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April 2021

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Federal Preemption of State Efforts to Ban Products or Chemicals in Children's Products

By Mitchell W. Taraschi and Alexander J. Gacos

Historically, federal preemption served to calm the potential chaos of regulating consumer products at the state level. Despite many new state consumer protection laws, the precedent of preemption holds.

States continue to grow more serious about dangers in consumer goods, with special focus on children's products and harmful chemicals. In recent years, several states have implemented, or are considering, full bans on certain products. Among these products are common infancy effects, such as infant walkers. Some states have acted in a similar way to ban certain chemicals commonly used in the manufacture of children's products. The enacted and proposed bits of legislation can have profound economic effects on manufacturers, developers, and retailers in the child-product industry. Indeed, perhaps the most obvious costs associated with states' outright bans of entire product lines include lost sales as well as heightened care when distributing products in or around those states.

Less obvious are the costs associated with having to redesign or reformulate products to remove and replace banned chemicals, or the costs associated with navigating a labyrinth of laws to meet different rules in different states. These are the costs that accompany, for instance, labeling and packaging, marketing, and aftermarket product issues flowing from the interplay of different products. Then, there are the well-spent but unanticipated costs of keeping a robust and reliable legal and compliance system to respond to these product bans. But perhaps most daunting is the

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risk of losing consumer trust due to inconsistencies among state rules and the tussle over what is adequately "safe."

The arena is rapidly developing, with rules changing on a monthly or, in some cases, weekly basis. The idea that an industry competitor can stay fully abreast of and comply with amorphous state standards can seem elusive—a plaintiffs' bar dream. But states are not entirely unchecked. Federal legislation has worked to set uniform standards, hoping to temper uncertainty and the threat of rising costs from varying sets of rules across state lines. This legislation's teeth come from the doctrine of preemption, the constitutional principle that federal law will displace conflicting or incompatible state law.

This article explores the issue of preemption and how it applies to states' efforts to ban select children's products and chemicals used to manufacture children's products. This article first sets the table by describing the source of the preemption doctrine, and the ways preemption can occur. It then examines preemption at play in two distinct realms—consumer products under the Consumer Product Safety Improvement Act, and the advancement of green chemistry under the Toxic Substances Control Act and its reform under the Frank R. Lautenberg Chemical Safety for the 21st Century Act.

Preemption Doctrine

Preemption, a doctrine rooted in the Supremacy Clause of Article VI of the United States Constitution, provides that "the Laws of the United States… shall be the supreme Law of the Land." Under the clause, "any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield." *Free v. Bland*, 369 U.S. 663, 666, 82 S. Ct. 1089 (1962). Preemption occurs in three ways: *express preemption*, when a federal law specifically preempts state law; *implied preemption*, when a federal law is so extensive that Congress could not have intended to allow additional state law; and *conflict preemption*, when it is not possible for an individual to comply with both the federal and state laws in question. *Hillsborough Cnty., Fla. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713, 105 S. Ct. 2371 (1985).

Express preemption is self-explanatory, as Congress's intent will be found in the law's express text. Implied and conflict preemptions, on the other hand, are far less intuitive. Preemption is "implied," and state law may be displaced, "if federal law so thoroughly occupies a legislative field as to make reasonable the inference that Congress left no room for the States to supplement it." *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516, 112 S. Ct. 2608 (1992) (internal quotation marks omitted). Conflict preemption occurs either "when it is impossible to comply with both the state and the federal law… or when the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Orson, Inc. v. Miramax Film Corp.*, 189 F.3d 377, 382 (3d Cir. 1999) (*en banc*) (internal citations and quotation marks omitted).

Consumer Products

Staking its territory over the product safety field, Congress revamped the Consumer Product Safety Act to empower the U.S. Consumer Product Safety Commission to review states' own regulations and to set mandatory rules aligning with industry norms for durable infant or toddler products.

Preemption Under the Consumer Product Safety Improvement Act of 2008

In 2008, Congress passed the Consumer Product Safety Improvement Act (CPSIA), which amended the Consumer Product Safety Act (CPSA), 15 U.S.C. §§2051-2084, to give more money and authority to the U.S. Consumer Product Safety Commission (the Commission). Within the CPSIA, Congress included a section directly addressing preemption of conflicting state laws. *See* §2075. There, coupled with federal regulation, the CPSIA expressly prohibits state standards or regulations that directly conflict with requirements of the related federal standards. §2075(a); *see also* 16 C.F.R. §1061.3.

