Ceraso Law Office •39 Ethan Allen Dr •Acton, MA 01720 • (v) 978.760.3402 •jc@cerasolaw.com

Massachusetts' Top Court Interprets Long-Standing DEP Interpretation of "Willfulness" in the Administrative Penalties Act

by Jane Ceraso, March 2014

It is rare that a high court gets into the weeds of on an agency's interpretation of its own technical rules. Once authority has been properly delegated to an agency, courts generally defer to that agency's decisions and administrative rulings. So it was somewhat unusual when this past September the Massachusetts Supreme Judicial Court (SJC), on its own motion, transferred *Franklin Office Park Realty Corp. v. Comm'r of DEP*, 466 Mass. 454 (2013) to itself, and issued an opinion that clarified the Department of Environmental Protection's (DEP) long-standing interpretation of its own administrative penalty statute.

At issue was when the agency may bypass the usual pre-penalty notice requirement for environmental violations that qualify as "willful and not the result of error" and the exact meaning of "willful" in this context. The Administrative Penalties Act (M.G.L. ch.21A § 16) provides six exceptions to the requirement that a penalty may not be imposed without notice. The "willfulness exception" is one of those six exceptions.

Facts and Case History

In *Franklin*, DEP asserted that Franklin Office Park (Franklin), via its president and licensed construction supervisor, as agents, committed various violations in connection with the removal and disposal of asbestos-containing roof shingles. DEP assessed a penalty of $18,225 for these violations, without issuing Franklin a Notice of Violation with an opportunity to cure. After a DEP administrative hearing upheld the pre-notice penalty, Franklin sought judicial review, and a Superior Court judge determined that the DEP's interpretation of M.G.L. ch.21A § 16 was unreasonable and thus not entitled to deference. DEP then appealed, and the SJC took the case up on its own motion.

DEP argued that Franklin's failure to comply fell within the willfulness exception because it was willful and not the result of error, which the agency had long interpreted as requiring only a showing of "intent to do an act that violates the law if done". DEP has historically held that no showing of knowledge of either the operative facts underlying the violation, or the law, was required to show willfulness.[1]

[1] *See, e.g.,* Matter of Seney, 20 DEP Rep. 45, 50 (2013) (immaterial whether the violator knew the heating system contained asbestos, because he intended to dismantle the system, and in so doing he caused asbestos violations); Matter of Myrtle, 107, LLC, 19 DEP Rep. 153, 155-157 (2012) (manager's awareness of asbestos abatement order prior to purchase of a property was irrelevant in determining willfulness).

Franklin, in turn, contended that it acted in good faith and without knowledge of the law and a motive to violate the law. It claimed that neither Franklin, its principal, nor its independent roofing contractor had reason to know or suspect that the roof shingles contained asbestos. Franklin argued that an action is only willful if the person knew the act was illegal at the time it was committed.

Supreme Judicial Court's Interpretation

The Court reviewed the statutory language in light of the purpose of the Administrative Penalties Act. It found that the Legislature intended a "willful" violation of DEP's laws to be a violation that has been committed by a party who knew or, due to his experience or expertise, should have known the operative facts that made his actions a violation of the law. Because it found that the Legislature "has spoken with certainty on the topic," the Court rejected DEP's interpretation requiring no knowledge of operative facts on Franklin's part. The Court concluded that the willfulness exception in M.G.L. ch.21A § 16, requires that the violator had intentionally undertaken the act that caused the violation, and that the violator either knew or should have known at least the facts that made the act a violation of the law. Having said that, the Court stated that there is no requirement that a violator either be aware of the applicable environmental laws or intend to violate those laws.

In *Franklin*, the operative fact was that the shingles at the site likely contained asbestos. The DEP hearing officer held that Franklin's property manager and roofing contractor should have known that the roofing shingles being removed likely contained asbestos because of their industry knowledge, experience, and professional licensure. The Court, while interpreting the statute, also affirmed DEP's penalty without prior notice and found it properly rested on the hearing officer's findings that Franklin knew or should have known of the likely presence of asbestos in the shingles.

Although it upheld the pre-notice penalty, the Court found that DEP's decision in the case was based on an error of law because the agency's interpretation of the willfulness exception did not comport with the clear meaning of the statute. The Court opined that DEP's interpretation was "unreasonable" because it "sweeps so broadly as to make nearly all conduct subject to penalty without notice."

Impact on Future Environmental Penalty Cases

The *Franklin* holding will likely have ramifications for many future DEP penalty cases. The Court has narrowed DEP's definition of willfulness and clarified how future environmental penalty cases may be interpreted. We can expect that courts may excuse a violator's mistake of operative fact, but not a violator's mistake of law. We can expect that the operative facts of each case will likely be closely examined. And we can expect that DEP must show that the violating party "knew or should have known of the operative facts that made their acts unlawful."

Although the definition has narrowed somewhat, courts may still have the opportunity to wade into the weeds of the operative facts. The Court's reference to the "should have known" standard allows room for an argument that even if a party did not willfully violate the law, that

party may still be liable because he *should have known* that his acts would violate the law. In *Franklin,* the Court concluded that Franklin's property manager and roofing contractor should have known that the roof shingles contained asbestos because of their industry knowledge and experience, a notation on the building permit requiring compliance, and the licensed Construction Supervisor status of the building manager.

In addition to informing future environmental penalty cases, the *Franklin* holding provides good guidance to property owners and contractors, who would be wise to stay vigilant and exercise due care. Ignorance of the law will be no defense; even if property owners claim ignorance of the facts, knowledge may be imputed to them via their professional contractors and agents.