

**NOTE: POISON IN OUR OWN BACKYARDS: WHAT  
MINNESOTA LEGISLATORS ARE DOING TO WARN  
PROPERTY PURCHASERS OF THE DANGERS OF  
FORMER CLANDESTINE METHAMPHETAMINE LABS**

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## I. INTRODUCTION

Methamphetamine (meth) is getting more attention in Minnesota today than in the past, largely because the problem has become so widespread that it can no longer be ignored.<sup>1</sup> Meth is not simply a rural or an urban problem in Minnesota; it is everywhere in Minnesota.<sup>2</sup> In its wake of addiction, abuse, and toxic pollution, meth leaves innocent victims exposed to meth-lab toxins, including neighbors who live adjacent to toxic meth lab properties, law enforcement officials, and children who live at meth lab sites.<sup>3</sup> In addition, unsuspecting property purchasers who

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1. The Minnesota Department of Health has posted on its website a comprehensive informational guide to meth abuse, response, and cleanup in Minnesota. Minn. Dep't of Health, *Methamphetamine and Meth Labs*, at <http://www.health.state.mn.us/divs/eh/meth/index.html> (last visited Mar. 15, 2005) [hereinafter *Methamphetamine and Meth Labs*].

2. Minnesota law enforcement officials have discovered clandestine meth labs in every one of Minnesota's eighty-seven counties. Chris Hamilton, *Home Meth Labs Leave Toxic Trail*, DULUTH NEWS TRIB., Mar. 2, 2004, at 1A [hereinafter *Toxic Trail*], available at 2004 WLNR 3196254.

3. Children are found living in an estimated fifty percent of Minnesota meth labs, higher than the national average of thirty percent. Mark Ells et al., Nat'l Center for Prosecution of Child Abuse, *BEHIND THE DRUG; THE CHILD VICTIMS OF METH LABS*, 15 NAT'L CENTER FOR PROSECUTION OF CHILD ABUSE UPDATE 3 (2002), available at <http://www.health.state.mn.us/divs/eh/meth/lab/ellsetal.pdf>; Kermit Pattison, *Meth Labs Putting More Kids at Risk*, ST. PAUL PIONEER PRESS, Dec. 18, 2003, at B1, available at 2003 WLNR 3378482.

unknowingly buy property that is contaminated by chemical waste from past meth production can become sickened by residual pollution. The process of cooking meth in a home, apartment, or vehicle can result in toxic chemicals seeping into drywall, carpet, wood, and upholstery, leaving health-threatening toxins for future inhabitants. Unsuspecting purchasers who inhabit property that formerly housed a meth lab can become victims of this contamination, suffering adverse health effects including severe eye, nose, and throat irritation.<sup>4</sup> Children are more vulnerable to these health problems than adults because of their small size and underdeveloped immune systems.<sup>5</sup> In the words of Deborah Durkin, an environmental scientist at the Minnesota Department of Health, buyers deserve to know if there has been a toxic clandestine drug lab on property they are about to purchase.<sup>6</sup>

The Department of Health estimated that in 2003, roughly 5000 homes in Minnesota were contaminated with meth-lab waste and predicted that the numbers will keep growing.<sup>7</sup> There are currently no laws in Minnesota that provide effective protections to property purchasers from the dangers of unknown residual toxins from undisclosed former methamphetamine labs.<sup>8</sup> During the 2004 and 2005 legislative sessions, Minnesota lawmakers have made progress in drafting legislation that will protect property purchasers from the hazards of undisclosed meth-lab contamination. The purpose of this article is to analyze the proposed legislation and to

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4. See Amy Becker, *Home Sweet Brownfield*, ST. PAUL PIONEER PRESS, Feb. 22, 2004, at A17, available at 2004 WLNR 3546163 [hereinafter *Home Sweet Brownfield*]. Unsuspecting family members who lived in a house that contained a former meth lab subsequently fell seriously ill due to lingering undetected contamination. *Id.* Neighbors discovered at a neighborhood potluck dinner that the house had been a former meth lab. *Id.* In addition to severe eye, nose, and throat irritation, first responders at meth lab properties have been known to suffer lung disease and cancer resulting from exposure to lab toxins. Telephone interview with Deborah Durkin, Minnesota Department of Health Environmental Scientist and member of the Minnesota Multi-Agency Drug Lab Task Force (Sept. 7, 2004) [hereinafter Durkin].

5. See *infra* Part II.B.

6. Durkin, *supra* note 4.

7. *Home Sweet Brownfield*, *supra* note 4.

8. While Minnesota law does require that sellers make certain disclosures regarding the condition of property and that sellers of contaminated properties file affidavits evidencing such disclosure in land records prior to transfer, these provisions are inadequate to protect buyers. See *infra* Part III.A (discussing inadequacy of seller disclosure provisions) and Part IV.C.4 (discussing the Minnesota Environmental Response and Liability Act (MERLA) affidavit disclosure requirement and its shortfalls).

provide suggestions, based on existing statutory models, for adapting proposed legislation to best protect buyers from unknowingly purchasing properties contaminated by clandestine methamphetamine labs.<sup>9</sup>

The article begins with an overview of the problems of meth abuse and manufacture in Minnesota, as well as the toxins that are left behind after physical evidence of meth labs has been removed.<sup>10</sup> A discussion of current statutory seller disclosure provisions in Minnesota and in other states then follows.<sup>11</sup> The article next analyzes proposed Minnesota legislation that has attempted to address the problem.<sup>12</sup> A survey follows of six statutory models that provide guidance for drafting legislation to encompass disclosure, buyers' remedies, filing forms in county land records, and requiring state-wide standards for proper cleanup.<sup>13</sup> Finally, a comprehensive workable solution is proposed that includes a requirement that sellers provide property buyers with copies of recorded affidavits regarding meth-lab contamination prior to signing an agreement to sell, specific seller disclosure requirements and buyers' remedies against sellers who fail to disclose, and a means to provide notice to buyers of the existence of a website that contains information on contaminated properties.<sup>14</sup>

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9. While contamination from clandestine labs negatively impacts property lessees as well, these topics are not within the scope of this article. The protections are recommended mainly with the residential homebuyer in mind. Most residential homebuyers would not think to conduct contamination testing on properties they are considering purchasing; whereas, in contrast, Phase I testing is standard in nearly all commercial property purchases today. *See* 25 EILEEN M. ROBERTS ET AL., MINN. PRACTICE SERIES REAL ESTATE LAW § 9.20 (2004) (explaining that most purchasers in the commercial context satisfy due diligence with a Phase I Investigation).

10. *See infra* Part II.

11. *See infra* Part III.

12. *See infra* Parts IV.A–B.

13. *See infra* Part IV.C.

14. *See infra* Part IV.D.

## II. METHAMPHETAMINE: HIGHLY ADDICTIVE, CHEAP TO MAKE, AND DEADLY

### A. *What Is Methamphetamine?*

#### 1. *Methamphetamine Use*

Methamphetamine, otherwise known as “meth” or “crank,”<sup>15</sup> is a man-made amphetamine that is illegally produced or “cooked” in clandestine<sup>16</sup> makeshift laboratories.<sup>17</sup> In Minnesota, meth is the drug most commonly manufactured in illegal labs.<sup>18</sup> Methamphetamine, a derivative of amphetamine, is a powerful stimulant that affects the central nervous system.<sup>19</sup> Meth is manufactured either by heating or cold-processing over-the-counter medications that contain ephedrine or pseudoephedrine with precursor chemicals such as ether, lye, ammonia, or phosphorus.<sup>20</sup> Essentially, “[a]nyone who can read can make meth.”<sup>21</sup> It requires only a series of simple steps and the directions

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15. Anna S. Vogt, *The Mess Left Behind: Regulating the Cleanup of Former Methamphetamine Laboratories*, 38 IDAHO L. REV. 251, 253 (2001). Some other common street names for meth include “shabu,” “shi-shi,” “glass,” “zip,” “crystal,” “spoosh,” “tick tick,” “wake me up,” and “load of laundry.” *Id.* at n.6.

16. A clandestine drug lab is a “collection of materials and ingredients used to manufacture illegal drugs.” Narcanon Southern Cal. Drug Rehab Center, *Meth Lab*, at <http://www.stopmethaddiction.com/meth-lab.htm> (last visited Mar. 18, 2005). Proposed Minnesota Methamphetamine legislation defines a “clandestine lab site” as any structure that is occupied or affected by conditions or chemicals typically associated with the manufacturing of meth. S.F. 423, 84th Leg., Reg. Sess. (Minn. 2005).

17. Interview with Gary Smith, Northfield Chief of Police, in Northfield, Minn. (Oct. 4, 2004) [hereinafter Smith]. Chief Smith has served as Northfield Chief of Police since March of 1999. *Id.* Prior to coming to Minnesota, Chief Smith served on the Grand Island, Nebraska Police Department for eighteen years. *Id.* On September 29, 2004, Chief Smith helped to coordinate a major drug raid in Northfield, Minnesota, and Faribault, Minnesota, in which at least fifty people were arrested. Terry Collins, *50 Nabbed in Southern Minnesota Drug Raid*, STAR TRIB. (Minn.), Sept. 30, 2004, at 1A, available at 2004 WLNR 17405833.

18. *Methamphetamine and Meth Labs*, *supra* note 1.

19. Jennifer Lloyd, Office of National Drug Control Policy, *Methamphetamine Fact Sheet*, available at <http://www.whitehousedrugpolicy.gov/publications/factsht/methamph/index.html> (last updated Apr. 14, 2004).

20. Smith, *supra* note 17; see generally Minn. Dep’t of Health, *Clandestine Drug Labs in Minnesota: Health, Safety, and Remediation Issues* 1–2 (Mar. 2004), available at <http://www.health.state.mn.us/divs/eh/meth/lab/mdhbasicmeth.pdf> (discussing production by heating).

21. *Toxic Trail*, *supra* note 2. “A meth maxim is anyone who can bake a cake can make meth.” *Id.* Minnesota meth labs usually produce only enough meth for

for making the drug can easily be found on the internet.<sup>22</sup> However, manufacturing meth is extremely dangerous because of the volatile nature of the chemicals used in the process.<sup>23</sup> In addition, meth is said to be one of the most addictive illegal drugs ever sold.<sup>24</sup>

Meth is usually sold in the form of a white powder, but can be found in the form of clear chunky crystals (crystal meth).<sup>25</sup> Meth is typically injected or snorted,<sup>26</sup> and meth users often go on binges that can last for days, often not sleeping and completely losing track of time.<sup>27</sup> Dramatic weight loss, extremely poor hygiene, loss of teeth, and skin infections caused by a combination of poor health and hygiene and by scratching at imaginary bugs are all hallmarks of meth use.<sup>28</sup> In Minnesota, meth related deaths, emergency room episodes, law enforcement seizures, labs, and treatments have increased steadily over the past several years.<sup>29</sup> The Hazelden treatment facility reports that in 2004, meth addicts accounted for nearly ten percent of persons entering treatment programs.<sup>30</sup> Meth users describe incredible highs and feelings of invincibility when using the drug.<sup>31</sup> However, kicking the highly addictive habit is extremely difficult; recovering users often

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a few friends and the meth makers. *Id.*

22. Smith, *supra* note 17; *see also Toxic Trail, supra* note 2. Recipes for meth can easily be found on the Internet where users and "manufacturers" trade recipes. *See, e.g.,* Speed Rebel, *How to Make Methamphetamine the Nazi Way*, at [http://www.totse.com/en/drugs/speedy\\_drugs/howtomakemetha170440.html](http://www.totse.com/en/drugs/speedy_drugs/howtomakemetha170440.html) (last visited Mar. 15, 2005) [\*\*warning: website contains profanity\*\*].

23. *See infra* Part II.A.3.

24. Smith, *supra* note 17. Minnesota Governor, Tim Pawlenty, referred to meth addiction as "one of the steepest, slipperiest slopes known to mankind." Tony Kennedy, *Governor to Push for Meth Cleanup*, STAR TRIB. (Minn.), Oct. 26, 2004, at 3B, *available at* 2004 WLNR 17481776.

25. U.S. Drug Enforcement Admin., *Methamphetamine & Amphetamines Fact Sheet*, at [http://www.usdoj.gov/dea/concern/meth\\_factsheet.html](http://www.usdoj.gov/dea/concern/meth_factsheet.html) (last visited Mar. 15, 2005).

26. *Id.*

27. Pattison, *supra* note 3; Amy Becker, *What Makes Meth So Bad*, ST. PAUL PIONEER PRESS, Feb. 22, 2004, at A1, *available at* 2004 WLNR 3546149, [hereinafter *What Makes Meth So Bad*].

28. Smith, *supra* note 17; *What Makes Meth So Bad, supra* note 27.

29. CAROL FALKOWSKI, HAZELDEN FOUNDATION, DRUG ABUSE TRENDS, 3-4, (Dec. 2004), *available at* <http://www.hazelden.org>.

30. *Id.* at 3.

