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Comment
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***1047 CLEANING UP SOMEONE ELSE'S METH: SEEKING PROTECTION FOR INNOCENT HOMEBUYERS OUTSIDE OF PROPERTY LAW**

INTRODUCTION

Jonathan Hankins purchased a home in Klamath Falls, Oregon, from HomeSteps.com, a listing site for properties owned by Freddie Mac.¹ Hankins paid \$36,000 and moved in with his wife and two-year-old son, proud to be a homeowner.² Within a few weeks, Hankins and his family began to experience dry mouth, migraines, sores, and breathing problems.³ Eventually, some neighbors informed the Hankins family that the foreclosed home had previously housed a methamphetamine lab.⁴ Hankins tested the house for residue and found that the methamphetamine levels were nearly eighty times Oregon's legal limit.⁵

Two-thirds of state and local agencies in Western states perceive methamphetamine as their greatest drug threat.⁶ Methamphetamine is often manufactured in houses, cars, hotel rooms, and recreational vehicles by amateur chemists who have gotten their hands on pseudoephedrine, acetone, lithium batteries, or certain types of ammonia.⁷ Home-cooking methamphetamine spreads toxic substances throughout a house and onto every surface, including the walls, furniture, drapes, and air ducts.⁸ In fact, police officers in Missouri treat methamphetamine labs as hazardous waste sites.⁹ Living in a former methamphetamine lab ***1048** can cause a wide range of serious ailments, some of which the Hankins family experienced. Decontaminating a former drug lab is costly and can range from a few thousand to tens of thousands of dollars.¹⁰

Mr. Hankins complained repeatedly to Freddie Mac to no avail. Frustrated with the lack of response and discouraged by the legal fees associated with challenging the sale, Hankins created a petition asking Freddie Mac to "stop selling former meth labs to unsuspecting buyers."¹¹ As of November 26, 2012, the petition had gained over 200,000 signatures.¹²

The Hankins' story is not unique. In 2011, 10,287 methamphetamine labs were seized across the country.¹³ One can only imagine how many clandestine labs went undiscovered, but the number must be substantial. Professional contractors estimate that about ninety percent of methamphetamine houses are never uncovered.¹⁴ Many states have enacted laws requiring remediation of known former methamphetamine labs,¹⁵ but innocent homebuyers who find themselves in contaminated houses will find no relief or protection under these laws.

I. FEDERAL LAW: ENVIRONMENTAL CONCERNS

Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) to provide a legislative mechanism for the cleanup and removal of hazardous waste sites.¹⁶ CERCLA identifies and holds liable those who are responsible for the dangerous disposal of hazardous waste.¹⁷ While the language of CERCLA imposes liability

on “any person” who falls within one of its categories, CERCLA is targeted mainly at corporations and owners of commercial real estate.¹⁸

In early 2002, then-President George Bush signed the Small Business Liability Relief and Brownfields Revitalization Act, which amended CERCLA and authorized a grant program for state responses to brownfield problems.¹⁹ The Act defined a “brownfield” as “real property, the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant.”²⁰ This legislation meant that any cause of action available to someone in Hankins’ situation would have to be granted by an act of the state legislature.

II. STATE LAW: DISCLOSURE AND REMEDIATION EFFORTS

Soon after CERCLA’s enactment, many states enacted similar legislation. Twenty-three states, including Oregon, have legislation in place requiring a seller to disclose to a buyer if a property was ever used as a clandestine drug lab.²¹ In the Hankins’ case, this law did not apply because the seller, Freddie Mac, did not know of the property’s history.²² Home sales by banks and lending organizations are often executed with limited inspection, and a foreclosing institution has minimal ability and incentive to examine the property’s history.²³

A central principle of property law is caveat emptor: let the buyer beware.²⁴ Lending institutions like banks and Freddie Mac are discouraged from testing for methamphetamine residue prior to selling a property for two reasons. First, knowledge of contamination requires disclosure of contamination, which substantially burdens the institution’s ability to sell the property. Second, twenty-three states also have laws requiring property owners to remediate, or clean up, contaminated properties upon discovering its use as a methamphetamine lab.²⁵ Arizona, for example, requires a property owner to remediate the methamphetamine residue within twelve months of discovering contamination.²⁶ If the property owner fails to do so, the county or city will perform the remediation, with the cost passed on to the property owner in the form of a lien on the property.²⁷

The state laws requiring remediation of cleanup of discovered methamphetamine contamination address only known contaminated properties, and offer no protection for innocent buyers and sellers.

III. RECOMMENDATION

As the economy continues to recover and more houses, especially ones that were foreclosed on, are bought and sold, former methamphetamine labs will be an increasing environmental and health risk for homebuyers. While state laws requiring disclosure and remediation are positive steps, they only address a small percentage of former meth labs: ***1050** those that are discovered by property owners. The state-law schemes offer no protection for the innocent homebuyer, who, like Jonathan Hankins, discovers the contamination only when family members start falling ill. The vast majority of former methamphetamine labs are undiscovered until their residents begin to show symptoms, and by then it is too late to protect the buyer. Consumers need to know whether a property is contaminated before entering into a contract. The \$50 test the Hankins ultimately used to discover the degree of their contamination is a step all homebuyers should take, but most buyers will ignore this valuable test or simply overlook the risk of contamination.

