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## Dildos, Artificial Vaginas, and Phthalates: How Toxic Sex Toys Illustrate a Broader Problem for Consumer Protection

Zach Biesanz\*

Not long ago, Mattel, the world's largest toymaker, responded to pressure from consumer advocate and environmental groups, by changing the composition of its Barbie toys and ending its use of polyvinyl chloride (PVC) through opting to use less toxic plastics.<sup>1</sup> This appears to be a bold change, but some critics think it took too long: "The company and the entire toy industry are dragging their feet . . .," said Jeff Wise, policy director of the National Environmental Trust.<sup>2</sup>

Children's toys are not the only PVC products that pose toxicity risks to consumers.<sup>3</sup> Manufacturing sex toys is a major industry, and sales of sex toys are growing.<sup>4</sup> However, a lack of regulation of these products has allowed manufacturers to exploit inexpensive but highly toxic materials in their fabrication to the quiet detriment of consumers.<sup>5</sup> Recent studies show that some sex toys contain highly toxic chemicals, and knowledge of the effects of these toxins continues to unfold.<sup>6</sup>

This Note begins with background about the sex toy industry and the few laws that govern it. It then discusses the link between the composition of many sex toys and a family of toxins called phthalates. Finally, it explores the known toxicity of these phthalates, which seems more severe with each study released.

The goal of this Note is to evaluate possible remedies to the problem presented by toxic sex toys by weighing the advantages

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1. See Holcomb B. Noble, *Barbie and Other Toys to Go on an Oil-Free Diet*, N.Y. TIMES, Dec. 21, 1999, at F7.

2. *Id.*

3. See Section I.A.2 *infra*.

4. See Section I.A *infra*.

5. See Section I.A.2 *infra*.

6. See Section I.A.2 *infra*.

and disadvantages of regulatory or legislative action against those of voluntary industry action or toxic tort litigation.

Ultimately, this Note concludes that special regulation of the sex toy industry would be unreasonably burdensome from a regulatory standpoint. Voluntary industry agreements with an industry that “doesn’t give a damn about consumers”<sup>7</sup> would be ineffective. Neither approach would adequately address the problem that toxic sex toys illustrate: certain phthalates are highly toxic and very common in consumer goods. Only banning these toxins outright will suffice to protect consumers from phthalates’ harmful and even lethal effects.

## I. Background

### A. Sex Toys: A Growing but Often Toxic Industry

The consumer market for sex toys, also called marital aids, adult novelties, and, in some states, obscene devices,<sup>8</sup> has grown tremendously in the last century, beginning with the first “electromechanical” vibrators as medical treatment for hysteria in 1899<sup>9</sup> and blossoming into a \$500 million-per-year industry in North America alone today.<sup>10</sup> Products that once were available only through physicians and eventually mail order<sup>11</sup> are now widely available; some can be purchased at big box retailers such as Wal-Mart, Kmart, and CVS,<sup>12</sup> and the popularity of in-home sales (similar to Tupperware parties) is increasing dramatically.<sup>13</sup>

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7. Gerd Schuster, *Sexspielzeug: Lust von der Stange [Lust Mass Produced]*, STERN, July 26, 2001, at 54, 60 (“„Dem Gewerbe sind die Kunden scheißegal,” wettert Masterson.” [“The industry does not give a damn about the consumers,” fumes [industry insider Davis] Masterson.]).

8. See, e.g., GA. CODE ANN. § 16-12-80(c) (2005); KAN. STAT. ANN. § 21-4301(c)(3) (1995).

9. See *Williams v. Pryor*, 220 F. Supp. 2d 1257, 1284-85, 1294 (N.D. Ala. 2002) (citing expert testimony of historian Dr. Rachel Maines).

10. See Lianne George, *Toyland in the Torrid Zone*, MACLEAN’S, May 17, 2004, at 36, 36. See also Canadian Broadcast Company, *Bad Vibrations: A Look at Sex Toys*, Nov. 28, 2001, available at [http://www.cbc.ca/consumers/market/files/health/sexshow\\_2001/sex\\_toys.html](http://www.cbc.ca/consumers/market/files/health/sexshow_2001/sex_toys.html) (describing sex toy sales as “soaring”). In 2005 “Adult Novelty” sales (which may include more than just sex toys) in the United States alone were estimated at \$1.5 billion. *State of the U.S. Adult Industry*, ADULT VIDEO NEWS, Jan. 2006, at 30, 30.

11. See *Williams*, 220 F. Supp. 2d at 1294 (citing expert testimony of historian Dr. Rachel Maines).

12. See Jordan Lite, *Sex Toys Go Mainstream*, N.Y. DAILY NEWS, Sept. 19, 2005, at 36.

13. See Martha McCaughey & Christina French, *Women’s Sex Toy Parties*:

There are currently no associations that represent the sex toy industry for lobbying,<sup>14</sup> standard-setting,<sup>15</sup> but the proliferation of sex toy sales continues to climb, with or without lobbying efforts.<sup>16</sup>

### 1. Sex Toys and the Law

Despite the increasing popularity of sex toys, they are largely unregulated.<sup>17</sup> In fact, many states have banned them under obscenity statutes as "obscene devices."<sup>18</sup> Further, the North American Industry Classification System (NAICS), a classification scheme designed to compile North American business statistics and adopted by the Office of Management and Budget,<sup>19</sup> does not

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*Technology, Orgasm, and Commodification*, SEXUALITY & CULTURE: AN INTERDISCIPLINARY QUARTERLY, Summer 2001, at 77, 77-79.

14. See United States Senate, Office of Public Records, *Filing Disclosure Program*, <http://sopr.senate.gov/> (last visited Oct. 12, 2006) (providing a search engine that yields no results for "sex," "adult," "marital," or "erotic").