31. *See* Dan Gunderson, *Meth Makes its Way into Minnesota Public Schools*, Minn. Public Radio News Website, June 14, 2002, at [http://news.minnesota.publicradio.org/features/2004/06/14\\_gundersond\\_meth\\_education/](http://news.minnesota.publicradio.org/features/2004/06/14_gundersond_meth_education/).

describe feeling as if they have lost part of their cognitive abilities.<sup>32</sup> The studied effects of meth use include addiction, psychotic behavior, and brain damage resembling Alzheimer's disease, stroke, or epilepsy.<sup>33</sup> Meth users are extremely paranoid, and law enforcement reports that this fact often makes the users very dangerous and difficult to deal with.<sup>34</sup>

## 2. *Minnesota's Methamphetamine Laboratories*

While there are many possible recipes for making meth, the base of each recipe is usually ephedrine or pseudoephedrine from over-the-counter cold medications.<sup>35</sup> The pills from these medications are crushed and then processed—cooked or strained—with other chemicals, called precursors, to produce

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32. *See id.* One Minnesota high school teen has described how his entire life was ruined by meth addiction. *Id.* He lost fifty pounds in six months and his skin turned yellow. *Id.* He was finally arrested when, at four in the morning, a police officer spoke to him but the teen did not respond because he was convinced no one could see him because he was wearing sunglasses. *Id.* The teen reported that although he once was an "A" student in school, he could now only earn "C's" as he felt he had "lost part of his brain." *Id.* When asked what steps schools should take to prevent meth use, teens in Fergus Falls, Minnesota, responded that law enforcement presentations had no effect, and that random drug testing was the better tool. *Id.* Chief Gary Smith of the Northfield Police Department reported that he has never met a person who has been able to stay off of meth permanently. Smith, *supra* note 17. For more on recovering from meth addiction, see *What Makes Meth So Bad*, *supra* note 27.

33. U.S. Drug Enforcement Admin., *supra* note 25.

34. *What Makes Meth So Bad*, *supra* note 27. Special Agent Paul Stevens, Minnesota Bureau of Criminal Apprehension, explained in an interview with the St. Paul Pioneer Press that VCRs in many users' homes were broken or found with screwdrivers jammed in the video cassette bay. *Id.* He had discovered that users frequently attacked the viewing equipment when they "were so paranoid, they wonder[ed] where those people on TV are." *Id.* Ginger Peterson, narcotics investigator, explained that meth users are dangerously aggressive, using more guns, explosives, and more booby traps in meth labs than were found in crack houses. *Id.*

35. Minn. Dep't of Health, *supra* note 20, at 2. Early meth producers used the chemical "phenyl-2-propanone, also known as phenylacetone or P2P" as the base for the amphetamine. *Id.* at 1. After the government placed that chemical on a Schedule II controlled list, meth producers switched to the more readily available ephedrine and pseudoephedrine which are found in common cold and allergy medications and are widely available without a prescription. In the last ten years, these over-the-counter drugs have become the most popular choice for the base chemical for meth production. Other chemicals needed for the process can easily be obtained from household goods; for example, sulphuric acid may be obtained from drain cleaner and red phosphorus may be stripped from match box strike plates or road flares. Smith, *supra* note 17.

meth.<sup>36</sup> The process generally includes the following steps: “(1) mixing and heating, (2) straining, (3) chemical conversion, (4) extraction, and (5) drying.”<sup>37</sup> Common chemicals used in the meth-production process include acetone, ether, anhydrous ammonia, hydrochloric acid, and iodine.<sup>38</sup> These chemicals are relatively inexpensive, or, most of the time, easily stolen, and in less than one day meth cooks can transform these chemicals into saleable meth.<sup>39</sup> However, meth cooks are almost always meth addicts themselves, so they don’t get rich; they spend their money on more meth and products to make meth.<sup>40</sup>

Sixty-five to seventy-five percent of Minnesota’s meth comes from Californian or Mexican “super labs,” capable of making up to ten pounds of meth at a time.<sup>41</sup> The remaining Minnesota meth is manufactured in clandestine labs within the state.<sup>42</sup> Minnesota-made meth is more desirable to users than imported meth because imported meth is often diluted or cut by middlemen during shipping to maximize profits.<sup>43</sup> For this reason, Minnesota meth is known to be much more potent than imported meth and more deadly, since users accustomed to dosing according to the effects of imported meth may easily overdose with Minnesota-made meth.<sup>44</sup>

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36. Smith, *supra* note 17; *see also* Minn. Dep’t of Health, *supra* note 20, at 2.

37. Minn. Dep’t of Health, *supra* note 20, at 2. Using ether or other similar precursors, meth can be made by cold-processing pseudoephedrine pills with the precursor. Smith, *supra* note 17. However, makers of meth are usually too impatient to use this method, which takes longer than heat processing, so they incorporate heat into the process. *Id.*

38. Minn. Dep’t of Health, *supra* note 20, at 2; *see also* Vogt, *supra* note 15, at n.28.

39. In October 2004, after a major southern Minnesota drug bust, the street price of meth rose to \$150 per gram, compared with cocaine at \$120 per gram. Smith, *supra* note 17. Because law makers, retailers, and law enforcement track pseudoephedrine sales and have made it more difficult to steal pills containing pseudoephedrine, the street price of meth now often includes blister packs of pills containing pseudoephedrine. *Id.*

40. Chris Hamilton, *Drug’s Costs Don’t Prevent Big Profits*, DULUTH NEWS-TRIB., Mar. 2, 2004, at 04-A, *available at* 2004 WLNR 3196263. In addition to stealing cold pills, meth producers steal many boxes of coffee filters, a tell-tale sign that many merchants are not aware of. Smith, *supra* note 17. Meth producers also steal boxes of matches, thinking the phosphorus they need as a precursor to meth is found in the matchheads. *Id.* Actually, the phosphorus is found in the strike plates on the boxes. *Id.*

41. Durkin, *supra* note 4.

42. Smith, *supra* note 17; *see also* *Toxic Trail*, *supra* note 2.

43. Smith, *supra* note 17; *Toxic Trail*, *supra* note 2. Imported meth is known by users in Minnesota as the “weak beer” of meth. *Toxic Trail*, *supra* note 2.

44. Smith, *supra* note 17.

Because meth labs produce strong unpleasant odors,<sup>45</sup> cookers<sup>46</sup> seeking to avoid detection set up mobile labs in rental properties, hotel rooms, barns, moving or stationary vehicles, mobile homes, campgrounds, horse trailers, storage lockers, houseboats, abandoned buildings, or commercial buildings.<sup>47</sup> Small “box labs” can fit into the back seat of a car or on top of a toilet tank lid.<sup>48</sup> Because meth labs can be detected by their odor, meth producers often select rural locations where they can set up their labs, cook meth undetected, and then dump the waste products.<sup>49</sup>

In 2003, Minnesota officials reported over 500 meth labs and meth related events.<sup>50</sup> Deborah Durkin estimates that these numbers are low, however, because reporting can be problematic.<sup>51</sup> State law enforcement officials have estimated that there could be over 10,000 meth lab dump sites in Minnesota.<sup>52</sup> Nevertheless, numbers of reported labs in Minnesota have been increasing at a steady rate. In 2002, 239 labs were discovered in Minnesota, while in the previous year there had been 152—compared with only 35 labs in 1998.<sup>53</sup> Special Agent Paul Stevens, Minnesota Bureau of Criminal Apprehension, has estimated that only one in ten to twenty meth labs is found by law enforcement and that “thousands of Minnesotans are making meth.”<sup>54</sup> These sentiments were

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45. *Id.* The odors emitted from meth labs are unusually sweet and strong, smelling of ammonia or other solvent chemicals. Ells, *supra* note 3. Northfield Chief of Police Gary Smith describes the smell as a very strong, almost urine-like smell that varies with the chemicals used. Smith, *supra* note 17.

46. People who cook meth are known as cooks or “cookers.” *Toxic Trail*, *supra* note 2.

47. See Minn. Dep’t of Health, *supra* note 20, at 1. Meth labs have also been found in isolated cabins in rural Minnesota and even in deer stands in Northeastern Minnesota. *Toxic Trail*, *supra* note 2. An Ottertail County Sheriff reported catching a high school student attempting to mix a batch of meth in his backpack. See Gunderson, *supra* note 31.

48. *Toxic Trail*, *supra* note 2.

49. Smith, *supra* note 17. Meth cooks dump their waste chemicals and used equipment wherever they find it convenient to do so, including streams, ditches, bathtub drains, backyard pits, or sewer and septic systems. *Id.* For every pound of finished meth product, poisonous gasses are released into the atmosphere and five to seven pounds of waste are created. Lloyd, *supra* note 19. Interestingly, when meth is smoked it does not produce an odor, making detection of meth use difficult to detect. Durkin, *supra* note 4.

50. Minn. Dep’t of Health, *supra* note 20.

51. Durkin, *supra* note 4.

52. *Home Sweet Brownfield*, *supra* note 4.

53. Pattison, *supra* note 3.

54. *Toxic Trail*, *supra* note 2; *Home Sweet Brownfield*, *supra* note 4.

echoed by Deborah Durkin.<sup>55</sup>

### 3. *Cooking Meth: The Hazards and the Victims*

The chemicals and recipes used to cook meth vary widely. This, combined with the fact that many cooks are inexperienced, leads to deadly results in the clandestine labs. When mixed improperly, the chemicals used in cooking meth can explode or ignite, resulting in chemical fires and the release of toxic chemicals, causing severe injury or death to cooks and others in the vicinity.<sup>56</sup> Meth labs are often discovered when they explode,<sup>57</sup> and children have sometimes been victims of these fires and explosions.<sup>58</sup> Drug Enforcement Administration data show that children are found living in thirty percent of labs seized by law enforcement nationwide.<sup>59</sup> Minnesota law enforcement officials estimate that thirty to fifty percent of labs are discovered with children living in them at the time of seizure.<sup>60</sup> Children living in labs are often abused and neglected and may also be at risk of other hazards, including finished drugs, weapons, and unsanitary

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55. Durkin, *supra* note 4.

56. Omar Saleem, *Killing the Proverbial Two Birds with One Stone: Using Environmental Statutes and Nuisance to Combat the Crime of Illegal Drug Trafficking*, 100 DICK. L. REV. 685, 699 (1996) (explaining that “red phosphorus, if contaminated with white phosphorous, may explode on contact with air . . . [and] lithium aluminum hydride is spontaneously flammable on contact with air or moisture”). In June of 2004, a Minnesota man was injured and his friend was killed when the friend entered the trailer where the two were staying carrying a propane tank that spilled and subsequently blew up, according to the surviving victim. Tracy Swartz, *Deadly Fire in Aitkin County Blamed on Meth Lab*, STAR TRIB. (Minn.), June 18, 2004, at 3B, available at 2004 WLNR 17583357. The Aitkin County Sheriff noted that certain remains in the burned trailer were “consistent with meth manufacturing.” *Id.*

57. Ells, *supra* note 3, at 2.

58. *Id.* In November 2002, two Minnesota girls, ages 11 and 2, were killed in a fire in a home housing a meth lab when the mother of one of the girls left them alone in the house to run an errand. *Mom Sentenced in Meth Lab Fire*, ST. PAUL PIONEER PRESS, Aug. 24, 2004, at B3, available at 2004 WLNR 3554677. In a separate investigation, one Minnesota law enforcement officer reported finding a meth lab beside a crib. Pattison, *supra* note 3.

59. Minn. Dep’t of Health, *supra* note 20, at 3.

60. See Ells, *supra* note 3, at 2; Pattison, *supra* note 3. Gary Smith, Chief of Police in Northfield Minnesota, believes the percentage of children exposed to the chemicals is even higher than the number of children found living in labs. Smith, *supra* note 17. Many children are exposed to the labs when visiting a parent pursuant to a custody arrangement. *Id.* Drug agents report that often when they don’t find children living in the labs, they still find signs of children like toys and clothes. *Id.*

conditions.<sup>61</sup>

In addition to the risks associated with fire and explosion, the chemicals used in meth production cause serious injuries to those who inhale the fumes or whose skin comes in contact with the chemicals.<sup>62</sup> Corrosives such as hydrochloric acid, sodium hydroxide, acetone, ether, and methyl alcohol can cause coughing, eye irritation, skin irritation, severe skin burns, gastrointestinal disturbances, thirst, dizziness, and convulsions.<sup>63</sup> Solvents like acetone, starter fluid, and Coleman fuel can cause irritation, headache, dizziness, depression, nausea, vomiting, and visual disturbances.<sup>64</sup> Metals and salts like iodine, lithium metal, red phosphorus, and sodium metal may cause eye, skin, nose, and respiratory irritation, breathing problems, headache, stomach pain, birth defects, jaundice, and kidney damage.<sup>65</sup>

The health effects that meth exposure causes are dependent on three variables: “[t]he lab process and the chemicals used; the amount of chemical and length of exposure; and the age and health of the person exposed.”<sup>66</sup> Acute exposure to the chemicals can cause “shortness of breath, cough, chest pain, dizziness, lack of coordination, chemical irritation, or burns to skin, eyes, nose, and mouth.”<sup>67</sup> These symptoms can befall both cooks and bystanders either during the cooking process or immediately thereafter.<sup>68</sup> Death can result from the cooking process when a bystander is particularly vulnerable to the toxins or when the chemical to which

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61. Ells, *supra* note 3, at 2. Meth users go on binges that can last for days, and when they do so they lose track of time, causing them to completely neglect the basic duties of parenting like feeding, supervising, and bathing. *Id.*; see also Pattison, *supra* note 3. Northfield Chief of Police Gary Smith reports that once while on duty—not undercover—a woman on meth attempted to sell him her child for money to buy meth. Smith, *supra* note 17. In September 2004, a four-month old baby in Princeton, Minnesota died as the result of being fatally punched by a nineteen-year-old meth addict. Kennedy, *supra* note 24.

62. JOHN W. MARTYNY ET AL., NAT’L JEWISH MED. AND RESEARCH CENTER, CHEMICAL EXPOSURES ASSOCIATED WITH CLANDESTINE METHAMPHETAMINE LABORATORIES 39–40, at [http://www.nationaljewish.org/pdf/chemical\\_exposures.pdf](http://www.nationaljewish.org/pdf/chemical_exposures.pdf) (extensive study on the physiological effects and residual pollution of methamphetamine manufacture) (last visited Mar. 6, 2005).

