S T A T E O F T E N N E S S E E
OFFICE OF THE
ATTORNEY GENERAL
PO BOX 20207
NASHVILLE, TENNESSEE 37202

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Opinion No. 09-09

Effect of preemption and Commerce Clause on state law concerning toxic substances in toys

QUESTIONS

1. Whether legislation prohibiting the sale of toys containing a toxic substance in Tennessee and requiring disclosure of any safety test methods to the State would be preempted by federal law; and

2. Whether legislation prohibiting the sale of toys in Tennessee containing a toxic substance and requiring disclosure of any safety test methods to the State would violate the Commerce Clause of the United States Constitution.

OPINIONS

1. It depends on the toxic substance and the risk of injury at issue. A state law prohibiting the sale of toys containing toxic substances would not be preempted if (1) it addressed the same risk of injury and set an identical standard to the federal standard established by the Consumer Product Safety Commission; (2) if it set a more restrictive standard to the one established by the federal Consumer Product Safety Commission, but concerned a different risk of injury; or (3) established a standard or a ban not addressed by the federal regulation. A state law requiring disclosure of any and all safety test methods to the State would not be preempted.

2. Not likely. Legislation prohibiting the sale of toys containing a toxic substance in Tennessee and requiring disclosure of any safety test methods to the State would likely be a valid exercise of the State's police power and would be deemed to protect interests that would outweigh any incidental effects to interstate commerce.

ANALYSIS

PREEMPTION

Congressional power to preempt state law arises from the Supremacy Clause, which provides that "the Laws of the United States shall be the supreme Law of the Land ... any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, cl. 2. Preemption may be either (1) express or (2) implied from a statute's structure and purpose. *Jones v. Rath Packing Co*., 430 U.S. 519, 525 (1977). Nevertheless, "[c]onsideration under the

Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law." *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981).

At the federal level, regulation of toxic substances within children's toys is found within a patchwork of overlapping statutes. The principal federal statutes at issue are the Consumer Product Safety Act ("CPSA"), 15 U.S.C. § 2051, *et seq.*, the Federal Hazardous Substances Act ("FHSA"), 15 U.S.C. § 1261, *et seq.*, and the Consumer Protection Safety Improvement Act ("CPSIA"), Pub. L. No. 110-314 (2008). Some products containing toxic substances are banned under the FHSA, while others are banned under the CPSA or even the CPSIA.

The CPSA is an umbrella statute that defines the Consumer Product Safety Commission's federal authority, including its ability to develop specific standards in response to unreasonable risks posed by products, to ban hazardous substances if there is no feasible standard, and to pursue recalls. *See generally* 15 U.S.C. §2051n, *et seq*.

The CPSIA, which was passed in August 2008, has several freestanding provisions and also amends, among other statutes, the CPSA and the FHSA. Among other things, the CPSIA establishes the toy safety standards of the manufacturer's trade group, the American Society for Testing and Materials International (ASTM F963) as they existed in August 2008, as the Consumer Product Safety Commission's standard if the Commission does not have a different standard. CPSIA, Pub. L. No. 110-314, § 106 (2008).

The FHSA addresses consumer products that are intended for use or packaged in a form suitable for household use or by children. "The scope of [the FHSA's] coverage is extremely broad. Nevertheless, the Act does not purport to establish a comprehensive federal scheme of regulating hazardous substances[1] found in the household." *Toy Mfrs. of Am., Inc. v. Blumenthal*, 986 F.2d 615, 615 (2d Cir. 1992).

The CPSA, the CPSIA, and the FHSA each contain some express language concerning their respective effect on state laws. The CPSIA makes clear that neither the CPSC nor the courts can change the scope of the preemption provisions of the CPSA and the FHSA. CPSIA, Pub. L. No. 110-314, § 231 (2008). The CPSIA contains a preemption provision concerning standards covered by the ASTM, the manufacturer's trade group,[2] and another preemption provision concerning the use of phthalates,[3] but does not contain a preemption provision addressing the statute as a whole. The CPSA and the FHSA also have express provisions preempting state law in limited circumstances. 15 U.S.C. § 2075 and 15 U.S.C. § 1261n.

The extent to which a state law banning the use of toxic substances would be preempted depends largely on the substance at issue. Lead, lead-based paint, and phthalates are topical

[1] "Hazardous substance" means, among other things "Any substance or mixture which (i) is toxic, (ii) is corrosive, (iii) is an irritant, (iv) is a strong sensitizer, (v) is flammable or combustible, or (vi) generates pressure through decomposition, heat or other means, if such substances or mixture of substances may cause substantial personal injury or substantial illness during or as a proximate result of any customary or reasonably foreseeable handling or use, including reasonably foreseeable ingestion by children." 15 U.S.C. § 1261(f)(1)(A).
[2] CPSIA, Pub. L. No. 110-314, § 106(h).
[3] Pub. L. No. 110-314, §108(d) (2008).

toxic substances that concern each of these statutes and serve to better illustrate this complicated preemption framework.

