

# ENFORCEMENT BASICS

*As Applied to G.L. ch. 21E and the MCP*



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October 24, 2017

# Legal Framework for Enforcement

## Common Law

- derived from *Judicial Decisions*



‘case law’  
precedent based

(contract, property, and tort law rooted in  
common law)

*more malleable than Statutory Law*

## **Statutory Law**

- created by statute



## **Regulatory Law**

- authority delegated to agencies by statute

ALL 'PURE' ENVIRONMENTAL LAW IS  
STATUTORY LAW

*Less malleable than Common Law*

# Identifying a Statutory Violation

## ELEMENTAL ANALYSIS

example:

**G.L. ch. 21E, sec. 7**

**Notice of release or threat of release**

## Section 7. Notice of Release or Threat of Release (1<sup>ST</sup> PARAGRAPH)

Any owner or operator of a site or vessel, and any person otherwise described in paragraph (a) of section 5, and any fiduciary, city, town, redevelopment authority, redevelopment agency, community development corporation, economic development and industrial corporation or secured lender who holds title to or possession of a site or vessel and any eligible tenant who acquires occupancy or possession of a site or a portion thereof, as soon as he has knowledge of a release or threat of release of oil or hazardous material, shall immediately notify the department thereof. Such notice shall not be required hereunder for any release which conforms to the terms of a currently valid permit or license issued by the department. Such notice shall not be required hereunder for the application of a pesticide product registered under the Federal Insecticide, Fungicide, and Rodenticide Act 7 USC Sec. 136 et seq., and under the provisions of chapter one hundred and thirty-two B, or to the handling and storage of such a pesticide product by an agricultural producer.



HELP !!!!

Trapped in Legalese!  
How do I Find My Way  
Out of Here ????

# Establish the Violation

- Find the Statutory or Regulatory Provision
- Identify Each Element
  - What is an “element”
    - “a fundamental irreducible constituent”

# It's Elementary.....

1. Owner/Operator
2. With Title or Possession
3. Of a "Site"
4. Having "Knowledge"
5. Of a "Release" or "Threat of Release"
6. Of Oil or HazMat
7. Shall Immediately Notify
8. The Department





## MCP definition of KNOWLEDGE (310 CMR 40.0006(12) (verbatim)

- (a) actual knowledge; or
- (b) knowledge a person acting in a reasonably prudent and intelligent manner would have, but for that person's willful, knowing or negligent avoidance of learning about the fact or facts in question.

In determining whether a person has acted in a reasonably prudent and intelligent manner, any specialized knowledge or training possessed by that person and the circumstances surrounding the fact or facts in question shall be taken into account.



# Are there EXCEPTIONS to Statutory Requirements ?

- Look at the Statute to Find out
  - NO NOTICE REQUIRED FOR RELEASE
  - THAT CONFORMS TO VALID LICENSE/PERMIT
  - ISSUED BY THE DEPARTMENT
  - (ET AL)



# Identifying a Regulatory Violation

## ELEMENTAL ANALYSIS

example:

**40.0404**

**Timing of Response Actions**

#### 40.0404: Timing of Response Actions

(1) RPs and any other persons conducting response actions shall initiate, implement, and complete those response actions described in 310 CMR 40.0400 within the time frames specified in 310 CMR 40.0400 and/or any Interim Deadlines specified by the Department pursuant to 310 CMR 40.0167.

(2) RPs and any other persons conducting response actions shall submit all required plans, status reports, completion reports, and other required response action documentation described in 310 CMR 40.0400 within the time frames specified in 310 CMR 40.0400 and/or any Interim Deadline specified by the Department pursuant to 310 CMR 40.0167.



No Worries!

# It's Elementary.....

## Section 1

1. RPs and any other persons
2. conducting “response actions”
3. shall initiate, implement, and complete them
4. within the time frame at 310 CMR 40.0400  
and/or any Interim Deadlines specified by the Dept.  
at 310 310 CMR 40.0167.

AND

5. shall submit all required [RA documents] at 310 CMR 40.0400
6. within the time frame at 310 CMR 40.0400  
and/or any Interim Deadlines specified by the Department  
at 310 310 CMR 40.0167.



