

The company sold primarily one consumer product and assorted products which could be used with this product. In this particular case, they sold a limited number of small products which were intended as close-out items. The surface of the products contained a very small amount of DEHP. The products were only to be sold in the tri-state area on the east coast. The products were found, allegedly, in a very little known grocery store in a remote part of the state. In all probability some small amount of product was sold to a wholesaler by the client's only nationwide distributor as close-out lots, and found their way to California.

Given the geographical intentions for sale of the product, the client was particularly upset with the claim. Early on it was determined that the case might have to be tried. A very experienced chemist was retained and performed an analysis of the product contents. This is only the first step.

Thereafter the toxicologist I mentioned in the previous case, (one of only 28 others with identical academic credentials in the United States) was retained and performed the critical testing necessary in these cases. Too many defendants get a chemical analysis which shows non-compliance and assume they are in violation. This assumption cannot be confirmed or ruled out until a qualified toxicologist performs the correct test analysis using the correct bases for the testing.

The information contained in the California Attorney General's letter of April 2012 to plaintiff's counsel regarding a case pending at that time, where the chemical involved was DEHP, was very valuable in educating anyone who read the letter about the AG's position and the behavior of plaintiffs' attorneys and their expert.

After the testing it was clear that the claims of plaintiff re the content of DEHP in the product were wrong. We offered to exchange test results, but the other side would not agree. We were and are confident of our results.

As the case moved forward, it became clear that the costs of defending the case, given that plaintiffs get attorney's fees, arguably whether they win or lose to any degree, was going to be a problem. I had two clients challenged on the same chemical and both had little if any "real" exposure. The problem was the cost of "winning", which could make the cases prohibitive to try. As always, there are cash flow problems in the retail business.

There were little if any grounds for a civil penalty. That portion of the case was settled for a very small amount based only the cost of continuing to fight the action.

Settling the entire case was more difficult because of claims of plaintiff that our products had large amounts of DEHP and that there was a large distribution in the US. By gathering all of the sales records of our client and reaching out to distributors of my client's product, we were able to establish that few of our products were actually in this jurisdiction, let alone sold here. Thereafter we were able to settle the case very favorably.

Both cases illustrate that the proper experts must be retained at the beginning of a case, and testing must be done under an attorney's guidance and consultation with the experts. Though these cases are always heavily in plaintiffs favor, "rolling over" and just paying an amount demanded is not the way to resolve the cases unless the client has an unlimited check book.