The CPSIA does, however, exempt from preemption any state regulation covering a product for the state's own use if the regulation "provides a higher degree of protection from such risk of injury than the standard applicable under [the CPSIA]." 15 U.S.C. §2075(b); *see also* 16 C.F.R. §1061.3(a). Importantly, to qualify for exemption, states must first apply to the Commission for approval. 15 U.S.C. §2075(c); *see also Ball v. BIC Corp.*, 2000 U.S. Dist. LEXIS 19699, at *6 (E.D. Mo. Feb. 8, 2000). The Commission then determines whether the proposed state regulation both affords "a significantly higher degree of protection and does not unduly burden interstate commerce." *Ball*, 2000 U.S. Dist. LEXIS 19699, at *6–7 (citing 15 U.S.C. §2075(c); 16 C.F.R. §1061.3). In making this determination, the Commission has discretion to consider and make appropriate findings on several criteria generally relating to the practicability of the proposed regulation. These considerations include the technological and economic feasibility of compliance; the cost of compliance; the applicable geographic distribution of the product; the probability of other states applying for a similar exemption; and the need for a national, uniform standard for the consumer product. 15 U.S.C. §2075(c).

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If approved for exemption, the state's proposed regulation must be amended to include in its text the Commission's findings that the regulation "affords a significantly higher degree of protection than the Commission's [rule], and that it does not unduly burden interstate commerce." 16 C.F.R. §1061.3(b). There appear to be no reported cases that consider issues relating to conflicts between 15 U.S.C. §2075 and 16 C.F.R. §1061.3 and regulations enacted by state legislatures without Commission approval.

Federal Regulatory Framework Relating to Children's Products

Unsurprisingly, the child-products industry is heavily regulated to keep children

and their families safe. As part of the CPSIA, Congress vested regulatory authority over "durable infant or toddler products" in the Commission. 15 U.S.C. §2056a(b)(1)(A). Section 104 of the CPSIA, known as the "Danny Keysar Child Product Safety Notification Act," requires the Commission to issue mandatory rules for products based on voluntary standards and issue a rule requiring consumer registration of those products. §2056a(b)&(d). The mandatory rules must be "substantially the same as" the standards voluntarily developed by industry participants and non-governmental organizations, unless "the Commission determines that more stringent standards would further reduce the risk of injury associated with [the] products." In that case, the more stringent rule may survive. §2056a(b); *see also* Durable Infant or Toddler Products, United States Consumer Product Safety Commission, https://www.cpsc.gov/Business--Manufacturing/Business-Education/Durable-Infant-or-Toddler-Products/.

By way of example, the federal regulations for infant walkers adopt as the national standard all applicable provisions of ASTM (formerly known as the American Society for Testing and Materials) F977-12, Standard Consumer Safety Specification for Infant Walkers, and direct readers to ASTM International to obtain a copy of those ASTM standards. 16 C.F.R. §1216.2.

In the broader context, the federal regulatory regime's structure at least implies that Congress intended to exercise its authority over durable products designed for infants, toddlers, and young children. Tellingly, a series of regulations, including 16 C.F.R. §1216 concerning infant walkers, cover such products as: infant bath seats (16 C.F.R. §1215); toddler beds (16 C.F.R. §1217); bassinets and cradles (16 C.F.R. §1218); full-size baby cribs (16 C.F.R. §1219); non-full-size baby cribs (16 C.F.R. §1220); play yards (16 C.F.R. §1221); bedside sleepers (16 C.F.R. §1222); infant swings (16 C.F.R. §1223); portable bed rails (16 C.F.R. §1224); hand-held infant carriers (16 C.F.R. §1225); soft infant and toddler carriers (16 C.F.R. §1226); carriages and strollers (16 C.F.R. §1227); sling carriers (16 C.F.R. §1228); infant bouncer seats (16 C.F.R. §1229); frame child carriers (16 C.F.R. §1230); high chairs (16 C.F.R. §1231); children's folding chairs and stools (16 C.F.R. §1232); portable hook-on chairs (16 C.F.R. §1233); infant bath tubs (16 C.F.R. §1234); and toys (16 C.F.R. §§1250, 1251, and 1252). The Commission continues to expand its regulatory reach, adding new regulations as recently as 2019 and 2020 covering baby changing products (16 C.F.R. §1235) and booster seats (16 C.F.R. §1237), respectively.

