

A Game-Time Decision: NY Federal Court Says Phthalates Ban Applies to Products in Inventory and on Store Shelves

As the clock ticks toward the looming February 10 deadline for new restrictions under the Consumer Product Safety Improvement Act (“CPSIA”) on lead content and phthalates in children’s products and children’s toys, a federal court has just weighed in. Yesterday, the U.S. District Court for the Southern District of New York issued a memorandum opinion and order concluding that “the phthalate prohibitions unambiguously apply to existing inventory, and that the Commission’s opinion to the contrary must be set aside.”¹ This development adds another layer of complexity as manufacturers, importers, distributors, and retailers of children’s products are scrambling first to understand the requirements and then to comply with them.

Section 108 of the CPSIA imposes new limits for certain phthalates in children’s toys and child care articles. Further, the CPSIA provides for an interim prohibition on certain additional phthalates in child care articles and children’s toys that can be placed in a child’s mouth. The CPSIA dictates that these restrictions become effective February 10, 2009.

On November 17, 2008, the CPSC General Counsel responded by letter to an inquiry regarding the retroac-

tive application of the CPSIA’s requirements for phthalates.² The General Counsel noted that Congress treated phthalates differently from lead and, based on that difference in treatment and existing case law, determined that the requirements for phthalates would apply only to those products manufactured *after* the effective date of the new standard (February 10, 2009) and not to products already in inventory.

In response to that advisory opinion, the National Resources Defense Council and Public Citizen filed a complaint against the CPSC seeking a declaration that the opinion violates the CPSIA and the Administrative Procedure Act (“APA”). In the decision issued yesterday in that action, the court first looked at the particular statutory language and determined that the plain text of the phthalates provision provides that no covered products may be sold as of February 10. The court then considered the statutory context and determined that Section 108 does not create an exception for existing inventory. Although it determined that the language and structure of the statutes are dispositive, the court went further and looked at the statutory purpose and legislative history, noting that, “if retailers are allowed to continue to sell existing inventory, consumers will have no way to distinguish which products comply with the phthalate prohibitions and which do not.”³ The court also concluded that the General Counsel’s advisory opinion is not entitled to deference and dismissed arguments that the phthalate prohibitions are retroactive. For

¹ *Nat’l Res. Def. Council, Inc. v. U.S. Consumer Prod. Safety Comm’n*, No. 08 Civ. 10507, slip op. at 36 (S.D.N.Y. Feb. 5, 2009).

² See Letter from Cheryl A. Falvey, General Counsel, Consumer Product Safety Commission, to Georgia C. Ravitz, Esq., Scott A. Cohn, Esq., Arent Fox LLP (Nov. 17, 2008) <http://www.cpsc.gov/ABOUT/Cpsia/cpsia.html>.

³ *Nat’l Res. Def. Council, Inc.*, No. 08 Civ. 10507, slip op. at 28.

these reasons, the court granted the plaintiffs' motion for summary judgment, denied the defendant's cross motion for summary judgment, declared that the Commission has violated the CPSIA and the APA, and ordered that the General Counsel's advisory opinion be set aside.

A CPSC spokesman has reportedly indicated that the Commission does not intend to appeal the decision. Thus, unless the road for phthalates encounters yet another turn, beginning Tuesday, it will be unlawful to sell *any* children's toys or child care articles that do not satisfy the new phthalate requirements, regardless of when the products were manufactured.

KELLEY DRYE & WARREN LLP

Kelley Drye & Warren's Consumer Product Safety Practice Group is experienced in providing advice on the difficult issues of how and when potentially hazardous consumer products must be reported to the CPSC. If product recalls are necessary, we work with our clients and CPSC staff to quickly develop and implement cost-effective communications programs that satisfy product liability concerns and minimize potential penalties. When the CPSC threatens or brings enforcement actions, we advise our clients on appropriate strategies.

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