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Mattress Tags and Pillow Cases*

Mary Whisner**

A simple question about the origins of the law prohibiting the removal of mattress tags led Ms. Whisner on a whirlwind tour of state and federal law, regulations, and history. In the end she not only found the answer, she also learned a few new lessons about legal research.

¶1 “The crime of tearing the tag off a mattress has become a kind of metaphor for oppressive, trivial, and intrusive government regulation.”¹ Ridicule of this law is widespread throughout the culture. A dance company has choreographed a spoof on the crime.² A motivational speaker stresses “the importance of letting go of unnecessary things in our lives” in a speech titled *What Would Happen If I Did Remove the Mattress Tag?*³ Jay Leno reports that his mother is so afraid of breaking the law that she checks the mattress tags once a month.⁴ And Woody Allen parodies true crime writing in a story about two drifters who break into a home and slash off the mattress tags.⁵

¶2 I like a joke as well as the next person, but one day it occurred to me to look into the law behind the punch line. What law requires mattresses to be labeled? Why? When did the regulation of mattress tags begin? What government has jurisdiction? It turns out that there is a surprisingly rich and complex body of mattress

* © Mary Whisner, 2009.

** Reference Librarian, Marian Gould Gallagher Law Library, University of Washington School of Law, Seattle, Washington. Nancy C. Unger once again helped me smooth some rough spots in a draft.

1. Stuart P. Green, *Why It's a Crime to Tear the Tag off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses*, 46 EMORY L.J. 1533, 1540 n.7 (1997) (citing three movies and reproducing a cartoon imagining a Consumer Product Safety Commission SWAT team surrounding a house with a mattress-tag remover holed up inside). Despite the main title, this article is not all about the crime of tearing off a mattress tag; it's a philosophical discussion of what makes crimes “bad”—culpability, harmfulness, and moral wrongfulness—and how those elements apply (or don't apply) to regulatory crimes.

2. Amber Foote, *Dance the Night Away: Let BYU Groups Thrill You with Their Style and Ease*, DAILY HERALD (Provo, Utah), Sept. 11, 2008 (highlighting that Brigham Young University's Dancers' Company will perform “Do Not Remove Under Penalty of Law”).

3. Barbara Hollenbaugh, *Women Are Focus of Penn State Fayette Event*, PITTSBURGH TRIB.-REV., May 18, 2008 (quoting speaker Nancy Coey).

4. Ernie Santosuosso, *A Symphony of Wit from Unerring Leno*, BOSTON GLOBE, Nov. 21, 1987, at 12.

5. WOODY ALLEN, *Above the Law, Below the Box Springs*, in MERE ANARCHY 133 (2007). “‘Why? Why?’ sobbed Bonnie Beale, a neighbor of the Washburns. ‘So senseless, so cruel. What kind of world are we living in when someone other than the consumer cuts off the mattress tags?’” *Id.* at 135.

tag law. And exploring it can illustrate some important lessons for legal researchers.

Smoking in Bed

¶3 I started my research with federal regulations. Why? Because my hunch was that this was a nationwide law and that the detail of what should be on a mattress tag was the sort of thing that would be in regulations. And, indeed, regulations from the Consumer Product Safety Commission do require mattress tags.

¶4 The tags come as part of the regulatory scheme under the Flammable Fabrics Act.⁶ Part 1632 of title 16 of the *Code of Federal Regulations* is headed “Standard for the Flammability of Mattresses and Mattress Pads (FF 4-72 Amended).” Subpart A⁷ lays out the standard, with considerable detail about how flammability is to be tested. The testers use smoldering cigarettes, placed in specified locations on mattresses (both bare and with two sheets), and watch to see how much of the mattress chars.⁸ Each location tested must pass the test.

¶5 Subpart B is where we find the requirement of a label—and the prohibition against removing it:

(b) *Labeling.* (1) All mattress pads which contain a chemical fire retardant shall be labeled with precautionary instructions to protect the pads from agents or treatments which are known to cause deterioration of their flame resistance. Such labels shall be permanent, prominent, conspicuous, and legible.

(2) If a mattress pad contains a chemical fire retardant, it shall be prominently, conspicuously, and legibly labeled with the letter “T”.

(3) Each mattress or mattress pad subject to the Standard shall bear a permanent, accessible, and legible label containing the month and year of manufacture and the location of the manufacturer. (See § 1632.1(i) of the Amended Standard.)

(4) The information required on labels by this section shall be set forth separately from any other information appearing on such label. Other information, representations, or disclosures, appearing on labels required by this section or elsewhere on the item, shall not interfere with, minimize, detract from, or conflict with the required information.

(5) No person, other than the ultimate consumer, shall remove or mutilate, or cause or participate in the removal or mutilation of, any label required by this section to be affixed to any item.⁹

¶6 So far we have a prohibition on removing the tag, but nothing saying it’s a crime. For that we need to turn to the statute. One section¹⁰ makes it a crime to

6. Pub. L. No. 83-88, 67 Stat. 111 (1953) (codified as amended at 15 U.S.C. §§ 1191–1204 (2006)).

7. 16 C.F.R. §§ 1632.1–.8 (2008).