# Identifying the Violator

DOES THE TARGET FALL WITHIN DEFINITION OF RP or other persons?

If so....

– Individual

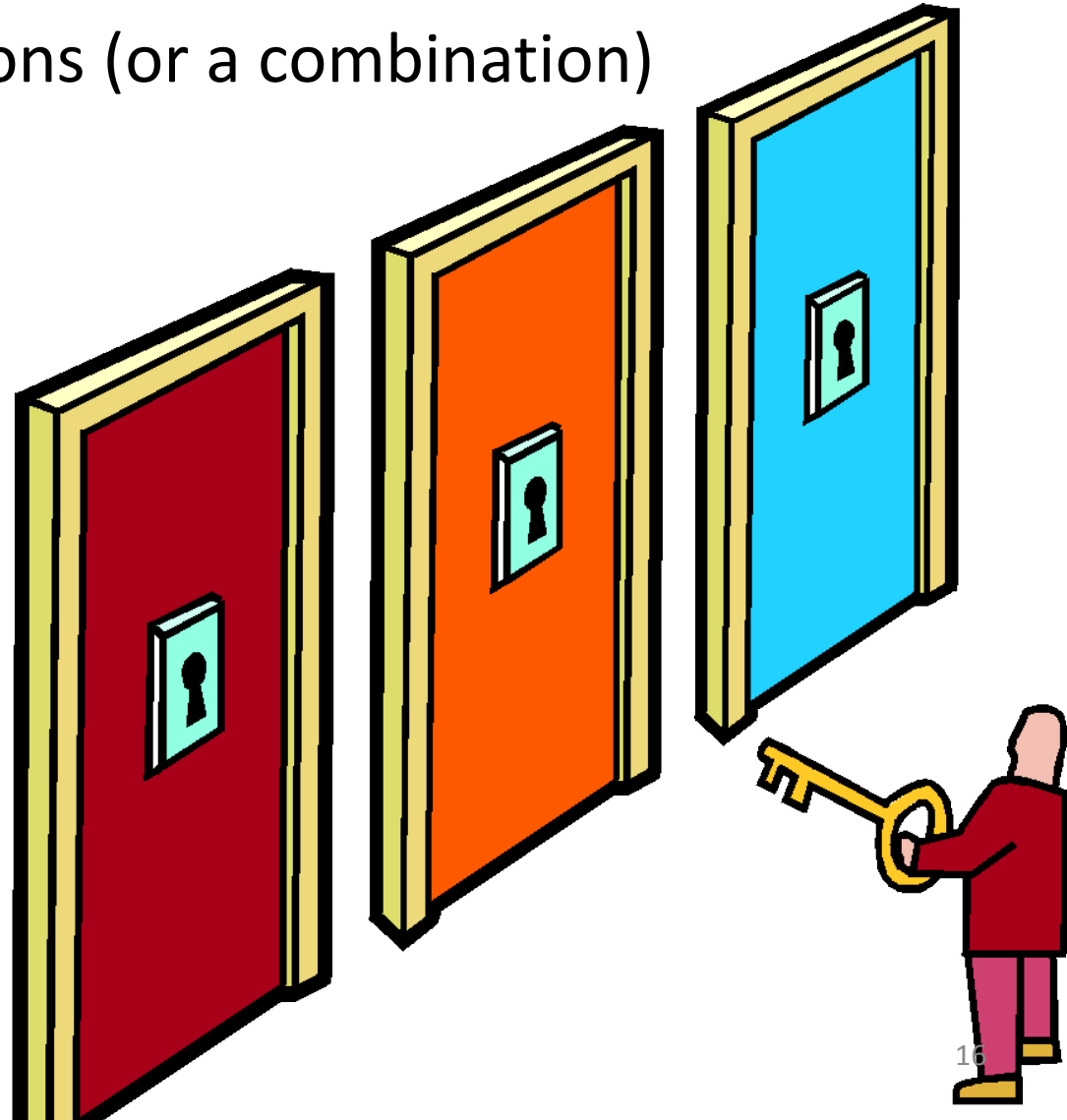
– Entity

- d/b/a
- Partnership
- Corporation
- LLC
- LLP
- etc.

Now....

What to Do with a Violation of the Law, and a Violator ?