Lead Content

The CPSIA amends the FHSA to ban any children's product[4] that contains lead in excess of 600 parts per million total lead content by weight. CPSIA, Pub. L. No. 110-314, § 101(a)(2) (2008). This ban becomes 300 parts per million in August 2009 and, subject to a feasibility study, 100 parts per million in August 2011. CPSIA, Pub. L. No. 110-314, § 101(a)(2)(B)(C) (2008). Under the FHSA, if the Commission establishes a requirement "to protect against a risk of illness or injury associated with a hazardous substance, no State or political subdivision of a State may establish or continue in effect a requirement applicable to such substance and designed to protect against the same risk of illness or injury unless such requirement is identical to the requirement established under such regulations." 15 U.S.C. § 1261n(b)(1)(B).

Express preemption provisions, such as the FHSA's, must be construed narrowly in light of the presumption against the preemption of state police power regulations, such as those affecting health and safety. *See Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 518 (1992). State legislation regulating the use of hazardous substances in toys would go to the heart of the state's police power to regulate child safety. *See, e.g., Toy Mfrs. of Am., Inc. v. Blumenthal*, 986 F.2d 615, 620 (2d. Cir. 1992). By the terms of the FHSA's limited preemption provision, a state legislature could enact a statute banning the sale of toys marketed to children twelve and under with a total lead content that is identical to the federal standard or establish a different standard under a different risk of harm.

The mere presence of a limited express preemption provision, such as the FHSA's, does not automatically foreclose a finding of implied preemption. *Toy Manufacturers of Am., Inc. v. Blumenthal*, 986 F.2d 615, 623 (2d Cir. 1992). Yet, when a statute contains an express preemption provision and that statement provides a "reliable indicium of congressional intent with respect to state authority," courts do not generally look beyond the statutory language to find implied preemption. *Liggett Group, Inc.*, 505 U.S. at 518. Here, it is likely that a court would find the express partial preemption provision a "reliable indicium of congressional intent with respect to state authority" and would reject a finding of implied preemption. *See, e.g., Toy Mfrs. of Am., Inc. v. Blumenthal*, 986 F.2d 615, 623 (2d Cir. 1992).

Lead Paint

The CPSIA amends the lead paint ban promulgated under the CPSA in 16 C.F.R. § 1303.1. This ban prohibits the sale of certain materials whose total weight is more than .06 percent lead-based paint. 16 C.F.R. § 1303.1. In August 2009, this amount becomes .009 percent. CPSIA, Pub. L. No. 110-314, § 101(f) (2008). The CPSA contains a limited preemption provision that differs from the one contained in the FHSA in that it only references "safety standards" and not bans, or "requirements" generally. The CPSA states:

[4] "Children's product" means a consumer product designed or intended primarily for children 12 years of age or younger." 15 U.S.C. § 2052(a)(2).

> Whenever a *consumer product safety standard* under this Act is in effect and applies to a risk of injury associated with a consumer product, no State or political subdivision of a State shall have any authority either to establish or to continue in effect any provision of a safety standard or regulation which prescribes any requirements as to the performance, composition, contents, design, finish, construction, packaging, or labeling of such product which are designed to deal with the same risk of injury associated with such consumer product, unless such requirements are identical to the requirements of the Federal standard.

15 U.S.C. § 2075(a) (emphasis added).

While the preemption provision is slightly different, the result is the same as under the FHSA. Construing the provision narrowly, state legislatures would not preempted from establishing the identical standard based on the same risk of injury or establishing a different standard for a different risk of injury. Again, it is unlikely that a court would find implied preemption, given the express statement made by Congress limiting the provision's scope.

Phthalates

The CPSIA bans the sale of children's toys[5] or child care articles[6] that contain more than .1 percent of phthalates, [7] which are industrial solvents added to plastic to increase flexibility and resilience. Section 108(d) of the CPSIA makes clear that the ban on products containing phthalates is to be considered a consumer product safety standard under the Consumer Product Safety Act. CPSIA, Pub. L. No. 110-314, § 108 (2008). Therefore, the same analysis for the CPSA's limited preemption provision, shown above for lead-based paint, would apply.

Notably, the preemption provision goes on to state, "Nothing in this section or the Consumer Product Safety Act (15 U.S.C. 2051 et seq.) shall be construed to preempt or otherwise affect any State requirement with respect to any phthalate alternative[8] not specifically regulated in a consumer product safety standard under the Consumer Product Safety Act." CPSIA, Pub. L. No. 110-314, § 108 (2008). States are expressly authorized under the CPSIA to ban chemicals that replace phthalates.

