Pat Chisley, OS

ADVISORY OPINION
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U.S. CONSUMER PRODUCT SAFETY COMMISSION
WASHINGTON, D.C. 20207

AUG 4 1982

OFFICE OF THE
GENERAL COUNSEL

Irwin S. Davison, Esq.
General Counsel
Department of Health
125 Worth Street
New York, New York 10013

Dear Mr. Davison:

This responds to your June 14, 1982 letter, also signed by the General Counsels of the Department of Buildings and Department of Housing, Preservation and Development, concerning the preemptive effects of the Consumer Product Safety Act on New York City's requirements for gas-fired space heaters. We have considered and evaluated the portions of your laws that were enclosed with your letter. However, the most helpful advice that we can provide is our views on the various issues that they present. In any case, the courts rather than the Commission would have the responsibility for ultimate interpretations of the statutory preemption provisions and their effect on state and local laws.

As you know, section 26 of the Consumer Product Safety Act (15 U.S.C. 2075) governs the preemptive effects of the Commission's regulation for unvented, gas-fired space heaters (16 CFR Part 1212) on state and local requirements. In general, state and local jurisdictions are prohibited from enforcing safety requirements applicable to such heaters that are different from the Commission's standard and are intended to address only the risk of injury from carbon monoxide poisoning. The following discussions address

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some specific issues:

1. Since New York City prohibits unvented, gas-fired space heaters in residential properties, the first issue is whether a federal standard preempts a state or local ban.

The express language of section 26(a) might appear to support the position that preemption applies only to state or local standards for the performance, composition, contents, design, finish, construction, packaging, or labeling of a product.*/ However, the legislative history indicates that this preemption provision also refers to state and local bans:

> It is intended that Federal authority--once exercised--occupy the field and broadly preempt State authority to regulate the same product hazards. Accordingly, the Federal preemption is intended to extend not only to State authority to set standards on labeling requirements but also to prevent States from acting to ban products which conform to applicable Federal safety standards where the purpose of the ban is to protect the public from the same product hazard. H.R. Rep. No. 92-1153, 92d Cong., 2d Sess. (1972), p. 49 (emphasis added).

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*/ Section 26(a) states:

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 describes 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.

Based on this language, we believe that states and localities are prohibited from enforcing bans of any products that are covered by the Commission's space heater standard and are intended to address the risk of carbon monoxide poisoning.

We would also note that a purpose of the Consumer Product Safety Act is "to develop uniform safety standards for consumer products and to minimize conflicting State and local regulations..." 15 U.S.C. 2051(b)(3). Our view is that a statutory interpretation permitting states and localities to ban a product that is the subject of a Commission standard would run counter to this Congressional purpose.

2. Even if complete bans of products are covered by preemption, the New York City requirements raise the more specific question of a partial ban. In other words, a second issue is whether states and localities are prohibited from banning unvented gas-fired space heaters in, for example, residences or nursing homes or other specified locations.

Since state and local bans (in our view) and standards are preempted, assuming that they address the same risk as the federal standard in a non-identical way, we know of no reason why partial bans would not also be preempted. We know of no legal or logical reason to treat partial bans differently than complete bans and standards. Regardless of whether they are more similar to standards or to bans, the category of partial bans falls somewhere in the "middle" and clearly does not justify separate treatment under federal preemption law.

3. Your letter also raises the issue of whether a requirement for the venting of space heaters is a prohibition on unvented space heaters. We believe that such a requirement is merely another way of banning unvented heaters.

The alternative interpretation results in a legalistic loophole that would render meaningless the Consumer Product Safety Act's statutory preemption provision: A local requirement that banned unvented heaters would be preempted, but a local requirement that permitted only vented heaters would not be preempted. Our view is that an appropriate interpretation of section 26(a) must reject such a semantic anomaly.

4. A difficult issue involves state and local requirements, such as New York City seems to have, that address the installation of space heaters.

