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ADVISORY OPINION

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U.S. CONSUMER PRODUCT SAFETY COMMISSION

WASHINGTON, D.C. 20207

OFFICE OF THE GENERAL COUNSEL

March 23, 1981

Kim D. Mann, Esquire
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7101 Wisconsin Avenue
Washington, D.C. 20014

Dear Mr. Mann:

This is in response to your letter of September 26, 1980, concerning the effect of the preemptive provisions of section 26 of the Consumer Product Safety Act (CPSA) and the requirements of the Commission's standard for architectural glazing materials on certain building code provisions, and to your previous letter concerning the same subject dated July 31, 1980.

More specifically, your letters request the opinion of this office on the possibility that provisions of the Commission's architectural glazing standard may preempt certain requirements for glazing materials which appear in the 1980 supplement to the Basic Building Code published by Building Officials and Code Administrators International, Inc. (BOCA).

This office will respond to all of the questions you raised in your letters regarding possible preemption of state or local requirements based on certain provisions of the 1980 supplement to the BOCA model building code. However, as you know, section 26 of the CPSA does not empower the Commission to prohibit any state or local jurisdiction from enforcing a requirement which is not identical to the provisions of a consumer product safety standard. Instead, section 26 may be raised as a defense to any legal action for enforcement of a state or local requirement which is applicable to a product covered by a consumer

product safety standard and imposes nonidentical requirements for that product to deal with the same risk of injury as the CPSA standard. Thus, the final decision on any issue of preemption of state or local requirements by a consumer product safety standard ultimately lies with the courts and not with the Commission.

PROHIBITION OF ANNEALED GLASS

In your letters, you observe that the 1980 supplement to section 857.5.6 of the BOCA code not only requires the use of glazing materials which meet the requirements of the Commission's standard in the locations and products listed in that section, but also prohibits the use of annealed glass in any of those locations or products.

In your letter of September 26, 1980, you express the opinion that annealed glass in thicknesses of approximately seven-eighths of an inch and greater can pass the impact test of the Commission's standard. You ask if the provisions of the 1980 supplement prohibiting the use of annealed glass in any of the products listed in section 857.5.6 of the BOCA code are preempted by provisions of section 26 of the CPSA to the extent that those products are subject to the Commission's standard.

It is our opinion that to the extent that section 857.5.6 of the BOCA code is applicable to any of the products subject to the CPSC architectural glazing standard, the language in the 1980 supplement prohibiting the use of annealed glass imposes a non-identical requirement intended to deal with the same risk of injury as the Commission's standard, and is for that reason preempted by section 26.

The Commission is aware that it is possible that annealed glass in some thicknesses could pass the impact test in section 1201.4 if it did not break when impacted with the force specified in that section.

The Commission staff has written to the technical staff of BOCA to urge elimination of the sentence prohibiting the use of annealed glass from future editions of the BOCA model code.

OUTDOOR EXPOSURE TEST FOR PLASTICS

In both of your letters you also observed that section 857.5.6 of the 1980 supplement to the BOCA code prescribes an outdoor weathering test for plastic glazing materials used in any of the locations or products listed in that section in addition to the requirements of the Commission's standard.

At this time, the Commission's standard prescribes an accelerated environmental durability test of plastic glazing materials intended for outdoor use. This test involves exposure of test specimens in a Weather-Ometer and comparison of impact strength of specimens before and after the required exposure.

As you know, on October 6, 1980, the Commission issued a partial revocation of the architectural glazing standard to delete the accelerated environmental durability test from the standard, effective April 6, 1981. The Commission took this action because it concluded that the accelerated environmental durability test is not reasonably necessary to reduce or eliminate unreasonable risks of injury associated with accidental impact breakage of plastic glazing materials. This action is now being reviewed by the U.S. Court of Appeals for the Sixth Circuit in the case of Plastic Safety Glazing Committee, et al. v. Consumer Product Safety Commission, No. 80-3795.

It is the view of this office that both before and after April 6, 1981, the requirement for an outdoor exposure test of plastic glazing materials in section 857.5.6 of the 1980 supplement would be preempted by the Commission's standard, because it is a nonidentical requirement applicable to products subject to the Commission's standard and is intended to deal with the same risk of injury as that standard.

The Commission's staff has informally communicated this view to BOCA's technical staff.

WIRED GLASS

In your letter of August 31, 1980, you expressed the opinion that section 857.5.6 of the 1980 supplement contains language permitting the use of wired glass in any of the locations or products covered by the BOCA code if that wired glass meets the test in ANSI standard Z97.1. We agree that the language in section 857.5.6 could be interpreted in the manner suggested in your letter, and if so, would impose a nonidentical requirement subject to preemption by section 26 of the CPSA.

The Commission staff has advised the technical staff of BOCA about the possible preemption of the language in section 857.5.6 concerning wired glass. The technical staff of BOCA has drafted a revision of the language applicable to wired glass to state that the requirement for meeting the ANSI standard applies only to wired glass used in doors and other assemblies to retard the passage of fire.

As you know, section 1201.1(c)(1) of the Commission's standard exempts wired glass required by Federal, state, or local law in doors and other assemblies for purposes of retarding the passage of fire. Section 1201.1(c)(1) does not require wired glass used in such doors and other assemblies to pass the tests in ANSI standard Z97.1.

