



LEGAL ALERT

CONSUMER PRODUCT SAFETY UPDATE

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Section 108 & the Phthalate Limits Are Retroactive

"The phthalate provisions unambiguously apply to existing inventory, and the Commission's opinion to the contrary must be set aside." The United States District Court for the Southern District of New York unequivocally reversed the Commission's opinion regarding the non-retroactive application of the phthalate ban today, February 5, 2009. As of February 10, 2009, all non-compliant phthalate inventory needs to be off store shelves, cannot be sold or exported and must be destroyed.

On November 17, 2008, the Consumer Product Safety Commission ("CPSC") issued an advisory opinion stating that the phthalate limits in Section 108 of the Consumer Product Safety Improvement Act ("CPSIA") do not apply to products manufactured prior to February 10, 2009, and therefore would not be applied retroactively. However, the CPSC's interpretation of the phthalate prohibitions received immediate criticism from members of Congress, state Attorney Generals, and consumer advocacy groups.

On December 4, 2008, two consumer advocacy groups, the National Resources Defense Council, Inc. ("NRDC") and Public Citizen, Inc. ("PC") filed a lawsuit against the CPSC. The NRDC and PC asked the Court to set aside the opinion of the CPSC and declare that the phthalate provisions are retroactive. The Court did just that.

The Court stated that Section 108 of the CPSIA unambiguously forbids the continued sale and distribution of products that violate the prohibitions, whether in inventory or otherwise. The Court, with excruciating detail, cataloged the faults in the CPSC's opinion



letter and explained why Section 108 clearly applies to existing inventory. The Court found that the language and the structure of the CPSIA unambiguously states that the phthalate provisions of Section 108 apply to all products offered for sale after February 10, 2009, including existing inventory. In addition, the Court found that the statutory purpose and legislative history of the CPSIA also support this conclusion.

Bottom Line: The phthalate limits in Section 108 of the CPSIA are retroactive. As of February 10, 2009, all non-compliant toys and child care articles must be removed from store shelves and inventory, and destroyed. These products can no longer be sold, stored or transported after this date.