63. Melanie Sommer, *Meth Labs are Hazardous to Health*, Minn. Public Radio News Website, June 14, 2004, at [http://news.minnesota.publicradio.org/features/2004/06/14\\_postt\\_methhealth/](http://news.minnesota.publicradio.org/features/2004/06/14_postt_methhealth/); see also Ells, *supra* note 3.

64. Sommer, *supra* note 63.

65. *Id.*

66. *Id.*

67. Minn. Dep’t of Health, *supra* note 20, at 2.

68. *Id.*

the person is exposed is particularly toxic.<sup>69</sup>

Children are especially vulnerable to adverse health effects from exposure to meth production because “1) they have immature organ systems, faster metabolic rates, and weaker immune systems; 2) they eat more food, drink more fluids and breathe more air per pound of body weight; 3) they are less able to protect themselves; and 4) their behaviors (crawling, dirt eating, hand-to-mouth) expose them to more hazards.”<sup>70</sup> Research indicates that children exposed to meth labs have “chronic coughs, persistent skin rashes and red, itchy eyes.”<sup>71</sup> Many children who have lived in sites containing meth labs have learning disabilities, are malnourished, and display erratic sleeping habits.<sup>72</sup>

Symptoms also commonly occur in people who are exposed to the labs before the sites have been cleaned and ventilated.<sup>73</sup> Minnesota’s first responders, including police, firefighters, and emergency medical personnel, are therefore increasingly put at risk by toxic chemicals in meth labs.<sup>74</sup> In addition, hospital workers and ambulance drivers who come in contact with those who have been contaminated by meth lab chemicals are in danger of suffering adverse health effects.<sup>75</sup> Similarly, occupants of property adjacent to lab sites can also experience adverse health effects. “Toxic vapors have been known to corrode the metal in building ventilation systems, where vapors may affect neighbors.”<sup>76</sup> Long-term exposure to meth-lab chemicals or byproducts “may cause

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69. Sommer, *supra* note 63.

70. Minn. Dep’t of Health, *supra* note 20, at 2.

71. Pattison, *supra* note 3. In Northfield, Minnesota, children living in apartments adjacent to an apartment that had formerly been a known meth lab exhibited symptoms that included headaches, achy muscles, colds, and respiratory problems—most likely attributable to the ether and lye fumes from the lab. Smith, *supra* note 17.

72. Pattison, *supra* note 3.

73. Minn. Dep’t of Health, *supra* note 20, at 2; Vogt, *supra* note 15, at 263.

74. Tim Post, *Meth Poses a Danger to First Responders*, Minnesota Public Radio News Website, June 11, 2004, at [http://news.minnesota.publicradio.org/features/2004/06/14\\_post\\_methsidebar](http://news.minnesota.publicradio.org/features/2004/06/14_post_methsidebar). Sheriff Brad Gerhardt of Martin County reported that “[w]e’ve had the soles of shoes actually ‘melt’ chemically. We all know that meth labs are literally bombs waiting to go off.” Brad Gerhardt, *Collaboration, Communication, Essential in Tackling Meth Use*, 48 MINNESOTA COUNTIES, Iss. 4, at 1 (2004), available at <http://www.mncounties.org/Focus/METHpagesMnCountiesAPR04.pdf>.

75. Post, *supra* note 74.

76. Vogt, *supra* note 15, at 260.

both short-term and long-term [adverse] health effects.”<sup>77</sup>

*B. What Is Left Behind: Residual Meth Lab Toxic Waste Sickens Residents*

Adverse health effects can befall people living or working in a former lab site even if the exposure is at low levels.<sup>78</sup> The Minnesota Department of Health reports that people who unknowingly moved into former meth lab sites that had not been properly remediated had developed chest and respiratory ailments months after having moved to the site.<sup>79</sup> Long after the toxic chemicals, containers, and other paraphernalia have been removed from an illicit meth lab site, acids, solvents, and other chemicals may remain in the walls, appliances, and carpets, posing a danger to anyone who occupies the former drug lab site.<sup>80</sup> In a recent study performed in meth labs in Colorado, tests showed high contamination levels of meth months after labs had been shut down.<sup>81</sup> Contamination in areas where meth was manufactured may include areas affected by “spills, boil-overs, explosions, chemical fumes, and gasses created during the [cooking process].”<sup>82</sup> Areas potentially affected include “floors, walls, ceilings . . . working surfaces, furniture, carpeting, draperies and other textile products, plumbing fixtures and drains, [and] heating and air-conditioning vents.”<sup>83</sup> Other affected areas are disposal areas including “sinks, toilets, bathtubs, plumbing traps and floor drains,” chimneys, and outdoor areas affected by burning or dumping.<sup>84</sup> Secondary contamination may occur in hallways,

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77. Minn. Dep’t of Health, *supra* note 20, at 2.

78. *Id.*; see also Sommer, *supra* note 63.

79. *Toxic Trail*, *supra* note 2.

80. Smith, *supra* note 17; Vogt, *supra* note 15, at 252; Minn. Dep’t of Health, *supra* note 20, at 2. Chemical mixtures can remain on household surfaces for months or years after production. *Toxic Trail*, *supra* note 2; Minn. Dep’t of Health, *supra* note 20. In Chislm county, private contractors were hired to dig up a backyard in order to clean up a septic system after meth cookers poured their waste into the system. *Toxic Trail*, *supra* note 2.

81. MARTYNY, *supra* note 62, at 39.

82. Minn. Dep’t of Health, *supra* note 20, at 5.

83. *Id.*

84. *Id.* at 6. In Northfield, Minnesota, neighbor children living in an apartment adjacent to an apartment housing a meth lab became ill when toxins were transmitted through common ventilation systems. Smith, *supra* note 17. The children exhibited symptoms including muscle aches and unexplained long-term respiratory problems. *Id.* When meth cookers pour chlorinated solvents and

common areas of apartment buildings, and common ventilation or plumbing systems in hotels or multiple dwellings.<sup>85</sup>

In addition to the acids, bases, metals, solvents, and salts that are contained in meth recipes, many recipes require combinations of volatile organic compounds (VOCs).<sup>86</sup> Long-term exposure to VOCs, even at low levels, “may result in liver and kidney damage, neurological problems, and increased risk of cancer.”<sup>87</sup> Because of their increased risk factors, children who live in areas near meth labs are especially vulnerable to the residual chemicals from the labs.<sup>88</sup> Waste from meth labs may contain “corrosive sodium hydroxide solution, sealed cans containing residual Freon, and other hazardous fluids and inorganics such as red phosphorus and hydrochloric acid.”<sup>89</sup>

Because each clandestine drug lab is regarded as a potential hazardous waste site, each site requires evaluation and possibly cleanup by hazardous waste professionals.<sup>90</sup> The Minnesota Department of Health has created guidelines for lab cleanup.<sup>91</sup> Cleanup for a typical lab can include removal of furnishings, carpeting, and other materials that cannot be cleaned; washing and rinsing of hard surfaces, followed by painting or other coating; as well as cleaning of ventilation systems and plumbing.<sup>92</sup> In most cases, contaminated materials may be made unsuitable for use and

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other toxic by-products down storm drains or onto the ground, the toxic hazards can persist in soil and groundwater for years. Institute for Intergovernmental Research, *The Methamphetamine Problem: A Question and Answer Guide*, at <http://www.iir.com/centf/guide.htm> (last visited Feb. 20, 2005). Cleanup costs are extremely high because solvent-contaminated soil usually must be dug up and incinerated. *Id.*

85. Minn. Dep't of Health, *supra* note 20, at 6.

86. *Id.* at 2.

87. *Id.*

88. *Id.* Childhood exposure to meth lab chemicals “can result in damage to kidneys, liver or spleen, and violent behaviors. Absorption of meth through the skin may cause rapid heart rate, hypertension, seizures, or solvent intoxication.” *Id.*

89. Vogt, *supra* note 15, at 261.

90. Minn. Dep't of Health, *supra* note 20.

91. *Id.* at 6. A new version of these guidelines, written in collaboration with, and based on research by, the Minnesota Pollution Control Agency, will be introduced at a statewide conference in July 2005. Durkin, *supra* note 4. The new guidelines will describe a process-based cleanup procedure, including disposal of upholstered furnishings, carpeting, and other materials that cannot be cleaned. *Id.*

92. Durkin, *supra* note 4.

disposed in a landfill.<sup>93</sup> If contamination is severe, some materials may require disposal as hazardous waste by a licensed contractor.<sup>94</sup> If a site is badly contaminated, or not worth the cost of remediation, the site may be burned or razed.<sup>95</sup> In addition to providing standards for cleanup, the Minnesota Department of Health recommends that no site should be rented, sold, or otherwise re-occupied until a health professional with training in clandestine lab cleanup verifies the site has been cleaned according to guidelines.<sup>96</sup>

### III. CURRENT STATUTES: INADEQUATE PROTECTION FOR PROSPECTIVE PROPERTY PURCHASERS

There is currently no Minnesota law that specifically provides property buyers protection in the form of mandatory disclosure of clandestine drug labs or in the form of land record notification.<sup>97</sup> Minnesota Statutes section 115B.16 provides that owners who knew or should have known that a site was subject to “extensive contamination by release of a hazardous substance” must record an affidavit evidencing this fact “before” the transfer of ownership.<sup>98</sup> While this requirement provides purchasers some protection in theory, in reality, the statute does not function well to protect buyers. The statute contains a built-in defense for sellers by virtue of the fact that “extensive contamination” is not defined.<sup>99</sup> Further, the statute does not specify exactly when the affidavit must be filed.<sup>100</sup> Pursuant to a literal interpretation of the statute, the seller

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93. *Id.*

94. *Id.*

95. Minn. Dep’t of Health, *supra* note 20; Durkin, *supra* note 4.

96. Minn. Dep’t of Health, *supra* note 20, at 7.

97. Outside of statutory protection, purchasers may find some relief under the common law fraud by silence doctrine. *See Flynn v. Am. Home Prods. Corp.*, 627 N.W.2d 342, 350 (Minn. Ct. App. 2001) (explaining that “[u]nder Minnesota law, fraudulent misrepresentation based on the concealment of a material fact occurs when one party knowingly conceals a material fact that is peculiarly within his own knowledge, and the other party relies on the presumption that the fact does not exist”).

98. MINN. STAT. § 115B.16, subd. 2 (2004).

99. *Id.*

100. The statute provides that county recorders shall record the affidavits in a manner which will assure their disclosure in the ordinary course of a title search. This provision is not at all helpful to buyers, however, if the affidavit is lawfully recorded one day prior to closing and well after title examination has been completed. *See id.*, subd. 3.

could record this affidavit at any time prior to transfer, arguably even the day before closing the sale. Regarding cleanup of contaminated lab sites, Minnesota Statutes chapter 145A, the Public Health Nuisance Statute, gives county boards of health the authority to remediate and abate any activities that adversely affect public health,<sup>101</sup> and some counties and municipalities have made use of this authority to enact their own meth-lab ordinances.<sup>102</sup> However, many Minnesota communities have no laws requiring cleanup of a hazardous waste site in private residences.<sup>103</sup> For these reasons, it is important that Minnesota adopts effective legislation that will protect purchasers in all Minnesota counties.

*A. Current Minnesota Disclosure Requirements for Real Property Sales Are Not Enough to Protect Buyers*

Minnesota Statutes require sellers of residential real property and their brokers or agents to make certain disclosures about the condition of the property, but these disclosure requirements do not specifically mandate disclosure of clandestine drug laboratories.<sup>104</sup> Minnesota Statutes require sellers of real property “[b]efore signing an agreement to sell or transfer residential real property” to make a “written disclosure to the prospective buyer.”<sup>105</sup> The seller must, in good faith and to the best of the seller’s knowledge, disclose to the buyer “all material facts of which the seller is aware that could adversely and significantly affect: (1) an ordinary buyer’s use and enjoyment of the property; or (2) any intended use of the property of which the seller is aware.”<sup>106</sup> Given the known dangers of chemical residue from meth labs, it would

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101. MINN. STAT. § 145A.04, subd. 8 (2004).

102. See, e.g., NORTHFIELD, MINN., CODE art. 5 (2004) (enacted pursuant to Minnesota Statutes chapter 145A) (declaring lab site and contents as public health nuisance; requiring a posting that evidences such declaration posted on all entrances of the site; requiring evacuation of the site; ordering abatement and remediation of the site; authorizing city remediation if owner fails to do so; and authorizing the city, pursuant to state statutes, to assess special taxes against property for costs of cleanup). For a comprehensive list of links to related county and city ordinances, see Minn. Dep’t of Health, *Methamphetamine and Meth Labs: Laws and Ordinances*, at <http://www.health.state.mn.us/divs/eh/meth/ordinance/index.html> (last updated Mar. 2, 2005).

103. Minn. Dep’t of Health, *supra* note 20; Durkin, *supra* note 4.

104. See MINN. STAT. § 513.55, subd. 1 (2004) (seller disclosure requirements); MINN. STAT. § 82.22, subd. 8 (2004) (broker disclosure requirements).

105. *Id.* § 513.55, subd. 1.

106. *Id.*

seem that Minnesota's statutory seller disclosure requirement provides adequate disclosure requirements. However, Deborah Durkin of the Minnesota Department of Health warns that these disclosure laws are not well known, may be too ambiguous to provide adequate protection, and therefore should specifically name meth labs to be required disclosure items.<sup>107</sup> According to Durkin, buyers "deserve to know" of the potential dangers lurking in the properties they are considering purchasing.<sup>108</sup> In addition, while sellers are required to disclose material facts that could adversely affect a buyer's enjoyment or use of the property,<sup>109</sup> if sellers have taken steps to mitigate the toxic residue of a lab site, under current law, they could be within their legal rights not to disclose the former site. Under those circumstances, if sellers are not technically required to disclose a former meth site, this robs buyers of their opportunity to verify the credentials of those who did the cleaning and to check the site's toxicity levels.<sup>110</sup> For chemically sensitive persons and for children, the lack of mandatory disclosure of former meth labs results in a lost opportunity for verifying safe contamination levels as well as a lost opportunity to provide buyers with remedies in the event that a seller fails to properly disclose the former clandestine lab site.

