

**CLANDESTINE METHAMPHETAMINE LABORATORIES –  
WHAT DISCLOSURES SHOULD BE MADE?**

1. The Problem
  - A. What is Methamphetamine? – Methamphetamine (or meth) is an illegal, highly addictive, synthetic drug that stimulates and affects the central nervous system and mood regulation. Meth has some legal medical uses, but is produced most frequently for illicit recreational use. RCRA Hazardous Waste Identification of Methamphetamine Production Process By-Products, United States Environmental Protection Agency (“EPA”), Report to Congress Under the USA PATRIOT Improvement and Reauthorization Act of 2005, September 26, 2008 (“2008 RCRA Report to Congress”), pp 1-2.
  - B. Where is Methamphetamine Produced? – Methamphetamine can, and is, manufactured in a variety of ways (“recipes”) with widely varying levels of sophistication and output. Clandestine laboratories range from “super labs” (more than 10 lbs/batch) in both the United States and Mexico to medium-small makeshift operations operated out of homes, apartments, motels and trailers. According to the Drug Enforcement Administration (“DEA”), as of 2005, more clandestine drug laboratories are being seized in the United States than ever before with the smaller laboratories now accounting for the majority of the laboratories seized in the United States. Guidelines for Law Enforcement for the Cleanup of Clandestine Drug Laboratories, United States Drug Enforcement Administration, 2005 Edition (“2005 DEA Guidelines), p 13. Michigan too reports an increase in the number of meth labs seized with the greater percentage of labs seized with the greater percentage of labs being small “personal-use” or “one-pot” labs located in the southwest part of the State. Methamphetamine Reporting Act Michigan State Police Methamphetamine Investigation Team (“2010 Michigan Report”), April 1, 2010, pp 1-2.
  - C. How is Methamphetamine Produced? – A background in chemistry is not necessary to manufacture meth. Many of the over 100 “recipes” are relatively simple and include chemicals and equipment which can be purchased legally. 2005 DEA Guidelines, pp 13-14.

D. What are the Effects of Methamphetamine Production? – Hazardous Wastes are produced when Methamphetamine is made. These wastes, found at laboratory sites, may weigh from a few pounds to several tons. Many of these wastes are reactive, explosive, flammable, corrosive and/or toxic and include hydrochloric acid, mercury chloride, chloroform, benzene, hydrogen cyanide and lead acetate. The presence of these waste products may present both acute and chronic health risks to those who reside in, or live or work nearby, the building where the laboratory is, or was, located. These health risks include everything from headaches and nausea to breathing problems and problems of a permanent nature. Contamination may be present in the plumbing, walls, floors, ceilings and items located within the building. Even after initial cleanup and removal of contaminated personal items, residual contamination is still present in the components of the structure itself; *i.e.*, the walls, floors and ceilings. This residual contamination cannot be seen and, thus, presents perhaps the greatest threat to the unsuspecting inhabitants of buildings formerly used as clandestine drug laboratories. 2005 DEA Guidelines, pp 15-18.

## 2. Partial Solutions

### A. Federal Government Programs

1) DEA Cleanup – The DEA began its Clandestine Drug Laboratory Cleanup Program (the “Cleanup Program”) in 1989 in conjunction with its seizure activities. The Cleanup Program focuses on the removal and disposal of the hazardous wastes created by the manufacture of meth by contracting with outside vendors who have specialized training and equipment for such removal and transport. As of 2005, the DEA was funding almost 12,000 cleanups per year.<sup>1</sup> In many instances, the DEA works with state and local enforcement agencies in coordinated cleanup efforts. 2005 DEA Guidelines, pp 19-36 and Appendix B. The DEA’s responsibilities, however, end with the removal and disposal of the hazardous waste found on site and notification of the completion of

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<sup>1</sup> In more recent years, the amount of DEA funded cleanups has decreased (*i.e.*, 3,866 in 2008). DEA officials attribute the decrease to the passage of the Combat Methamphetamine Epidemic Act of 2005, which restricted sales of pseudoephedrine – a major meth ingredient. The Drug Enforcement Administration’s Clandestine Drug Laboratory Cleanup Program Audit Report 10-29, June 2010 (the “2010 Cleanup Program Audit Report”), pp ii-iii.

