Federal Preemption of State and Local Laws Governing Children’s Products

Insight

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By Ben Woodard

In January 2015, Albany County became the first of several municipalities in New York to enact a version of the “Toxic Free Toys Act” (“the Act”) prohibiting any amount of six heavy metals and benzene in children’s products and apparel. Shortly thereafter, the Safe to Play Coalition\(^1\) challenged the law on federal preemption grounds in federal court. Specifically, the coalition argued that the legislation was preempted by the Federal Hazardous Substances Act (“FHSA”), the Consumer Product Safety Act (“CPSA”) and the Consumer Product Safety Improvement Act (“CPSIA”). Upon agreement of the parties, the litigation was stayed to allow Albany County to complete an amended draft of its legislation to address the coalition’s concerns.

Albany County amended the Act on February 18, 2016. The amendment acknowledges the coalition’s preemption argument by declaring the Act to be preempted by federal law if the federal government has a Final Rule in effect with respect to a children’s product safety standard that relates to a specific hazard that conflicts with the Act. Further, unlike the original draft which prohibited any amount of various substances in children’s products, the amended Act provides a specific maximum total content value allowable for antimony, arsenic, benzene, cadmium, cobalt, lead and mercury in children’s products. Albany County’s Act is a recent example of the complexities faced by manufacturers of children’s products in navigating product safety regulations promulgated by federal, state and local governments. This article provides a brief overview of this complex area of law.
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FEDERAL PREEMPTION GENERALLY

The federal preemption doctrine finds support in the U.S. Constitution’s supremacy clause which states that the “Constitution and the Laws of the United States...shall be the supreme Law of the Land.” Courts interpret the supremacy clause to hold that where a state law conflicts with federal law, the state law is preempted and has no effect. State and local laws may be preempted by federal law in the following three ways:

1. Preemption exists where a federal law expressly states it preempts state law;
2. Preemption may be implied where the scope of a federal law indicates that Congress intended federal law or regulations to occupy the field exclusively; or
3. A state law may be impliedly preempted if the law actually conflicts with federal law or regulations.

FEDERAL PREEMPTION UNDER CPSA

In 1972, Congress passed the CPSA, which formally established the Consumer Product Safety Commission (the “Commission”). Congress created the Commission “to develop uniform safety standards for consumer products and to minimize conflicting state and local regulations.” The Commission is charged with enforcing the CPSA and corresponding regulations, along with several other federal product safety statutes.

The CPSA expressly provides for federal preemption of its provisions over state and local law:

"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 Federal standard."

The other federal product safety laws within the Commission’s jurisdiction contain similar preemption provisions. Therefore, an analysis of whether the CPSA or other federal statutes under the Commission’s jurisdiction preempt state consumer products laws requires an analysis of whether the state standard pertains to the same risk of injury for the product as federal law. However, the CPSA contains two exceptions allowing for state involvement in the regulation of products when the products regulated are for the state’s own use, or when the state successfully petitions the Commission to allow it to enforce stricter regulations than federal standards.
CONTINUED STATE INVOLVEMENT UNDER CPSA

(a) A State’s Own Use

The CPSA provides that states may establish standards providing a higher degree of protection with respect to products that are for the state’s own use. There is surprisingly little authority as to what Congress intended with the “state’s own use” language. A reasonable interpretation may be that states may impose stricter regulations than those promulgated by the federal government for children’s products used by state entities, such as schools. However, there is little guidance for this possibility or its implementation.

(b) Petition to the Commission

Under the CPSA, a state or political subdivision of a state (i.e. a city, municipality, etc.) may petition the Commission to allow the state to enforce a statute or regulation that is stricter than a regulation provided for under the CPSA. However, such an exemption from the CPSA’s preemption clause requires the Commission to determine that the state’s stricter standard meet the following criteria: 1) it provides for a significantly higher degree of protection, and 2) it does not unduly burden interstate commerce. In determining burden, the Commission will make findings on the following:

- The technological and economic feasibility of complying with the State standard,
- The cost of complying with the standard,
- The geographic distribution of the product to which the standard would apply,
- The probability of other States or political subdivisions applying for an exemption for a similar standard, and
- The need for a national, uniform standard for such product.

Despite the express provisions of the CPSA, its preemptive effect historically has not been entirely clear. In part due to this ambiguity, several states and localities continued to pass legislation similar to Albany County’s recent Toxic Free Toys Act. As a result, stricter and clearer federal regulations pertaining to consumer products, including children’s products, were passed by Congress in 2008 through the CPSIA.

FEDERAL PREEMPTION UNDER CPSIA

The CPSIA includes specific provisions addressing lead, phthalates, toy safety, durable infant or toddler products, and third-party testing and certification. The CPSIA also established SaferProducts.gov, a publically-searchable database of reports of harm related to consumer products. The CPSIA also attempts to clarify the extent to which it, the CPSA and other federal product safety statutes under the Commission’s jurisdiction preempt state law. The following are among the ways in which the CPSIA has
clarified federal preemption of state laws pertaining to consumer products, including children’s products:

(a) The Commission is Prohibited From Expanding Preemption of State Law

The CPSIA prohibits the Commission from attempting to expand the preemptive effect of the statutes the Commission enforces. For example, the Commission is prohibited from including preemption language in a new Proposed or Final Rule, or by reference in any preamble, statement of policy, executive branch statements, or other matter associated with the publication of any rule or regulation. However, the Commission is not prohibited from explaining the scope of its rules and standards. Simply put, the CPSIA seeks to prevent the Commission from creating preemption where none already existed.