8. 16 C.F.R. § 1632.6(d)(2) (2008). If you aren’t used to reading regulations, you might be surprised at the precision of the standard: “An individual cigarette test location passes the test if the char length is not more than 1 inch (2.54 cm) in any direction from the nearest point of the cigarette, and the cotton felt is not ignited.”

The regulation includes a bit of common-sense advice, too: “CAUTION: In the interest of safety, the test operator should discontinue the test and record a failure before reaching the 1 inch (2.54 cm) char length if, in his opinion, an obvious ignition has occurred.”

9. 16 C.F.R. § 1632.31 (2008).

10. 15 U.S.C.A. § 1196 (2008): “Violation of section 1192 . . . of this title . . . is punishable by—(1)

willfully violate another section,¹¹ which makes it unlawful to sell products that fail to comply with regulations issued pursuant to yet another section.¹²

¶7 The requirement of labels on mattress pads with chemical fire retardants seems sensible. If consumers are to be protected from the risks of fire, they should know not to treat the pads in a way that will make the retardants ineffective.

¶8 Requiring that mattresses be labeled with the date and place of manufacture seems less clearly tied to fire safety. I can speculate that it's a way to help the government enforce the standard—and hence to improve fire safety indirectly. Obviously the government labs won't test every mattress, but *will* sample from different manufacturers. Maybe having labels on all mattresses would enable an inspector to drop by a mattress retailer and confirm that the mattresses there came from manufacturers and product runs that had been tested.

¶9 Is my imagined justification really the reason the agency requires labels? One way to check is to see whether there was any statement of purpose when the rule was adopted. To follow that trail, I looked at the “source” note at the beginning of Part 1632: “49 FR 39796, Oct. 10, 1984, unless otherwise noted.” I pulled up the *Federal Register* on HeinOnline and looked for section 1632.31. It appears on page 39805. As is typical, the introductory pages, before the text of the final rule, discuss the rule and the comments the agency received after publishing the proposed rule. In this case, all of the discussion¹³ is about testing procedures, because the agency was reviewing and amending those. Nothing is said about the label requirements. It does tell me that the standard was originally “issued in 1972 to protect the public from risks of death, personal injury, and property damage associated with fires which have resulted from ignition of mattresses by cigarettes.”¹⁴ So my next step was to see if that original rule-making said anything about the labels.

¶10 I tried the index to the *Federal Register* for 1972 (volume 37) and didn't find anything under “Mattresses.” “Flammable Fabrics” gave me a cross-reference to

imprisonment for not more than 5 years for a knowing and willful violation of that section; (2) a fine determined under section 3571 of Title 18; or (3) both.”

11. 15 U.S.C. § 1192(a) (2006) (emphasis added):

Nonconforming products

The manufacture for sale, the sale, or the offering for sale, in commerce, or the importation into the United States, or the introduction, delivery for introduction, transportation or causing to be transported, in commerce, or the sale or delivery after a sale or shipment in commerce, of any product, fabric, or related material *which fails to conform to an applicable standard or regulation issued or amended under the provisions of section 1193 of this title*, shall be unlawful and shall be an unfair method of competition and an unfair and deceptive act or practice in commerce under the Federal Trade Commission Act.

12. 15 U.S.C.A. § 1193(a) (2008) (emphasis added):

Proceedings by Commission for determination

Whenever the Commission finds on the basis of the investigations or research conducted pursuant to section 1201 of this title that a new or amended flammability standard or other regulation, *including labeling*, for a fabric, related material, or product may be needed to protect the public against unreasonable risk of the occurrence of fire leading to death or personal injury, or significant property damage, it shall institute *proceedings for the determination of an appropriate flammability standard (including conditions and manner of testing) or other regulation or amendment thereto* for such fabric, related material, or product.

13. 49 Fed. Reg. 39,790–96 (Oct. 10, 1984).

14. *Id.* at 39,790.

“Fire Protection.” There I found another cross-reference: “Mattresses. *See* Commerce Department.” And at last, that heading had a subheading for Flammability Standards, and a sub-subheading for Mattresses, pointing to page 11363. Lesson here: be persistent with indexes.

¶11 The reference turned out to be to the flammability standard,¹⁵ but didn’t include a label requirement for mattresses (although it did for mattress pads¹⁶). Interestingly for researchers, that standard was not codified in the *Code of Federal Regulations*. It’s good to remember that not everything that seems like a regulation shows up in the C.F.R. It sometimes pays to search the *Federal Register* as well.