Real estate broker disclosure requirements in Minnesota provide no additional protection for buyers.<sup>111</sup> The common law rule with regard to agent disclosure requirements was that in the absence of any statutory provision to the contrary, a real estate agent or broker had no duty to make an independent investigation

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107. Durkin, *supra* note 4. Currently there is no certification process for meth lab cleaning professionals, so the quality and effectiveness of the cleanup can vary from site to site. *Id.*

108. *Id.*; see also Amy Becker, *Buying a Meth House Too Easy, Case Shows Woman Says Clearer Disclosure was Needed*, ST. PAUL PIONEER PRESS, April 18, 2004, at C6. A home buyer in St. Paul once learned after closing on her home that it had been a former meth lab and needed professional cleanup. *Id.* A posting on the property declaring it a public health nuisance had allegedly been taken down when potential buyers were viewing the property. *Id.*

109. § 513.55, subd. 1.

110. See *infra* notes 118–22 and accompanying text (explaining the need for seller disclosure of former meth labs on property when there is no state certification or licensing requirement for companies offering meth lab cleanup services).

111. See MINN. STAT. § 82.22, subd. 8 (2004) (requiring brokers to disclose to prospective purchasers "all material facts . . . which could adversely and significantly affect an ordinary purchaser's use or enjoyment of the property").

for hidden property defects.<sup>112</sup> When making residential sales, real estate brokers in Minnesota must “disclose to the Buyer material facts . . . of which the broker is aware that could adversely and significantly affect the Buyer’s use or enjoyment of the property.”<sup>113</sup> As with the Minnesota seller disclosure requirements, the broker disclosure requirements do not make specific mention of clandestine meth laboratories.

*B. Other States’ Clandestine Lab Disclosure Laws*<sup>114</sup>

Missouri has enacted a key example of effective legislation that evidences a strong public policy in favor of protecting property purchasers from the dangers of unknown former drug labs. Missouri legislation requires sellers and other transferors of real property to disclose if “any parcel of real property . . . is or was used as a site for methamphetamine production . . . provided that the seller or transferor had knowledge of such prior methamphetamine production.”<sup>115</sup> The seller must disclose the fact that the lab existed, even if the persons involved in the production were not convicted of that crime.<sup>116</sup> In addition, the seller or transferor of the property must disclose that a person convicted of meth-related crimes resided there.<sup>117</sup>

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112. 12 AM. JUR. 2d *Brokers* § 146 (1999). In Minnesota, the term “real estate broker” is a term of art statutorily defined as someone who, for another and for commission, “lists, sells, exchanges, buys or rents, manages, or offers or attempts to negotiate a sale, option, exchange, purchase or rental of an interest or estate in real estate, or advertises or holds out as engaged in these activities.” MINN. STAT. § 82.17, subd. 18 (2004). A person may not act as a broker unless properly licensed pursuant to Minnesota law. MINN. STAT. § 82.41, subd. 1 (2004).

113. MINN. STAT. § 82.22, subd. 4.

114. For helpful general information, see RUFFORD G. PATTON ET AL., 3 PATTON & PALOMAR ON LAND TITLES § 614, *State Acts Requiring Notice of Environmental Damage to Land Before Transfer* (3d ed. 2003) (discussing seller disclosure requirements and requirements of filing environmental damage to property notices in land records).

115. MO. ANN. STAT. § 442.606 (West 2004).

116. *Id.*

117. *Id.* Similarly, the state of Oklahoma requires sellers of property to disclose information in relation to “existence of prior manufacturing of methamphetamine.” OKLA. STAT. ANN. tit. 60, § 833 (West 2004). California also requires that prior to a sale, owners of real property disclose if an “illegal controlled substance” or its precursor has been “released” on or beneath real property. CAL. CIV. CODE § 1102.18 (West 2004) (defining “illegal controlled substance” as a “drug, substance, or immediate precursor” or “an emission or waste material resulting from the unlawful manufacture or attempt to manufacture an illegal controlled substance” and defining “release” as “spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping,

Nevada devised an alternative remedy to the problem, requiring disclosure only if the clandestine drug labs have not been remediated by licensed professionals.<sup>118</sup> The fact that a meth lab was located on a property is not “material to the transaction” for disclosure purposes if “(a) [a]ll materials and substances involving methamphetamine have been removed from or remediated on the property by an entity certified or licensed to do so; or (b) [t]he property has been deemed safe for habitation by a governmental entity.”<sup>119</sup> While Nevada’s law does not require disclosure if the property has been remediated by licensed professionals, the law still protects buyers to a certain extent because licensed professionals must perform the cleanup. In Minnesota, there are no licensing measures in place for those conducting cleanup; therefore, it is unclear to what extent sellers in Minnesota must disclose former labs that have been cleaned by someone, professional, licensed, or not.<sup>120</sup>

As with seller disclosure, Nevada removes liability from agents for not disclosing issues material to the transaction.<sup>121</sup> However, if materials and substances involving meth have not been “removed” or “remediated” by an “entity certified or licensed to do so,” the existence of the meth lab is material to the transaction.<sup>122</sup> Other states have taken varying approaches to the absolute duty of real estate brokers and agents to disclose clandestine meth laboratories. In 2001, Wayne Stenehjem, North Dakota Attorney General, issued a letter opinion that directed real estate agents to disclose methamphetamine laboratory activity on property.<sup>123</sup> Stenehjem based his opinion on the fact that agents had a duty to disclose meth labs to purchasers so that purchasers could protect themselves from clean-up liability and on the premise that under North Dakota disclosure law, agents have a duty to disclose

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leaching, dumping, of an illegal controlled substance in a structure or into the environment”).

118. NEV. REV. STAT. ANN. 40.770 (Michie 2003). Nevada’s law brings to light an emerging problem in Minnesota: “nogoodnicks” posing as qualified clean-up personnel. Durkin, *supra* note 4. According to Durkin, if Minnesota or other states are going to enact legislation requiring cleanup, the states must also require that only specially certified companies are allowed to provide the cleaning services. *Id.*

119. NEV. REV. STAT. ANN. 40.770.

120. *See supra* Part III.A.

121. NEV. REV. STAT. ANN. 40.770.

122. *Id.*

123. 2001 N.D. Op. Att’y Gen. No. 2001-L-51 (2001).

“psychologically impacted” property, and a former meth lab could fit this definition.<sup>124</sup> In addition, Stenehjem asserted that failure to disclose a meth lab could be construed as constructive fraud, for which an agent should be disciplined.<sup>125</sup>

While some states impose a duty to disclose former meth labs on sellers and brokers, this type of disclosure requirement is unpopular with real estate broker and agent associations. Further, it is questionable whether it is fair to impose disclosure duties and liabilities on real estate brokers and agents with regard to clandestine drug labs. If authorities have not previously discovered a lab and the seller has removed physical evidence of the former lab, a real estate broker or agent would not have realistic means of discovering that lab in the course of the agency relationship.

#### IV. NEW PROTECTIONS, NEW SOLUTIONS

##### *A. Proposed Legislation in Minnesota 2003–04 Legislature Failed to Protect Property Purchasers*

Recent actions by Minnesota Governor Tim Pawlenty and Minnesota lawmakers evidence a recognition by Minnesota leadership that meth is indeed a serious threat to Minnesotans. In a keynote speech at a national conference of meth experts in October 2004, Governor Pawlenty vowed to push for a \$7-million-a-year cleanup program in Minnesota because meth “wreaks havoc in every corner of the state.”<sup>126</sup> During the 2003–04 legislative session, Minnesota lawmakers in both the House and the Senate introduced legislation to deal with the growing meth problem.<sup>127</sup>

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124. *Id.*

125. *Id.*

126. See Kennedy, *supra* note 24. Governor Pawlenty’s plan seeks to institute meth education programs in schools; limit sales of cold medications used to make meth, employ ten new narcotics agents who focus on meth only; institute stricter prison sentences for meth makers, especially if making meth in the presence of children or vulnerable adults; create a revolving loan fund to help officials clean sites; and develop new treatment protocols for addicts. *Id.* Governor Pawlenty’s promise was good news to lawmakers who introduced comprehensive bills last year to cope with Minnesota’s growing meth problem. *Id.* The proposed bills were not passed during the 2003–04 legislative session, but State Senator Rosen of Fairmont thanked the Governor for his support in the fall of 2004. *Id.* Scott Burns, deputy director of the White House Office of Drug Policy, has nicknamed Minnesota State Senator Rosen “Senator Meth.” *Id.*

127. See, e.g., H.F. 1989, 83d Leg., Reg. Sess. (Minn. 2004); S.F. 1580, 83d Leg.,

The proposed legislation focused on a number of key areas, including tougher criminal sentencing, a revolving loan fund for toxic site cleanup, and limitations on the sale of precursor chemicals,<sup>128</sup> the sale of cold medicines containing ephedrine and pseudoephedrine used to make meth,<sup>129</sup> and protections for children.<sup>130</sup> In addition, the drafters of last year's proposed legislation attempted to provide protections for property buyers who might unknowingly purchase property contaminated by residual toxic meth-lab contamination.<sup>131</sup> First, proposed legislation in the House and in the Senate provided that local officials must order that all property found to be a contaminated clandestine lab site must not be occupied, rented, sold, or used until it has been assessed and remediated.<sup>132</sup> In addition, House

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Reg. Sess. (Minn. 2004); S.F. 1863, 83d Leg., Reg. Sess. (Minn. 2004). State Senator Rosen has characterized the legislative efforts to fight meth as a "bipartisan approach." Rachel E. Stassen-Berger, *Broad Meth Battle Plan is Unveiled; Bipartisan Effort Tackles State 'Crisis,'* ST. PAUL PIONEER PRESS, Jan. 7, 2005, at B6 available at 2005 WLNR 431457.

128. Precursor chemicals include lye, ether, and anhydrous ammonia and are used to strain pills containing pseudoephedrine and ephedrine to make meth. *See supra* Part II.A.1.

129. *See supra* Part II.A.2.

130. *See* H.F. 1989; S.F. 1580.

131. H.F. 1989; S.F. 1580; S.F. 1863. Authors of the 2004 proposed bills attempted to mitigate the threat to buyers of contaminated property by ordering notations on deeds of contaminated properties and by prohibiting the sale of these properties until they had been remediated. *See* H.F. 1989; S.F. 1580. However, the legislation provided no viable logistical framework for filing these notations in land records, no solution for prohibiting contaminated properties from being sold, and no remedies for buyers in the event properties were illegally sold. *See* H.F. 1989; S.F. 1580. Further, deed notation provisions in the 2004 proposed House bill were removed from an early draft of the bill and were not replaced with other provisions that would accomplish the same protections for buyers. *See* H.F. 1989, 2nd Engrossment, Mar. 15, 2004. The deed notation provision survived in the 2004 proposed Senate bill, but the provision, as it stood in the proposed bill at the end of the 2004 legislative session, still did not provide a workable solution for "deed notation" from a land title and recording perspective. *See* S.F. 1580.

132. H.F. 1989; S.F. 1580; S.F. 1863. House Bill 1989, when first introduced in February 2004, required that "[a] local unit of government or local health department or sheriff shall order that all property that has been found to be a clandestine lab site and contaminated . . . be prohibited from being occupied, rented, sold, or used until it has been assessed and remediated as provided" by the Health Department. H.F. 1989. In addition to these provisions, in order to accomplish removal and abatement of the meth-lab contamination, as well as recovery of costs of enforcement, the bill refers to and relies on the framework outlined in Minnesota Statutes chapter 145A, Powers and Duties of Board of Health. H.F. 1989 (referencing the procedures set forth in MINN. STAT. § 145A.04,

Bill 1989 and Senate Bill 1580 both required that authorities notify parties “responsible for maintaining the information on the property deed” of the fact that a clandestine lab site had contaminated the property.<sup>133</sup> That party was then required to make a “notation on the deed” that the property is a “hazardous waste contaminated site.”<sup>134</sup> Upon proper removal and remediation of waste, the bills provided that the deed would be “updated” to reflect this remediation.<sup>135</sup>

The drafters of the proposed bills, while intending to ensure that notice of the meth lab is in the land records, did more harm than good by attempting to mandate an unrealistic and unworkable “deed” notation provision. While it is true that Torrens property certificates may be updated by placing on the certificates a “memorial” of an instrument filed in the land records that affects the property, properties for which title abstracts are used—including the majority of properties in Minnesota—have no corresponding option to place “memorials” on deeds.<sup>136</sup> Most

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subd. 8 (2004)). Pursuant to this chapter, a county or multi-county board of health, when a threat to public health such as a public health nuisance, source of filth, or cause of sickness is found on a property, has the power to remove or abate the nuisance if the property owner fails to do so. *Id.* Consequently, a city council or county board that has formed or is a member of a board of health may pay its expenses for the removal or abatement by levying taxes on all taxable property in its jurisdiction. § 145A.08, subd. 3. Proposed Senate bills also incorporated Minnesota Statutes chapter 145A, authorizing a county health department to remove and abate a meth lab when the property owner does not do so and to levy a tax assessment on the property if the owner does not pay for remediation. *See* S.F. 1580; S.F. 1863.