ASTM F963 Standards

The CPSIA also makes the standards of the product manufacturer's trade group, the American Society for Testing and Materials International, as they existed in August 2008, the

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[5] CPSIA, Pub. L. No. 110-314, § 109(a)(1)(B) (2008) "children's toy" means a consumer product designed or intended by the manufacturer for a child 12 years of age or younger for use by the child when the child plays."

[6] CPSIA, Pub. L. No. 110-314, § 109(e)(1)(C) (2008) "child care article" means a consumer product designed or intended by the manufacturer to facilitate sleep or the feeding of children age 3 and younger, or to help such children with sucking and teething."

[7] CPSIA, Pub. L. No. 110-314, § 108(a) (2008) (referencing di(2-ethylhexyl) phthalate (DEHP), dibutyl phthalate (DBP), or benzyl butyl phthalate (BBP)).

[8] CPSIA, Pub. L. No. 110-314, § 108(e)(1)(A) (2008). Phthalate alternative "means any common substitute to a phthalate, alternative material to a phthalate, or alternative plasticizer."

default standards of the Commission. CPSIA, Pub. L. No. 110-314, § 106 (2008). Under the CPSIA, these standards "shall be considered the standards issued by the Commission under section 9 of the Consumer Product Safety Act." CPSIA, Pub. L. No. 110-314, § 106(a) (2008). Elsewhere, the CPSIA makes clear that any regulation promulgated by the CPSC that is inconsistent with the ASTM standard supersedes the ASTM standard.[9] However, these ASTM standards largely concern the construction of toys and other products and do not establish new standards for toxic substances.[10] The ASTM regulations address toxic substances generally in section 4.3, but refer only in passing to the regulations already promulgated by the Commission under the FHSA. ASTM F963-07, § 4.3.

The CPSIA provides a mechanism for states to submit different safety standards than the ones contained in the ASTM standards by November 12, 2008. CPSIA, Pub. L. No. 110-314, § 106(h)(2) (2008). The FHSA, in turn, establishes its own mechanism by which States may seek to expressly exempt a more restrictive standard addressing the same risk of injury. 15 U.S.C. §1261n(b)(3)(A). However, the FHSA does not establish a deadline for states to seek this express exemption of their statutes. 15 U.S.C. §1261n(b)(3)(A). Since the ASTM regulations do not establish new standards for toxic substances, apart from those already regulated in the FHSA, it is unlikely that a court would find the FHSA's open-ended mechanism for express exemption abrogated by the CPSIA's November 12, 2008, deadline.

Other Hazardous Substances Not Expressly Covered

The Commission does not ban or regulate numerous substances that could be considered toxic. "A federal decision to forego regulation in a given area may imply an authoritative federal determination that the area is best left *un*regulated, and in that event would have as much pre-emptive force as a decision *to* regulate." *Arkansas Elec. Coop. Corp. v. Arkansas Public Serv. Comm'n*, 461 U.S. 375, 384 (1983) (emphasis in original). However, this is "obviously not meant in an unqualified sense; otherwise deliberate federal inaction could always imply pre-emption which cannot be. Where a comprehensive federal scheme intentionally leaves a portion of the regulated field without controls, then the preemptive inference can be drawn — not from federal inaction alone, *but from inaction joined with action*." *Puerto Rico Dept. of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495, 503 (1988) (emphasis added). In cases of CPSC targeted regulation accompanied by inaction, courts have looked to whether the Commission has announced its intention to assert exclusive control over a designated area. *Toy Mfrs. of Am., Inc.*, 986 F.2d at 621. After the passage of the CPSIA, it is unclear whether the CPSC would even have the authority to do so in the future because they are prohibited from expanding the preemptive scope of the CPSA and FHSA. CPSIA, Pub. L. No. 110-314, § 231(a) (2008). While it might depend on the toxic substance at issue, the express partial preemption provisions in the FHSA and the CPSA indicate that the Commission's assertions of exclusive control are limited by the particular risk of injury.

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[9] CPSIA, Pub. L. No. 110-314, § 101(c) (2008). "To the extent that any regulation promulgated by the Commission under this section (or any section of the Consumer Product Safety Act or any Act enforced by the Commission, as such Acts are affected by this section) is inconsistent with the ASTM F963 standard, such promulgated regulation shall supersede the ASTM F963 standard to the extent of the inconsistency."

[10] *See, e.g.*, ASTM F963-07, § 4.14.1 "Cords or elastics included with or attached to toys intended for children less than 18 months of age (excluding pull toys, see 4.14.3) shall be less than 12 in. (300 mm) long when measured to the maximum length in a free state and under a load of 5 lb. (2.25 kg)."