¶12 The 1972 flammability standard was not the first appearance of the issue in the *Federal Register*. In 1970 the Department of Commerce (over the name of Myron Tribus, Assistant Secretary for Science and Technology) published a finding that

a flammability standard or standards, or other regulations, *including labeling*, may be needed for mattresses, used either alone or as a component of a bedding assembly, and fabrics or related materials intended to be used, or which may reasonably be expected to be used, in these products, to protect the public against unreasonable risk of the occurrence of fire leading to death or personal injury, or significant property damage.¹⁷

The finding was supported by some sobering statistics—for instance, that Detroit had 159 hotel fires in 1966, that 90 were bedding fires, and that they led to 35 deaths. There were also controlled experiments showing that mattress fires could lead to deadly hazards: “toxic fumes, nonviable atmospheres (reduced oxygen or suffocating concentrations of carbon dioxide), smoke, and excessive temperatures.” The only experiments that did not produce lethal conditions were those using bedding and mattresses that had been treated to be flame retardant.

¶13 It was now sounding kind of serious: not as if the agency was preparing to create material for a generation of jokes.

¶14 Let’s pause to remember where we are in our quest for the origin of the label law. I found the labeling requirement in 1984, but there was no comment about it. The 1984 comments said that the flammability standard for mattresses was originally issued in 1972. I found the 1972 standard, but it said nothing about labels. So the label requirement must have come in sometime after 1972.

¶15 A little more looking turned up a proposal:

Notice is given that the Consumer Product Safety Commission . . . proposes to add a new section to 16 CFR, part 302 setting forth a regulation necessary and proper for the administration and enforcement of the Flammability Standard for Mattresses. The proposed regulation includes specific provisions regarding labeling, record-keeping, and guaranty testing.¹⁸

15. Flammability Standard for Mattresses (Doc FF 4-72), 37 Fed. Reg. 11,363 (June 7, 1972). That standard was promulgated by the Secretary of Commerce. Later that year, section 30(b) of the Consumer Product Safety Act, Pub. L. No. 92-573, § 30(b), 86 Stat. 1207, 1231 (1972) (codified at 15 U.S.C. § 2079(b) (2006)), transferred enforcement authority for the Flammable Fabrics Act to the Consumer Products Safety Commission.

16. 37 Fed. Reg. at 11,366 § .5(c).

17. 35 Fed. Reg. 8,944 (June 10, 1970) (emphasis added).

18. 38 Fed. Reg. 15,373 (June 11, 1973).

The first two labeling provisions—the ones about fire retardants on mattress pads—are (as far as I could tell) the same as the current ones, but the label requirements for mattresses were much more detailed:

[§ 302.20 (b)] (3) Every manufacturer, importer, or other person initially introducing mattresses subject to the Standard into commerce shall assign to each mattress a unit identification (number, letter, or date) sufficient to identify and relate to the production unit of which the mattress is a part. Such unit identification shall be designated in such a way as to indicate that it is a production unit identification under the Flammability Standard for Mattresses. Each mattress subject to the Standard shall bear a permanent, accessible, and legible label containing the appropriate production unit identification relating to such mattress.¹⁹

I think that the detail about the tag contents supports my guess that the purpose of the tags is to help enforcement.

¶16 The final regulation²⁰ includes a summary and discussion of comments the agency received. “The most extensive comments were submitted by the National Association of Bedding Manufacturers (NABM).”²¹ One thing the trade group wanted was a clarification “that any labeling information required by the regulation and the Standard . . . can be on the same label as labeling information which might be required by state law.”²² The agency’s response was that it had not intended to prohibit putting state and federal information on the same label—but some state laws might not allow that. The agency changed a sentence of the regulation to say “Other [instead of “non-required” as in the proposed regulation] information, representations, or disclosures, appearing on labels required by this section or elsewhere on the item, shall not interfere with, minimize, detract from, or conflict with the required information.”²³ The rest of the comments concerned record-keeping requirements.²⁴ So there isn’t a direct answer about why a label requirement was added—but I still think my guess is good.

¶17 A lesson for researchers from this exercise is that the source note in the *Code of Federal Regulations* does *not* list every entry in the *Federal Register* that affects a regulation. In fact, the Office of the Federal Register tries to streamline source notes. When it does so, it adds a note referring researchers to the List of Sections Affected in the finding aids section of print volumes and on GPO Access.²⁵

19. *Id.* The simpler requirement in force now—date and place of manufacture—was introduced in 1984, effective April 10, 1985. 49 Fed. Reg. 39,805 (Oct. 10, 1984). I did not find any discussion in the comments about why the change was made.

20. 38 Fed. Reg. 33,069 (Nov. 30, 1973).

21. *Id.*

22. *Id.*

23. *Id.*

24. The label language now in 16 C.F.R. § 16.32.31(b)(3) was added in 1984. 49 Fed. Reg. 39,796 (Oct. 10, 1984) (effective April 10, 1985). No comments addressed the reason for the change.

25. Ann Worley, *A Letter from the CFR Unit on Reducing the Length of CFR Source Notes*, FED. REG. BULL., Oct. 6, 2008, <http://www.archives.gov/federal-register/write/newsletter>.