133. H.F. 1989; S.F. 1580.

134. H.F. 1989; S.F. 1580.

135. H.F. 1989; S.F. 1580. The originally introduced version of the proposed House bill also contained a vehicle title provision analogous to the property deed provision. H.F. 1989 (as introduced on Feb. 12, 2004). The provision required that authorities notified the registrar of motor vehicles if a vehicle had been contaminated by meth chemicals. *Id.*

136. *See* MINN. STAT. § 508.38 (2004) (explaining process of placing memorial of instrument on Torrens certificate). Minnesota Statutes chapter 508 allows landowners to register property under the Torrens system. *See* MINN. STAT. § 508.03 (2004) (explaining the application process for registering land under the Torrens system). The Torrens system is a “system for establishing title to real estate in which a claimant first acquires an abstract of title and then applies to a court for the issuance of a title certificate, which serves as conclusive evidence of ownership.” BLACK’S LAW DICTIONARY 1526 (8th ed. 2004). Once property is registered under the Torrens system, documents affecting that property are filed with the Registrar of Titles rather than with the County Recorder. *See* MINN. STAT. § 508.34 (2004). Minnesota Statutes state that County Recorders shall act as County Registrars of Titles in their respective counties. MINN. STAT. § 508.30

Minnesota land is not part of the Torrens system; rather, it is referred to as “abstract” land, which is governed by Minnesota’s recording act, Minnesota Statutes chapter 507. Deeds, as recorded in this system, function as written contractual conveyances.<sup>137</sup> For this reason, placing notations and revisions on property deeds, as the 2003–04 bills proposed, is not a viable option for inserting notifications in the land records.<sup>138</sup>

2003–04 Senate Bill 1863 offered a different approach for alerting prospective purchasers to meth-lab dangers. It proposed amending Minnesota Statutes section 82.197 to require licensed real estate brokers to disclose to buyers if a property was under an order for assessment and remediation due to meth-lab contamination.<sup>139</sup> Senate Bill 1863 curiously did not propose any disclosure requirements on sellers. Nevertheless, had the proposed bills combined the licensee disclosure provisions and proposed a workable means to file notification of remediation orders in county land records, some measure of protection could have been provided to property purchasers. However, in their final iterations at the end of the 2003–04 legislative session, the proposed bills failed to protect property buyers in two major ways. First, while a proposed bill in the Senate provided for licensee disclosure of orders prohibiting sale until properties had been remediated,<sup>140</sup> the proposed legislation failed to require sellers to disclose former clandestine labs on property. This omission resulted in a missed opportunity to require owners themselves to disclose issues regarding the property they are selling and a missed opportunity to provide remedies to buyers when sellers have failed to disclose meth-related issues pursuant to the statute. Second, the bills, while providing that property deeds must be given a “notation” when meth labs were discovered on them, did not provide a feasible means to file notification in county land records that a property was

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(2004). An abstract of title is a “concise statement, usually prepared for a mortgagee or purchaser of real property, summarizing the history of a piece of land, including all conveyances, interests, liens, and encumbrances that affect title to the property.” BLACK’S LAW DICTIONARY 10 (8th ed. 2004); *see also* 1 AM. JUR. 2d *Abstracts of Title* § 17 (2004). Abstract documents are filed by the County Recorder.

137. A deed is first and foremost a written contract that functions as a conveyance “whereby an interest in realty is transferred from the grantor to the grantee.” 23 AM. JUR. 2d *Deeds* § 1 (2004).

138. *See id.*

139. S.F. 1863.

140. *See id.*

the site of a clandestine drug lab.<sup>141</sup> With or without the “deed notation” provision, neither the House nor the Senate bills provided the logistical framework for accomplishing the mandated prohibition of sale of the property until the property was properly remediated or for providing remedies for buyers in the event that a seller illegally sold the property prior to remediation.

*B. Proposed Legislation in Minnesota 2005–06 Legislature*

This year, several bills have been introduced to combat the growing meth problem.<sup>142</sup> Like last year’s bills, this year’s House and Senate methamphetamine bills address the general methamphetamine problem by regulating sales of precursor drugs, educating retailers who sell precursor drugs, increasing criminal penalties, establishing revolving funds for cleanup, providing protections for children and vulnerable adults exposed to lab chemicals, and providing for notations on vehicle titles of vehicles contaminated by mobile meth labs.<sup>143</sup> Further, this year’s bills again provide that “a county . . . shall order that all property that has been found to be a clandestine lab site and contaminated . . . be prohibited from being occupied, rented, sold, or used until it has been assessed and remediated . . . .”<sup>144</sup>

In addition to these provisions, which resemble last year’s proposed legislation, there are significant improvements in protections for property buyers in this year’s proposed legislation. First, a number of the proposed bills provide a framework for inserting notice, in the form of recorded affidavits, of meth-lab contaminated properties into county land records.<sup>145</sup> Second, some proposed bills provide that the commissioner of health shall create

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141. See *infra* Part IV.D.1.

142. See, e.g., H.F. 4, 84th Leg., Reg. Sess. (Minn. 2005); S.F. 49, 84th Leg., Reg. Sess. (Minn. 2005); H.F. 364, 84th Leg., Reg. Sess. (Minn. 2005); H.F. 572, 84th Leg., Reg. Sess. (Minn. 2005); S.F. 423, 84th Leg., Reg. Sess. (Minn. 2005); H.F. 1423, 84th Leg., Reg. Sess. (Minn. 2005); S.F. 1323, 84th Leg., Reg. Sess. (Minn. 2005).

143. See H.F. 4; S.F. 49; H.F. 364; H.F. 572; S.F. 423.

144. See, e.g., H.F. 364; H.F. 572; S.F. 423. Amended versions of certain bills provide that if a meth lab is found on a property, county officials shall order that the property shall be “prohibited from being occupied or used” until after remediation. See H.F. 572, 5th Engrossment, Mar. 16, 2005; S.F. 423, 3d Engrossment, Mar. 17, 2005. These amended versions of the bills do not prohibit sale of contaminated property prior to remediation. See H.F. 572, 5th Engrossment, Mar. 16, 2005; S.F. 423, 3d Engrossment, Mar. 17, 2005.

145. See, e.g., H.F. 572; S.F. 423; H.F. 1423; S.F. 1323.

and maintain a website that will provide contact information for county health officials.<sup>146</sup> Finally, while none of the 2005 bills initially included specific methamphetamine disclosure requirements, House Bill 572 and its companion, Senate Bill 423, were both amended to provide that sellers must disclose, prior to signing an agreement to sell property, whether or not meth production occurred on the property.<sup>147</sup> This year's proposed bills that provide for recording affidavits giving notice that property is contaminated, website information, and seller disclosure requirements are encouraging news for residential property buyers. However, while the new provisions for land-record affidavits and an informational website are improvements over last year's proposed bills, the new provisions are not without their limitations. In addition, because no bills have been passed yet, there is no guarantee that any of these proposed protections for buyers will become enacted as law.

Regarding provisions for land-record affidavits, a number of proposed bills require that the applicable authority who issues an order for remediation of a property shall record with the county recorder an affidavit with the legal description of the property where the clandestine lab was located.<sup>148</sup> The affidavit must disclose to "any potential transferee" that the land was the site of a lab, the location, condition, and circumstances of the lab, and that the use of the property may be restricted. When the authority has vacated the order for remediation, the authority shall record an additional affidavit noting this fact. County recorders and registrars of titles must record the affidavits in a manner that will assure their disclosure in the ordinary course of a title search, and it is likely that title examiners would report such an affidavit to their customers.<sup>149</sup> Under these circumstances, buyers who are thinking

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146. *See, e.g.*, H.F. 364; S.F. 49; H.F. 572; S.F. 423.

147. H.F. 572, 5th Engrossment, Mar. 16, 2005; S.F. 423, 3d Engrossment, Mar. 17, 2005.

148. *See, e.g.*, H.F. 572, 5th Engrossment, Mar. 16, 2005; S.F. 423, 3d Engrossment, Mar. 17, 2005; H.F. 1423, 84th Leg., Reg. Sess. (Minn. 2005); S.F. 1323, 84th Leg., Reg. Sess. (Minn. 2005).

149. Lenders are interested in condition and value of property on which they take a mortgage as security for purchase-money loans. In contrast, abstract company title examiners and title insurance companies are not responsible (unless their employers contract otherwise) for investigating records not pertaining to title; rather, title insurance companies are employed to guarantee the status of title of property and to insure against existing defects. *See, e.g.*, *Greenberg v. Stewart Title Guar. Co.*, 492 N.W.2d 147, 151 (Wis. 1992)

of purchasing property that is subject to an order for remediation would have record notice that the land is subject to the order and must not be sold until remediated.

In the event that property is not subject to an order for remediation, proposed bills differ in means to protect buyers by providing some form of seller disclosure. For example, House Bill 1423 and Senate Bill 1323 provide that if an affidavit has not already been recorded by county officials “before any transfer of ownership of any property that the owner knew or should have known had been used as a clandestine lab site” the seller must record with the county recorder an affidavit disclosing the details of the lab site.<sup>150</sup> This proposed solution is problematic. In the event that a buyer is thinking of purchasing land that housed a

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(explaining purposes and limitations of title insurance). While title insurers and examiners are not responsible for investigating condition of properties or disclosing items in land records not pertaining to condition of title, there is a split in jurisdictions as to whether title examiners can be held liable in tort for not disclosing items in land records not pertaining to condition of title but relevant to condition and value of the land. In a majority of jurisdictions, courts will not hold abstractors liable in tort for not including information irrelevant to condition of title in an abstract. See 1 AM. JUR. 2d *Abstracts of Title* § 16 (2004) (explaining that an abstractor’s duty is to disclose everything in the land records that pertains to title); *Bank of Cave City v. Abstract & Title Co.*, 828 S.W.2d 852, 854 (Ark. Ct. App. 1992) (holding complaint does not constitute lien until reduced to judgment and employer did not request more extensive abstract report therefore abstractor had no duty to disclose as complaint did not affect title); cf. *DuPratt v. Black Hills Land & Abstract Co.*, 140 N.W.2d 386, 389 (S.D. 1966) (noting liability of abstractors for any and all damages sustained by reason of any error, deficiency or mistake in any abstract or certificate of title made and issued by an abstractor is recognized in South Dakota law). Possible tort liabilities notwithstanding, many courts have held that the existence of hazardous waste, even with a notice that the owner is to clean up the waste and that there is a possibility a future lien may be filed for reimbursement costs of cleanup, will not render the title unmarketable, provided there is no lien or claim filed against the property’s title. PATTON, *supra* note 114, at § 614. This is because environmental damage is a physical defect in the land, affecting value, but not condition of title. *Id.* However, while it is unlikely that an environmental damage notice filed in the chain of title to give notice of the property defect to subsequent purchasers and mortgagees will affect title, “no authority . . . neatly categorizes whether a statutory notice of environmental damage to land recorded in the local land record affects title or does not.” *Id.* Because of these uncertainties, title examiners in Minnesota would likely disclose to their customers the existence of a meth lab notice in the land records. Interview with Charles Hoyum, Vice President & Senior Underwriting Counsel; North Dakota Agency Manager, Old Republic National Insurance Title Company, in Minneapolis, Minn. (Oct. 7, 2004).

150. H.F. 1423; S.F. 1323. Failure to record the affidavit does not prevent transfer of ownership in these proposed bills, but the failure to properly record the affidavit does render the seller guilty of a misdemeanor. H.F. 1423; S.F. 1323.

clandestine meth lab that is yet undiscovered by authorities, the buyer is at the mercy of the seller. If a lab has not yet been discovered by authorities, no affidavit evidencing an order for remediation has been recorded by the authorities, so the burden to record an affidavit is placed on the seller. Further, House Bill 1423 and Senate Bill 1323 provide that unless an affidavit has been filed by an applicable authority, “before any transfer of ownership . . . the owner shall record . . . an affidavit.”<sup>151</sup> The problem here is that the proposed bills do not specify exactly how long before the transfer of ownership the affidavit must be recorded. Therefore, the seller could technically be in compliance with the provisions in the legislation if the seller recorded the affidavit just before transfer, but well after a prudent buyer would have conducted a title search. Further, the proposed bills that require a seller to record an affidavit do not require that a seller provide a purchaser with a copy of the affidavit and any additional information necessary to make the facts in the affidavit accurate as of the date of the transfer.<sup>152</sup> In this scenario, the property is not under any order that it must not be sold until remediated because the authorities have not discovered the lab, and they have not recorded an affidavit themselves. Therefore, as long as the seller properly records the affidavit, he is free to transfer the land. In order to fully protect the buyer in this situation, the seller must be required to provide the buyer with a copy of the affidavit and any other relevant information that will make the facts of the affidavit accurate.

The proposed bills that require sellers to record affidavits further provide that an owner is guilty of a misdemeanor if he violates the provision requiring recording an affidavit.<sup>153</sup> While this provision may act as a deterrent for sellers who are thinking of conveying their contaminated property without filing the proper affidavit, the provision does not provide a remedy to buyers who are victims of the dishonest seller. Through this omission, and by failing to require that sellers disclose to buyers that properties had

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151. H.F. 1423; S.F. 1323.

152. H.F. 1423; S.F. 1323. This is precisely what the Minnesota Pollution Control Agency requires of sellers who record affidavits of underground storage tanks. MINN. STAT. § 116.48, subd. 6 (2004) (requiring sellers to provide buyers with a copy of the affidavit and all information necessary to make the affidavit’s facts accurate as of the date of transfer of ownership).

