

**OPINION NO. 82-088****Syllabus:**

With the exceptions found in 15 U.S.C. §2075(b) and (c), R.C. 3701.82 is preempted by the Consumer Product Safety Commission's regulations found in 16 C.F.R. Part 1212 to the extent that R.C. 3701.82 attempts to regulate the risk of carbon monoxide poisoning associated with the use of unvented gas-fired space heaters or burners.

**To: J. Gordon Peltier, Director, Ohio Department of Commerce, Columbus, Ohio**  
**By: William J. Brown, Attorney General, October 26, 1982**

I have before me your request for my opinion on "whether the federal safety standard of the Consumer Product Safety Commission, requiring oxygen depletion safety shutoff systems for unvented gas-fired space heaters, preempts the provisions of section 3701.82 of the Revised Code."

R.C. 3701.82 reads in part:

(A) A braizer, [sic] salamander, space heater, room heater, furnace, water heater, or other burner or heater using wood, coal, coke, fuel oil, kerosene, gasoline, natural gas, or similar fuel, and tending to give off carbon monoxide or other harmful gases:

(1) When used in living quarters, or in any enclosed building or space in which persons are usually present, shall be used with a flue or vent so designed, installed, and maintained as to vent the products of combustion outdoors; except in storage, factory, or industrial buildings which are provided with sufficient ventilation to avoid the danger of carbon monoxide poisoning;

(2) When used as a portable or temporary burner or heater at a construction site, or in a warehouse, shed, or structure in which persons are temporarily present, shall be vented as provided in division (A)(1) of this section, or used with sufficient ventilation to avoid the danger of carbon monoxide poisoning.

(B) This section does not apply to domestic ranges, laundry stoves, gas logs installed in a fireplace with an adequate flue, or hot plates, unless the same are used as space or room heaters.

(C) No person shall negligently use, or, being the owner, person in charge, or occupant of premises, negligently permit the use of a burner or heater in violation of the standards for venting and ventilation provided in this section. (Emphasis added.)

The federal Consumer Product Safety Commission,<sup>1</sup> pursuant to its powers granted under 15 U.S.C. §§2056 and 2058, has promulgated regulations concerning unvented gas-fired space heaters. 16 C.F.R. §1212.1 reads in part:

(a) Scope. This part requires an oxygen depletion safety shutoff system (ODS) and specified labeling for unvented gas-fired space heaters that are customarily produced or distributed for sale to or for the personal use or enjoyment of consumers in or around a household or residence, a school, in recreation or otherwise. Manufacturers (including importers) are responsible for certifying that their products comply with the requirements of the standard and for maintaining records which describe the testing performed as the basis for such certification.

. . .

(b) Purpose. This standard is intended to reduce the unreasonable risk of injury associated with unvented gas-fired space heater due to carbon monoxide (CO) poisoning. The standard addresses only the risks arising from carbon monoxide and does not deal with any other possible safety aspects of unvented gas-fired space heaters. This ODS Standard does not replace any other voluntary standards or parts of such standards that may apply to other performance or construction characteristics of the heaters for addressing any other potential hazards such as thermal burns or fires.

. . .

The remainder of the Consumer Product Safety Commission's regulations set out requirements for oxygen depletion safety shutoff systems (16 C.F.R. §1212.5), the equipment and procedures used by the Commission to evaluate the shutdown performance of unvented gas-fired space heaters fitted with an ODS (16 C.F.R. §1212.6), testing required for certification and reporting of noncompliance (16 C.F.R. §1212.7), labeling requirements (16 C.F.R. §1212.8), findings of the Commission (16 C.F.R. §1212.9), testing for certification (16 C.F.R. §1212.21), certification of compliance (16 C.F.R. §1212.22), recordkeeping requirements (16 C.F.R. §1212.23), a prohibition against stockpiling (16 C.F.R. §1212.30), and those products excluded from the regulations (16 C.F.R. §1212.4).

From the emphasized language of R.C. 3701.82 set out above, it may readily be discerned that the purpose of R.C. 3701.82(A) is to prevent injury to users of heaters and burners through carbon monoxide poisoning.<sup>2</sup> Likewise, the risk of

<sup>1</sup>The Commission was created as part of the Consumer Product Safety Act, 5 U.S.C. §§5314, 5315, 15 U.S.C. §§2051-2082 (1976 & Supp. IV 1981). See 15 U.S.C. §2053. The purposes of the CPSA are:

- (1) to protect the public against unreasonable risks of injury associated with consumer products;
- (2) to assist consumers in evaluating the comparative safety of consumers products;
- (3) to develop uniform safety standards for consumer products and to minimize conflicting State and local regulations; and
- (4) to promote research and investigation into the causes and prevention of product-related deaths, illnesses, and injuries.