Tag, You're It

¶18 What about the comment from the National Association of Bedding Manufacturers about labels required under *state* law? During most of the twentieth century, when the federal government had yet to test mattresses or require that they have tags, the states were hardly sleeping on the job. Beginning in 1913 states began enacting laws requiring those who manufactured or renovated mattresses to label them, indicating whether the materials were new or used.²⁶ Today most states have statutes regulating mattress manufacture, renovation, or sales and requiring mattresses to bear tags until they are sold to the consumer.²⁷ New York's legislature summarized the purposes these statutes serve:

New York state's concern for safeguarding the health and economic well-being of all its inhabitants properly extends to articles of upholstered furniture and bedding. The consumer is entitled to buy and use upholstered furniture and bedding secure in the knowledge that the articles purchased are free of pathogenic organisms, vermin and filth and that the nature of their contents is as represented by the seller. For its part, the industry is entitled to the state's protection in the maintenance of truth in the description of its products and in the elimination of deception and fraud. Reasonable, realistic and fair requirements provide an atmosphere in which an industry can operate prosperously and in a way that reflects credit upon it, and at the same time render a needed service to the ultimate consumer. It is in this spirit, and to protect the health and well-being of our citizens and promote the public welfare that the following provisions are enacted in exercise of the state's regulatory powers.²⁸

26. Minnesota's statute appears to have been the first. 1913 Minn. Laws 719.

27. I count thirty states plus the District of Columbia: ARIZ. REV. STAT. ANN. §§ 36-796 to 796.08 (2003); ARK. CODE ANN. §§ 20-27-202 to -210 (2005); CAL. BUS. & PROF. CODE §§ 19070-19074 (West 2008); COLO. REV. STAT. ANN. §§ 25-5-301 to -317 (West 2008); CONN. GEN. STAT. ANN. §§ 21a-231 to -236 (West 2006); DEL. CODE ANN. tit. 16, §§ 2101-2114 (2003); D.C. CODE §§ 8-501 to -508 (2008); FLA. STAT. ANN. § 501.145 (West 2006) (label required only for bedding with "any previously used materials"); HAW. REV. STAT. ANN. §§ 332-1 to -7 (LexisNexis 2008); 410 ILL. COMP. STAT. ANN. §§ 68/1-68/999 (West 2005); IND. CODE ANN. §§ 16-41-32-1 to -31 (LexisNexis 1993 & Supp. 2008); KY. REV. STAT. ANN. §§ 214.290-.310 (West 2006); MASS. ANN. LAWS ch. 94, §§ 272-276 (LexisNexis 2000); MINN. STAT. ANN. §§ 325E.25-.34 (West 2004); MO. ANN. STAT. §§ 421.005-.038 (West Supp. 2008); NEV. REV. STAT. §§ 444.010-.030 (2007); N.H. REV. STAT. ANN. §§ 339:56-68 (1995 & Supp. 2008); N.J. STAT. ANN. §§ 26:10-1 to -18 (West 2007); N.Y. GEN. BUS. LAW §§ 383 to 389-c (McKinney Supp. 2008); N.C. GEN. STAT. §§ 130A-261 to -273 (2007); OHIO REV. CODE ANN. §§ 3713.01-.99 (LexisNexis 2005); OKLA. STAT. ANN. tit. 63, §§ 1-1001.1 to .8 (West 2004); 35 PA. CONS. STAT. ANN. §§ 972-984 (West 2003); R.I. GEN. LAWS §§ 23-26-1 to -31 (1997 & Supp. 2008); TENN. CODE ANN. §§ 68-15-201 to -208 (2006 & Supp. 2008); TEX. HEALTH & SAFETY CODE ANN. §§ 345.001-.137 (Vernon 2001 & Supp. 2008); UTAH CODE ANN. §§ 4-10-1 to -11 (West 2004 & Supp. 2008); VT. STAT. ANN. tit. 9, §§ 2941-2943 (2006); VA. CODE ANN. §§ 32.1-212 to -226 (2004 & Supp. 2008); W. VA. CODE ANN. §§ 47-1A-1 to -18 (LexisNexis 2006); WIS. STAT. ANN. § 100.2095 (West 2004).

An aside about searching: I did not find all of these statutes when I searched online (mattress /p label! or tag). For instance, that search misses an applicable California statutory section that states "[i]mporters, wholesalers, and retailers *shall not sell or resell* in California *unlabeled* upholstered furniture or *bedding*." CAL. BUS. & PROF. CODE § 19072.5 (West 2008) (emphasis added). California's statute is lost in this search because it uses "bedding" instead of "mattress" and "shall not sell or resell . . . unlabeled" instead of "labeled." Looking in print indexes under Bedding, Beds and Bedding, and Mattresses was more effective. I didn't realize how valuable it would be: I at first went to the books just to fill in the dates for the citations I had found online.

28. 1964 N.Y. Sess. Laws 685-86 (McKinney) (formerly codified at N.Y. GEN. BUS. LAW § 383 (McKinney 1996), *repealed by* 1996 N.Y. Sess. Laws 569-70 (McKinney)).