Courts have construed the limited preemption provision contained within the FHSA narrowly. In *Toy Manufacturers of America, Inc. v. Blumenthal*, the Second Circuit rejected a challenge based on preemption to a Connecticut statute that banned the introduction of toys designed for children *between three and seven* that pose a danger of choking, aspiration or ingestion because of small parts to children under the age of three. 986 F.2d 615, 615 (2d Cir. 1992). The CPSC promulgated a regulation only banning the sale of toys intended for use by children *under 3 years of age* which present a choking, aspiration, or ingestion hazard because of small parts. *Toy Manufacturers of Am., Inc.*, 986 F.2d at 618. The Second Circuit affirmed the district court, which held that the substance governed by the CPSC regulations was not toys in general, which pose a small parts hazard, but only toys intended for use by children under three that pose such a hazard. *Toy Manufacturers of Am., Inc.*, 986 F.2d at 618.

Disclosure of Safety Test Methods to State

A state law requiring disclosure of safety testing methods to the State would not likely be preempted. Under the question presented, a proposed state law would not require or establish safety standards, but would merely require certain manufacturers to disclose their safety testing methods to the State. The preemption provisions in the FHSA and the CPSIA concern warnings made to consumers on product packaging, not general information provided to state institutions. See 15 U.S.C. §1261n(b)(1)(A), and CPSIA, Pub. L. No. 110-314, § 231(b) (2008). Given the narrow reading of limited express preemption provisions, such disclosures are not preempted by the express provision. Moreover, since the limited express partial preemption provisions are a reliable indicium of congressional intent on state authority, implied preemption seems unlikely as well. As a result, preemption seems unlikely.

COMMERCE CLAUSE

"A decision by Congress not to preempt state law simply means that Congress has chosen not to prevent states from legislating in areas in which they possess constitutional authority to do so. The Commerce Clause inquiry is the root question of whether, absent congressional authorization, states may act." *Nat'l Kerosene Heath Ass'n v. Massachusetts*, 653 F.Supp. 1079, 1094, n. 4 (D. Mass. 1987).

The general rule for determining the validity of state statutes affecting interstate commerce has been phrased as follows:

> "[w]here the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits ... If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities."

Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970) (internal citations omitted).

"[Courts] must take care not to overstep [their] mandate, for the Commerce Clause was not intended 'to cut the States off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country.'" *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 442-443 (1960).

For Commerce Clause purposes, the Legislature does not have to show that the products containing toxic substances are unsafe or that the ban is wise; all that need be shown is that members of the General Assembly could rationally believe that the products containing the toxic substances are unsafe. *See Nat'l Kerosene Heaters Ass'n*, 653 F.Supp. at 1094-1095 (emphasizing the Supreme Court's repeated use of the phrase *putative* local benefits).

In the abstract, it is difficult to analyze whether a ban of a product containing a toxic substance would be clearly excessive in relation to the local benefits. A complete product ban may be excessive for certain toxic substances and wholly appropriate for others.

A statute banning a toxic substance whose mere use would threaten a child's life would not likely violate the Commerce Clause. The burden on interstate commerce would be weighed against the legitimate local interest of protecting children's safety against the life-threatening exposure to toxic substances. Depending on the toxic substance at issue, the nature of the local interest would likely outweigh the statute's impact on interstate commerce. Moreover, while it would depend on the toxic substance at issue, there might not be any alternative means by which the state's interest could be accomplished without imposing as significant a burden on interstate commerce. Federal courts have used this test in Commerce Clause analysis. *See, e.g., Government Suppliers Consolidating Services, Inc. v. Bayh*, 753 F.Supp. 739, 779 (S.D. Ind. 1990).

Courts in other jurisdictions have upheld state laws banning products against Commerce Clause challenges. In *National Kerosene Heath Association v. Commonwealth of Massachusetts*, the federal district court upheld a state law banning the sale of unvented kerosene heaters in Massachusetts because of the risk of fire. 653 F.Supp. 1079, 1095 (D. Mass. 1987). Likewise in *Smith v. District of Columbia*, the Court of Appeals for the District of Columbia upheld a regulation prohibiting the mere possession of a police radar detector in a motor vehicle against a Commerce Clause challenge. 436 A.2d 53, 59 (D.C. 1981).

Similarly, the interests of the state in protecting the safety of its citizens by merely requiring toy manufacturers whose products are sold in Tennessee to disclose to the State any safety test methods for their products would likely outweigh the "slight burden on interstate commerce" it may impose.

ROBERT E. COOPER, JR.
Attorney General and Reporter

MICHAEL E. MOORE
Solicitor General

BRANT HARRELL
Assistant Attorney General

Requested by:

The Honorable Beth Harwell
State Representative
107 War Memorial Building
Nashville, TN 37243-0156