cleanup to state and local health and environmental agencies. The DEA does not remediate residual contamination. Rather, the responsibility for the cleanup of residual contamination is with the property owner or the local or state health or environmental agency with jurisdiction. In other words, the DEA is not responsible for ensuring that the property is safe or habitable and DEA “cleanup” does not produce such a result. 2005 DEA Guidelines, p 26; 2010 Cleanup Program Audit Report, p 3, fn 4.

- 2) EPA Guidelines – The EPA is responsible for publishing the standards by which hazardous materials from clandestine drug laboratories must be removed and disposed of by the DEA and other law enforcement agencies and contractors working for these agencies. In addition, as a result of a study published in 2006 by the White House Office of National Drug Control Policy, the Methamphetamine Remediation Research Act was passed in December 2007, which directed the EPA to establish voluntary guidelines (not requirements) for the remediation of residual contamination of former meth labs to the point where they become clean enough to inhabit again. The EPA published its “Voluntary Guidelines for Methamphetamine Laboratory Cleanup” in August 2009 (the “EPA Guidelines”). The EPA Guidelines are comprehensive remediation sequencing beginning with preliminary assessment testing and site investigation, continuing with the removal and disposal of contaminated materials as well as HEPA vacuuming, encapsulation and, ultimately, final report. The EPA Guidelines also advise on the best possible practices for remediating plumbing, septic and sewers, walls, ceilings, floors, countertops, appliances, windows and carpets, just to name a few. Suffice it to say, remediation is not a simple matter of washing the walls and floors and applying a new coat of paint. Remediation involves intense and costly procedures but, with the effect of allowing the property to be safely occupied post-remediation. EPA Guidelines, pp 7-26.
- 3) DEA National Clandestine Laboratory Registry – The DEA has a website at <http://www.justice.gov/dea/clan-lab/index.shtml> which provides a Resource Center and a listing, by state, county, address

and date of cleanup, of sites that have been reported to be clandestine drug laboratories or dumpsites.

B. Michigan – Legislation and Guidelines

- 1) Drug Sites Generally – Michigan enforcement agencies (state and local) must notify the local health department and the department of community health of potential contamination within 48 hours of discovery any illegal drug manufacturing site and post written warnings on the premises. If the likelihood of contamination is confirmed by either the local health department or the department of community health, they must order the property vacated until the property owner presents written certification of decontamination AND the enforcing agency agrees with the certification. MCL 333.12103(3).
- 2) Methamphetamine Specifically – Since October 1, 2006, where the drug site is a meth lab, in addition to complying with the requirements discussed above, the Michigan State Police must obtain and compile information from local police agencies and certain state agencies regarding incidents (manufacture, possession, use and distribution) involving methamphetamine. The required information includes the city, village or township and the county in which each incident occurred. The information is contained in an annual report which is, by statute, required to be posted on the Michigan State Police website (<http://www.michigan.gov/msp>). In addition, the Michigan State Police website contains a “Methamphetamine Resource Site.” Methamphetamine Reporting Act, MCL 28.191 *et seq.* However, the Michigan State Police information does NOT include the addresses for each methamphetamine incident or laboratory. MCL 28.192. And, although Michigan statutory law requires the Michigan State Police to transmit the locations of methamphetamine labs to the department of community health for posting on the department of community health website, MCL 333.26371, no such website is available.
- 3) Guidelines – The Michigan Department of Community Health does, however, publish a cleanup guidance document entitled “Cleanup of Clandestine Drug Laboratory Guidance,” June 5, 2007

(the “Michigan Guidelines”). The Michigan Guidelines are similar to the EPA Guidelines in that they cover the remediation of residual contamination. The Michigan Guidelines also contain specifics on the post-decontamination report requirements and certification for renewed occupancy.

