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been made, available for inspection and copying.

Arizona's rule was promulgated to require cooperation among parties and encourage early evaluation of a case. Arizona's rule also was intended to make litigation more efficient, less expensive, and more accessible to people and to avoid "litigation by ambush." Colorado, Alaska, and Nevada also have mandatory rules for voluntary disclosure of documents.

Rule 26, Federal Rules of Civil Procedure, and automatic disclosure rules in state courts create an obligation on both sides to wade through documents and databases to identify and produce relevant documents. Thus, the fact that a corporate defense counsel has reviewed thousands of documents and concluded that some are relevant to the litigation does not cloak those internal documents with work product protection. For example, defendants cannot cloak internal memoranda from discovery simply because defense counsel selected them from a databank or file cabinet filled with internal memoranda on a variety of subjects. Likewise, Rule 26, Federal Rules of Civil Procedure, and automatic disclosure rules in state courts also require plaintiffs to wade through documents and databases to identify and

produce relevant documents in their possession, custody, or control. Accordingly, plaintiff's determination that certain documents are relevant does not transform the documents into plaintiff's work product. The disclosure rules require both sides to produce all relevant documents, not just the ones a party may designate as particularly significant to the success of one side. Because all relevant documents must be produced by both sides, neither side will likely be able to discern what is important or significant to the opposing counsel.

By requiring both sides to produce all relevant documents, regardless of the source from which they were obtained, the goals of automatic disclosure rules can be achieved. Parties will spend less time and money in discovery and on discovery gamesmanship and more time in case evaluation and trial preparation. Additionally, production of defendant's documents by plaintiffs and defendants avoids litigation by ambush, which also advances the goals of automatic disclosure rules.

Conclusion

Although one court has protected documents that plaintiff's counsel obtained from sources other than a defendant because it is work product, the better reasoned opinions find no work product protection for the documents. Moreover,

the automatic disclosure rules that exist now in federal court and some state courts further support the position that plaintiffs cannot cloak defendants' documents with work product protection by obtaining them from a third party. Both sides have affirmative obligations under mandatory or voluntary disclosure rules to identify and produce relevant documents. In the absence of a mandatory disclosure rule, plaintiffs and defendants must identify relevant documents in response to document requests. While plaintiffs' access to defendant's documents from third parties via the Internet or other networks is relatively new and that access may have created some confusion about a plaintiff's obligation to produce the documents, the obligation is the same for plaintiffs and defendants.

Authors

Jill S. Goldsmith is a partner with Bowman and Brooke LLP, in the firm's Phoenix office. In her practice, she focuses on complex civil litigation, with an emphasis on product liability defense. Ms. Goldsmith is a member of the Defense Research Institute.

Ms. Goldsmith dedicates this article to the memory of Gary T. Walker, a former partner at Bowman and Brooke who encouraged her to become involved in DRI. Reprinted with permission. Copyright 2001, Defense Research Institute, Inc.

Preemption As a First Line of Defense Against State Law Tort Claims for Product Liability Defendants?

By William F. Auther and Mary M. Kranzow, Bowman and Brooke LLP

On August 14, 2008, President Bush signed into law The Consumer Product Safety Improvement Act of 2008 (CPSIA).¹ This law is the most sweeping consumer product safety law since the founding of the Consumer Product Safety Commission (Commission) more than 30 years ago. Although Congress enacted the CPSIA largely in response to widely-publicized recalls on imported children's toys from China, the Act reaches far beyond children's toys and will affect virtually all manufacturers, importers, distributors and retailers of consumer products.²

1. See H.R. 4040, 110th Cong. (2008) (Pub. L. No. 110-314).

2. See Info Alert, National Conference of State Legislatures Law and Criminal Justice Standing

Of significant interest particularly to businesses involved in the sale of consumer products is the CPSIA's potential to preempt state law tort claims. While the Act does not explicitly change the current preemption analysis, the new product standards under the CPSIA may preempt existing or new state laws including common law tort claims which address the same safety risks.

In determining whether state law tort claims are preempted under the Act, the nature of the claim and any applicable

Committee, Office of State-Federal Relations, August 18, 2008, at <http://www.ncsl.org/stand-comm/sclaw/CPSAPreemption.htm>.

federal standard must be examined. For example, state law tort claims based negligence, design defects and failure to warn may be preempted under the new federal standards pertaining to lead, phthalates, and four wheel all-terrain vehicles if these standards address the same safety risks. Accordingly, it is important for consumer product liability defendants to not only understand their new obligations under the Act, but to also utilize this preemptive language in defending product liability claims grounded in state law.

This article explores the preemptive effect of the CPSIA and discusses how these new

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product standards may be treated under the Act.

