#275

ADVISORY OPINION

6(b) CLEARED:
No Mfrs Identified
Exempted
Notified
Comments Processed

CONSUMER PRODUCT SAFETY COMMISSION
WASHINGTON, D.C. 20207

JAN 31 4 15 PM '79

January 30, 1979

Kim D. Mann, Esq.
Turney and Turney
Suite 1010
7101 Wisconsin Avenue
Washington, D.C. 20014

Re: Federal Preemption and the CPSC Safety Standard for Architectural Glazing Materials

Dear Mr. Mann:

This letter is in response to your letter of December 21, 1978 in which you request this office's guidance concerning the question of preemption of state and local safety glazing requirements. You indicate in your letter that you believe an inconsistency exists in various Commission interpretations and opinions concerning the preemption question.

A November 17, 1978 letter from Allen F. Brauninger of the Commission's Division of Enforcement set forth CPSC's approach to the preemption question as it relates to architectural glazing. This office consulted with Mr. Brauninger in the drafting of the November 17 letter and we concur with the position expressed in the letter. This office does not believe any inconsistency exists between the position taken by Mr. Brauninger and that reflected in previous advisory opinions which have addressed the question of preemption. Mr. Brauninger's letter, at page 3, cites language from page 1440 of the preamble to the architectural glazing standard and Advisory Opinion 267 as the most definitive statements of the Commission's view on preemption of nonidentical state or local safety requirements applicable to glazing materials; namely that state and local requirements for products, materials and uses not covered by the Commission's standard are not preempted and the products may be regulated by state or local authorities. We continue to believe that this position is correct and is supported by the language and legislative history of section 26(a) of the Consumer Product Safety Act.

TURNEY & TURNEY
SUITE 1010
7101 WISCONSIN AVENUE
WASHINGTON, D. C. 20014
(301) 986-1410

JOHN R. TURNEY 1934-1973

WILLIAM O. TURNEY *
KIM D. MANN +
W. BRUCE WHITE, JR

* D. C. BAR ONLY
+ OHIO AND D. C. BARS ONLY

December 21, 1978

Margaret A. Freeston, Esquire
Acting General Counsel
Consumer Product Safety Commission
1111 18th Street, N.W.
Washington, D.C. 20207

Re: Federal Preemption and CPSC Safety Standard for Architectural Glazing Materials

Dear Ms. Freeston:

I am general counsel to the Flat Glass Marketing Association. I am perplexed by seemingly inconsistent interpretations emanating from the Commission on the scope of the federal/state preemption. Any light your office will be able to shed on this problem, at least as it pertains to architectural glazing materials, will be greatly appreciated.

A product subject to a CPSC safety standard is exempt, under section 26 of the Act, from all non-identical state and local regulation addressing the same risk of injury. As I understand the CPSC's position,based on Advisory Opinions 269 and 270, the preemption continues even if aspects or components of the regulated product are not subject to the CPSC standard(because of definition, exemption, or exclusion) as long as the CPSC, in promulgating the standard, has addressed the risk of injury associated with the non-covered aspect or component and has concluded the risk is not sufficient to warrant a safety standard.

Counsel for the CPSC's Division of Enforcement apparently takes a different position. See my enclosed letter of September 22, 1978 to Allen Brauninger and his reply of November 17, 1978. His position is that any glazed opening in a building not requiring safety glazing under the CPSC standard is subject to the safety glazing laws and regulations of the state and local jurisdictions.

I recognize only the courts may make a definitive determination of the scope of the preemption. That rationale, of course, applies equally to any agency regulation. The glass and glazing industry must be afforded

some authoritative guidance. Members of our association are contract glaziers. They bid on glazing jobs every day and must know whether to bid the expensive safety glazing (as opposed to cheaper annealed glass) required by an applicable state law or local building code which covers a location not included in the CPSC safety standard. Your assistance in resolving this conflict will be appreciated.

Very truly yours,

Kim D. Mann

Kim D. Mann
General Counsel to
Flat Glass Marketing Association

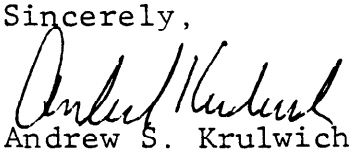
cc: Mr. William J. Birch
Mr. Joe Solomon
FGMA Safety Glazing Committee

Advisory opinions 269 and 270, in our view, are consistent with the position expressed above. These opinions, which address the preemption question in the context of the Commission's safety requirements for bicycles, deal with factual situations different from the situation concerning architectural glazing. For this reason, Mr. Brauninger concluded, and this office concurs, that the language of Advisory Opinion 269 (inadvertently cited as 270) is not as precise a statement of the Commission's position on preemption concerning architectural glazing as is Advisory Opinion 267 and the preamble language referred to above. However, the reasoning is consistent.

In the case of bicycles, the Commission decided not to impose safety requirements for one aspect of a regulated product on the basis that the aspect in question did not present an unreasonable risk of injury. Applying section 18(b) of the Federal Hazardous Substances Act to this situation, the Commission found that since there is a safety standard in effect that addresses the risk or risks of injury presented by the product, non-identical state or local requirements, including those that purport to address a risk of injury that the Commission found does not exist, are preempted. In the case of architectural glazing, on the other hand, the Commission decided to exempt certain products, materials or uses from the requirements of the standard. The products were placed outside the scope of the standard for a variety of reasons, detailed at pages 1430 through 1433 of the preamble to the standard (42 FR 1430-1433, January 6, 1977). Applying section 26(a) of the CPSA to this situation, we find there is no safety standard in effect for the products, materials, or uses in question, and consequently no preemption.

I hope this letter clarifies the Commission's position on the matter of preemption. If you have any further questions, please feel free to contact David Melnick of my staff.

Sincerely,



Andrew S. Krulwich
General Counsel