153. H.F. 1423; S.F. 1323.

formerly housed meth labs, lawmakers are missing an opportunity to provide buyers with the information they need regarding potential contaminated properties and remedies in the event that sellers unlawfully convey contaminated properties without filing proper affidavits and without notifying buyers of the contamination. Finally, a number of proposed bills provide that “[i]f proper removal and remediation has occurred on the property, an interested party may record an affidavit indicating that this has occurred.”<sup>154</sup> The proposed bills do not define “interested party,” leaving open the question of who may lawfully file an affidavit after proper remediation.

Revisions to House Bill 572 and Senate Bill 423 retain requirements for county officials to record affidavits upon ordering remediation of meth-lab contaminated properties, but the revisions have removed provisions requiring sellers to record affidavits prior to selling contaminated property.<sup>155</sup> In addition, the revisions do not provide that an order for remediation will prohibit a contaminated property from being sold.<sup>156</sup> However, revised House Bill 572 and Senate Bill 423 do provide for seller disclosure, in writing, to the buyer prior to signing an agreement to sell property; the disclosure must indicate whether meth production has or has not occurred on the property.<sup>157</sup> If there has been meth production on the property, the seller must include a statement that indicates whether there has been an order issued to remediate the property, whether that order has been vacated, and if there was no such order, the status of remediation.<sup>158</sup> The revised bills further provide that if a seller does not properly disclose prior meth production on the property, the seller is “liable to the buyer or transferee for costs relating to remediation of the property . . . and for reasonable attorney fees for collection of costs.”<sup>159</sup> These

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154. *See, e.g.*, H.F. 572; S.F. 423.

155. H.F. 572, 5th Engrossment, Mar. 16, 2005; S.F. 423, 3d Engrossment, Mar. 17, 2005.

156. H.F. 572, 5th Engrossment, Mar. 16, 2005; S.F. 423, 3d Engrossment, Mar. 17, 2005. The revised bills merely prohibit the property from being occupied or used until remediation. H.F. 572, 5th Engrossment, Mar. 16, 2005; S.F. 423, 3d Engrossment, Mar. 17, 2005.

157. H.F. 572, 5th Engrossment, Mar. 16, 2005; S.F. 423, 3d Engrossment, Mar. 17, 2005.

158. H.F. 572, 5th Engrossment, Mar. 16, 2005; S.F. 423, 3d Engrossment, Mar. 17, 2005.

159. H.F. 572, 5th Engrossment, Mar. 16, 2005; S.F. 423, 3d Engrossment, Mar. 17, 2005.

seller disclosure provisions, if enacted, will provide buyers with remedies against sellers in the event that county officials have not discovered the lab and recorded an affidavit and in the event that sellers do not properly disclose the contamination.

In addition to the requirements of affidavit recording and seller disclosure, this year's proposed bills also provide that the "commissioner of health shall post on the Internet contact information for each local community health services administrator [and that] each . . . administrator shall maintain information related to property within the administrator's jurisdiction that is currently or was previously subject to an order [for remediation]."<sup>160</sup> The administrator must maintain information including the location of the contaminated property, the extent of the contamination, the status of the removal, the remediation work done on the property and whether the order for remediation has been vacated.<sup>161</sup> The proposed website could be a useful tool for buyers if they are made aware of it; however, the proposed legislation provides no means for making buyers aware of the existence of the website.<sup>162</sup> In addition, the proposed website merely requires contact information for county health officials to be posted. The proposed website does not include a posting of a list of contaminated properties.

This year's proposed methamphetamine legislation is an improvement over last year's legislation in terms of the protections it affords property purchasers from meth-lab contamination. For buyers, the best case scenario will be if the legislature enacts legislation that encompasses land record notice to buyers of contaminated properties in the form of recorded affidavits, seller disclosure, and a website that provides a centralized database containing information on contaminated properties. If enacted legislation fails to provide for seller disclosure of meth labs, it will miss an opportunity to provide additional protection to buyers through written disclosure by sellers and an opportunity to provide buyers remedies in the event of unlawful failure to disclose by sellers. Last year's Senate Bill 1863 provided some protection to buyers by requiring sellers' brokers to disclose if a property was subject to an order for meth-lab remediation; however, that

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160. H.F. 572; S.F. 423.

161. H.F. 572; S.F. 423.

162. H.F. 572; S.F. 423.

provision has been omitted from this year's legislation.<sup>163</sup> Further, while proposed legislation now provides a framework for inserting notice that a property is contaminated into land records by means of an affidavit,<sup>164</sup> the proposed legislation does not require that sellers provide buyers with a copy of the affidavit. Finally, while proposed legislation provides for a state-maintained website providing county official contact information,<sup>165</sup> the legislation does not require that contaminated property information is provided online, nor does it provide a means for informing buyers of the website as a means to obtain this information. Existing legislation, however, provides guidance for how to effectively address these problems.

*C. Six Existing Models on Which to Base Future Legislation*

Six legislative models exist in current federal and state law. The first is the Minnesota statutory requirement for well disclosure, which provides a model that requires seller disclosure prior to the sale of property, remedies for buyers in the event a seller does not properly disclose, and a land record filing method.<sup>166</sup> The second is the Minnesota statutory provision requiring that sellers disclose information relating to septic systems to prospective purchasers and providing remedies for buyers when sellers do not properly disclose such information.<sup>167</sup> The third is the Minnesota statutory requirement that sellers disclose the existence of underground storage tanks to buyers and that sellers record affidavits regarding these tanks in county land records.<sup>168</sup> The fourth is the Minnesota Environmental Response and Liability Act's (MERLA) provision that requires owners of contaminated properties to file, prior to transferring property, an affidavit in county land records noting the contamination.<sup>169</sup> The fifth model is the Federal Environmental Protection Agency's (EPA) Lead-Based Paint Disclosure requirement, a provision that ensures buyers are educated about the dangers of lead-based paint and are given time to conduct testing for lead-based paint in properties they are considering

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163. See S.F. 1863, 83d Leg., Reg. Sess. (2004).

164. See, e.g., H.F. 572; S.F. 423.

165. See, e.g., H.F. 572; S.F. 423.

166. See *infra* Part IV.C.1.

167. See *infra* Part IV.C.2.

168. See *infra* Part IV.C.3.

169. See *infra* Part IV.C.4.

purchasing.<sup>170</sup> The sixth model is the Minnesota requirement that sellers and sellers' brokers and agents disclose in writing to buyers the existence of the Minnesota sex offender registry, which provides a model for posting on the internet a database of information relating to meth-lab contaminated properties and methods of making buyers aware of the website.<sup>171</sup> While the most comprehensive buyer protections would include elements of each of the models discussed below, each model stands on its own as effective in providing some measure of protection.

1. *Minnesota's Well Disclosure Policy*

Minnesota law provides well disclosure requirements that include statements on deeds and other instruments of conveyance regarding wells on properties sold in the state. Minnesota requires that a seller disclose the status and location of all known wells on property before signing an agreement to sell or transfer that property.<sup>172</sup> The seller must deliver to the buyer a statement by the seller that he or she knows of no wells on the property, or, if there are wells, a legal description and a map showing the location of each well.<sup>173</sup> At the time of the closing of the sale, the disclosure statement, name and address of the buyer, and the location of the well must be provided on a "well disclosure certificate."<sup>174</sup> However, if there is no known well on the property, a well disclosure certificate need not be provided; instead, the deed or other instrument of conveyance may state: "The Seller certifies that the Seller does not know of any wells on the described real property."<sup>175</sup>

Minnesota Statutes section 103I.235 prohibits a county recorder or registrar of titles from recording a deed or other instrument of conveyance unless the deed contains a statement that the seller or buyer does not know of a well on the property or the deed is accompanied by a well disclosure certificate.<sup>176</sup> When the county recorder or registrar of titles receives the certificate, they note on each deed that a certificate was received.<sup>177</sup> In addition, if

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170. *See infra* Part IV.C.5.

171. *See infra* Part IV.C.6.

172. MINN. STAT. § 103I.235, subd. 1(a) (2004).

173. *Id.*

174. *Id.* subd. 1(b).

175. *Id.* subd. 1(c).

176. *Id.* subd. 1(i).

177. *Id.*

there are no wells on the property, the recorder or registrar makes the note on the deed: “No wells on the property.”<sup>178</sup> The disclosure certificates are then forwarded from the county recorder or registrar of titles to the commissioner of health, who must maintain the certificates for at least six years.<sup>179</sup> If a well disclosure certificate has already been filed, buyers and sellers are not required to file a new certificate if no new wells have been discovered or installed.<sup>180</sup> While failure to comply with the well disclosure requirements does not impair the validity of a deed,<sup>181</sup> Minnesota Statutes do provide buyers with remedies against sellers who do not properly disclose wells on the property.<sup>182</sup> A seller who knows or has reason to know of a well or the status of a well, but who fails to disclose the existence of that well to the buyer is liable to the buyer for “costs relating to sealing of the well and reasonable attorney fees for collection of costs” from the seller.<sup>183</sup>

While property owners may argue that a clandestine lab disclosure requirement reduces property value, the dangers of meth residue outweigh this risk.<sup>184</sup> However, if a clandestine laboratory has not been discovered by authorities on a property, it is unlikely that a seller will voluntarily comply with the disclosure requirement and risk devaluing the property or jeopardizing the sale. While it is unlikely that sellers will comply with disclosure of a clandestine lab, implementing a buyers’ remedy against sellers for the failure to disclose could help to protect buyers of properties that housed former undiscovered clandestine labs. Borrowing from the Minnesota well disclosure policy, lawmakers could require sellers to disclose past or present meth-lab contamination to buyers before signing an agreement to sell the property.<sup>185</sup> Lawmakers could give buyers remedies against sellers in the form of cleanup costs and reasonable attorney fees for recovery of expenses and losses associated with undisclosed lab sites. As with the well

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178. *Id.*

179. *Id.*

180. *Id.* subd. 1(j).

181. *Id.* subd. 1(l)(1).

182. *Id.* subd. 2.

183. *Id.* The statute of limitations is six years from the date of closing. *Id.*

184. *See supra* Part II.B. (explaining the hidden dangers of former meth labs on property).

185. This disclosure requirement has been proposed in revised versions of this year’s House Bill 572 and Senate Bill 423. *See* H.F. 572, 84th Leg., Reg. Sess. (Minn. 2005); S.F. 423, 84th Leg., Reg. Sess. (Minn. 2005).

disclosure laws, failure to disclose would not void a conveyance; rather, the buyer would have a remedy to recover costs of cleanup.

2. *Minnesota Pollution Control Agency's Septic System Disclosure Requirements*

In Minnesota, sellers must disclose to buyers how sewage generated on the property is managed; failure to properly disclose results in buyers' remedies against the seller.<sup>186</sup> In addition, the Minnesota Legislature has mandated that the Minnesota Pollution Control Agency promulgate rules that define standards and criteria for septic system compliance.<sup>187</sup> Pursuant to Minnesota Statutes sections 115.55 and 115.56, before signing an agreement to sell or transfer residential or commercial property, a seller must disclose to a potential buyer whether sewage generated on the property is managed at a permitted facility or on the property by an "individual sewage-treatment system," and therefore subject to statutory requirements.<sup>188</sup> The seller must provide accurate information and a seller who does not properly disclose a septic system to a buyer prior to the closing of the sale is liable to the buyer for costs related to bringing the system into compliance.<sup>189</sup>

A noncompliant septic system is defined as a system that poses an imminent threat to public health and safety,<sup>190</sup> and this type of system must be brought into compliance within ten months after noncompliant attributes are discovered and notice has been given.<sup>191</sup> While sellers are not required by the state to bring properties into compliance before properties are sold, local ordinances probably require compliance before completion of the sale. In addition, potential lenders are unlikely to take the property as security for a loan unless septic systems are in

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186. MINN. STAT. § 115.55, subd. 6(b) (2004).

187. *Id.* subd. 3.

188. *Id.* subd. 6(b). Minnesota Rules do not require that a septic system is inspected before a property is transferred; however, local governments, particularly governments in areas having an abundance of shorelands, may require inspections before property transfer. *See* MINN. R. 7080.0305 (2004).

189. MINN. STAT. § 115.55, subd. 6(b). The statute of limitations for bringing an action is two years. *Id.*

190. MINN. R. 7080.0020 (2004). "Imminent threat to public health or safety means situations with the potential to immediately and adversely affect or threaten public health or safety. At a minimum, this includes ground surface or surface water discharges and sewage backup into a dwelling or other establishment." *Id.* subp. 19a.

191. MINN. STAT. § 115.55, subd. 5(a).

compliance. The Minnesota Pollution Control Agency is mandated by statute to adopt rules that specify minimum standards for “criteria for design, location, installation, use, and maintenance of individual sewage treatment systems.”<sup>192</sup> These rules are located at Minnesota Rules chapter 7080, and they explain, in precise detail, the standards required by statute.<sup>193</sup> In addition to these rules, Minnesota Statutes require that individual sewage system treatment professionals be licensed by the state.<sup>194</sup>

In proposed methamphetamine legislation, authors of the Minnesota House and Senate bills state that a property containing a clandestine lab may not be “occupied, rented, sold, or used until it has been assessed and remediated as provided in the Department of Health’s clandestine drug labs general cleanup guidelines.”<sup>195</sup> It is unclear from the statute where those guidelines may be found. While the Minnesota Department of Health does provide a guide to cleanup and remediation on the internet,<sup>196</sup> a better approach would be to mandate that the Minnesota Department of Health draft corresponding rules similar to those drafted by the Minnesota Pollution Control Agency regarding septic systems.<sup>197</sup> With the addition of Minnesota Rules directing detailed cleanup guidelines and licensure procedures for professional cleanup services, property owners will know to a certainty to what extent they must clean up their property and whether the people doing the cleaning

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192. *Id.* subd. 3 (requiring rules that include: how the agency will ensure compliance, how local units of government will enforce regulations, provisions for handling waste, provisions for handling abandonment, definitions of features, and criteria used by inspectors). *Id.*

193. *See* MINN. R. ch. 7080 (2004).