Preemption Defined

The doctrine of preemption is based on the Supremacy Clause of the United States Constitution which provides that the "... Constitution and the Laws of the United States ... shall be the supreme Law of the Land."³ Any preemption analysis begins with the intention of Congress and the premise that state law will not be superseded unless that is the "clear and manifest purpose of Congress."⁴

The Supremacy Clause has been interpreted to mean that state law is preempted by federal law if it conflicts with federal law.⁵ State laws may conflict with federal law and be preempted in the following three ways: (1) Congress may expressly preempt state law through a congressional command in the statute's language; (2) Congress may impliedly preempt state law 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"⁶; or (3) Congress may impliedly preempt state law if state law "actually conflicts with federal law" because (a) it is impossible to comply with both state and federal requirements, or (b) state law obstructs the purposes and objectives of Congress.⁷

Preservation of Preemption Framework

Section 231 of the CPSIA preserves the basic preemption framework of the Consumer Product Safety Act (CPSA).⁸ The CPSIA adopts the premise under the CPSA that a state cannot establish or continue in effect any law or regulation intended to

3. U.S. CONST. art. VI, cl.

4. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S.218, 230 (1947)).

5. *Id.*, citing *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981).

6. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. at 230.

7. *Great Dane Trailers v. Estate of Wells*, 52 S.W.3d 737, 743 (Tex. 2001).

8. See CPSIA Section Summaries: Section 231 Preemption, U.S. Consumer Product Safety Commission, at <http://www.cpsc.gov/ABOUT/cpsia/summaries/231brief.html> (last visited on January 6, 2009).

deal with the same risk of injury associated with a product addressed by the CPSA unless the state standard is identical to the federal standard.⁹ In fact, the Commission's guidelines explicitly state that the CPSIA is intended to preempt all state laws that address an identical hazard.¹⁰ The Act also allows the Commission to exempt a state or local law from its requirement if the Commission finds that the state or local law affords "a significantly higher degree of protection than the Commission's statute, standard, or regulation, and that it does not unduly burden interstate commerce."¹¹

The CPSIA also prohibits the Commission from altering the specified preemption provisions of the CPSA, Federal Hazardous Substances Act (FHSA), Flammable Fabrics Act (FFA), and Poison Packaging Prevention Act of 1970 (PPPA) by any rule or regulation or by reference to any statement of policy, executive branch statement, or other matter associated with a rule or regulation.¹² In enacting the CPSIA, this provision was not intended to limit the Commission's ability to explain the scope of its rules or regulations, but to prevent the Commission from creating preemption where none was intended by Congress.¹³

9. See 15 U.S.C. 2075(a); see also 16 CFR 1061.3.

10. See Consumer Safety Improvement Act of 2008 – Frequently Asked Questions (FAQ) No. 14, Bureau Veritas Consumer Products, www.bureauveritas.com/cps, http://www.bureauveritas.com.br/wps/wcm/connect/efbe2c804b5e3fc08be08f93f26b1a3d/BureauVeritas_CPSIA_FAQ.pdf?MOD=AJPERES&CACHEID=efbe2c804b5e3fc08be08f93f26b1a3d (last visited on January 6, 2009).

11. See 15 U.S.C. 2075(b)-(c); see also 16 CFR 1061.3.

12. See Pub. L. No. 110-314 § 231(a).

13. See *supra* note 8; see also Pub. L. No. 110-314 § 231; see also *AAJ Sends Obama Team Strategies to Reverse Bush "Complete Immunity" Regulations*, American Association for Justice, January 12, 2009 (discussing proposed plan for the Obama administration to reverse regulations preempting state claims).

Preemptive Effect of New Standards

Several new product standards under the Act may preempt state standards including common law tort claims on the same subjects. For example, the CPSIA establishes uniform national standards for lead in children's products.¹⁴ Specifically, section 101(g) of the CPSIA states that the lead standards are treated as a regulation under the FHSA:

Any ban imposed by subsection (a) or rule promulgated under subsection (a) or (b) of this section, and section 1301.1 of title 16, Code of Federal Regulations ... shall be considered a regulation of the Commission promulgated under or for the enforcement of section 2(q) of the Federal Hazardous Substances Act (15 U.S.C. 1261 (q)).

In turn, section 18(a)(1)(B) of the FHSA provides:

... if under regulations of the Commission promulgated under or for the enforcement of section 2(q) a requirement is established to protect against a risk of illness or injury associated with a hazardous substance, no State or political subdivision of a State may establish or continue in effect a requirement applicable to such substance and designed to protect against the same risk of illness or injury unless such requirement is identical to the requirement established under such regulations.

Therefore, because the CPSIA establishes a standard to protect against a risk of injury associated with lead, state common law tort claims that would hold a manufacturer to a different standard than the federal standard should be preempted.¹⁵

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14. See Pub. L. No. 110-314 § 101; see also FAQs: Do the new standards in the CPSIA, such as the new limits on lead-containing paint and lead content, phthalates and the like, preempt state laws that address the same risk of injury?, U.S. Consumer Product Safety Commission, at <http://www.cpsc.gov/about/cpsia/faq/preemption.html> (last visited on January 6, 2009).

