



Methamphetamine Lab Clean-Up / Disclosure Laws Present Quandary for Homeowners and Real Estate Agents

Illegal methamphetamine laboratories are a growing problem in Colorado. The byproducts of methamphetamine manufacture can contaminate the property, and the residual chemicals may pose health threats. Clean-up costs can be high. The specter of a contaminated home raises issues for both owners and for potential listing agents.

Under Colorado's "Meth Lab Clean-Up Statute", the state health department set standards for the clean-up of contaminated properties. An owner who receives notice that a meth lab was located on the property must either clean-up the property or demolish it. If the owner follows the statutory requirements, immunity from liability for health-related injuries is granted. This immunity does not apply to property damage claims, or to a person convicted of producing methamphetamine.

The Legislature recently addressed the issue of meth lab disclosure in residential real estate transactions. C.R.S. §38-35.7-103 provides that a buyer of residential property may have it tested for meth contamination. If the test shows meth contamination that has not been properly remediated, the buyer must give written notice to the seller of the test results, who then has 30 days to obtain a second test. If the seller does not obtain a second test, or if the second test confirms the results of the first test, the seller has the duty to clean-up or demolish the property.

If there is contamination, the buyer can terminate the contract. The buyer may also choose to purchase the property, if the buyer provides notice to the proper agency, assumes liability for remediation, and completes the remediation within 90 days from the closing.

Without proper remediation, the seller has a duty to disclose that the property was used as a meth lab. If disclosure is not made, the seller is liable for the cost of remediation, for health-related injuries, and for attorney fees. The seller's duty to disclose does not apply if the property was remediated and the other requirements of the Act were met.

A conflict may exist between a listing agent's duty to disclose adverse material facts and the exemption from disclosure for a seller who has cleaned up a meth lab. Does the real estate agent have a separate duty to disclose that the property was previously used as a meth lab even if it has been properly remediated? The seller might not want the disclosure made as it might impact the marketability of the property. The buyer might want to know if he or she was purchasing a property that had been remediated. If the agent does not make the disclosure, an aggrieved buyer could sue the agent for damages. If the agent makes the disclosure without the seller's consent, the agent could have liability to the seller.

The Colorado Association of Realtors apparently takes the position that disclosure is not required if the property was remediated and all requirements of the Act were met.¹ CAR recommends that the listing agent obtain the clean-up report and documentation of compliance with the Act. If those documents are obtained, CAR maintains that a real estate agent has no duty to disclose that the property was previously a meth lab. The rationale is that requiring disclosure after proper remediation is contrary to the spirit of the statutes and that it would unfairly prejudice the seller. Disclosure is required if the documents are not obtained, or if the agent has knowledge that the remediation failed.

This rationale is compelling. However, the legislative immunity only applies to the owner, and does not extend to the agent. The broker can reduce risk by obtaining the written permission of the seller and by making the disclosure. If the seller refuses to consent, the real estate agent should be aware that nondisclosure involves a risk, even if the statutory requirements were met. There is nothing to prevent a suit by the buyer; and, because of the seller's immunity, the agent could possibly be found liable for all of the damages. If the agent is not willing to accept this risk, the agent should consider not accepting the listing, or should consider withdrawing from representing that seller.

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ON A PERSONAL NOTE...

Three years ago, in our Spring newsletter, I wrote a tribute to my dad, Charles Rothman, and we honored dads and other heroes across the country. There is an old Jewish proverb that says, "When a father gives to his son, both laugh; when a son gives to his father, both cry." I'm thankful that I was able to share those thoughts with him while he could enjoy them.

This spring, my dad would have celebrated his 80th birthday. Sadly, he passed away a few months ago, just 6 days after his 58th wedding anniversary with my mom, Alice Rothman. Someone once said that the best gift a father can give to his children is to love their mother. I couldn't agree more, and my sister and I are wealthy from that gift.