You may recall that when the Commission issued the architectural glazing standard on January 6, 1977 (42 FR 1428), it stated:

> It is the view of the Commission, however, that the preemptive provisions of the Consumer Product Safety Act would not apply to those products exempted from the scope of this standard by § 1201.1(c).

Consequently, we believe that the preemptive provisions of section 26 would not affect a state or local requirement that wired glass in doors or other assemblies to retard the passage of fire must pass the test in ANSI standard Z97.1.

JALOUSIE LOUVERS

In your letter of August 31, 1980, you state that section 857.5.5 of the 1980 BOCA supplement prescribes minimum thicknesses for glazing materials used as louvers in jalousie assemblies.

As you know, louvers of jalousie doors are exempted from the requirements of the Commission's standard by section 1201.1(c)(2). We do not believe that section 26 would preempt the enforcement of any requirements for glazing materials used as jalousie louvers in doors, for the reasons stated in the discussion of additional requirements for wired glass used in doors and other assemblies to retard the passage of fire, set forth above.

EQUIVALENT TEST RESULTS

In your letter of August 31, 1980, you also observe that section 857.5.6 of the 1980 BOCA supplement requires that glazing materials used in the locations and products subject to that section must pass the applicable tests in the Commission's standard "or by comparative test shall be proven to produce at least equivalent performances." You ask if the language concerning comparative tests and equivalent performance is preempted by section 26.

We do not believe the language concerning comparative tests and equivalent performance is preempted by section 26, because we do not believe that the language in question imposes any requirement for glazing materials or products incorporating glazing materials subject to the Commission's standard other than those in that standard. Instead, we believe that this language would allow a manufacturer of glazing materials or products incorporating glazing materials to demonstrate compliance with the requirements of the referenced standard to the satisfaction of the state or local enforcement authority by means of tests other than those contained in that standard.

LABELING REQUIREMENTS

In both of your letters you observe that section 857.5.1 of the 1980 BOCA supplement requires individual items of glass to be labeled by the manufacturer to indicate type of material and thickness, while the Commission's standard has no such requirement. You ask if the labeling requirements contained in the 1980 BOCA supplement are preempted by section 26.

As you know, section 26 does not preempt every non-identical state or local requirement imposed on a product subject to a consumer product safety standard, but only those nonidentical requirements "which are designed to deal with the same risk of injury associated with such consumer product . . . ."

We are not able to determine the purpose of the labeling requirements in section 857.5.1 of the 1980 BOCA supplement. Those requirements are set forth separately from the requirements for safety glazing in specified locations contained in section 857.5.6 of the 1980 BOCA supplement. The labeling requirements in section 857.5.1 apply to items of glass used in applications where safety glazing is not required, in addition to items of glass used in locations specified in section 857.5.6.

The labeling requirements are applicable to certain kinds of glass which are not necessarily manufactured to meet the test in the Commission's standard, such as heat strengthened glass and insulated glass, as well as to certain types of glass which usually are manufactured to comply with the requirements of that standard, such as laminated glass and fully tempered glass. The labeling requirements of section 857.5.1 appear not to be applicable to any item of plastic glazing, although many plastic glazing materials meet the requirements of the Commission's standard.

Since we are not able to determine if the labeling requirements of the 1980 BOCA supplement are intended to deal with the same risks of injury as the Commission's standard, we are unable to express an opinion as to whether those labeling requirements are preempted by section 26 and the Commission's standard.

VARIANCE PROCEDURES

Finally, in both of your letters, you state that the current BOCA model code contains variance procedures which will allow the use of materials other than those specified in the 1980 supplement in certain instances.

The variance procedures referred to in your letter set forth conditions under with a state or local jurisdiction will refrain from enforcement. As a matter of law, section 26 would not prohibit a state or local jurisdiction from deciding not to enforce a requirement, whether or not it is identical to a CPSC standard.

In your letter, you indicate that the existence of variance procedures can pose a practical problem for builders, building owners, architects, and glazing contractors, because in making application for a variance, the applicant acknowledges the existence of the requirement for which the variance is sought. If a state or local requirement is identical to a requirement imposed by the Commission's standard, the application for variance might be some evidence of knowledge of the existence of the requirement in the Commission's standard, which could be relevent in an action for civil or criminal penalties brought by the Commission under section 20 or 21 of the CPSA, or in an action to recover damages for injuries brought by an individual under section 23.

Like state and local jurisdictions, the Commision also has some prosecutorial discretion, and does not pursue every alleged violation of a consumer product safety standard by litigation. In most cases, it would be reasonable to expect that the Commission would refrain from taking legal action in any case where a duly appointed board had granted a variance in accordance with local law on the basis of a determination that alternative materials or methods of construction provide an equivalent or greater degree of safety than compliance with the literal requirements of a building code.

However, as you know, the Commission has no control over the decision of individual parties about whether to pursue any rights available under section 23 of the CPSA.

Since no one is required to seek variances, we believe that in those cases where the primary concern of the builder, architect, building owner, or glazing contractor is the possibility, however remote, of a federal enforcement action or private suit for damages, the obvious solution is to forego application for a variance and comply with the applicable requirements of the building code.

We hope that this adequately addresses the questions and concerns of your letters of August 31 and September 26, 1980. Please note that the Commission has approved this letter.

Sincerely,

Margaret A. Freeston

Margaret A. Freeston
Acting General Counsel