On top of mandatory regulations and voluntary standards, many products are also subject to state laws. The added state controls are not in themselves problematic, of course, in light of the CPSIA's avenue for exemption from preemption. But various states—for example, New Jersey—are looking to ban products such as infant walkers altogether, claiming those products are unsafe in certain settings, e.g., around stairs and pools. These overcorrections tend to be reactionary and ineffective, relying on outdated science and disregarding federal preemption and the value in voluntary standards.

As with infant walkers, annual related injuries dropped to around 3,200 in 2003 from around 21,000 in 1990, largely due to manufacturers' voluntary safety improvements in response to publicity surrounding the accidents. And in 2010, after the Commission implemented national standards, including testing requirements and other preventive safeguards, annual injuries dropped another 23 percent. These drastic improvements underscore the importance that remedial measures be based on accurate and current information—an aim that state laws must embody to be necessary and effective.

Effectiveness aside, state prohibitions on products also ignore Congress's intent to control the field by empowering the Commission to establish mandatory federal rules. But to reiterate, states are not unchecked, and courts have adhered to federal preemption to invalidate state bans. Keeping with the example of infant walkers, courts have struck down local laws in the last decade that inadvertently banned several child products, ruling that federal law preempted the local ban.

Chemicals in Children's Products

Product manufacturers have responded to concerns about certain substances used when making consumer goods, specifically those used in children's products. Understanding and regulating these new "green" chemicals now falls under the purview of the Frank R. Lautenberg Chemical Safety for the 21st Century Act.

Federal Regulatory Framework Relating to "Green Chemistry"

For decades, the Toxic Substances Control Act of 1976 (TSCA), 15 U.S.C. §2601 *et seq.*—the law governing regulation of chemicals used in consumer products and manufacturing processes—was plagued with complexities and costly delay. In 2016, Congress passed the Frank R. Lautenberg Chemical Safety for the 21st Century Act (the "Lautenberg Act"), partially in response to a growing landscape of confusing state green chemistry laws—that is, laws concerning the design of alternative chemicals purposed to eliminate or reduce risks to human health or the environment. *See* H.R. Rep. No. 114-176, at 12-13 (2015). The Lautenberg Act reformed the TSCA by providing the Environmental Protection Agency (EPA) with consistent funding for research into the potential danger of specific, enumerated chemicals, and creating a new federal preemption regime over state-level chemistry regulations. *See* Millar, Sheila A. and Anushka N. Rahman, "Green Chemistry in 2017: The State of the States," *Keller and Heckman LLP – Publications* (May 16, 2017).

Unlike traditional solvents, which can be toxic or chlorinated, green chemistry uses solvents that derive from renewable resources and can biodegrade into innocuous compounds. And in addition to environmental friendliness, green chemistry prioritizes making products with harmful chemicals safer. The majority of states have green chemistry bills, with New York leading the country in number, followed by New Jersey, Massachusetts, New Hampshire, and California—to name some of the bigger players.

As to preemption, the Lautenberg Act provides three instances where EPA action expressly preempts state law. *See* 15 U.S.C. §2617. First, states may not enforce their own rules "to require the development of information about a chemical substance or category of chemical substances that [are] reasonably likely to produce the same information" as "rules promulgated by the [EPA] Administrator; a consent agreement entered into by the [EPA] Administrator; or an order issued by the [EPA] Administrator."

§2617(a)(1)(A). Next, states may not enforce their own rules, including in this instance criminal penalties, prohibiting or otherwise restricting "the manufacture, processing, or distribution in commerce or use of a chemical substance" covered by the Lautenberg Act. §2617(a)(1)(B). Last, states may not enforce their own rules "requiring the notification of a use of a chemical substance that the [EPA] Administrator has specified as a significant new use and for which the [EPA] Administrator has required notification pursuant to a rule promulgated under [the Lautenberg Act]." §2617(a)(1)(C).

