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August 6, 1973

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Potential Sanctions Against Retailers Under The FHSA

Query

What potential sanctions does the Federal Hazardous Substances Act provide for retailers who sell banned or misbranded hazardous substances?

Answer

The FHSA provides for seizure of violative products, injunctions to restrain violations of the Act, and criminal prosecution.

Discussion

Section 6 of the FHSA provides that banned or misbranded hazardous substances shall be liable to seizure while in interstate commerce or at any time thereafter. Under this provision, violative products have been seized directly from retailers' shelves or inventories. Although retailers frequently own the products seized, they are generally reimbursed by the manufacturer in the interests of good will and customer relations. Seizure is nonetheless an effective sanction against retailers since they wish to avoid the inconvenience and attendant publicity of a seizure.

Section 8 of the FHSA provides for injunctions to restrain violations of the Act. Since the sale of banned or misbranded hazardous substances is a prohibited act, a retailer could be enjoined to prevent such sales. Although injunctions have been obtained against manufacturers under the Act, no attempt to do so has been made with regard to retailers. To be successful in such an action against a retailer, the agency would probably need to show that the retailer consistently sold banned or misbranded substances, that he had been prosecuted under the terms of the Act, and that it was reasonable to expect that he would continue such sales unless enjoined from doing so. As a sanction, therefore, injunctions are not the most practical way of dealing with retailers.

Section 4 of the FHSA establishes the prohibited acts under the statute. Several of these prohibitions, and the attendant criminal penalties of section 5, would lie against retailers.

Section 4(a) prohibits the introduction or delivery for introduction into interstate commerce of any misbranded or banned hazardous substance. The application of this section would be limited to retailers in the District of Columbia, however, or to those retailers who make delivery of violative products across state lines.

Section 4(b) of the FHSA prohibits:

> The alteration, mutilation, destruction, obliteration, or removal of the whole or any part of the label of, or the doing of any other act with respect to a hazardous substance, if such act is done while the substance is in interstate commerce, or while the substance is held for sale (whether or not the first sale) after shipment in interstate commerce, and results in the hazardous substance being a misbranded hazardous substance or banned hazardous substance.

The first case ever brought under this section of the Act was U.S. v. Chalaire, 316 F.Supp.543, E.D.LA., 1970, which was a criminal prosecution of a retailer for selling banned fireworks. In that case, the court held that selling a hazardous substance is "the doing of any act with respect to a hazardous substance" which results in it being banned. The court found that fireworks were not banned per se, because there was an exemption for agricultural purposes. But the sale of such fireworks for non agricultural use resulted in their being banned.

Section 4 prohibits the enumerated acts "and the causing thereof." The court in Chalaire, supra, found therefore that the owner of the retail establishment was guilty as was the clerk who actually sold the fireworks (citing U.S. v. Dotterweich, 320 U.S. 277 (1943) and Palmer v. U.S., 340 F.2d 248 (5 Cir.1964)).

The court in Chalaire, supra, also held that "[k]nowledge and willfulness are not an element of 15 U.S.C. §1263(b) [section 4(b) of the FHSA]. Nowhere in the statute is this element mentioned. It is clear from the legislative hisotry of the statute that Congress intended that knowledge and willfulness not be an element" (citing U.S. v. Weisenfeld Warehouse Company, 379 U.S. 86 (1964), and again citing

Dotterweich and Palmer, supra).

Thus, where the sale of a hazardous substance results in its being a banned or misbranded hazardous substance, the retailer can be prosecuted under section 4(b) of the act and his lack of knowledge or ~~each~~ lack of willfulness will not be a defense.

Section 4(c) of the Act prohibits:

> The receipt in interstate commerce of any misbranded hazardous substance or banned hazardous substance and the delivery or proffered delivery thereof for pay or otherwise.

This section clearly applies to a retailer who sells or offers to sell a banned or misbranded hazardous substance. Section 5(b), however, provides that no person shall be penalized for violating section 4(c) if the receipt, delivery, or proffered delivery was made in good faith, unless he refuses to furnish records and documents pertaining to the shipment to him of such substances.

Because "good faith" can be raised as an affirmative defense to a prosecution under section 4(c), the Bureau of Product Safety was mailing lists of banned toys to retailers to pave the way for future prosecution. Official notification to a retailer of a product's banned status would help to rebut a later defense of "good faith". There are some banned and misbranded products, however, for which a defense of good faith could hardly be raised. Examples include highly charged fireworks, cyanide products, unlabeled gasoline and kerosene, and so on.

Even if a lack of good faith cannot be established so that a prosecution might lie under section 4(c), the court's broad interpretation of the Congressional intent in Chalaire, supra, and in a number of cases construing an identical prohibition in the Federal Food, Drug, and Cosmetic Act, indicate that a retailer can be prosecuted for selling a banned or misbranded hazardous substance even if the sale did not result in its violative status. This has, however, never been attempted under the FHSA.

The penalties provided under section 5 for violations of section 4 are a fine of up to $500 and/or imprisonment for up to 90 days. But for second or subsequent offenses, or for violations with intent to defraud or mislead, the penalty is a fine of up to $3,000 and/or imprisonment for up to one year.

Conclusion

The sanctions outlined above, in addition to penalties for giving false guarantees or refusal to permit inspection or copying of records, constitute a broad array of legal means for punishing violations of the FHSA by retailers. Although most of these "sticks" have never been used, they are available to assist a policy of vigorous enforcement of the Act.

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