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ADVISORY OPINION #289

U.S. CONSUMER PRODUCT SAFETY COMMISSION

WASHINGTON, D.C. 20207

December 8, 1983

OFFICE OF THE
GENERAL COUNSEL

Thomas W. Power, Esq.
Power and McDonald
1919 Pennsylvania Ave., N.W.
Washington, D.C. 20007

Dear Mr. Power:

This is in response to your recent letter on behalf of your client, the Upholstered Furniture Action Council, requesting our views on the preemptive effects of section 16 of the Flammable Fabrics Act (FFA), (15 U.S.C. 1203), on California's newly enacted flammability law, as that law would apply to polyurethane foam used in mattresses for convertible sofas. Please bear in mind that our views on the issue of preemption are advisory only. Only the courts can provide binding interpretations on matters of preemption.

In your letter, you enclose copies of correspondence */ indicating that California's mattress flammability rules may not be identical to the requirements of the federal Standard for the Flammability of Mattresses (16 CFR 1632). Our response to you is predicated on the assumption that the materials you sent will, in fact, become the state's flammability rules.

Section 16 of the FFA provides, with exceptions not under discussion here, that whenever a federal flammability standard or requirement for a fabric, related material, or product is in effect under the FFA, no state or local government may establish or continue in effect a flammability standard or requirement for such item designed to protect against the same risk of the occurrence of fire, unless it is identical to the federal standard. Therefore, the important question is whether the federal and California requirements are designed to protect against the "same risk of the occurrence of fire."

*/ Letter from Gordon H. Damant, California Bureau of Home Furnishings, to Thomas W. Power, October 7, 1983, concerning Assembly Bill 594.

California Bureau of Home Furnishings, Technical Bulletin 117, January, 1980.

As you know the federal standard uses lit cigarettes to test smoldering ignition of mattresses while the state rule, in part, would test mattresses by open flame. Thus, ignition begun by an open flame igniting a mattress may not necessarily present the same risk of the occurrence of fire as a mattress ignited by a smoldering cigarette.

However, a review of the applicable legislative history of the Consumer Product Safety Improvements Act of 1976, which must be given significant weight when interpreting section 16 of the FFA, indicates that the difference in ignition sources used for testing under the federal and state requirements does not mean that a different risk is being addressed. The pertinent portion of the legislative history states,

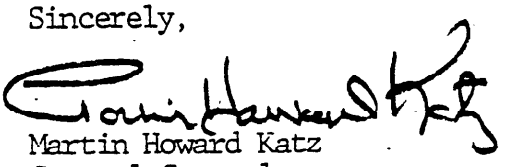
> [A] State standard designed to protect against the risk of injury from a fabric catching on fire would be preempted by a Federal flammability standard covering the same fabric even though the Federal standard called for tests using matches and the State standard called for tests using cigarettes. When an item is covered by a Federal flammability standard, ... a different State or local flammability requirement applicable to the same item will be preempted since both are designed to protect against the same risk, that is the occurrence of or injury from fire. (H.R. Rep. No. 94-1022, 94th Cong., 2d Sess. 29 (1976).)

We conclude from the above-quoted legislative history that the phrase in section 16 of the FFA, "the same risk of occurrence of fire" means that, notwithstanding the fact that a state/local requirement uses a different ignition source to test an item than does a requirement under an FFA standard, the risk of occurrence of fire involving that item is the same for purposes of preemption.

Therefore, in our view, any California requirement that addresses mattress flammability in the manner described in Technical Bulletin 117, would be preempted by the federal mattress standard, under authority of section 16 of the FFA.

This letter represents the views of the General Counsel; the letter has not been reviewed by the Commission.

Sincerely,



Martin Howard Katz
General Counsel