UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NATURAL RESOURCES DEFENSE COUNCIL, INC., AND PUBLIC CITIZEN, INC. Plaintiffs	:	
	:	
v.	:	08 Civ. 10507 (PGG)
	:	
U.S. CONSUMER PRODUCT SAFETY COMMISSION Defendant	:	January 16, 2009

AMICUS CURIAE BRIEF OF THE STATE OF CONNECTICUT

The State of Connecticut hereby files this amicus curiae brief regarding the issues raised by the above captioned matter.

I. PRELIMINARY STATEMENT

The Consumer Product Safety Improvement Act, ("CPSIA"), bans the manufacture, sale, distribution, and import of children's products containing more than 0.1 percent of any of six listed phthalates beginning February 10, 2009. In a series of publicly announced interpretations of the act, the defendant Consumer Product Safety Commission, ("CPSC"), decided that the ban does not apply to any children's product manufactured before the effective date of February 10, 2009. The CPSC's interpretation would allow the sale of banned children's products after the statute's effective date despite Congress' clear and explicit intent to protect children from the harm arising from exposure to phthalates in these products. Swift resolution of this case is necessary to effectuate the will of Congress and to protect the health of children in Connecticut.

II. STATEMENT OF INTEREST

The Attorney General of the State of Connecticut is entrusted to represent the people of the state of Connecticut and to protect their interests in matters before the courts. The people of Connecticut have an interest in securing the full protection afforded by Congressional legislation. In particular, the children of this state have a right to expect that the CPSC will enforce legislation so as to accomplish its clear legislative intent. In this case, Connecticut's children are interested in securing the protection afforded by Congress' decision to prohibit the manufacture, sale, distribution or import of children's products containing more than 0.1 percent concentration of six different phthalates that pose a significant threat to their health and safety.

III. ARGUMENT

The CPSIA, beginning February 10, 2009, permanently prohibits the manufacture, sale, distribution, or import of children's toys and child care articles that contain concentrations of more than 0.1 percent of any of three phthalates known as DEHP, DBP, and BBP. 15 U.S.C. Section 2057c(a). The act also imposes an interim prohibition[1] on the manufacture, sale, distribution, or import, beginning on the same date, of any children's toy which might be placed in a child's mouth or child care article that contains more than 0.1 percent of any of three other phthalates, DINP, DIDP, OR DnOP. 15 U.S.C. Section 2057c(b)(1).

Passage of the CPSIA attests to Congress' recognition that children's products containing the listed phthalates at levels above 0.1 percent pose a significant and immediate health hazard to children. The plain language of the statute prohibits any action to "offer for sale" or "distribute in commerce" children's toys and articles that contain these phthalates at concentrations that exceed the threshold amount as of February 10, 2009. The legislation ensures parents that these products will be removed from store shelves by February 10, 2009.

[1] The interim prohibition remains in place until the CPSC promulgates a final rule based on the findings of an independent panel of scientific experts. 15 U.S.C. Section 2057c(b)(2), (b)(3).

The CPSC has decided that, despite the plain language to the contrary, the CPSIA phthalate provisions do not prohibit the sale and distribution of products which violate the standard as long as the products were manufactured before February 10, 2009. The CPSC published its decision in a letter signed by its General Counsel dated November 17, 2008, in a public statement by CPSC Chairperson Nancy Nord on November 18, 2009, and on its website on December 4, 2008. The CPSC concluded that the ban on phthalates in children's products is not "retroactive" and, therefore, products manufactured before February 10, 2009 can be sold after February 10 even if the level of any of the six phthalates exceeds 0.1 percent. Plaintiff's Exhibit B. Relying on the CPSIA's designation of the phthalate prohibition as a "consumer product safety standard", the CPSC decided that the ban only applies to products manufactured after the effective date of the standard. Plaintiff's Exhibit B at 1-2 (citing 15 U.S.C. 2058(g)(1)).

The practical effect of the CPSC's decision is that children's products containing any of the six prohibited phthalates at levels above the mandated threshold will be sold and distributed well beyond the prohibition date, February 10, 2009. Further, consumers will have no easy way to distinguish those products which contain more than 0.1 percent of the banned phthalates from those that do not. The result is that Congress' clear intent to protect children from the harmful effects of these chemicals is lost.