- C. Unresolved Issues – Even with the federal, state and local cleanup programs, it is estimated that only a small percentage of meth labs are subject to law enforcement action and cleanup. Thousands of meth lab sites go undetected and, therefore, are not seized, registered as contaminated, and/or remediated. Some of these sites are simply abandoned, resulting in mini-toxic dump sites that may affect that site as well as surrounding properties. Other sites are sold or rented and pose health threats to the new owners or lessees. These sites, where the history of the property as a former meth lab is unknown, as a result of foreclosure, the non-disclosure by an unscrupulous seller, etc, creates potential issues for REALTORS®.

### 3. The Impact of Meth Labs Upon the Sale of Real Estate

- A. Out-of-State Litigation – Despite the pervasiveness of the manufacturing of methamphetamine, a nation-wide, 50-state search for lawsuits involving liability for the sale of residential property containing former meth labs yielded only two cases.

#### 1) *Bloor v Fritz*, 143 Wash App 718 (2008).

In *Bloor*, an agent representing both the buyers and sellers of a home was held liable to the buyers for failing to disclose that the house had previously been the site of a crystal-methamphetamine lab and marijuana-growing operation. In early January of 2004, the owners of a home located on a secluded five-acre parcel in rural Washington state rented it out to four tenants. The industrious tenants immediately set up a methamphetamine lab underneath the back deck and in the hot tub, together with a large marijuana growing facility in the basement.

A few weeks later, on January 30, the county police department’s narcotics task force executed a search warrant at the property and quickly discovered all of the tenants’ contraband. The police issued a

press release that identified the house and revealed that the home had been the site of methamphetamine production; the details of the press release were reported in the local newspaper. However, the narcotics task force apparently neglected to inform the local health department.

One of the property owners learned of the police activity at the house and set about learning what had happened. She eventually spoke with the narcotics task force detective who helped conduct the search of the home. Through this conversation, the property owner learned the details of what had been going on in the house and she shared this information with the other owner (her husband) and their real estate agent, Robert Miller, who at that point had been acting as the owners' property manager. In February, the owners initiated eviction proceedings against the tenants, two of whom had been arrested and charged with drug crimes. The owners then had Mr. Miller list the property for sale.

Eddie and Evan Bloor moved to the area from Missouri shortly thereafter and began looking for a home to purchase. Over the summer of 2004, they began working with Robert Miller, the property owners' real estate agent, and Miller eventually showed them the property where the drug manufacturing operations had taken place. The Bloors decided to make an offer to buy the property. Robert Miller represented both the sellers and the buyers in the transaction.

One of the owners had completed a seller's disclosure statement in which he represented that the property had never been used as an illegal drug manufacturing site. When Miller reviewed that disclosure statement with the buyers, he never disclosed to them the fact that a drug task force had discovered a marijuana-growing operation and a methamphetamine lab on the property. The sellers accepted the buyers' offer and the transaction closed in August of 2004. The buyers moved into the home shortly thereafter.

In September, the buyers' son heard from a neighbor that the property was commonly known in the community as a "drug

house.” Not surprisingly, this rumor spurred the buyers to investigate the history of the house and they quickly came upon the online version of the February local newspaper report detailing the drug raid in what had become their home. In October, the buyers called the local health department, which immediately conducted an investigation.

The health department quickly determined that the property had been extensively contaminated by the production of methamphetamine and was entirely unfit for occupancy. The health department instructed the buyers to leave immediately and told them they could not take any personal items from the home, as everything in the house had become contaminated and posed serious health hazards. They did as they were told, leaving nearly all their personal belongings behind in the house and the garage. The health department then posted an order on the house prohibiting all use of the property, stating that any use of the property was subject to criminal prosecution and that the buyers were financially responsible for the cost of remediation by a certified, professional contractor.

The buyers lived with relatives before finding a new home in a new city. They had to repurchase all of the personal items they had been forced to leave behind - clothing, bedding, furniture and other necessities. Because they were unable to bear the financial burden of making payments on the former meth lab home while paying for new accommodations elsewhere, the home was lost in foreclosure. The buyers sued the sellers, the real estate agent, Robert Miller, and Mr. Miller’s real estate company.