¶19 Requiring a tag listing a mattress's contents helps consumers know what they're buying. From the outside, you can't tell what a mattress is stuffed with, but you might want to know if it's cotton batting or old rags. You'd especially want to know if it is made of used materials and, if so, that they have been sterilized.

¶20 Today I think a lot of us take mattress safety for granted, but there must have been a reason legislatures went to the trouble to legislate. An enforcement official said that New York's law "grew out of the protests of workmen in various mattress factories who saw the leavings of their lunches being swept into the pile of prospective stuffing."²⁹ And it wasn't just bread crusts and apple cores: "Before the division of bedding was organized by the State Department of Labor in 1933, an unwary housewife who purchased a mattress in the belief that it was filled with horse hair or cotton felt was likely to find herself tossing uncomfortably on old rags and newspapers."³⁰ Eww.

¶21 There can be a pretty high "eww, yuck!" factor in these cases—and not just in the distant past. For instance, in April 2008, Dateline did a hidden camera investigation of companies that recondition used mattresses, often picked up from street corners.³¹ When covers were removed, the television crew found "cigarette burns, dust, huge unsightly stains," and layers of old mattress pads. A lab found that "[a]ll of the samples from reconditioned mattresses were contaminated, including those from mattresses made in California, which have strict laws and enforcement. The testing revealed traces of urine, fecal matter, at least seven different fungi, most of them potentially harmful to children, the elderly, anyone with a compromised immune system."³² As I said: Eww. Yuck.

¶22 New York's statement also points out advantages for manufacturers and retailers. If you're an honest mattress maker or dealer and you're selling mattresses with high-quality contents, you don't want to compete with someone whose product has cheap stuffing and who lies about it.

¶23 This, too, remains a current issue. Tennessee had repealed its early mattress labeling law, but in 2003 business asked for another law to protect Tennessee businesses from out-of-state companies that were marketing used mattresses as new:

"In 1983 Tennessee repealed every law it had dealing with the resale of used mattresses," said Horace Bass, owner of Capitol City Mattress Co., who pushed for the new tag law. "The northern states had very stringent laws about things you had to do to sell used mattresses, to the point it was not economically feasible. So they started selling them down here as seconds or factory overruns or close-out models, when in fact most of them had been sent back after 'comfort trials.' In effect, they were used."

29. *1933 Bedding Law Still Aids Buyers*, N.Y. TIMES, July 2, 1954, at 16. The official reported that the most common misrepresentation in 1954 was labeling products as down when in fact they were feathers. More on that later. For more about enforcement, see Rita Rief, *Upholstery Tag Serves as Protection for Buyer*, N.Y. TIMES, May 26, 1962, at 16; John Howard, *Lab Makes Furnishings Live up to Labels*, L.A. TIMES, March 4, 1984, at 3.

30. Arthur Gelb, *State Wide Awake on Bedding Frauds*, N.Y. TIMES, Feb. 25, 1949, at 8.

31. *Dateline NBC: Profile: Mattresses Parts 1 and 2; Hidden Camera Investigation into Rebuilt Mattresses and Bedbug Infestation* (NBC television broadcast Apr. 20, 2008) (transcript available at 2008 WLNR 7426378).

32. *Id.*

This practice was hurting the retail sales of Tennessee manufacturers, Bass said. “There was one guy opening dealerships for them,” he said.

“All I wanted to do was get a law on the books that says before you can sell a used mattress in Tennessee, it has to have a tag on it indicating that’s what it is,” Bass said.

“I have no problem with people selling used mattresses. But people need to know that’s what they’re buying,” he said.³³

¶24 Our federal system has many advantages,³⁴ but wouldn’t the welter of state laws be daunting for a company that wants to market products nationwide? Here we meet the Association of Bedding and Furniture Law Officials, founded in 1936 (the organization added “International” to its name in 2003, so it is now known as IABFLO). Its stated purpose is to promote “uniformity in laws, terminology, test methods, and enforcement procedures within the various state programs.”³⁵ Its long-range plan “is to have one set of laws that would govern the bedding and furniture industry worldwide with one law label that would be acceptable to all.”³⁶ Its members are government officials, but it also has many associate members—manufacturers, retailers, and others.³⁷ Its web site shows uniform labels and links to different states’ licensing bodies.

¶25 Manufacturers can also turn to businesses for assistance with their labeling needs. American Law Label, Inc. makes millions of mattress tags a year.³⁸ Three companies that are associate members of IABFLO help companies with the registration process.³⁹

Pillow Fights

¶26 Of course mattresses aren’t the only bedding with “do not remove” tags. In the 1950s, the issue was truth in labeling. The Federal Trade Commission brought eleven proceedings against the makers of down and feather pillows—most of the industry⁴⁰—for deceptive trade practices. The charges were about inaccurate labels—for instance, saying a pillow was stuffed with 100% goose down when it had chicken feathers as well. You can learn a surprising amount about pillow

33. Tom Sharp, *New Laws Include Mattress Tag Rules*, COM. APPEAL (Memphis), Jan. 1, 2004, at B2. See also *‘Do Not Remove’ Mattress-Tag Law Could Reawaken*, COM. APPEAL (Memphis), Mar. 6, 2003, at A1.