15 U.S.C. §2051(b).

<sup>2</sup>This conclusion is also supported by contrasting R.C. 3701.82(A) with the provisions of R.C. 3701.82(D) through (I). These divisions, which exempt from R.C. 3701.82(A) kerosene-fired heaters equipped with an automatic extinguishing device and approved by a source recognized by the State Fire Marshal, address the risk of potential fire hazards as well as ventilation problems of kerosene-fired heaters.

injury to which the Consumer Product Safety Commission's regulations are addressed is carbon monoxide poisoning. See 16 C.F.R. §1212.1(b) ("[t]his standard is intended to reduce the unreasonable risk of injury associated with unvented gas-fired space heater due to carbon monoxide (CO) poisoning"); 16 C.F.R. §1212.9(b) ("[t]he risk of injury addressed by this standard is from the poisonous gas, carbon monoxide (CO) entering the human respiratory system due to the CO hazard associated with unvented gas-fired space heaters").

15 U.S.C. §2075(a) reads:

Whenever a consumer product safety standard under this chapter 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 prescribes 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.

State law is preempted by federal law under U.S. Const. art. VI. cl. 2 (the Supremacy Clause) whenever the two schemes inevitably conflict so as to make compliance with both federal and state regulations a physical impossibility or whenever Congress has manifested an intent, express or implied, to displace state regulation in a specific area. Northern States Power Company v. State of Minnesota, 447 F.2d 1143 (8th Cir. 1971), *aff'd*, 405 U.S. 1035 (1972); Florida Lime and Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963). In this instance, 15 U.S.C. §2075 unequivocally evidences Congress' intent that federal standards promulgated by the Consumer Product Safety Commission pursuant to its power under the CPSA form the exclusive regulatory standards applicable to a particular risk of injury. This intent is also demonstrated in 15 U.S.C. §2051(b)(3) which states that one of the purposes of the Consumer Product Safety Act is "to develop uniform safety standards for consumer products and to minimize conflicting State and local regulations." The Consumer Product Safety Commission's regulations found in 16 C.F.R. Part 1212 thus stand as the sole source of regulation with regard to the risk of carbon monoxide poisoning associated with unvented gas-fired heaters and burners.<sup>3</sup> This is so even though state regulation would merely supplement federal law or impose a more stringent or pervasive standard.<sup>4</sup> See Campbell v. Hussey, 368 U.S. 297 (1961), *rehearing denied*, 368 U.S. 1005 (1962). See also Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947). It is also of no importance that it is federal regulations rather than federal statutes which are in conflict with state statute. Federal regulations constitute federal law and prevail over state law under the Supremacy Clause. See Free v. Bland, 369 U.S. 663 (1962). See also Standard Oil Company of California v. Johnson, 316 U.S. 481 (1942).

There are two exceptions to the preemption provisions of 15 U.S.C. §2075(a). Section 2075(b) allows the federal government, a state, or a political subdivision of a state to establish or continue in effect safety requirements for consumer products for its own use, even though the same risk of injury is addressed, if the

<sup>3</sup>Those heaters covered by R.C. 3701.82(A) which are not gas-fired may continue to be regulated by the state, since the federal regulations apply only to gas-fired heaters. See 16 C.F.R. §1212.3(h)-(m) and (q) (listing types of gases with which heaters are designed to be used). I note also that those standards found in or passed pursuant to R.C. 3701.82(D) through (I) addressing the dangers of thermal burns or fires of kerosene-fired heaters are not preempted since they do not address the same risk of injury as the federal regulations. See 16 C.F.R. §1212.1(b).

<sup>4</sup>Contrast the exceptions to 15 U.S.C. §2075(a) found in 15 U.S.C. §2075 (b) and (c), discussed in greater detail below, which require state standards to provide a higher degree of protection from carbon monoxide poisoning than that provided by 16 C.F.R. Part 1212.

requirement provides a higher degree of protection from injury than the standard passed pursuant to the Consumer Product Safety Act. Section 2075(c) permits a state or one of its political subdivisions to apply to the Consumer Products Safety Commission for an exemption from 15 U.S.C. §2075(a). The proposed standard or regulation must provide a higher degree of protection than the Commission's standard and not unduly burden interstate commerce.

In conclusion, therefore, it is my opinion, and you are advised, that with the exceptions found in 15 U.S.C. §2075(b) and (c), R.C. 3701.82 is preempted by the Consumer Product Safety Commission's regulations found in 16 C.F.R. Part 1212 to the extent that R.C. 3701.82 attempts to regulate the risk of carbon monoxide poisoning associated with the use of unvented gas-fired space heaters or burners.