Not surprisingly, the trial court ruled in favor of the buyers against all of the defendants. Predictably, the court found that the buyers were entitled to compensation for the loss of the personal property and the loss of their home. The trial court also found that the buyers were entitled to be compensated for their loss of income, the damage to their credit and for their emotional distress.

In finding against the real estate agent, the court relied in part on a Washington statute, which requires a real estate agent to

disclose “all existing material facts known by the agent.” As most Michigan REALTORS® are aware, Michigan does not have such a statutory requirement. And unlike in Michigan, Washington state’s seller’s disclosure form explicitly asks whether the home has ever been used as an illegal drug manufacturing site. Finally, the judge ruled that the agent’s conduct violated the state of Washington’s Consumer Protection Act (Michigan’s Consumer Protection Act, however, does not - and hopefully never will - apply to real estate agents).

2) *Moore v Williams*, 192 P3d 1275 (2008).

Oklahoma, like Michigan, has a sellers’ disclosure law. In *Moore*, the sellers of a house answered “no” to Question 27: “Are you aware of [the] existence of hazardous or regulated materials or other conditions having an environmental impact, including, but not limited to, residue from drug manufacturing?”<sup>2</sup> The buyers received a copy of the disclosure statement, signed the contract for sale the next day and closed on the sale and took possession of the home about one month later. About one month after that, the buyers learned that the sellers’ daughter had resided in the house and had been arrested when the house was raided approximately two years earlier for being a meth lab. The buyers sued the sellers and the sellers’ real estate agent claiming that they knew, but failed to disclose, that the house had been used as a meth lab. The buyers claimed that court records showed the raid on the house and the arrests. The buyers claimed that because the house was used as a meth lab, “the walls of the house were bleeding iodine and the countertops were burned.” With respect to the REALTORS®, the buyers claimed that they violated Oklahoma statutory law which, in relevant part, provides:

FN6. 60 O.S.2001 § 834 **Delivery of statements**

C. If the seller becomes aware of a defect after delivery to the purchaser of either a disclaimer

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<sup>2</sup> Oklahoma’s current sellers’ disclosure form also includes Question 28: “Are you aware of [the] existence of prior manufacturing of methamphetamine?”

statement or a disclosure statement, then the seller shall promptly deliver to the purchaser either a disclosure statement or an amended disclosure statement which discloses the newly discovered defect....

60 O.S.2001 § 836 Duties of real estate licensee

A. A real estate licensee representing a seller has the duty to obtain from the seller a disclaimer statement or a disclosure statement and any amendment required by this act and to make such statement available to potential purchasers prior to acceptance of an offer to purchase.

The REALTORS® filed a Motion for Summary Judgment which the trial court granted. In particular, the trial court found that there was no evidence that defendant REALTORS® knew about the house being used as a meth lab any time prior to the sale of the home. The trial court also found that defendant REALTORS® had fulfilled their statutory duty to buyers to provide the sellers' disclosure form. The trial court noted that, in Oklahoma, a real estate licensee has no duty to conduct an independent investigation or verify the accuracy or completeness of a sellers' disclosure statement. The Oklahoma Court of Appeals agreed with the trial court and affirmed the dismissal of the REALTORS®, stating:

Although Realtors had a duty to provide Sellers with the disclosure form, the only remedy Buyers may pursue is when a real estate licensee has actual knowledge of a defect prior to acceptance of an offer, which was not included in the Seller's disclosure statement or amendment, and the real estate licensee does not reveal this defect to the Buyer. Summary Judgment was properly granted in favor of Realtors in the present case.

- B. Michigan – To date, there is no published appellate case in Michigan involving the disclosure of the prior use of property as a meth lab. However, some insight as to how a court might rule on the question can be

gleaned from the out-of-state cases discussed above and Michigan cases involving similar issues.