The CPSIA does not change the existing preemptive effect of regulations under the statutes enforced by the Commission, to the extent those laws provide for preemption. Therefore, the CPSIA did not modify the CPSA or other statutes subject to the Commission’s jurisdiction that allow states to impose stricter product standards if the product is for the state’s own use or if the Commission expressly authorizes a state to impose a stricter standard, as discussed above.

(b) Preemptive Effect of New Regulations under CPSIA

Two of the most significant changes in the CPSIA are: 1) the addition or alteration of maximum limits on particular heavy metals, including lead and phthalates, in children’s products, and 2) the adoption of a new federal toy safety standard under ASTM F963. ASTM F963 is the previously-voluntary toy safety standard issued by the American Society for Testing and Materials. In short, the CPSIA designates the provisions of ASTM F963 as mandatory consumer product safety standards under the CPSA. By doing so, the CPSIA gives preemptive effect to ASTM F963 under the CPSA’s preemption provisions. Therefore, if a state statute or regulation pertaining to children’s toys is inconsistent with ASTM F963, the state standard is preempted.

Similar to the CPSA’s exceptions to preemption, the CPSIA provides for a state’s ability to petition the Commission for permission to impose stricter standards. Just as with the CPSA exclusions, the Commission must find that the state standard provides a greater degree of protection and does not unduly burden interstate commerce. The same considerations of burden also apply.

Finally, states are allowed to enforce state laws and regulations for children’s products covered by ASTM F963 so long as such standards provide a greater degree of protection and were in effect on or before August 13, 2008.
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(c) State Warning Requirements

The CPSIA expressly provides that “[n]othing in this Act or the Federal Hazardous Substances Act shall be construed to preempt or otherwise affect any warning requirement relating to consumer products or substances that is established pursuant to state law that was in effect on August 31, 2003.” Therefore, no state law regarding warnings on consumer products that was established prior to September 1, 2003 is preempted by the CPSIA, and the state may continue to enforce that regulation.

(d) Preemption of Common Law Claims

One issue left unresolved by the CPSIA is whether state common-law claims are preempted by federal law. Although the CPSIA prohibits the Commission from interpreting any law as preempting a cause of action for damages under state or local common-law, the CPSIA is silent as to whether a private defendant in litigation may assert that a federal regulation be given preemptive effect over a common-law claim. Despite the importance of this issue, courts across the country have come to contradictory conclusions.⁸

PREEMPTION OF ALBANY COUNTY’S TOXIC FREE TOYS ACT

Although Albany County in New York has yet to comment on its rationale for the amendment of its Act, it appears there are multiple avenues in which its legislation could be preempted. For instance, as argued by the Safe to Play Coalition, the CPSA, CPSIA and the FHSA all contain express preemption provisions over laws such as Albany County’s legislation. Pursuant to those statutes, the Commission already issued regulations that apply to the same risk in the same products regulated by Albany’s County’s Act. Further, the CPSIA already provides specific maximum permissible levels of several of the heavy metals covered by Albany County’s legislation, including lead.

Unfortunately, the analysis of whether federal laws pertaining to children’s products preempt state and local laws is typically not as straightforward as the analysis of Albany County’s Act. Albany County’s local law covered the exact same products and the exact same risk of danger as the federal statutes. However, many issues, such as whether a private defendant may raise the defense of federal preemption or whether federal preemption reaches a state’s law regarding products or risks not covered by the federal legislation, remain uncertain. As such, whether federal law preempts a specific state and local statute pertaining to children’s products, and how the issue of preemption can be raised in the state or locality at issue, will depend on a thorough analysis of the factors discussed above in conjunction with the specific state or local statute.

For more information about federal preemption of state and local children’s products laws, please contact Benjamin Woodard or the Stinson Leonard Street attorney with whom you regularly work. For additional literature and insights from the Stinson Leonard Street Children’s Products Group, please visit our...
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1 The Safe to Play Coalition is comprised of multiple trade organizations representing the manufacturers of children’s products.
2 U.S. CONST. art. VI, cl. 2.
5 The Commission enforces multiple federal statutes pertaining to children’s products, including those set forth in the CPSA, the CPSIA, the FHSA and the Child Safety Protection Act. For an overview of the regulations under the Child Safety Protection Act pertaining to choking hazards, see Corrigan, Children’s Products: An Analysis of Small Parts Regulation and Choking Hazards.
7 For a synopsis of some of the changes made by the CPSIA, particularly related to toy safety, please see Corrigan and Simpson, Children’s Products and the Consumer Product Safety Improvement Act: A Synopsis of the Rules and Regulations Governing Toy Safety.

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