As discussed and quoted above, section 26(a) specifically names the types of state and local requirements that are preempted. While mentioning eight different types of such requirements, the provision does not include installation. Installation is sometimes the final stage in the manufacturing process, and therefore clearly covered by the types of requirements named, but that is not necessarily the case.

The legislative history of the Emergency Interim Consumer Product Safety Standard Act of 1978 (concerning cellulose insulation) addresses installation in its discussion of the preemptive effects of the cellulose insulation standard:

> Of course, under the terms of section 26 of the Consumer Product Safety Act, the interim safety standard [for cellulose insulation] established by the conference substitute would not preempt such State or local installation standards. Section 26 preempts only standards which prescribe requirements for a consumer product rather than requirements relating to installation of such product. H.R. Rep. No. 95-1322, 95th Cong., 2d Sess. (1978), p. 9.

While it may be that this legislative history applies only to cellulose insulation standards, the language seems rather to refer to all Commission standards that would affect state and local requirements under section 26. Therefore, we will consider two different possible interpretations for the role of installation requirements under federal preemption.

One interpretation is that Congress did not intend to interfere with any state or local requirements relating to installation of products covered by a Commission standard. This would mean that states and localities are free to protect against carbon monoxide poisoning from unvented gas-fired space heaters by requiring that all such heaters be vented when installed. For reasons similar to those discussed in item 3 above, we disagree with this interpretation because it could have the practical effect of permitting states and localities to ban unvented, gas-fired space heaters. Such bans of a product that is covered by a federal standard directly contradict the statutory language and legislative history of section 26 of the Consumer Product Safety Act. State and local "installation" requirements could be tantamount to bans, and a legal loophole would be allowed to reverse the clear intention of federal preemption.

We believe that the better interpretation is one that focuses more narrowly on installation. Our view is that the Congressional intent, reflected in the legislative history quoted above, extends only to the manner of installing a product and not to an installation requirement that indirectly bans the manufacture, sale and distribution of a product in a particular jurisdiction. In the case of unvented gas-fired space heaters, a state or local requirement would be permitted only if it is concerned with how such a heater performs (i.e., whether it is capable of venting carbon monoxide emissions to the outside). A state or local requirement would not be viewed as an installation requirement, and thus be excluded from preemption, merely because it concerns the installation of a vented gas-fired space heater. An example of a "true" installation requirement is one that prescribes the BTU capacity of heaters for a given volume of residential space.

In summary, our view is that preemption would apply to any state or local requirement that prohibits installation of unvented gas-fired space heaters or requires that gas-fired space heaters be vented before installation is permitted. In contrast, we believe that preemption would not apply to a state or local requirement that contains provisions on how or where to install unvented gas-fired space heaters.

5. A final issue concerns state and local requirements that an unvented gas-fired space heater be "listed" or otherwise approved by an organization such as the American Gas Association (AGA). As we explained at the beginning of our letter, no such requirements may address the risk of injury of carbon monoxide poisoning differently than the oxygen depletion system addresses that risk. However, preemption would not apply to any "listing" requirement that addresses other risks.

More specifically, we believe that AGA requirements, based on the American National Standards Institute (ANSI) standard for gas-fired room heaters (Exhibit E to your letter), would not be preempted (if adopted by state or local jurisdictions) as long as they address thermal burns, explosion hazards, or any risks other than carbon monoxide poisoning. However, we believe that the carbon monoxide limitation requirements (section 2.4.2 of Part II) probably would be preempted because they seem to us to address the carbon monoxide risk in a manner different from the manner in which the oxygen depletion system addresses it. This is the case even though the ANSI standard also includes an oxygen depletion system requirement.

We hope that our advice is helpful. Please call us at (301) 492-6980 if you have any questions.