- 1) Common Law Fraud - While Michigan REALTORS® would not be subject to the same statutory framework that the defendants in the Bloor (Washington) case would, the outcome could have been the same for a Michigan REALTOR®. The judge in that case made a specific finding of fact — *i.e.*, that the REALTOR® had knowingly passed on false information about the meth lab use of the home to the buyers. In light of this factual determination, a Michigan REALTOR® could be held liable under a simple common law fraud claim. By contrast, as found by the court in the *Moore* (Oklahoma) case, where Michigan REALTORS® area wholly unaware of the prior use of the property as a meth lab, they should not be found liable for fraud.
  
- 2) However, Michigan REALTORS® could be found liable if they commit fraud by omission or provide inaccurate or misleading information where they have a duty of disclosure. For example, in *Alfieri v Bertorelli*, 295 Mich App 189 (2012), purchasers of a condominium unit brought a lawsuit against the seller and the seller's agent for fraud, silent fraud and negligent misrepresentation. The Michigan Court of Appeals held that whether the seller's agents had a legal duty to the purchasers to disclose information they knew about a property's contamination status was a question for the jury. The condominium unit was in what had been an abandoned factory contaminated with trichloroethylene. The plaintiff buyers relied on local newspaper articles and a sales brochure prepared by the realtor that the site had been cleaned up. However, serious contamination remained and the jury found for the plaintiffs on their claims. The real estate agent appealed arguing there was no claim for silent fraud and negligent misrepresentation because as sellers' agents they owed no duty to the buyers. The Court of Appeals noted that while Michigan law does not impose a *per se* duty to disclose on seller's agents as it does on sellers, here, the buyers had inquired about the contamination and the real estate agent had been notified by the Department of Environmental Quality that information about the condition of the property in the sales brochure was "inaccurate and

misleading.” The Court stated: “a duty of disclosure may be imposed on a seller’s agent to disclose newly-acquired information that is recognized by the agent as rendering a prior affirmative statement untrue or misleading.” The Court also found unpersuasive, the real estate agent’s argument that there was no fraud because the purchasers had the option to conduct their own due diligence regarding the contamination status of the property. The Court held that the purchasers had no duty to disprove the agent’s representations nor were they given any indication in their talks with the agent that further investigation was needed.

C. Possible Resolutions – Faced with the issues of the discovery and disclosure of the prior use of property as a meth lab, as well as potential REALTOR® liability involving these issues, some states have taken preventative action through legislation.

1) Amend Existing Disclosure Law – The majority of the 50 states require written seller disclosure statements on real estate transactions. As seen in the *Moore* case discussed above, some states such as Oklahoma have amended their sellers’ disclosure laws to add a specific question relating to the prior use of the property as a meth lab or other illegal drug operation. In Texas and Washington, for example, the sellers’ disclosure laws themselves, contain the text of the sellers’ disclosure from statement, much like in Michigan. In those two states, the sellers’ disclosure laws were amended so that the “form” now contains specific inquiries into the use of the property as follows:

Texas

4. Are you (seller) aware of any of the following conditions:

\_\_\_ Previous Use of Premises for Manufacture of Methamphetamine

VTCA, Property Code, §5.008, effective September 1, 2001.

Washington

Yes  No  Don't Know J. Has the property been used as an illegal [drug] manufacturing site?

RCWA 64.06.020, effective June 7, 2012.

- 2) New Statute – In other states, entirely new laws were passed to provide for the disclosure of meth labs.

For instance, Minnesota's law provides for the seizure and cleanup of meth labs in a manner similar to the EPA's Voluntary Guidelines and Michigan's Public Health Code [MCL 333.12103(3)] discussed above. Minnesota's law also states:

(m) Before signing an agreement to sell or transfer real property, the seller or transferor must disclose in writing to the buyer or transferee if, to the seller's or transferor's knowledge, methamphetamine production has occurred on the property. If methamphetamine production has occurred on the property, the disclosure shall include a statement to the buyer or transferee informing the buyer or transferee:

(1) whether an order has been issued on the property as described in paragraph (c) [order to vacate];

(2) whether any orders issued against the property under paragraph (c) have been vacated under paragraph (j) [certificate of remediation]; or

(3) if there was no order issued against the property and the seller or transferor is aware that methamphetamine production has occurred on the property, the status of removal and remediation on the property.