Three Enforcement Options (or a combination)





# **Which Door to Open ?**

## **Choosing the Appropriate Enforcement Forum**

- Administrative
- Civil
- Criminal

(or a combination.....)

# How to Decide ?

Regional Enforcement  
Review



Case Screening  
Committee

“Just  
the facts  
Ma’m”

(as applied to the  
law, of course)



# General Criteria Government Looks for, Include:

- Need for Injunctive Relief
- Resource Damage
- Unpermitted Activity
- Public Health Impacts of Threat
- Mens Rea
- Pattern of Non- Compliance
- Suggestion of Financial Skullduggery
- Unfair and Deceptive Business Practices
- Tampering with Monitoring or Treatment Equipment
- Knowingly Submitting False, Inaccurate, Misleading Info



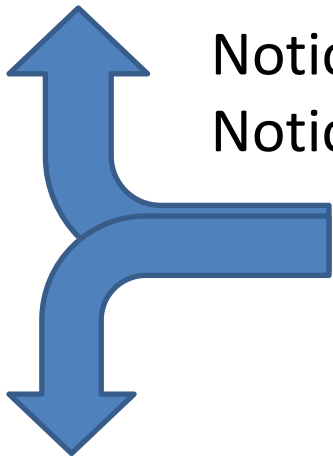
The Law is like The Hanger

The Facts are like The Coat

**Enforcement - Application  
of The Facts to The Law**

# *Administrative Enforcement - Two Main Routes*

## ***Low Level Enforcement***



Notice of Non-Compliance (NON)  
Notice of Response Action (NORA)

## ***High Level Enforcement***

Unilateral Administrative Order (UAO)  
Penalty Assessment Notice (PAN)  
Administrative Consent Order (ACO)  
Administrative Consent Order with Penalties (ACOP)

# Administrative Penalty Authority

## *Civil Administrative Penalty Statute*

**G.L. ch. 21A, sec. 16**

**310 CMR 5.00, et seq.**



# Civil Enforcement – Road Map

## Civil Law Suit

Injunctive Relief (if needed)

Motion to Dismiss

Discovery

Summary Judgment

Consent Agreement

- Conditions

- Penalties

OR

Trial – Mass. Superior Court (Jury or Bench)

Verdict – Liable/Not Liable

Liabe ? Judgment can Include

- Conditions

- Penalties

Appeal - to Mass Appeals Ct.

Appeal to - Mass Supreme Judicial Court



# Civil Penalty Authority

## Express Provision of “Environmental Statute”

**G.L. ch. 21E**

**G.L. ch. 21C**

**G.L. ch. 131, sec. 40**

**G.L. ch. 21, sec. 26-53**

**G.L. ch. 111, sec. 150A**

**etc. etc. etc.**



# **Burden of Proof - The Degree of Belief**

**Administrative** –  
preponderance of the evidence;

(a/k/a more likely than not; and  
substantial evidence )

**Civil** – preponderance of the  
evidence

# What is at Stake in Adm. or Civil Proceedings ?

- Assessment (and Collection) of Adm. or Civil Penalties (\$\$\$)
- Changes in Business Practices (\$\$\$)
- Loss of Goodwill/Reputation (\$\$\$)
- Possible Injunction (\$\$\$)

# Obtaining Injunctive Relief

STOP THAT !

START THAT !

RIGHT NOW !

Forum ?

- **Administrative**

- Unilateral Administrative Order (UAO)  
(can be appealed ... )

- **Civil**

- Temporary Restraining Order (TRO)  
Preliminary Injunction (PI)