So, friends, enjoy these warm months with all of the folks who are important to you. Life is short and unpredictable; treasure your relations and tell them so. You will be glad you did!

Best regards,

Barry Rothman

P.S. In our last issue, a typo missed our attention and we misspelled the name of our new associate, Greg S. McLaughlin. Our sincere apologies to Greg! Please read his first article for the firm on the back of this issue.

This publication provides general information and should not be used or taken as legal advice for specific situations which depend on the evaluation of precise factual circumstances. Use of any information herein does not create an attorney-client relationship. The law is constantly changing and there are exceptions to almost every rule of law. You should not rely on the information provided in this newsletter without seeking legal counsel.

¹ Richard Clark, *Realtors Meth Lab Dilemma: Disclose or Not?*, www.coloradorealtors.com/car_legal_tools_main.asp. (2008)

The Customer Account Form: Priority #1 in Preserving Creditor Rights

Every business is faced with three common issues: how to make the sale, how to collect on the sale, and how to protect against liability exposure. Often, in the rush to make the sale, the latter elements may be overlooked. As a standard operating procedure, each customer (new and old) should complete and sign a "Customer Information Form." This form should be tailored to your specific business with your attorney, but the key elements of the document and some examples of its provisions are as follows:

1. Contact Information: Obtain primary and secondary contact information for customers;
2. Legal structure: Identifies customer legal status, such as corporation, LLC, sole proprietorship, etc.;
3. Trade references;
4. Bank References: This is important where you will have multiple transactions on payment terms with the customer;
5. Officer/owner and primary contact list;
6. Payment terms and interest clause: ex. "1.5% interest will be charged per month on all past due amounts."
7. Collection clause: Entitles you to recover all attorney, court and collection costs incurred by you on delinquent accounts;
8. Choice of law and venue clause: Any law suit must be filed in the county where your business is located;
9. Statute of limitation clause: Contractually shortens the time period in which any suit must be brought;
10. Bad check/ NSF clause: Notice of a \$25 service charge on all returned checks;
11. Payment application clause: ex. "payments will be applied first to accrued charges and interest, then to principal;"
12. Liability limitation clause: Limits your damage exposure for defective goods to either replacement of the goods or full refund of the purchase price;
13. Returned Merchandise: Requires pre-authorization before goods can be returned, and provides for a restocking fee;
14. Continuing personal guarantee clause: Binds the owner(s)/officer(s) to pay if the business defaults;
15. Terms of sale: Notifies customer that the buyer's purchase order terms are not incorporated into your terms of sale;
16. Dispute notification clause: Requires claim of non-conforming/rejection of goods be submitted in writing within 30 days, or claim is waived;
17. Credit check authorization clause;
18. Tax exempt certificate clause: Requires a copy of certificate to be on file in order to transact a tax exempt sale;
19. Dun & Bradstreet number; and
20. Entire agreement/merger clause.

By consistently using a well crafted customer account form, a business can tremendously enhance its ability to collect sales revenues and limit its potential exposure if a dispute arises. If you have questions about creating a new form for your business or revising an existing one, feel free to give us a call.

About the author: Greg S. McLaughlin is an associate attorney with the firm and his practice emphasizes Commercial Litigation, Commercial Law, Insurance Litigation, Business and Employment Law, and Creditor's Rights.

(CONTINUED FROM FRONT) The clean-up and disclosure statutes contain detailed requirements which are not addressed in this article. Anyone faced with clean up or disclosure issues should consult with legal counsel to determine the requirements of these statutes. The attorneys at Stewart, Shortridge & Rothman can provide assistance to sellers or real estate agents faced with these issues.

About the author: Scott Fitzke is Special Counsel to the firm and his practice areas include Civil Litigation (Trials and Appeals), Defense Litigation, HOAs, Professional Liability and Malpractice, Entertainment Law, Business Law and Business Associations, Wills, Trusts and Estates, Probate.