Additionally, once the EPA defines the scope of a given chemical substance's risk evaluation, states may not establish any statutes, criminal penalties, or administrative actions affecting that substance until either the EPA publishes its risk evaluation or a year passes, whichever is earlier. §2617(b)(1). States may, however, continue to enforce or maintain any rules that existed prior to the date when the EPA defines and publishes the scope of its risk evaluation for that substance. §2617(b)(2).

According to guidance from the Environmental Defense Fund, the Lautenberg Act has been understood to apply on a "chemical-specific basis," in that there will be a preemptive effect only when the EPA is acting on a specific chemical; and in such event, preemption is limited to that chemical. Environmental Defense Fund, *What is Preempted and Not Preempted under the Frank R. Lautenberg Chemical Safety for the 21st Century Act*, at 1 (2016). As a result, the EPA's final actions concerning a specific chemical will preempt any states' restrictions on that same chemical. *Id.* This includes situations where the EPA finds that a chemical poses no unreasonable risk, or where the EPA finds the existence of unreasonable risks and promulgates appropriate regulations in response. *Id.*; *see* 15 U.S.C. §§2605(i) and 2617(a)(1)(B).

There are exceptions, however. A state's action will not be preempted if it is adopted "under the authority of any other Federal law." 15 U.S.C. §2617(d)(1)(A)(i). Nor will an action be preempted where it "implements a reporting, monitoring, or other information obligation for the chemical substance not otherwise required by" federal law. §2617(d)(1)(A)(ii). Finally, the action will not be preempted if it is identical to the EPA's requirement. §2617(d)(1)(A)(iv). (There is a fourth exception relating to water quality, waste treatment, and disposal law, which are beyond the scope of this article. *See* §2617(d)(1)(A)(iii).) States may also obtain waivers related to EPA preemption; however, such waivers are harder to obtain once final EPA action has been issued. Environmental Defense Fund, *What is Preempted and Not Preempted under the Frank R. Lautenberg Chemical Safety for the 21st Century Act*, at 2.

As a matter of industry practice, manufacturers' efforts to improve standards voluntarily might include: researching alternatives to or eliminating chemicals of high concern; routinely checking for state chemical updates; collaborating with third-party lab partners and research organizations; staying aware of developing concerns or requirements; identifying new supply chains as needed; creating test protocols for chemical compliance, including systematic testing; and having open dialogues with non-governmental organization leaders.

Conclusion

For the last two decades, Congress has attempted to resolve what has become—and is still—a landscape of confusing and often conflicting state standards for children's products. Some of these standards are likely impermissibly at odds with, and thus preempted by, federal standards. On the actual products side, Congress has empowered the Commission to review any proposed state rule before it can be considered exempt from CPSIA's express preemption. As a threshold matter, the state rule must provide a significantly higher degree of protection to consumers. The Commission's review then turns on whether the proposed rule unduly burdens interstate commerce.

There can hardly be dispute that an outright ban on children's products is a significantly higher degree of protection than that afforded by the CPSIA. Should the Commission decide to exempt a full ban, a traditional lawsuit based on preemption would not likely change that decision. But if a state were to pass a rule without first seeking the Commission's approval, a traditional lawsuit alleging preemption may be successful. If nothing else, the state would have failed to comply with the procedures set out in the CPSIA and applicable federal regulations, under 15 U.S.C. §2075 and 16 C.F.R. §1061.3, respectively. For these reasons, as various states consider banning certain children's products, close attention should be paid to determine if each proposed ban complies with federal law.

As to green chemistry, the Lautenberg Act governs preemption on a chemical-specific basis, preempting state restrictions on a given chemical only when the EPA acts on a specific chemical. States are not precluded altogether from legislating in this realm. Rather, states are permitted to enact and enforce rules governing certain aspects of preempted chemicals, such as monitoring, reporting, and disclosure. At the same time, state restrictions must be identical to the EPA's to be enforceable. Unlike with products, the statutory regime governing green chemistry and preemption is very clear, providing little room for the sort of creative interpretation that CPSIA does. Here, too, as states move to ban certain chemicals used in children's products, the industry should pay close attention to determine if each proposed ban complies—in substance and process—with federal law.

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