# CRIMINAL ENFORCEMENT - *PERILOUS JOURNEY*

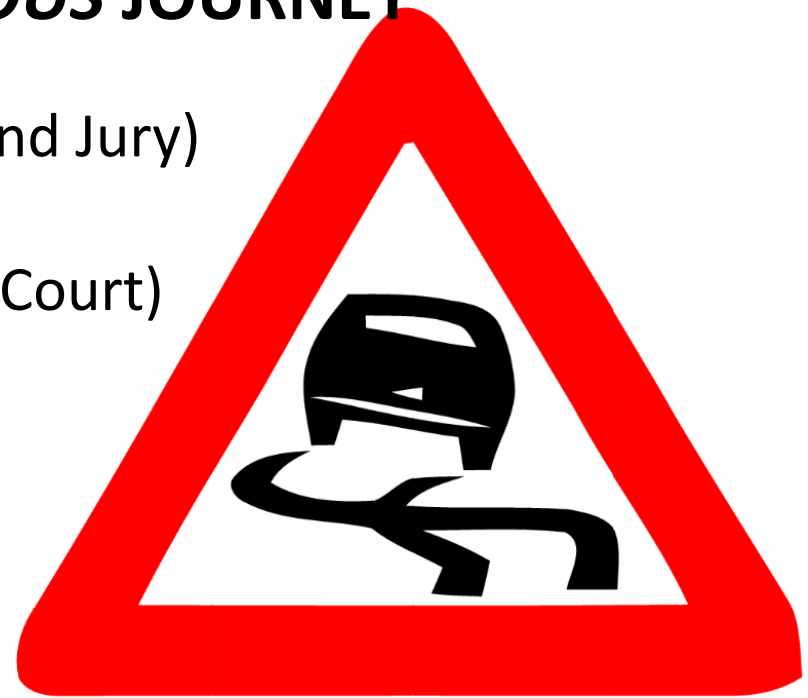
Probable Cause (Clerk Magistrate or Grand Jury)

Arraignment (District or Superior Court)

- Discovery

- Motions

Plea Agreement OR Trial



Verdict – GUILTY / NOT GUILTY

Sentencing or Plea, can include:

- Jail or State Prison

- and/or Probation

- and/or Criminal Fines

- and/or Restitution

- and/or Other Conditions

# Criminal Burden of Proof - The Degree of Belief

## ***Beyond a Reasonable Doubt***

required under the ***DUE PROCESS CLAUSE*** of the Fifth Amendment

grounded on "*a fundamental value of [American] society that it is far worse to convict an innocent man than to let a guilty man go free.*"

(IN RE WINSHIP, 397 U.S. 358, (1970 )

# What is at Stake in Criminal Proceedings ?

- Individual Liberty Interest
- Marked as a criminal – misdemeanant or felon (limits in some states on felon's rights)
- Criminal Fines (\$\$\$)
- Reputation (\$\$\$)
- Possible 'Injunctive –type' judicial Orders, as a Condition of Plea or Sentence (\$\$\$)

# Criminal Sanctions

## Express Provision of Environmental Statute

HOUSE OF CORRECTION

STATE PRISON

CRIMINAL FINES





# 21E - SERIOUS SANCTIONS

Section 11. - Let's Take a Look .....

**Any violation of this chapter, or of any regulation** adopted or order issued thereunder, shall be **presumed to constitute irreparable harm** to the public health, safety, welfare or the environment.

Such presumption may be rebutted by a preponderance of evidence.

In addition to liability for costs [ ...]

**any person who violates any provision of this chapter, or any order or regulation** issued or adopted thereunder:

DRUM ROLL PLEASE ....