34. “It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.” *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

35. IABFLO, About Us, http://abflo.info/about_us.htm (last visited Jan. 25, 2009).

36. *Id.*

37. IABFLO, Members, <http://abflo.info/members/index.htm> (last visited Jan. 25, 2009).

38. Steve Rubenstein, *Mattress Tags Not for Gags: Manufacturers Sew Down the Law, Churn out 15 Million a Year*, S.F. CHRON., Mar. 19, 1994, at A20.

39. These companies are Global Registration Services, Inc., <http://www.globalrsinc.com/index.php> (last visited Jan. 30, 2009) (stating that the company is “from the owners of . . . American Law Label, Inc.”); Law Label Services, <http://lawlabel.com> (last visited Jan. 30, 2009); and Legal Label Inc., <http://www.legallabel.com> (last visited Jan. 30, 2009).

40. *Lazar v. FTC*, 240 F.2d 176, 177 (7th Cir. 1957).

manufacturing—at least mid-twentieth-century technology—by reading appellate pillow cases.⁴¹

¶27 Because of the way feathers and down were sorted, the industry did not really make pillows that were 100% down. Everyone accepted that some light feathers would be in the mix. So the FTC's first rule said that pillows that were sampled and found to be 90% down would meet the standard.⁴² But the industry found that to be too restrictive a limit, so in 1949 and 1950, "there was a joint conference of the matter participated in by representatives of the Commission and the feather pillow industry," and a new rule was promulgated allowing a tolerance of 15%.⁴³ That history helped persuade the Third Circuit to reject a pillow company's claim that compliance with the standard was impossible. "[A] set of rules worked out in conference between a government agency and an industry can be taken as a guide if, to those responsible for enforcement, they are reasonable and fair."⁴⁴

¶28 The FTC proceeding had included testimony about the competition in the pillow industry. A manufacturer trying to put as much down as possible into a pillow it labeled "100% down" could not compete with one who aimed only at the 85% mark and therefore often fell short. The court agreed that the FTC had a legitimate reason to enforce the rule against a company whose pillows were even a little below the 85% mark. The court also cited testimony that consumer purchasers of pillows did rely on labels (after physically inspecting the pillows).⁴⁵

¶29 Label controversies weren't limited to those initiated by the government. There were also trademark cases between manufacturers, for instance, when Du Pont took action against a pillow manufacturer for its use of "Dacron."⁴⁶ As the New York legislature had proclaimed, accurate contents labels are important to industry as well as to consumers.⁴⁷

Still a Burning Issue

¶30 The federal flammability standard might have laid the issue of mattress fires to rest—but it didn't. One analyst concluded that the standard brought about a statistically insignificant increase in consumer safety, led to higher prices, and had the effect of benefiting large manufacturers over small ones and affluent consumers over poor.⁴⁸ Safety advocates, on the other hand, thought that the standard did not go far enough.

41. See *id.*; *Burton-Dixie Corp. v. FTC*, 240 F.2d 166 (7th Cir. 1957); *N. Feather Works, Inc. v. FTC*, 234 F.2d 335 (3d Cir. 1956).

42. See *N. Feather Works*, 234 F.2d at 337 (citing 16 C.F.R. §§ 78.4, 78.5 (1949)).

43. *Id.* (citing 16 C.F.R. § 200.3(c)(1) (Supp. 1956)).

44. *Id.* at 338.

45. *Id.*

46. *E. I. Du Pont de Nemours & Co. v. Purofied Down Prods. Corp.*, 176 F. Supp. 688 (S.D.N.Y. 1959). See also *Monsanto Chem. Co. v. Perfect Fit Prods. Mfg. Co., Inc.*, 349 F.2d 389 (2d Cir. 1965) (trademark dispute over use of "Acrilan" in mattress pads); *Star Bedding Co. v. Stix, Baer & Fuller Co.*, 133 F. Supp. 704 (E.D. Mo. 1955) (use of fabric with star pattern found not to infringe plaintiff's star label trademark).

47. See *supra* note 28.

48. Peter Linneman, *The Effects of Consumer Safety Standards: The 1973 Mattress Flammability Standard*, 23 J.L. & ECON. 461 (1980).

