. Department of Labor's new overtime regulations went into effect. While the potential impact of these new regulations has been overstated by organized labor and certain business groups, two of the few positive results of the new regulations are the creation of a new permissible deduction, as well as a "safe-harbor" provision with respect to improper deductions. Both require employers to carefully examine their policies and employee handbooks to make sure that they are in full compliance.

Under the new and old Fair Labor Standards Act (FLSA) regulations, employees qualifying as an "executive", "administrative" or "professional" employee are generally exempt from the FLSA's overtime regulations. In order to qualify for any of these so-called "white-collar" overtime exemptions, an employee must perform certain specified duties and must also be paid on a "salaried" basis. In order to be paid on a salaried basis, an employee must regularly receive a predetermined amount of compensation each pay period which is not subject to reduction because of variations in the quality or quantity of the employee's work.

Obviously, in order to be exempt, these white-collar employees do not need to be paid for any workweek in which they perform no work. But if the employer makes deductions from an employee's salary because of the operating requirements of the business or the employee's occasional tardiness, that employee is not paid on a "salary basis" and is not exempt from the FLSA's overtime requirements. However, under both the old and new regulations, deductions from pay are permissible and the salaried status will not be lost when an exempt employee: is absent from work for one or more full days for personal reasons other than sickness or disability; is absent for one or more full days due to sickness or disability if the deduction is made in accordance with a bona fide plan, policy or practice of providing compensation for salary lost due to illness; is compensated for jury duty or witness fees, or for military pay, and that amount is offset. Likewise, an employer can make partial or full day deductions for an employee's first or last week of employment, for penalties imposed in good faith for infractions of safety rules of major significance, or for weeks in which an exempt employee takes unpaid leave under the Family and Medical Leave Act.

One of the few bright spots in the new FLSA overtime regulations is the addition of a new permissible deduction for unpaid disciplinary suspensions of one or more full days imposed in good faith for workplace conduct rule infractions. The new regulations require that the suspensions must be imposed pursuant to a written policy applicable to all employees. The Department of Labor has also made it clear that this new exception is to be read very narrowly, and is to apply only to unpaid suspensions for workplace misconduct (*e.g.*, unlawful harassment, violence, drug/alcohol violations, violations of federal/state law), not unpaid suspensions for performance or attendance issues.

Another bright spot in the new regulations is the creation of a new "safe harbor" provision that provides some limitation of liability for employers making improper deductions. For example, suppose a facility manager has an actual practice of docking the salaries of supposedly exempt employees who are late to work. Under the new and old regulations, the overtime exemption would be lost for all employees in the same job classification as the workers who suffered the deductions and worked for this particular manager. However, the new safe harbor provision provides that the exemption will not be lost if: (1) the employer maintains a written policy on improper deductions with an effective complaint procedure; and (2) after receiving and investigating an employee complaint of improper deductions, the employer reimburses the employees for the improper deductions and makes a good faith commitment to comply with the FLSA in the future.

LESSON: In recent years employers in Nebraska and throughout the country have been subjected to FLSA class action lawsuits alleging that a broad class of otherwise exempt employees were transformed into non-exempt employees because of improper deductions. The new regulations limit the effectiveness of these lawsuits by adding the new permissible deduction and creating the new safe harbor provisions.

If you have not already done so, you should consider reviewing and revising your personnel policies and employee handbook to ensure that your policies comply with these new FLSA regulations. First, you should confirm that your written work conduct policies make it clear that the possible forms of disciplinary action for violations include unpaid suspensions of a day or more. Second, you should promptly adopt and publish a policy against improper deductions that contains an effective complaint procedure. Recently, the

Department of Labor published the following sample policy on its website:

Company Policy

It is our policy to comply with the salary basis requirements of the FLSA. Therefore, we prohibit all company managers from making any improper deductions from the salaries of exempt employees. We want employees to be aware of this policy and that the company does not allow deductions that violate the FLSA.

What To Do If An Improper Deduction Occurs

If you believe that an improper deduction has been made to your salary, you should immediately report this information to your direct supervisor, or to [insert alternative complaint mechanism(s)].

Reports of improper deductions will be promptly investigated. If it is determined that an improper deduction has occurred, you will be promptly reimbursed for any improper deduction made.

While this policy is not a model of clarity, it does provide the very basics of what such a policy must contain. Among other things, the policy must provide an effective complaint procedure (with alternative avenues for lodging a complaint) and the employer must promptly address improper deductions. This process is similar to the affirmative defense established by the federal courts for avoiding liability for sexual and other forms of workplace harassment. The policy and complaint procedure must be published to all employees and, like the anti-harassment policy, it will be the employer's burden to prove that the employees had knowledge of it. That means it's critical that employers obtain a signed acknowledgment from the employee regarding the receipt, review and understanding of the policy, as well as posting, training and other timely reminders.

-Mark A. Fahleson, Esq.

THE CLOSING

The closing is when the rubber hits the road; it is the culmination of the negotiations, the due diligence, the documentation, and the financing. All the documents are signed and delivered, and the purchase price is paid.

