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Asbestos ruling, beware

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A recent case decided by the Mass. Supreme Judicial Court (SJC) clarified how strict and sometimes onerous the enforcement of the Mass. Department of Environmental Protection's (DEP) regulations can be. In *Franklin Office Park Realty Corp. vs. Commissioner of the DEP*, decided on September 16, 2013, the owner of a building challenged the DEP's authority to impose an administrative penalty without providing prior notice for the improper handling and disposal of roofing tiles containing asbestos.

BEWARE, the Administrative Penalties Act and the DEP regulations categorize a person's violation of its regulations as "willful and not the result of error," regardless of whether the violator specifically knew about the applicable requirements or intended to violate the law. The interpretation belies the common sense meaning of these words, even if the person did nothing other than hire someone who failed to properly remove, handle, and/or dispose of this material. The DEP has long attributed this category of "willfulness" and the associated penalties with the presumptive knowledge of the violator; either knew or should have known, based on the violator's experience or expertise. In such circumstances, DEP has the authority to apply one of six exceptions to the notice provision it otherwise must employ.

Although a lower court determined under the state's Administrative Penalties Act (M.G.L. c. 21A, Â§16) that DEP's interpretation was unreasonable and not entitled to deference, the SJC reversed the decision upon the DEP's appeal. The SJC's ruling that the alleged violator's actions were "willful and not the result of error" was based on a two-step test used to determine whether the agency's interpretations of its regulations are valid.

First, the SJC examined whether the legislature clearly articulated the intent of the statute; and secondly when the legislature has been clear, whether the agency's interpretation has rejected the legislature's intent. If the legislature's language is ambiguous and has not directly addressed the issue, the SJC will proceed to the second step to determine whether the agency's interpretation is reasonable, granting "substantial deference" to the agency's particular expertise. Only where the agency's interpretation is "patently wrong, unreasonable, arbitrary, whimsical, or capricious," will the court disturb the agency's interpretation. In the *Franklin Office* case, the SJC determined that the legislative intent was clear as to when a violation of environmental protection laws is "willful and not the result of error," and therefore upheld the DEP's imposition of a penalty without providing prior notice to the violator. The court did not reach the second step of the test.

The importance of due diligence; educate yourself about the materials you are using, seek assistance from professionals as to the applicable laws and regulations, and understand the credentials necessary to comply with the requirements.

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