¶31 The standard tested flammability when a mattress was exposed to a smoldering cigarette. But mattresses can catch fire other ways—from a candle or matches, or from bedding ignited by a cigarette. Mattresses still seemed to pose hazards. The increased use of polyurethane in mattresses and upholstered furniture was of special concern.⁴⁹

¶32 In 2006, the Consumer Product Safety Commission adopted a “Standard for the Flammability (Open Flame) of Mattress Sets.”⁵⁰ The agency summarized the standard’s potential benefit:

Mattresses and mattress and foundation sets (“mattress sets”) that comply with the requirements will generate a smaller size fire with a slower growth rate, thus reducing the possibility of flashover occurring. These improved mattresses should result in significant reductions in deaths and injuries associated with the risk of mattress fires. The Commission estimates that the standard could limit the size of mattress fires to the extent that 240 to 270 deaths and 1,150 to 1,330 injuries could potentially be eliminated annually. As discussed in the preamble, this means that the standard could yield lifetime net benefits of \$23 to \$50 per mattress or aggregate lifetime net benefits for all mattresses produced in the first year of the standard of \$514 million to \$1,132 million.⁵¹

¶33 Who can argue with saving lives? Mark Strobel, who makes “toxin-free” mattresses, does. He says that the chemicals used to make mattresses flame-retardant are themselves hazardous.⁵² Strobel’s company, Strobel Technologies, and two other manufacturers sponsor People for Clean Beds,⁵³ opposing the standard and encouraging consumers to use the exception that allows people to buy mattresses that don’t meet the standard if they have a prescription.⁵⁴

¶34 There is disagreement about the hazards of standard mattresses. A recent *New York Times* article quoted a number of advocates for chemical-free mattresses and also quoted a professor of toxicology saying that the chemicals in mattresses probably have minimal health effects.⁵⁵ Consumers who want all-natural mattresses often cannot tell what they’re getting. For instance, one manufacturer has a mattress that uses a foam made in part from castor bean oil—but the castor bean oil is only 12% of the mix and 88% of the oil used is petroleum.⁵⁶ “No government agency regulates the labeling of mattresses as ‘organic’ or ‘natural,’ and trade groups like the International Sleep Products Association and the Specialty Sleep Association

49. See, e.g., Larry Green, *25 Deaths in Missouri Fire Laid to Urethane Hazard*, L.A. TIMES, April 4, 1979, at B5; Robert Gillette, *Report Urges Cut in Urethane’s Use*, L.A. TIMES, Nov. 11, 1979, at A1.

50. 71 Fed. Reg. 13,472, 13,498 (Mar. 15, 2006) (codified at 16 C.F.R. pt. 1633).

51. *Id.* at 13,472.

52. Christopher D. Kirkpatrick, *New Mattress Rules May Save Lives, Pad Costs: Federal Regulation for Increased Fire Resistance Begins Today*, CHARLOTTE OBSERVER, July 1, 2007, at 1D.

53. <http://www.peopleforcleanbeds.org> (last visited Jan. 25, 2009).

54. 16 C.F.R. § 1633.13(c) (2008). Mattresses manufactured under this exception must have prominent warning labels: “WARNING: This mattress set may be subject to a large fire if exposed to an open flame. It was manufactured in accordance with a physician’s prescription and has not been tested under the Federal Standard for the Flammability (Open-Flame) of Mattress Sets (16 CFR part 1633).” *Id.* These labels may not be removed—even by the consumer—“for the useful life of the mattress set.” *Id.*

55. Julie Scelfo, *The Stuffing Dreams Are Made Of?*, N.Y. TIMES, Jan. 15, 2009, at D1.

56. *Id.*

offer their members no guidelines for using the terms.”⁵⁷ Even in a culture that mocks mattress-tag law, some people wish for more of it.

¶35 The last round of rulemaking drew criticism from Congress as well as from anti-toxin advocates—not because of the standard itself but because of a statement the agency made about its effect. In the preamble to the regulation, the agency said that it would “preempt inconsistent state standards and requirements, whether in the form of positive enactments or court created requirements.”⁵⁸ That is, if a state had a different standard, mattress manufacturers would only have to comply with the federal one. And if someone tried to bring a civil action—perhaps under a common law tort theory—the state action would also be precluded. Two congressional committees criticized that statement, attacking both the agency’s power to affect preemption standards and the way it attempted to do so.⁵⁹

¶36 Reflecting this concern, the Consumer Product Safety Improvement Act of 2008⁶⁰ explicitly cabins the agency’s authority to affect preemption:

(a) RULE WITH REGARD TO PREEMPTION.—The provisions of sections 25 and 26 of the Consumer Product Safety Act (15 U.S.C. 2074 and 2075, respectively), section 18 of the Federal Hazardous Substances Act (15 U.S.C. 1261 note), section 16 of the Flammable Fabrics Act (15 U.S.C. 1203), and section 7 of the Poison Packaging Prevention Act of 1970 (15 U.S.C. 1476) establishing the extent to which those Acts preempt, limit, or otherwise affect any other Federal, State, or local law, any rule, procedure, or regulation, or any cause of action under State or local law may not be expanded or contracted in scope, or limited, modified or extended in application, by any rule or regulation thereunder, or by reference in any preamble, statement of policy, executive branch statements, or other matter associated with the publication of any such rule or regulation. In accordance with the provisions of those Acts, the Commission may not construe any such Act as preempting any cause of action under State or local common law or State statutory law regarding damage claims.⁶¹