194. MINN. STAT. § 115.56, subd. 1 (2004). In addition, the Minnesota Pollution Control Agency is mandated to promulgate rules that outline training requirements, testing procedures, continuing education requirements, and other provisions. *Id.*

195. *See, e.g.*, H.F. 1989, 83d Leg., Reg. Sess. (Minn. 2004) (2nd Engrossment, Mar. 15, 2004); S.F. 1580, 83d Leg., Reg. Sess. (Minn. 2004).

196. *See* Minn. Dep’t of Health, *Methamphetamines and Meth: Lab Cleanup*, at <http://www.health.state.mn.us/divs/eh/meth/lab/labcleanup.html> (last updated Jan. 10, 2005).

197. The State of Colorado has taken just this approach and has mandated that the state board of health shall “promulgate rules that establish the acceptable standards for the cleanup of illegal laboratories used to manufacture methamphetamine.” *See* COLO. REV. STAT. ANN. § 25-18.5-102 (West 2004). The State of Arkansas has similarly mandated that the Arkansas Department of Health develop guidelines for the cleanup of former clandestine meth drug labs and that the department shall update these guidelines annually and make them available online. ARK. CODE ANN. § 20-7-132 (Michie 2003).

are qualified.<sup>198</sup> In addition, while owners of property may be disinclined to disclose that the property has been the site of a clandestine lab, a remedy like the one given to buyers when a seller does not disclose a septic system will at least help to protect property purchasers.

3. *Minnesota Pollution Control Agency's Disclosure and Notification Requirements for Underground Storage Tanks*

Minnesota Statutes section 116.48, subdivision 6, provides a helpful model for filing information related to property condition in county land records and for requiring seller disclosure of tanks prior to transfer of ownership. The statute provides that before transferring ownership of property that contains an underground storage tank, a property owner must record an affidavit with the county recorder or registrar of titles.<sup>199</sup> The affidavit must contain a legal description of the property containing the storage tank, a description of the tank and any known release of a regulated substance from the tank, and a description of any restrictions in force due to release of the substances.<sup>200</sup> The statute further provides that the "county recorder shall record the affidavits in a manner that will insure their disclosure in the ordinary course of a title search of the subject property."<sup>201</sup> This provision functions as record notice to the buyer that the property contains an underground storage tank and provides the buyer with the opportunity to inspect the situation. As an important additional protection to buyers, the statute provides that "[b]efore transferring ownership of property that the owner knows contains an underground or aboveground storage tank, the owner shall

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198. Durkin, *supra* note 4. To date, there is no licensure requirement for professionals who clean up clandestine labs, and there is some concern that unqualified persons are taking advantage of the need for cleanup personnel, resulting in improper cleaning. *Id.* In a keynote address to the National Methamphetamine Legislative and Policy Conference, Minnesota Governor Tim Pawlenty announced that part of his plan to deal with the Minnesota meth problem is to mandate statewide clean up standards, which would require the procedures and outcomes developed by the Minnesota Department of Health be applied to all cleanups of properties contaminated by meth labs. Press Release, *Governor Announces Plan to Prevent, Prosecute, Clean up, and Treat Meth use in Minnesota*, October 25, 2004, available at [http://www.governor.state.mn.us/Tpaw\\_View\\_Article.asp?artid=1156](http://www.governor.state.mn.us/Tpaw_View_Article.asp?artid=1156).

199. MINN. STAT. § 116.48, subd. 6 (2004).

200. *Id.*

201. *Id.*

deliver to the purchaser a copy of the affidavit and any additional information necessary to make the facts in the affidavit accurate as of the date of transfer of ownership.”<sup>202</sup> The statute also provides a means for recording with the county recorder or registrar of titles a “removal affidavit” if the tank and any regulated substances have been removed from the property in accordance with applicable rules and laws.<sup>203</sup>

In addition to these disclosure and affidavit filing requirements, Minnesota Statutes section 116.491 requires that tank installers and repair persons receive certifications of competence issued by the Minnesota Pollution Control Agency.<sup>204</sup> Pursuant to Minnesota Statutes section 116.491, subdivision 3, the Minnesota Pollution Control Agency has promulgated comprehensive rules for training tank installers. Those rules outline certification provisions, standards of performance, training course requirements, and criteria for examinations.<sup>205</sup> Like the Minnesota Pollution Control Agency’s criteria for certification of septic system professionals,<sup>206</sup> these certification and training criteria protect property owners against the dangers of hiring unscrupulous or simply ill-trained drug lab “cleanup” crews.<sup>207</sup>

Taking a cue from the legislative framework already in place that provides notification to property purchasers of the existence of underground storage tanks and to certify tank installers, Minnesota legislators should revise proposed methamphetamine legislation to include a requirement that sellers provide prospective property buyers with (1) a copy of affidavits pertaining to meth-lab contamination and (2) any additional information sellers have that would be necessary to update the affidavits. Finally, proposed legislation should provide that the Minnesota Department of Health adopt rules with standards of competence for persons engaging in the work of clandestine lab remediation as well as standards for acceptable chemical levels on remediated lab sites. This provision would mirror both the current statutory provisions

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202. *Id.*; see also MINN. R. 7150.0120, subp. 6 (2004).

203. § 116.48, subd. 7.

204. MINN. STAT. § 116.491, subd. 1 (2004).

205. See MINN. R. ch. 7105 (2004).

206. See *supra* Part IV.C.2.

207. See *supra* note 198 and accompanying text discussing the current problems in Minnesota with untrained cleanup companies; see also *supra* note 118 and accompanying text discussing the state of Nevada’s plan to certify drug lab remediation personnel.

that require certification of septic system professionals and tank installers and the Minnesota Pollution Control Agency's rules outlining proper septic tank system functioning guidelines.<sup>208</sup>

#### 4. *MERLA's Owner Affidavit Requirement*

Similar to the underground storage tank affidavit requirements, Minnesota Statutes section 115B.16, subdivision 2, requires that a property owner must file an affidavit in county land records prior to transferring the property if the owner knows or should have known that the property was "subject to extensive contamination by release of a hazardous substance."<sup>209</sup> The statute provides that the affidavit must include a legal description of the property and the nature of the hazardous waste disposal, including whether "the land has been used to dispose of hazardous waste" or is contaminated by release of hazardous substances and "[t]he identity, quantity, location, condition and circumstances of the disposal or contamination to the full extent known or reasonably ascertainable."<sup>210</sup> If a person knowingly fails to record the required affidavit, that person will be subject to civil penalties of not more than \$100,000, and shall be liable for any release of hazardous substances on that property.<sup>211</sup>

It is possible for buyers who purchase meth-lab contaminated property from a seller who knew or should have known of the contamination to recover under this provision. However, there are two barriers to purchasers' recovery. First, the statute does not define "extensive contamination." This lack of definition provides to sellers a built-in defense against buyers' claims because buyers would be forced not only to prove sellers' knowledge or imputed knowledge, but also that sellers had knowledge that the contamination was somehow "extensive." Second, the statute requires that the seller record the affidavit "before any transfer of ownership,"<sup>212</sup> and requires county recorders to record the affidavits in a "manner which will assure their disclosure in the

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208. See § 116.491 (requiring certification of tank installers and requiring promulgation of agency rules); MINN. STAT. § 115.55 (2004) (requiring agency promulgation of rules relating to septic system requirements).

209. MINN. STAT. § 115B.16, subd. 2 (2004).

210. *Id.*

211. *Id.*, subd. 4.

212. *Id.*, subd. 2.

ordinary course of a title search of the subject property.”<sup>213</sup> While the provision that requires recording is a helpful provision and results in the affidavit being easily found during title search, it becomes useless in light of the fact that sellers are merely required to record the affidavits “before” the transfer. Based on a literal reading of this language, the seller could lawfully record the affidavit the day before the transfer and after a buyer will have conducted a title search. For these reasons, the current language of Minnesota Statutes section 115B.16 provides little effective protection for purchasers.

The statute does, however, provide a model on which to base legislation requiring owners of properties contaminated by meth labs to file affidavits in the county land records. The statute also sheds some light on problems with the proposed meth legislation. Like the Minnesota Pollution Control Agency’s requirements for filing affidavits regarding underground storage tanks, a provision requiring filing notification in land records would provide record notice to buyers that a property has a contamination problem, so long as the affidavit is recorded before the buyer performs a title examination. If the buyer performs a title examination before the affidavit is recorded, unless the seller is required to provide the buyer with a copy of the affidavit, it would appear the buyer is out of luck. Technically, the buyer would have record notice of the contamination if the affidavit were recorded prior to the sale, even if the affidavit were recorded just prior to the sale. This result hardly seems fair to a buyer, however, and could easily be remedied by requiring the seller to provide the buyer with a copy of the affidavit, as is required by the Minnesota Pollution Control Agency’s underground tank disclosure requirements.<sup>214</sup> For this reason, drafters of the proposed methamphetamine legislation should require sellers to provide buyers with copies of affidavits pertinent to meth-lab contamination. Ideally, these copies of affidavits would be provided as part of a full seller disclosure requirement prior to signing an agreement to sell or transfer the property.

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213. *Id.*, subd. 4.

214. *See supra* Part IV.C.3.

5. *Environmental Protection Agency's Lead Paint Disclosure Requirement*

In 1992, Congress passed the Residential Lead-Based Paint Hazard Reduction Act.<sup>215</sup> Unlike the Minnesota Pollution Control Agency's septic system disclosure program, the EPA's lead-based paint disclosure program is a disclosure program only, not a remedial program. The program does not require testing or removal of lead paint; rather, it provides a means to warn residential property purchasers of lead-based paint dangers on the property and to educate purchasers about the dangers lead-based paint pose to health.<sup>216</sup> Disclosure occurs before signing the purchase agreement, and homebuyers are allowed a ten-day period to conduct a lead-based paint inspection at their own expense.<sup>217</sup>

The lead-based paint disclosure requirement is a residential property requirement, but a similar requirement for meth chemicals and labs could be imposed on the sale of both residential and commercial property. The advantage of this type of legislation is that it would provide a means for educating buyers on the dangers of former clandestine labs on the property. In addition, in the case of labs that have been cleaned at the expense of sellers, buyers, in their discretion, would have the opportunity to conduct testing at their own expense. In the future, after remediation professionals have been certified and quality standards are in place, many purchasers might not feel it necessary to conduct their own testing. In the interim, however, purchasers, especially those with children or those who are chemically sensitive, might well appreciate the opportunity to conduct testing to their satisfaction.

6. *Minnesota Predatory Offender Registry*

In Minnesota, predatory offenders must register with the Department of Corrections.<sup>218</sup> Following the predatory offender's

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215. Residential Lead-Based Paint Hazard Reduction Act, Pub. L. No. 102-550, 106 Stat. 3672 (1992) (codified as amended at 42 U.S.C. §§ 4851-56 (2000)). Congress had found that "at low levels, lead poisoning in children causes intelligence quotient deficiencies, reading and learning disabilities, impaired hearing, reduced attention span, hyperactivity, and behavior problems." 42 U.S.C. § 4851 (2000).

216. 42 U.S.C. § 4852d (2000).

217. *Id.*, see also 24 C.F.R. § 35.80 (2004).

218. MINN. STAT. § 243.166, subd. 1(a)(3) (2004).

registration, pursuant to Minnesota law,<sup>219</sup> the Minnesota Department of Corrections updates its database and offers information pertaining to certain offenders to the public through a searchable website.<sup>220</sup> Property sellers and their brokers are not required by law to disclose information regarding an offender who is required to register with the State of Minnesota, provided that the seller or the broker provides to the prospective buyer a “written notice that information about the predatory offender registry and persons registered with the registry may be obtained by contacting the local law enforcement agency where the property is located or the Department of Corrections.”<sup>221</sup> As a result of these disclosure provisions, sellers and their agents and brokers routinely provide purchasers with information regarding the existence of the Minnesota predatory offender registry and the existence of the website and predatory offender search page provided by the Minnesota Department of Corrections. This search allows users to search the database for level three offenders based on any of the following criteria: zip code, name, city, county, or by viewing a list of all names of level three sex offenders registered.<sup>222</sup>

This year’s proposed methamphetamine legislation provides that “the commissioner of health shall create and maintain an Internet [website] and post on the [website] contact information for each local community health services administrator.”<sup>223</sup> In addition, the proposed legislation provides that each local community health services administrator shall, on request, make available to the public information relating to property subject to an order for remediation from meth-lab contamination.<sup>224</sup> While this information could be helpful to property purchasers, the current proposed bills provide no means to alert property purchasers to the existence of the website. Legislators could use

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219. See MINN. STAT. § 244.052, subd. 4(b) (2004).

220. See Minn. Dep’t of Corrs., *Level III Predatory Offender Search*, at <http://www.doc.state.mn.us/level3/Search.asp> (last visited Mar. 22, 2005). For more information on this program, see generally Minn. Dep’t of Corrs., *Information Page*, at <http://www.corr.state.mn.us/level3/level3.asp> (last visited Mar. 22, 2005).

221. MINN. STAT. § 513.56, subd. 2 (2004) (stating when seller disclosure is not required); MINN. STAT. § 82.22, subd. 8 (2004) (identifying real estate broker disclosure requirements).

222. See Minn. Dep’t of Corrs., *Level III Predatory Offender Search*, at <http://www.doc.state.mn.us/level3/Search.asp> (last visited Mar. 22, 2005).