**(a) shall be subject to a civil penalty not to exceed \$50,000 for each such violation;**

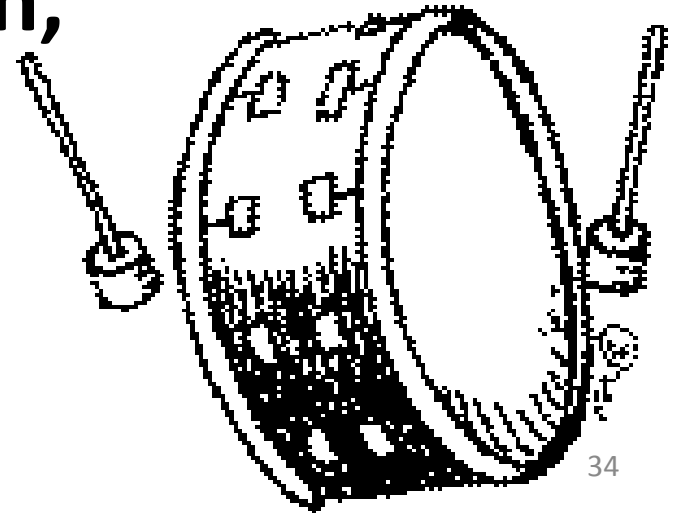
**or**

**(b) shall be punished by a fine of not more than \$50,000**

**or**

**by imprisonment for not more than two years in a house of correction,**

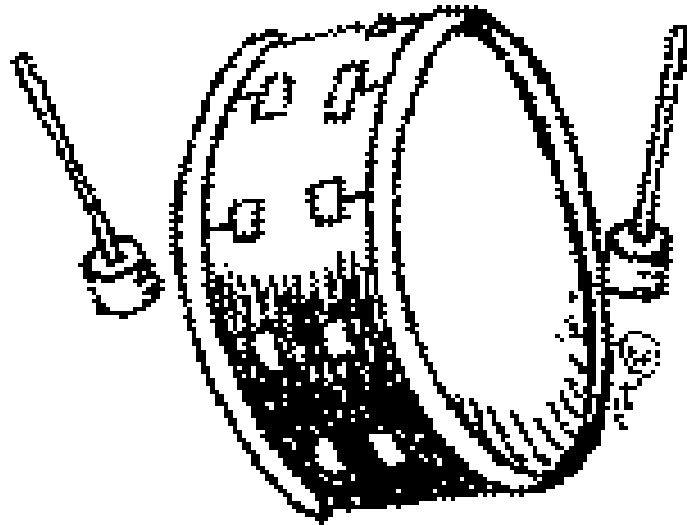
**or both, for each such violation;**



**c) a person violating any provision of section seven**

**shall be punished by a fine of not more than one hundred thousand dollars,**

**or**



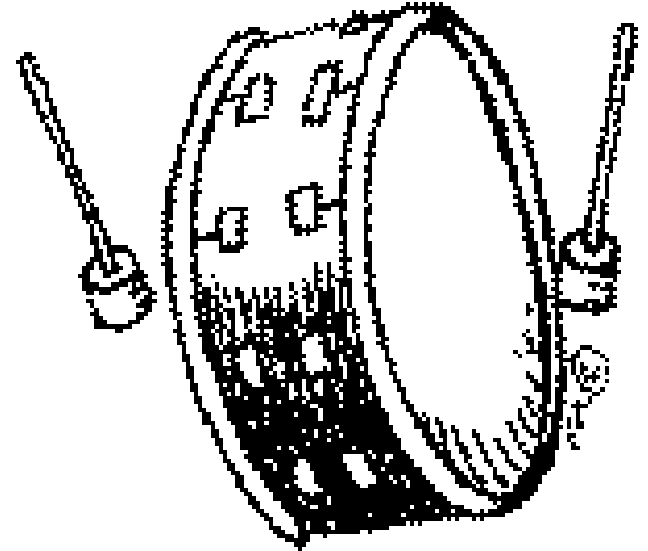
by imprisonment in the **state prison for  
not more than twenty years**

or

in a jail or **house of correction for not more  
than two and one-half years,**

or both,

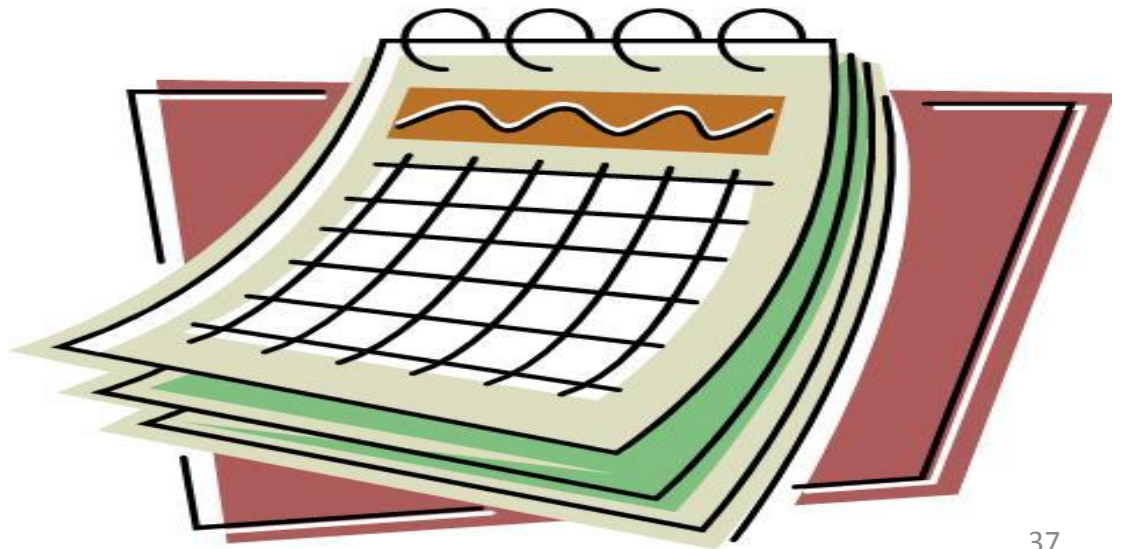
One last drum roll.....