Typically, everyone relevant to the transaction should be present at the closing. Most importantly, this includes representatives of the buyer and seller who can sign documents and authorize the payment of funds. The lawyers are there to handle last minute details and to make sure that all the i's are dotted and the t's crossed. Representatives of the lenders may be there, either to collect payment for the seller's debts, or to give their blessing before the loan is made to the buyer.

Other attendees might include those who have a vested interest in seeing that the transaction will close, such as a business broker or investment banker. It might include representatives of agents involved with the due diligence, such as accountants, escrow agents, environmental engineers, or title insurance agencies.

In many transactions, the actual purchase agreement is not signed until the closing. However, whether or not it was signed in advance, the seller expects to leave the closing with money: the purchase price. If the closing is delayed for any reason beyond the scheduled closing date, it begins to create doubt whether the deal will ever close. Although the closing may seem like a formality, transactions fail on its doorstep for many reasons, such as a failure of a condition (e.g., financing is not approved, environmental contamination is discovered, an employee refuses to sign, etc.), or there might be a case of seller's or buyer's remorse. Therefore, it is important to keep everyone focused on closing the deal and not let the transaction drag on.

The conduct of a closing has changed with modern technology. With fax machines, video conferencing, documents transmitted electronically, overnight courier services, and wire transfer of funds, businesses that buy or sell regularly may not have a representative physically present at the closing. This can save expense, as one or more lawyers and/or business representatives do not need to travel to the closing and tie up two, or sometimes three, days of productivity.

The absence of any relevant decision maker or authorized representatives can create unexpected problems. Parties are more likely to delay completion of last minute details and document approval. Authorization for a wire transfer may not be communicated in time to meet banking deadlines. If the closing is delayed, costs tend to increase as some tasks need to be repeated.

A closing, whether or not everyone is present, requires a carefully developed schedule and assignment of responsibilities prepared well in advance. Planning can avoid the pitfalls that may arise from a failure to consider all the details.

-Alan D. Slattery, Esq.

DON'T LET ASSUMPTIONS RUIN YOUR DREAMS

Intellectual Property Considerations in Buying a Business

Buying an existing business can be an exciting venture, but it is one fraught with dangers for the unaware. Some of the most elusive pitfalls are intellectual property issues.

When you buy a business, one of the first questions you ask should be, "Is the trademark[1] of the business registered, and are the other trademarks used on the products or services the business provides registered, too?"

If the answer is "No," all is not lost. The mere use of the trademark in commerce may afford the business some rights in the state. However, if you plan to continue to use the trademark(s), you would do well to research the availability of that trademark for registration, and research the use by others of the mark – or anything confusingly similar – in the goods and services into which you may hope to expand. When negotiating with the seller of the business, you also, of course, do not want to overvalue a trademark that is only minimally protected.

Even if the answer is, "Yes, it is registered," it is important to learn what type of registration applies. Trademark rights vary widely; assumptions about any trademark rights could cause you to vastly overvalue the worth of the trademark.

For instance, if you plan to expand an existing business into other products or services, you need to know if another business is already legally providing those products or services under the same or a confusingly similar trademark. Trademarks are usually registered for a particular category of goods or services; such registration does not prevent others from using the same trademark on products or services outside that category.

Trademarks can be limited geographically as well. A trademark can be registered in the Nebraska Secretary of State's office but not registered in the United States Patent and Trademark Office (USPTO). Without USPTO registration, any plans to expand outside of Nebraska could be thwarted by the legitimate use of the trademark by another company in other states. Furthermore, registration in the USPTO may not provide rights to use, and to prevent others from using, the trademark in other countries.

So do not assume that even a registered trademark gives you the ability to expand the scope of the trademark protection, either in terms of goods and services provided or in terms of geography.

Another note of caution: the "®" and the phrase "Reg. U.S. Pat. Off." can be used even if the trademark is not afforded all the normal trademark rights. There is a secondary status of trademark registration, usually for trademarks too generic for full protection, that permits the use of the above symbols but which affords the holder of the trademark very few rights. For example, the holder of a trademark registered in this Supplemental Register would likely lose a dispute over another's allegedly infringing use of the trademark, until that trademark develops sufficient distinction to be transferred to the Principal Register.

A buyer of an existing business might also want to find out how aggressively the business has protected its trademark rights. There is a legal doctrine that the law will not protect him who sleeps on his rights. Even if a business had a trademark registered and originally had strong rights to the mark, a lack of enforcement against infringers could significantly weaken the strength of the mark. Consequentially, you could inherit a significantly weakened right to prevent others from using similar marks for similar products. A simple search can reveal most of the closely-related trademarks in use, if any. Making an erroneous assumption that a mark has been protected can lead you to an unanticipated and agonizing choice between keeping the trademark and expanding the business as you dreamed.

Finally, do not overlook the ownership of the trademarks when drafting the purchase agreements. The transfer of the trademark rights must be done properly to assure that you do not end up owning the bricks and mortar of the business, but not the good will vested in the trademarks.

A little research on the existence and scope of the trademarks involved in the business can go a long way to prevent both overpaying for the business and overestimating the ability of the business to expand under its existing trademark(s).

-Glen Th. Parks, Esq.

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[1]Trademark in this article is used in its generic sense, that is, to include trademarks, service marks, certification marks, collective marks, trade dress, logos, symbols, phrases, tunes - anything registerable that distinguishes the source of the services or products from other providers.