

NEWS ALERT February 9, 2009
U.S. District Court Rules Phthalates Ban Applies to Children's Products in Inventory

On February 5, 2009, United States District Judge Paul G. Gardephe issued a decision that will significantly affect manufacturers and retailers of children's toys and/or child care articles on February 10, 2009.

Congress enacted the Consumer Product Safety Improvement Act of 2008 (the "CPSIA") on August 14, 2008 which amended the Consumer Product Safety Act of 1972. The CPSIA states that it is unlawful to "offer for sale . . . [or] distribute in commerce . . . any children's toy or child care article that contains concentrations of more than 0.1 percent of" certain chemicals known as phthalates "[b]eginning on" February 10, 2009. 15 U.S.C. §§ 2057c(a), (b)(1). The prohibited phthalates include DEHP, DBP, BBP, DINP, DIDP, and DnOP. *See id.* Phthalates are a group of chemicals (oily, colorless liquids) that are used, among other things, to make vinyl and other plastics soft and flexible and according to scientific studies, phthalates can cause a variety of toxic effects.

The statute defines a "children's toy" as a product intended for a child 12 years old or younger for use when playing. *See* U.S.C. § 2052(a)(2). In addition, "child care articles" are defined by statute to include products that a child 3 years of age and younger would use for sleeping (i.e. mattress), feeding (i.e. sippy cup), sucking or teething (i.e. pacifier/teether). *See* U.S.C. § 2057c(e)(1)(C).

On November 17, 2008, an advisory opinion was issued in response to a letter from the law firm Arent Fox LLP, on behalf of several anonymous wholesale and retail entities, who requested that the Consumer Product Safety Commission (the "Commission") reconsider an earlier advisory opinion that the CPSIA's new lead content restrictions apply "to inventory of children's products containing lead as of February 10, 2009" and "consider not applying the phthalates restrictions set forth in Section 108 of the CPSIA retroactively to inventory as of February 10, 2009." *Nat'l Resources Defense Council, Inc. and Public Citizen, Inc. v. U.S. CPSC*, 08 Civ. 10507, at 5 (S.D.N.Y. Feb. 5, 2009). In response to the request, the Commission's General Counsel did not change her earlier opinion regarding the lead content restrictions. *See id.* at 5-6. However, the General Counsel opined that the phthalate prohibitions do not apply to products manufactured prior to February 10, 2009. *See id.* at 6.

Thereafter, a declaratory action was filed in the U.S. District Court for the Southern District of New York by the National Resources Defense Council, Inc. and by Public Citizen, Inc. against the Commission. The Plaintiffs requested that the Court declare unlawful the Commission's interpretation of the phthalate prohibitions as not applying to existing inventory. *See id.* at 1-2.

U.S. District Judge Gardephe found in favor of the Plaintiffs and ruled that the prohibition of phthalates in the CPSIA applies to products in inventory. *See id.* at 36.