¶37 Thus mattress tag law illustrates the complexity of our legal system. We’ve seen federal regulation of mattress tags and state legislation in the area (there are

57. *Id.*

58. Standard for the Flammability of Mattress Sets, 71 Fed. Reg. at 13,496.

59. In 2006, the CPSC included language in the preamble of its mattress flammability rule that would foreclose common law tort claims applied to mattress fire safety. The preemption language was not included in the draft rule that was released to the public for the notice and comment period, giving constituents no opportunity to comment on this significant change. In addition, the Commission did not fulfill the requirements of [Exec. Order No. 13,132, 3 C.F.R. 206 (2000), *reprinted in* 5 U.S.C. § 601 (2006)] that mandated consultation with local and State governments before enacting a rule that would substantially impact them, such as extinguishing common law actions in tort as part of a rule regulating product safety.

S. REP. NO. 110-265, at 5 (2008) (Senate Committee on Commerce, Science, and Transportation, report on S. 2045, Consumer Product Safety Commission Reform Act of 2007). “The Committee does not believe it is proper for the CPSC to issue advisory opinions (in regulatory preambles or otherwise) that attempt to alter the scope of [state common law actions and standards].” H.R. REP. NO. 110-501, at 43 (2007) (House Committee on Energy and Commerce, report on H.R. 4040, Consumer Product Safety Modernization Act). The House bill was enacted.

60. Pub. L. No. 110-314, 122 Stat. 3016.

61. *Id.* § 231, 122 Stat. at 3070 (to be codified at 15 U.S.C. § 2051 note). In 2006 Louisiana enacted a statute requiring mattresses to be resistant to open flames, and *invited* preemption by providing that the provision would be “null and void” as soon as there was a federal statute, rule, or regulation requiring that mattresses and box springs be flame resistant. LA. REV. STAT. ANN. § 40:1614(D) (2008).

state regulations, too, though I haven't discussed them). Now we see the interplay between federal and state law, including state common law. We see the legislative branch exercising its power to constrain an independent agency. Even something as simple as mattress tags can require a lot of legal and research acumen to sort out. And I haven't even touched on international aspects of the issue.⁶²

Some Thoughts to Sleep on

¶38 I'll admit that I became oddly fascinated by this quest; it was fun to see what I could find. But beyond entertaining me, this investigation into a mattress tag law can serve to illustrate many lessons for legal researchers, both basic and arcane. In roughly the order they came up:

- Regulations are important. Agencies are active in a wide variety of areas of economic life, and many industries—such as the bedding industry—are bound by detailed regulations.
- If you want to trace the origin of a regulation, begin with the source note in the C.F.R.
- Don't stop with the source note, because it doesn't list every change to a regulation. Other tools you can use: volume indexes, full-text searching, and the List of Sections Affected.
- The introductory material to a final regulation summarizes comments on the rule as it was proposed and explains the agency's position.
- Even when you have found federal law on a subject, don't assume there is no state law.⁶³
- A statute or regulation can serve several purposes—e.g., protecting consumers from fraud, protecting public health, and protecting honest merchants from unfair competition.
- State laws can vary in scope. (I didn't discuss this in any detail, but they do. Just scanning the citations in note 27 gives some evidence, since some states' laws on mattress tags, sanitation, etc., comprise only one section and others go on for eight or ten sections.)
- Reading news stories can provide helpful context for statutes and regulatory enforcement.
- More than one agency can have an interest in an industry. For instance, the Consumer Product Safety Commission is concerned about mattress safety, and the Federal Trade Commission was concerned about deceptive trade practices in pillow labels.
- Private parties can also be legal actors—for instance, the companies that used the courts to enforce their trademarks.

62. See Joshua A. Escoto, *Technical Barriers to Trade Under NAFTA: Harmonizing Textile Labeling*, 7 ANN. SURV. INT'L & COMP. L. 63 (2001) (discussing textile labeling regimes in Canada, Mexico, and the United States).

63. Stuart Green, in the longest academic discussion of mattress tags I found, only discussed the Consumer Product Safety Commission's rule. Green, *supra* note 1, at 1540 n.7, 1610 n.264, 1610–12.

- Industry groups can have an impact on regulations—as when the pillow industry worked with the FTC to arrive at a standard that was manageable, and when the bedding industry commented on proposed flammability standards.
- Regulations—and law generally—can have complex or ambiguous effects. The policy-makers at the Consumer Product Safety Commission think that their flammability standards have saved lives. But consider the scholar who found that the mattress flammability standard had statistically insignificant safety effects or the mattress maker who believes that fire retardant chemicals will do far more harm to people through exposure than they will do good by preventing fire damage.
- Congress may exercise oversight and respond to agency actions.
- The interplay between federal and state law is not always clear. When there are laws from both federal and state governments, it pays to research preemption.

That's a lot to pick up from what began as a mild curiosity about a clichéd joke. So maybe the last lesson in my list is this:

- If you wonder about how a source works or where a law comes from, pursue that curiosity. You can learn a lot.