From a congressional standpoint, it would make sense under the Commerce Clause for Congress to delegate authority to the Environmental Protection Agency to require lenders and other institutions to test their properties for methamphetamine contamination before offering them for sale. Lenders and financial institutions that foreclose on property and then sell it are contributing to interstate commerce, giving Congress the prerogative to legislate foreclosure-sale procedures. Proposed legislation would obviously encounter substantial resistance from lenders opposed to the imposition of such additional costs to selling foreclosed houses. The cost here would be twofold, because not only would lenders have to bear the burden of testing the foreclosed houses, but the lenders, as the owners of the properties, would also (in most states) bear the (much larger) cost burden of remediating foreclosed properties that tested positive for methamphetamine residue.

If Congress and the EPA were unable to require lenders to test foreclosed properties for contamination before selling them, other methods would have to be explored. Congress may be able to offer a tax credit to buyers to offset the cost of a methamphetamine residue test prior to purchasing. While Freddie Mac was empathetic in the Hankins case, a spokesperson

for the lender noted that, “the buyers were given every opportunity to do an inspection or conduct any test they wanted to conduct.”²⁸ Buyers need to be aware of this right, and be encouraged to exercise it. If Congress and the EPA cannot require the seller to test for methamphetamine contamination, lawmakers should do everything they can to encourage the buyer to conduct his or her own tests before a buyer is stuck not only with a contaminated property and its attendant health impacts, but with the expensive burden of cleaning it up.

Footnotes

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¹ Ryan Jaslow, *Family: New Home’s Meth Lab Past Made Us Sick*, CBS NEWS (Oct. 3, 2012, 12:54 PM), http://www.cbsnews.com/8301-204_162-57525298/family-new-homes-meth-lab-past-made-us-sick/.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ U.S. DEP’T OF JUSTICE, NAT’L DRUG INTELLIGENCE CTR., NATIONAL DRUG THREAT SURVEY 2011 51 (2011).

⁷ *Intro to Meth*, METHPEDIA.ORG, <http://www.methpedia.org/intro-meth> (last visited Jan. 29, 2013).

⁸ Michael Glenn Easter, *Once Meth Labs, Contaminated Homes Now Sicken Thousands*, ON EARTH (Apr. 28, 2010), <http://www.onearth.org/blog/once-meth-labs-contaminated-homes-now-sicken-thousands>.

⁹ *Id.*

¹⁰ Joshua Rhett Miller, *Meth Rehab: Former Labs a Nightmare for Unwitting Homebuyers*, FOXNEWS.COM (June 27, 2012), <http://www.foxnews.com/us/2012/06/27/meth-rehab-former-labs-nightmare-for-unwitting-homebuyers/>.

¹¹ Jonathan Hankins, *Freddie Mac: Stop Selling Former Meth Labs to Unsuspecting Buyers*, CHANGE.ORG (Aug. 10, 2012), <http://www.change.org/methlabhome>.

¹² *Id.*

¹³ Miller, *supra* note 10 (citing DEA statistics).

¹⁴ *Id.*

¹⁵ *See, e.g.*, WASH. REV. CODE § 64.44.020 (2013); TENN. CODE ANN. § 68-212-503(a)-(b) (2012); ARIZ. REV. STAT. ANN.

§ 12-1000(C) (2012).

16 Pub. L. No. 96-510, 94 Stat. 2767 (codified as amended at 42 U.S.C. §§ 9601-9675 (2012)).

17 *Id.*

18 42 U.S.C. § 9607 (2012).

19 Pub. L. No. 107-118, 115 Stat. 2375 (codified in scattered sections of 42 U.S.C. ch. 103, and adding 42 U.S.C. § 9628 (2012)).

20 42 U.S.C. 9601(39) (2012).

21 *See, e.g.,* OR. REV. STAT. § 453.855 (2012). *See also* Emily I. Krause, Comment, *Take My Property Please! Who Should Bear the Burden of Cleaning Up Toxic Methamphetamine Lab Waste?*, 56 CATH. U. L. REV. 187, 226 (2006).

22 Jaslow, *supra* note 1.

23 *Id.*

24 BLACK'S LAW DICTIONARY (9th ed. 2009).

25 *Meth Lab Cleanup Laws and Clandestine Drug Lab Regulations*, METH LAB CLEANUP
<http://www.methlabcleanup.com/meth%20cleanup%20laws.htm> (last visited Nov. 26, 2012).

26 *See* ARIZ. REV. STAT. ANN. § 12-1000(C) (2012).

27 *Id.*

28 Jaslow, *supra* note 1.