15. Unless exempt by application to the Commission, see *supra* note 11.

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Additional provisions of the CPSIA create standards for other consumer products. These new standards allow additional opportunities to argue for preemption of certain state law tort claims. Even the CPSC guidelines for these new standards suggest that they preempt state law.¹⁶ For example, section 108 of the CPSIA establishes a national standard for phthalates in children's products.¹⁷ The new CPSIA standard for four wheel all-terrain vehicles may preempt certain state law tort claims.¹⁸ Further, the adoption of ASTM F963 under section 106 of the CPSIA as a mandatory federal toy safety standard may also preempt state law.¹⁹ However, for this toy safety standard, the CPSIA permits states to petition the Commission to "grandfather in" existing state laws of this kind so long as they are more stringent than the federal standard.²⁰ The deadline

16. See supra note 14.

17. See Pub. L. No. 110-314 § 108.

18. See Pub. L. No. 110-314 § 232(a).

19. See Pub. L. No. 110-314 § 106.

20. See Pub. L. No. 110-314 § 106(h); see supra note 14; see also <http://www.cpsc.gov/library/foia/foia09/media/media.html> (Four states have submitted exemption applications for existing state or political subdivisions of a state toy and children's product safety standards in effect under CPSIA Section 106(h)(2)).

for states to apply to have their toy safety standard deemed exempt from preemption was November 12, 2008.²¹

Clarification Regarding State and Local Law

The CPSIA further clarifies the extent to which CPSA laws and regulations preempt, limit or otherwise affect federal, state, or local law.

The CPSIA prohibits the Commission from construing statutes to preempt any cause of action under state or local common law or state statutory law regarding damage claims.²² Read literally, this means that only the Commission cannot preempt consumer lawsuits under state common law and state statutes. Presumably then, state and federal courts are free to decide whether a product safety standard under the CPSIA preempts a state standard.²³

21. See Pub. L. No. 110-314 § 106(h); see supra note 14.

22. See Pub. L. No. 110-314 § 231(a).

23. See John B. O'Loughlin Jr., Consumer Product Safety Improvement Act: Not the Last Word on Preemption, 36 BNA Product Safety & Liability Reporter 1037, 1040-41 n. 41, October 20, 2008 (citing *BIC Pen Corp. v. Carter*, No. 05-0835, slip op. (Tex. Apr. 18, 2008)).

The CPSIA also affords states the opportunity to exempt from preemption some laws adopted at the state level before the CPSIA's enactment.²⁴ For example, the requirements under the CPSIA and the FHSA shall not be construed to preempt or affect state warnings requirements under state laws, such as California's Proposition 65, that were in effect on or prior to August 31, 2003.²⁵

Conclusion

While the CPSIA does not fundamentally change preexisting preemption statutes, new product safety standards promulgated under the Act will undoubtedly raise federal preemption questions. New rules and regulations to be published by the Commission are of keen interest to all product liability defendants. Though the full scope and impact of the CPSIA will not be known for some time, it is important for businesses involved in the sale of consumer products to understand their new risks and obligations so that they can more effectively defend product liability cases.

24. See Pub. L. No. 110-314 § 231(b).

25. See U.S. Consumer Product Safety Commission, supra note 8.

Limits on Depositions of Corporate Executives: Special Rules for Important People

By Jill Goldsmith, Bowman and Brooke LLP

With the growth and globalization of the economy in recent years, individuals are increasingly in contact, directly or indirectly, with large national or multi-national corporations. American consumers buy products that are designed and manufactured by very large companies, that are led by high-level executives who often have little direct knowledge of the day-to-day operations of the company. As a result, products liability claims, insurance disputes, and employment disputes often pit an individual against a large corporate structure, and the individual may not know which persons in the company can provide information the plaintiff believes he or she needs.

After a lawsuit is filed, some plaintiffs' lawyers attempt to begin the discovery process with depositions of corporate executives or others at the "apex" of the company's hierarchy. These corporate executives generally have no personal knowledge of the facts surrounding the disputes with individuals, but their depositions are requested anyway. The United States Supreme Court has recognized that this behavior may well be improper. In *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 741 (1975), it acknowledged and disapproved of the common practice of some plaintiffs in securities litigation, who abuse the discovery rules "to simply take up the time of a number of other people, with the right to do so representing an in terrorem

increment of the settlement value, rather than a reasonably founded hope that the process will reveal relevant evidence." See *Armstrong Cork Co. v. Niagara Mohawk Power Corp.*, 16 F.R.D. 389 (S.D.N.Y. 1954) (noting that the trial court should be alert to make sure that the liberal rules of procedure for depositions are used only for the intended purpose and not as a litigation tactic to harass the opponent or waste money).

Guidelines for Deposing Executives

In spite of the concern raised by the Supreme Court more than 25 years ago, the rules of civil procedure in state and

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