**for each such violation. (!!!)**

and

**each day** such violation occurs or continues shall be considered a separate violation. (!!!)



# PARALLEL PROCEEDINGS

(do not have to involve injunctive relief)

- two actions, both brought by the government, either concurrently or successively, in which the allegations of unlawful conduct arise out of the same set of facts.
- Can be Administrative /Criminal or Civil/Criminal;
  - Different standards of proof
  - Varying Interests at Stake

# PARALLEL PROCEEDINGS (contd.)

*CONSTITUTIONAL LIMITS* - can be stumbling blocks for the Govt.

- 4<sup>th</sup> Amendment

- 5<sup>th</sup> Amendment

# PARALLEL PROCEEDINGS (contd.)

## Maintaining the Balance .....

Defendant often STAYS the civil proceedings pending criminal disposition

- Say good-bye to broad civil discovery
- Say hello to right against self-incrimination (5<sup>th</sup> Amendment )

If immunity is granted ?

- No right to assert the 5<sup>th</sup>
- Defendant can be compelled to respond to discovery



## ***ENFORCEMENT FOOTNOTE:***

**common law** criminal claims:

Larceny and Fraud – can be part of a 21E enforcement case



Who's Safe  
Who's Out  
??????

## Examples of Past Games:

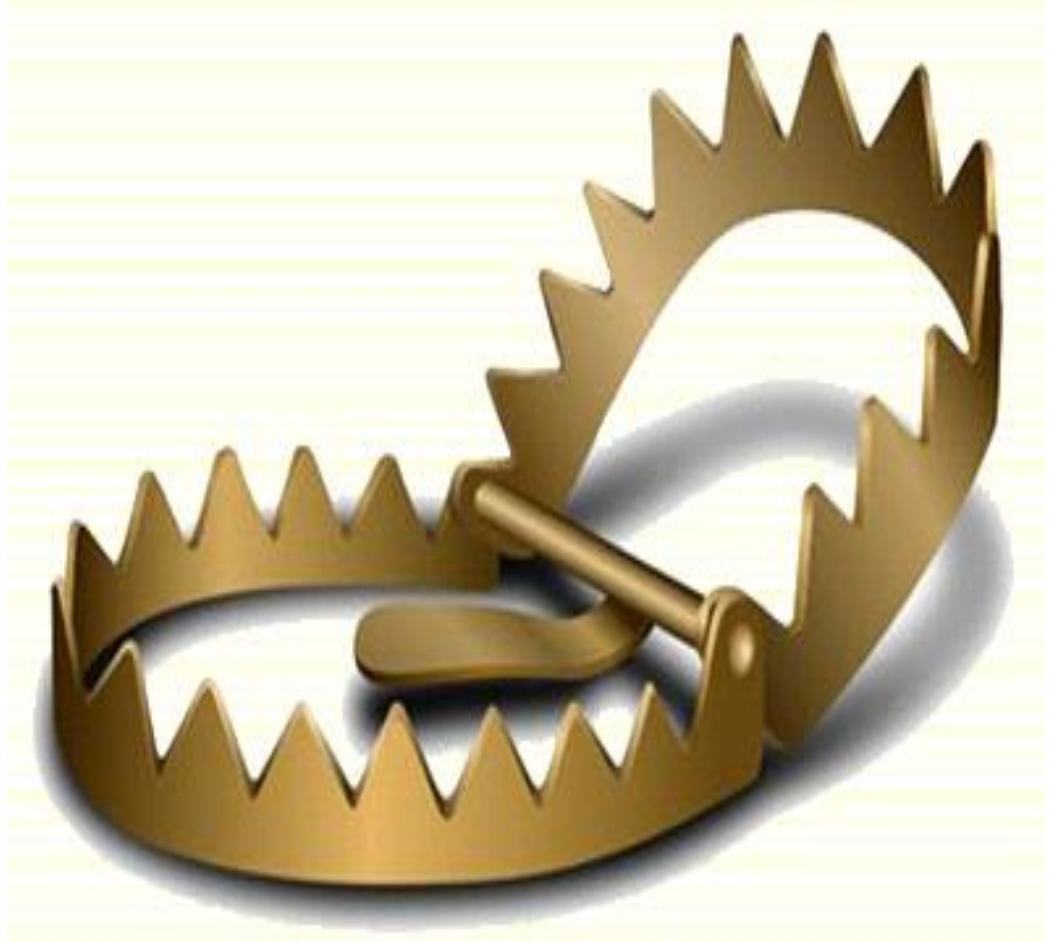
Comm. v. Bertrand

Comm. v. Pan AM RR.

In Re: Blackinton  
Common



# TRAPS FOR THE UNWARY .....



# ECONOMIC BENEFIT

**The Govt. will look for EB – in any Case, in any Forum  
\$\$\$**

- “benefit quantifiable in terms of money, such as revenue, net cash flow, net income”  
US v. Frazier, 2010 U.S. App. (6th Cir. Tenn. 2010)
- Look for: avoided costs
- Look for: delayed costs

Not punitive in nature



FALSE STATEMENTS

FALSE  
CLAIMS

# False Statements

## False Claims

false , misleading, inaccurate information

- Administrative claims
- Civil counts
- Criminal charges
- State and Federal Laws
- Adm., Civil and Criminal Jurisdiction

# Administrative Enforcement Authority

## *Civil Administrative Penalty Statute*

**G.L. ch. 21A, sec. 16** (up to \$25,000 per violation)

*elements*