MSA §152.0275(m), effective January 1, 2006. Missouri's law is slightly more detailed:

1. In the event that any parcel of real property to be sold, exchanged or transferred is or was used as a site for methamphetamine production, the seller or transferor shall disclose in writing to the buyer or transferee the fact that methamphetamine was produced on the premises, provided that the seller or transferor had knowledge of such prior methamphetamine production. The seller or transferor shall disclose any prior knowledge of methamphetamine production, regardless of whether the persons involved in the production were convicted for such production.

2. A seller or transferor of any parcel of real property shall disclose in writing the fact that any premises to be sold or transferred either was the place of residence of a person convicted of any of the following crimes, or was the storage site or laboratory for any of the substances for which a person was convicted of any of the following crimes, provided that the seller or transferor knew or should have known of such convictions:

(1) Creation of a controlled substance in violation of section 195.420, RSMo;

(2) Possession of ephedrine with intent to manufacture methamphetamine in violation of section 195.246, RSMo;

(3) Unlawful use of drug paraphernalia with the intent to manufacture methamphetamine in violation of subsection 2 of section 195.233, RSMo;

(4) Endangering the welfare of a child by any of the means described in subdivision (4) or (5) of subsection 1 of section 568.045, RSMo; or

(5) Any other crime related to methamphetamine, its salts, optical isomers and salts of its optical

isomers either in chapter 195, RSMo, or in any other provision of law.

VAMS 442.606, effective 2001.

- 3) Exempt if Remediated – In some states, the disclosure of prior use of property as meth labs is not required if the property has been fully remediated. For example, Colorado’s statute requires a seller to disclose any prior use of the residential property as a meth lab. However,

(4) If the seller became aware that the property was once used for the production of methamphetamine and the property was remediated in accordance with the standards established pursuant to section 25-18.5-102, C.R.S., and evidence of such remediation was received by the applicable governing body in compliance with the documentation requirements established pursuant to section 25-18.5-102, C.R.S., then the seller shall not be required to disclose that the property was used as a methamphetamine laboratory to a buyer, and the property shall be removed from any government-sponsored informational service listing properties that have been used for the production of methamphetamine.

CRSA §38-35.7-103, effective April 20, 2009.

- 4) Sanctions For Non-Disclosure – Some state laws contain not only the disclosure requirement, but also the penalty for failing to disclose. Colorado’s Meth Lab Disclosure Law allows a buyer three years from the date of purchase to sue for failure to disclose previous use of residential property as a meth lab. A seller can be liable for:

(I) Costs relating to remediation of the property according to the standards established by rules of the state board of health promulgated pursuant to section 25-18.5-102, C.R.S.;

(II) Costs relating to health-related injuries occurring after the sale to residents of the property caused by methamphetamine production on the property; and

(III) Reasonable attorney fees for collection of costs from the seller.

CRSA §38-35.7-103, effective April 20, 2009. Arizona takes an even more stringent approach, making the failure to disclose the use of property as a meth lab a crime, unless the property has been fully remediated.

H. The following notice requirements apply until the remediation is complete as provided in subsection E of this section:

1. Within five days after a buyer signs a contract to purchase the real property, the owner shall notify the buyer in writing that methamphetamine, ecstasy or LSD was manufactured on the real property or that an arrest was made pursuant to this section. The buyer shall acknowledge receipt of the notice. A buyer may cancel the real estate purchase contract within five days after receiving the notice. An owner who does not comply with this paragraph is subject to criminal prosecution for failure to disclose.

ARS §12-1000, effective August 2, 2012.

#### 4. Conclusions

A. Buyers' Agents – counsel clients to:

- 1) Check Registers
- 2) Test – Test kits are available starting around \$50
- 3) Ask the Sellers and the Neighbors

B. Sellers' Agents

- 1) Amend Sellers' Disclosure Law
- 2) Disclose If You Know
- 3) Do Not Provide Inaccurate Or Incomplete Information