The CPSC's decision is flawed for two reasons. First, it defeats the intent of the CPSIA by allowing childrens' products containing toxic and harmful phthalates to be sold and distributed far beyond the prohibition date. Second, the CPSC has mistakenly relied on a separate provision of the CPSA, which applies only to those consumer product safety standards promulgated by the agency, to explain its decision to impede Congress' efforts to remove harmful phthalates from children's products.

A. THE CPSC'S DECISION THWARTS THE CLEAR CONGRESSIONAL INTENT BEHIND CPSIA.

The CPSC's decision directly conflicts with the plain language of the CPSIA and completely thwarts the goal of the legislation. "[A]n agency may not 'adopt a policy that directly conflicts with its governing statute.'" *M. Fortunoff of Westbury Corp. v. Peerless Ins. Co.*, 432 F.3d 127, 141 (2d Cir. 2005), citing *Maislin Indus. V. Primary Steel, Inc.*, 497 U.S. 116, 134-35 (1999). An agency's interpretation of a statute is not entitled to any deference by a reviewing court when that interpretation is "arbitrary, capricious or *manifestly contrary to the statute*." *De La Mota v. United States Dep't of Educ.*, 412 F.3d 71, 78 (2d Cir. 2005).

The plain language of CPSIA unequivocally prohibits the sale or distribution of specified children's products containing more than 0.1 percent of any of the six listed phthalates after February 10, 2009. 15 U.S.C. Sections 2057c(a), (b)(1). The CPSC's decision ignores Congress' intent completely by allowing the continued sale and distribution of children's products with the toxic phthalates. The decision indefinitely postpones the protections Congress sought to secure for this nation's children. It also delays any security Congress sought to provide to consumers, particularly parents, that the items they purchase for infants and children are free from the documented dangers arising from contact with phthalates.

If any deference is due to CPSC's interpretation, certainly Skidmore rather than Chevron applies.

B. THE CPSA PROVISION REGARDING MANUFACTURE DATES APPLIES ONLY TO CONSUMER PRODUCT SAFETY STANDARDS ADOPTED BY THE AGENCY.

The reasoning behind the CPSC's decision relies primarily on the CPSIA's designation of the phthalate prohibition as a "consumer product safety standard". The CPSC's logic appears to be that the designation allows the application of a provision in the CPSA which states that consumer product safety standards "shall be applicable only to consumer products manufactured after the effective date." 15 U.S.C. Section 2058(g)(1). The CPSC's reasoning fails because the provision governs only those consumer product safety standards promulgated by the agency itself, not those set by Congress.

Section 2058 of the CPSA governs the CPSC's promulgation of "consumer product safety rules" which include both consumer product safety standards under the CPSA and hazardous substance bans under he FHSA. 15 U.S.C. Secion 2052(a)(6). Section 2058 sets forth a list of procedural requirements with which the CPSC must comply when promulgating a consumer product safety standard or ban by regulation. 15 U.S.C. Section 2058. The requirements of Section 2058 are procedural rules that apply to the agency's rulemaking but would obviously never apply to standards set by Congress itself.

Finally, even if Section 2058 might apply to certain standards set by Congress itself, it cannot apply in those instances where Congress has specifically stated otherwise. The language of the specific statute supersedes any language set forth in a more general statute. "Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment." *Cal. Pub. Emples. Ret. Sys. v. Worldcom, Inc.*, 368 F.3d 86, 101 (2d Cir. 2004), citing *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153, 48 L. Ed. 2d 540, 96 S. Ct. 1989 (1976). The CPSIA specifically prohibits the sale or distribution of any children's products which contain the banned phthalates at levels above the threshold amounts regardless of the date of manufacture. Effectively, the CPSC's decision would prohibit

only the manufacture of such products, but continue to allow the sale and distribution of them indefinitely. The specific language of the CPSIA precludes such a result.

IV. CONCLUSION

For all the reasons set forth herein, the State of Connecticut asks this court to set aside the CPSC's decision.

STATE OF CONNECTICUT

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CERTIFICATION

I hereby certify that on January 16, 2009, a copy of the foregoing Amicus Curiae Brief of the State of Connecticut was filed electronically. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ _____

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