- 1) knowingly making, or causing any person to make,
- 2) any false, inaccurate, incomplete or misleading statement
- 3) in any document
- 4) submitted to or required to be kept by the department

# Civil Enforcement Authority

## *The Mass. False Claims Act*

### **G.L. c. 12, sec. 5B – 50**

(up to \$10,000 per violation, plus triple and consequential damages)

*elements:*

- 1) knowingly present/make/cause
- 2) false or fraudulent claim/record/statement
- 3) for payment or approval
- 4) by the Commonwealth



# Civil Enforcement Authority

## *The Federal False Claims Act*

### **31 USC 3729 – 3733**

(up to \$10,000 per violation, plus triple damages)

*elements:*

- 1) knowingly present or cause to be presented
- 2) a false claim
- 4) that is material
- 5) seeking payment from the government

# Criminal Enforcement Authority

## *State Procurement Law*

**G.L. ch. 266, sec. 67A** *(supplies, services, contracts)*

(felony (5 years state prison) or misdemeanor (2 ½ years HOC); and/or \$10,000 criminal fine)

**POTENTIAL TARGETS** - in any matter relative to procurement, whoever intentionally:

- (1) makes a material statement that is false;
- (2) omits or conceals material fact in a written statement;
- (3) submits or invites reliance on a material writing or recording that is false, forged, altered, or otherwise lacking in authenticity;
- (4) submits or invites reliance on a sample, specimen, map, photograph, boundary-mark, or other object that is misleading in a material respect; or
- (5) uses any trick, scheme, or device that is misleading in a material respect.

# Criminal Enforcement Authority

## *State Environmental False Information Statute*

### **G.L. ch. 21A, sec. 19J**

(misdemeanor (2 yrs. HOC) and/or \$10,000 fine)

*elements:*

- 1) Knowingly making : 2) a materially false or inaccurate statement : 3) submitted to (or required to be maintained) by the Dept./Board **OR**
- 1) Knowingly (or knowingly allowing): 2) alteration, tampering, destruction of 3) a required monitoring device

“Truth is the best refuge of an honest man.”

*anon*