Sincerely,

Stephen Lemberg

Stephen Lemberg
Assistant General Counsel

The City of New York

DEPARTMENT OF HEALTH
125 WORTH ST., NEW YORK, N.Y. 10013

IRWIN S. DAVISON
General Counsel

RECEIVED
JUN 28 1982
Consumer Product
Safety Commission
Office of the
General Counsel

June 14, 1982

Martin Katz, Esq.
General Counsel
Consumer Product Safety
Commission
Washington, D.C. 20207

Re: Commission Safety Standard Requiring Oxygen Depletion-Safety Shutoff Systems (ODS) for Unvented Gas-Fired Space Heaters (16 CFR Part 1212)

Dear Mr. Katz:

We are writing to you on behalf of the New York City Departments of Health, Buildings, and Housing Preservation and Development, pursuant to recent conversations the Health Department has had with your office concerning the above CPSC standard for unvented gas fired space heaters.

We are requesting that the General Counsel's Office issue an advisory opinion specifying that the standard promulgated by your agency does not invalidate or preempt New York City laws concerning residential premises which permit only the use of vented gas heaters and which strictly regulate the installation and use of such equipment.

We are enclosing for your examination the pertinent sections of the Housing Maintenance and Health Codes which provide the basis of City regulation of residential gas fired space heaters. (Marked Exhibits A & B respectively).

We draw your attention to page 3762 of the Federal Register (enclosed as Exhibit C) which clearly states that local laws and enforced industry standards governing vented gas space heaters do not require supplementation through Commission regulations or other federal law. The summary and background of this report, calling for additional safety standards, is aimed at the dangers associated with unvented gas space heaters in residential properties. Since the residential laws of the City of New York prohibit the

Save water.

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use of this equipment and deal specifically and in detail with requirements for installing vented gas space heaters, it is our view that these local laws have not been preempted, nor was preemption intended, by the Commission's regulations and the Federal law.

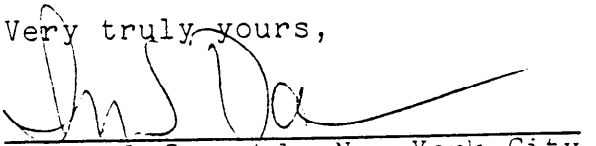
The Commission's regulations concerning the ODS system in commercial buildings is acceptable to the City, especially since City laws already require the installation of such a device in non-residential situations where unvented gas space heaters are permitted. We are attaching appropriate sections of the Building Code, (Exhibit D) and call your attention to §1.8 of Part I (Construction) of the ANSI for Gas-Fired Room Heaters, Volume II, Unvented Room Heaters. (Attached hereto as Exhibit E) These provisions are incorporated into the law of New York City, and mandate use of an ODS system, very comparable, if not identical, to that required by your regulations. These particular standards are not applicable to City residential premises as such buildings are governed by the earlier cited provisions of the Health and Housing Maintenance Codes.

It is our position that the laudable safety aims of your Commission, and its regulations promulgated thereunder are not in conflict with the laws of New York City, but in fact, are complimentary, in that both are intended for the maximum protection of the consumer. The City laws provide equal protection in the case of commercial premises, and greater protection in residential buildings.

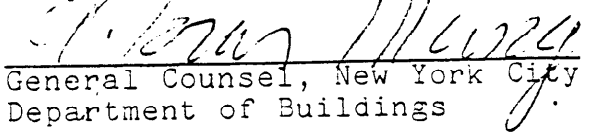
We would appreciate a prompt response from you in order to prevent manufacturers of these devices, or landlords, from attempting to avoid compliance with the City residential laws by imposing upon residential consumers equipment which the locality believes would lessen their protection as tenants.

We look forward to hearing from you.

Very truly yours,



General Counsel, New York City
Department of Health



General Counsel, New York City
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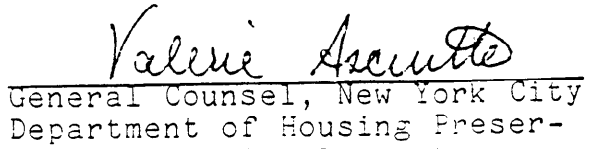

General Counsel, New York City
Department of Housing Preservation and Development

/tc