223. See H.F. 364, 84th Leg., Reg. Sess. (Minn. 2005); S.F. 49, 84th Leg., Reg. Sess. (Minn. 2005).

224. See H.F. 364; S.F. 49.

the predatory offender registry disclosure requirement model as a guide to informing property purchasers of the means to discover, via the internet, whether property has been subject to a meth-lab contamination remediation order. This could be accomplished by requiring sellers and brokers to inform purchasers of the existence of this information on the internet. Finally, the website would be most useful to property purchasers if it functioned like the search page provided by the Minnesota Department of Corrections, allowing users to search a central database that is a collection of listings of Minnesota properties subject to meth-lab remediation orders. In the current proposed bills, the proposed website merely gives contact information for county officials; it does not provide access to a state-wide database.

*D. A Proposed Solution Based on Existing Statutes*

In order to effectively protect property purchasers against the dangers of former meth labs, the new legislation should be revised in the following ways: (1) inclusion of a provision that sellers be required to provide buyers with copies of recorded affidavits regarding meth-lab contamination; (2) the adoption, in all proposed legislation, of provisions for seller disclosure requirements, remedies for a buyer against a seller who sells land without disclosing a former meth lab, and penalties for sellers who convey land before it has been properly cleaned; and (3) the proposed legislation's website proposal should include a website maintained by the Department of Health that provides a search page on which users may search for properties that are, or have ever been, under an order for contaminated meth-lab cleanup as well as accompanying requirements that sellers and brokers disclose to buyers the existence of the website. In addition, drafters of future legislation should consider a provision mandating that the Minnesota Department of Health promulgate rules, similar to the Minnesota Pollution Control Agency's rules on septic and underground tank requirements and worker certification, that outline in detail training and certification procedures for clandestine drug lab remediation professionals and acceptable levels of residual chemicals at former lab sites.<sup>225</sup>

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<sup>225</sup>. See *supra* Parts IV.C.2-3. (discussing the Minnesota Pollution Control Agency's provisions).

*1. Sellers Required to Provide Buyers with Copies of Recorded Affidavits*

Proposed bills in the 2003–04 legislative session provided that “[i]f the applicable authority determines [that the contaminated property] . . . is subject to a deed, the authority shall notify the party responsible for maintaining the information on the deed of this fact. That party shall make a notation on the deed . . . .”<sup>226</sup>

This provision would have functioned to provide buyers with record notice that contaminated properties were under orders for remediation. However, there were two problems with the language and the methods that the proposed bills provided for recording this information in county land records. First, from the language provided in the bills, it was unclear who the person responsible for maintaining the deed would be, although it was assumed the language referred to a county recorder or registrar of titles. Second, making a “notation” on a deed is not at all a feasible alternative in the community of practitioners who work with title issues.<sup>227</sup> Fortunately this year’s proposed bills provide the framework for a solution to this problem by requiring that counties or owners record affidavits evidencing meth-lab contamination in county land records. In addition to this provision, as mentioned earlier, lawmakers should take a cue from existing underground storage tank disclosure statutes, requiring that before transferring the property, the owner shall provide the purchaser with a copy of the affidavit.<sup>228</sup>

*2. Seller Disclosure Requirements and Penalties for Non-disclosure*

While a seller of a property containing waste from a clandestine lab will most likely not willingly disclose this fact, the requirement should nevertheless be added to the statutory

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226. S.F. 1580, 83d Leg., Reg. Sess. (Minn. 2004).

227. Because a deed is a written contract, functioning as a conveyance, it is neither feasible nor wise to clutter the deed with notations and revisions. Hoyum, *supra* note 149; Interview with John Ophaug, attorney specializing in real estate, in Northfield, Minn. (Oct. 11, 2004).

228. MINN. STAT. § 116.48, subd. 6 (2004). Other states have taken this approach as well. The State of Delaware has provided that if the Secretary of the Department of Natural Resources and Environmental Control determines that a release of a hazardous substance is a threat to public health or the environment, the owner of the property must place a notice in the records. DEL. CODE ANN. tit. 7, § 9115 (2004).

disclosure requirements for sellers.<sup>229</sup> Enacting a specific meth-lab disclosure requirement will provide buyers with a remedy against sellers in the event that undisclosed meth-lab waste is discovered on the property.<sup>230</sup> A requirement imposed on sellers to disclose former meth labs, whether or not they have been cleaned up, provides buyers with the opportunity to conduct their own testing of toxicity levels on the property. This opportunity for buyers is important for two reasons. First, if disclosure of meth labs is not specifically required, a seller could potentially clean the property and then, under current statutory disclosure laws, lawfully omit from the disclosure the fact that a meth lab had been on the property.<sup>231</sup> This scenario robs potential purchasers of the opportunity to conduct their own safety tests, if they so choose.<sup>232</sup> Second, unlike the requirements Minnesota has in place for licensure of professionals who work on septic and sewage systems,<sup>233</sup> there are currently no licensure requirements for companies and individuals who hold themselves out as qualified to clean former lab sites.<sup>234</sup> Therefore, even sellers who in good faith believe the

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229. Minnesota Statutes section 513.55 requires that before signing a purchase agreement to sell property, sellers of residential property shall make a written disclosure to the potential buyer, disclosing all material facts pertaining to the property of which the seller is aware that could adversely and significantly affect the ordinary buyer's use and enjoyment of the property. MINN. STAT. § 513.55 (2004). The State of Missouri specifically requires that sellers disclose former meth labs. See MO. ANN. STAT. § 442.606 (West 2004).

230. Current Minnesota law provides that within a two-year statute of limitations, buyers may bring a civil action against sellers who fail to make a disclosure as required by law. MINN. STAT. § 513.57, subd. 2 (2004). Revised versions of 2005 House Bill 572 and Senate Bill 423 have added comparable seller disclosure requirements with regard to meth-lab contamination. See H.F. 572, 5th Engrossment, Mar. 16, 2005; S.F. 423, 3d Engrossment, Mar. 17, 2005.

231. Minnesota Statutes require disclosure of facts that could adversely affect the ordinary buyer's use and enjoyment of the property. MINN. STAT. § 513.55, subd. 1 (2004). If a seller has already "cleaned" a property, there would therefore be no need under current law to disclose this fact. See *id.*

232. Deborah Durkin maintains that because of the toxic nature of meth labs, buyers have a right to know if meth labs have been on the property. Durkin, *supra* note 4.

233. See *supra* Part IV.C.2.

234. Durkin, *supra* note 4. In fact, Deborah Durkin maintains that there may be some people who are not qualified to clean lab sites, but who do so anyway to take advantage of the growing market. *Id.* The State of Colorado mandates that as long as property owners meet the standards outlined in the Colorado Board of Health's promulgated rules, as evidenced by a test performed by a certified industrial hygienist, owners can avoid liability in a subsequent suit for alleged health-based afflictions in future owners and renters. COLO. REV. STAT. ANN. § 25-

property was sufficiently cleaned by professional cleaners could be wrong about the safety of the site. Full disclosure of the existence of the lab and how it was cleaned can protect buyers who will be given the opportunity to investigate the circumstances of the situation. In addition, sellers will be given the opportunity to make a full good-faith disclosure regarding their clean-up efforts.

Proposed legislation should also adopt buyers' remedies against sellers who do not comply with meth lab disclosure provisions. Minnesota Statutes already provide for seller liability to buyers when sellers do not comply with statutory disclosure requirements.<sup>235</sup> Within a two-year statute of limitations, buyers may bring a civil action and recover damages from sellers who were aware of the condition of the real property and who failed to make disclosure pursuant to statutory requirements.<sup>236</sup> Buyers may receive damages and other equitable relief as determined by the court.<sup>237</sup> The 2005 revised versions of House Bill 572 and Senate Bill 423 provide buyers with remedies against sellers who do not properly disclose meth-lab contamination pursuant to statutory mandates.<sup>238</sup>

An additional argument in support of providing seller disclosure requirements and buyers' remedies for failure to disclose is that in bills that propose bans on the sale of contaminated properties prior to cleanup, it is unclear who, if there is to be such a person, will be the "gatekeeper" who prevents the prohibited sale from taking place. One possible solution to the gatekeeper problem, similar to Minnesota's well disclosure law, would be to prohibit county recorders from recording deeds of properties that have recorded against them an initial notification of a contaminated lab site form but no subsequent clean up form. However, preventing recording of the deed will not void a sale of the property,<sup>239</sup> and in fact will only harm the buyer because it interferes with her status as a bona fide purchaser for value, who is

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18.5-103, subd. 2 (West 2004).

235. MINN. STAT. § 513.57, subd. 2 (2004).

236. *Id.*

237. *Id.*

238. H.F. 572, 5th Engrossment, Mar. 16, 2005; S.F. 423, 3d Engrossment, Mar. 17, 2005.

239. The fact that the deed is not recorded will not void the sale of the property unless a subsequent bona fide purchaser for value records a subsequent deed. MINN. STAT. § 507.34 (2004). This is the effect of Minnesota's race-notice recording statute. *Id.*

entitled to the protection of Minnesota's Recording Act, codified at Minnesota Statutes section 507.34 (2004).<sup>240</sup> Furthermore, Minnesota's county recorders most likely will not appreciate being burdened with the job of informing unsuspecting buyers that they may not record their deeds.<sup>241</sup> A better approach would be to give buyers a statutory remedy similar to the remedies for failure to disclose a well<sup>242</sup> or a septic system.<sup>243</sup> In both of these instances, the failure to disclose will not void the sale or prevent the buyer from recording her deed; rather, the buyer is given the opportunity, subject to a statute of limitations, to recover the cost of cleanup or remediation from the seller. In addition, it should be clear that the buyer's record notice of the lab's existence on the property is not a defense for the seller in an action by buyer to recover the cost of cleanup.<sup>244</sup>

At the very least, and possibly in lieu of specific seller disclosure requirements, drafters of proposed legislation could craft an educational solution for prospective purchasers modeled on the Federal Lead-Based Paint disclosure program.<sup>245</sup> This solution would require that sellers of commercial property

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240. Hoyum, *supra* note 149.

241. On the other hand, in most instances, lenders and title examiners will have found the notification in the land records indicating that the property was a clandestine meth lab site. Furthermore, buyers, provided that there was a notification filed in the land records after a lab was discovered by authorities, will be on record notice of the contamination. Nevertheless, sellers who knowingly, fraudulently, and illegally convey title of contaminated property to buyers should be liable to those buyers for the cost of cleanup.

242. See *supra* Part IV.C.1.

243. See *supra* Part IV.C.2.

244. Minnesota's well disclosure laws prohibit the buyer from recording the deed without the proper well-disclosure certificate. See *supra* Part IV.C.1. This law provides incentive to the buyer to properly complete the necessary forms and to require from the seller the proper disclosure forms. In this situation, it is fair to place this burden on the buyer because the well disclosure law applies to all sales of all types of properties in Minnesota and the buyer is on notice that it is necessary to bring the correct well-disclosure paperwork in order to record her deed. Further, a person who owns property that contains a well may place that property on the market; owners of property containing contaminated meth-lab sites may be prohibited from selling the property until cleaned pursuant to the statutes. In that case, sellers who place on the market real property that is contaminated by a clandestine lab could be acting illegally by the mere act of putting the land up for sale. For this reason, sellers, not buyers, should bear the cost of cleanup and should be liable to buyers for this cost in the event the sellers unlawfully convey the property to buyers or in the event sellers do not properly comply with disclosure laws.

245. See *supra* Part IV.C.5.

distribute to buyers specific information regarding the residual dangers of meth-lab contaminants. The information would alert buyers to the dangers and could inspire buyers to conduct chemical testing of the property.

3. *Website Maintained by the Minnesota Department of Health*

Proposed bills in the 2004–05 legislative session already contain provisions for a website intended to help provide citizens with information about properties contaminated by clandestine drug labs.<sup>246</sup> However, the proposed bills provide no means for property purchasers to learn of the existence of the website. Further, the proposed legislation requires only that the commissioner of health maintain a website with contact information for each local community health services administrator. The proposed bills do not provide for keeping centralized information readily available to the public regarding properties contaminated by clandestine meth labs. A search page connected to a centralized database similar to the predatory offender registry search page provided by the Department of Corrections<sup>247</sup> would be a more helpful tool for property purchasers, both in checking specific properties and in researching areas in which to purchase property. In order to inform prospective property purchasers about the existence of the site, drafters of proposed legislation could use disclosure requirements found in the Minnesota Predatory Offender Registry as a model. Legislators should further amend the Minnesota Statutes to require sellers and sellers' brokers to advise prospective property purchasers of the existence of the website.

## V. CONCLUSION

Despite the proven dangers of residual toxins from clandestine drug labs, there are currently no laws in Minnesota that specifically protect property purchasers by mandating disclosure of a lab's existence prior to property sale or by mandating that when a clandestine lab is discovered, a notice must be filed in land records to warn future purchasers. Methamphetamine is a problem in

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246. See H.F. 364, 84th Leg., Reg. Sess. (Minn. 2005); S.F. 49, 84th Leg., Reg. Sess. (Minn. 2005).

247. See *supra* Part IV.C.6.

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Minnesota that is growing at an alarming rate. Minnesota lawmakers and law enforcement officials must address the problem on many fronts, including monitoring and limiting sale of precursor chemicals and over-the-counter drugs containing pseudoephedrine, responding to the many crimes involving meth abuse, and rescuing children from the scenes of meth labs. Minnesota lawmakers can ensure that property purchasers are protected by requiring sellers to provide property buyers with copies of recorded affidavits regarding meth-lab contamination, by providing seller disclosure requirements, and by providing easy web access to a state-wide database that lists contaminated properties under order for remediation. By providing these protections to property buyers, lawmakers will protect innocent purchasers from the adverse health effects and expenses of unknown toxic meth labs.