

# **2016 Dangerous Goods Symposium**



**DOES THE D.O.T. KNOW  
WHAT A D – O – G KNOWS?**

**SEPTEMBER 8, 2016  
CHICAGO, ILLINOIS**

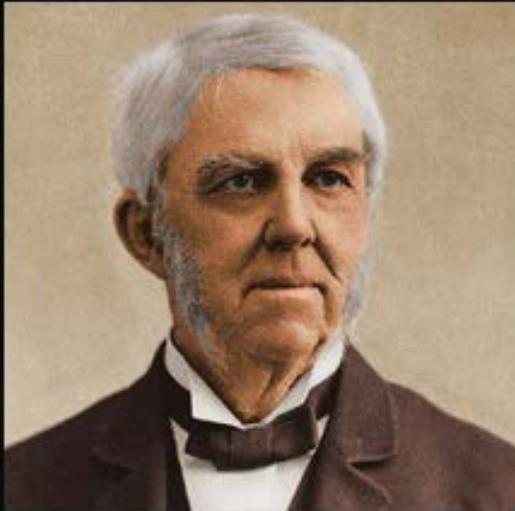
# *Scienter (in legalese)*



[Latin, **Knowingly.**] *Guilty knowledge that is sufficient to charge a person with the consequences of his or her acts.*

- The term *scienter* refers to a state of mind often required to hold a person legally accountable for her acts. The term often is used interchangeably with *mens rea*, which describes criminal intent, but *scienter* has a broader application because it also describes knowledge required to assign liability in many civil cases.
- *Scienter* is relevant to the pleadings in a case. Plaintiffs and prosecutors alike must include in their pleadings allegations that the defendant acted with some knowledge of wrongdoing or guilt. If a legislative body passes a law that has punitive sanctions or harsh civil sanctions, it normally includes a provision stating that a person must act willfully, knowingly, intentionally, or recklessly, or it provides similar *scienter* requirement.

# *Scienter* (in plain English)



Even a dog knows the difference between being kicked and being stumbled over.

~ Oliver Wendell Holmes

# Civil Penalty Statute: 49 U.S.C. § 5123



**(a) PENALTY. – (1) A person that knowingly violates ... a regulation ... is liable ... for a civil penalty .... A person acts knowingly when – (A) the person has actual knowledge of the facts giving rise to the violation; or (B) a reasonable person acting in the circumstances and exercising reasonable care would have that knowledge.**

# Crim. Penalty Statute: 49 U.S.C. § 5124



- (a) **IN GENERAL.** – A person ... willfully or recklessly violating ... a regulation ... shall be fined, imprisoned for not more than 5 years or both .... 10 years ... [if] the violation ...results in death or bodily injury ....
- (b) \*\*\*
- (c) **WILLFUL VIOLATIONS.** – [A] person acts willfully when – (1) the person has knowledge of the facts giving rise to the violation; and (2) the person has knowledge that the conduct was unlawful.
- (d) **RECKLESS VIOLATIONS.** – [A] person acts recklessly when [(s)he] ... displays a deliberate indifference or conscious disregard to the consequences ....

# **FAA Complaint** (filed 6-4-15)



¶1. “[Respondent] knowingly offered ... a one-piece shipment consisting of a specification fiberboard box containing hazardous materials for transportation by air.”

¶10. By reason of the above, [Respondent] violated the ... [following HMRs]

# Shipper's Motion to Dismiss for Insufficiency

(filed June 23, 2015)



Original statutory language: civil penalty may be imposed upon “a person who *knowingly committed an act which is a violation of*” the HMRs.

Unpublished decision in federal court in 1986:  
“knowingly” means “willful negligence.”

Congress considered two opposite approaches to clarifying the *scienter* requirement: (1) Senate = delete it (strict liability); (2) House = establish a simple negligence standard.

House version passed & was signed into law.

# FAA Interpretation



- Government need only show that the shipper had “knowledge only of the act which constituted the violation – offering a shipment for transportation by air – not knowledge of the application of the act to relevant law or regulations.”
- Therefore, strict liability as to any specific HMRs they think shipper didn’t comply with.
- Cited cases involving undeclared shipments & ALJ decisions that have no precedential effect.

# Shipper's Reply



Shipper did all it could reasonably be expected to do to comply with HMR provisions (e.g., use of absorbent material in package)

Fair reading of applicable limited quantity provision

Regulations constantly ask shippers to make judgment calls (e.g., is an inner packaging “unlikely to break and leak”?)

# Legal Resolution

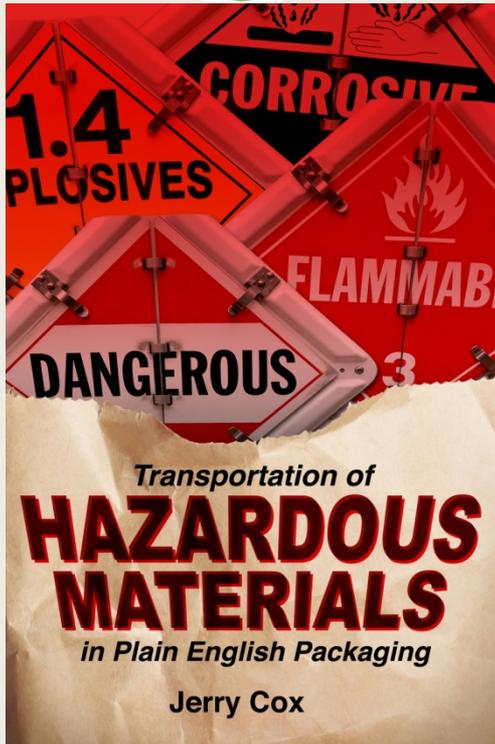


Is the (original) statutory language clear? (Supreme Court has spoken on how to read a *scienter* requirement.)

If not, what does the legislative history tell us?

- House explicitly rejected Senate bill that would have deleted the word “knowingly.”
- House Committee Report: (1) “imposition of penalties ... for unknowing and unavoidable violations of the law is contrary to ... [American] concepts of law and equity ... and inconsistent with our basic legal and equitable concepts & standards....”  
(2) “[the new language] intends to cover violations that are committed *negligently* ....”

# For More Information on Legal Issues Arising in Enforcement Proceedings



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# “I knew I was a DG Pro for life when....”

## It Is In Your DNA

- Started telling friends about my latest classification success
- Placards started appearing in my dreams!
- I could remember UN Number, Proper Shipping Name, and Limited Quantities (all modes of transport) for more than one chemical
- I plastered my wall with DG Placards and Label charts
- I look at packaging of items I order from Amazon to make sure it's compliant
- I thought about what the cards would look like for placard bingo
- I started researching truck placards while driving on the interstate
- This topic didn't scare me
- It started invading every aspect of my professional life



See you tonight at 6:00 pm!



Breakfast tomorrow at 7:30 am



**DANGEROUS GOODS  
SYMPOSIUM**  
for Instructors and Practitioners