15. See Interview with Jessica Giordani, Co-Owner, The Smitten Kitten, in Minneapolis, Minn. (Jan. 15, 2006) (noting that there is one industry association "in its developing stages"—the Coalition Against Toxic Toys—though, as its name implies, its focus is on educating the public about choosing safe, non-toxic sex toys). There is one lobbying association in the adult industry, but its focus is and always has been adult entertainment, not sex toys. See FREE SPEECH COALITION, HISTORY OF THE FREE SPEECH COALITION, <http://www.freespeechcoalition.com/FCSview.asp?coid=87> (last visited Sept. 23, 2006).

16. See *Canadian Broadcast Company*, *supra* note 10 (describing sex toy sales as "soaring").

17. See Schuster, *supra* note 7, at 55 (noting that the sex toy industry has taken advantage of the lack of regulatory attention and "hat jahrzehntelang im Verborgenen geblüht und ist dabei robust gewachsen. . . ." [has thrived in obscurity for decades and grown robust thereby . . .]).

18. See, e.g., ALA. CODE § 13A-12-200.2 (Supp. 2003); GA. CODE ANN. § 16-12-80(c) (2003) ("Any device designed or marketed as useful primarily for the stimulation of human genital organs is obscene material under this Code section."); KAN. STAT. ANN. § 21-4301(c)(3) (1995) ("Obscene device" means a device, including a dildo or artificial vagina, designed or marketed as useful primarily for the stimulation of human genital organs, except such devices disseminated or promoted for the purpose of medical or psychological therapy."); MISS. CODE ANN. § 97-29-105 (2000); TEX. PENAL CODE ANN. § 43.23(a) (2003) ("A person commits an offense if, knowing its content and character, he wholesale promotes or possesses with intent to wholesale promote any obscene material or obscene device."), TEX. PENAL CODE ANN. § 43.23(f) ("A person who possesses six or more obscene devices or identical or similar obscene articles is presumed to possess them with intent to promote the same."). But see COLO. REV. STAT. § 18-7-101 et seq. (specifically exempting "obscene devices"—defined as "device[s] including a dildo or artificial vagina, designed or marketed as useful primarily for the stimulation of human genital organs"—from the ban on obscene materials, reflecting the repeal of a previous inclusion of a ban on "obscene devices").

19. See UNITED STATES CENSUS BUREAU, NORTH AMERICAN INDUSTRY CLASSIFICATION SYSTEM (NAICS), available at <http://www.census.gov/epcd/www/>

recognize sex toys—or any other part of the sex industry—as a category of retail.<sup>20</sup> Philip Pearl, publisher and editor-in-chief of the trade magazine *AVN Adult Novelty Business* notes that, in part because they are all privately held, no adult novelty business publishes financial information.<sup>21</sup>

The Food and Drug Administration lists vibrators under “Obstetrical and Gynecological Therapeutic Devices” as “genital vibrator[s] for therapeutic use,” and defines them as “electrically operated device[s] intended and labeled for therapeutic use in the treatment of sexual dysfunction or as an adjunct to Kegel’s exercise (tightening of the muscles of the pelvic floor to increase muscle tone).”<sup>22</sup> While regulations of medical devices abound, there is no law regarding the quality or composition of sex toys at the consumer level.<sup>23</sup>

## 2. Sex Toys and Toxicity

Sex toys made of Jelly plastic, which allegedly has a natural feel, enjoy massive popularity in sex shops.<sup>24</sup> However, Jelly plastic is composed of a substantial amount of toxic chemicals.<sup>25</sup>

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naics.html (last visited Jan. 17, 2005).

20. See generally United States Senate, Office of Public Records, *Filing Disclosure Program*, <http://sopr.senate.gov/> (last visited Oct. 12, 2006) (providing a search engine that yields no relevant results for “sex,” “adult,” “marital,” or “erotic”). See also Giordani, *supra* note 15 (explaining why The Smitten Kitten (a sex boutique) is registered as miscellaneous retail: “Nothing else accurately classifies what we do.”).

21. See Emily Gertz, *Naughty by Nature: Ever Thought About the Toxins in Your Sex Toys?*, GRIST, Dec. 6, 2005, available at <http://www.grist.org/news/maindish/2005/12/06/gertz> (“In the U.S., all of the companies that manufacture adult novelties, whether they’re mom-and-pop or large corporations, are privately held,” explains Philip Pearl, publisher and editor in chief of *AVN Adult Novelty Business*, a trade magazine. “None are required to publish financial information, and none do.”).

22. 21 C.F.R. § 884.5960(a) (2005). Cf. KAN. STAT. ANN. § 21-4301(c)(3) (1995) (prohibiting the sale of devices “designed or marketed as useful primarily for the [non-medical or non-psychological] stimulation of human genital organs”).

23. Extensive searching on Westlaw and LexisNexis yielded no results. See also Giordani, *supra* note 15. Ms. Giordani claimed to be unaware of any regulation of the toxicity of sex toys, the products her store sells. *Id.*

24. See Schuster, *supra* note 7, at 62 (“Das angeblich „gefühlsechte“ Glibberzeug „Jelly“ ist im Pornoladen mega-in: Immer mehr Sexspielzeuge werden in bunten Farben aus transparentem Weich-PVC gefertigt.” [The allegedly natural-feeling substance “Jelly” is all the rage in sex shops: more and more sex toys are produced in bright colors from transparent soft-PVC.]).

25. See Schuster, *supra* note 7, at 62 (noting that Jelly is “randvoll mit gefährlichen Lösungsmitteln und anderen Chemikalien, die ausgasen, auch wenn der Dildo gar nicht benutzt wird.” [full to the brim with dangerous solvents and

These chemicals include "enormous amounts"<sup>26</sup> of phthalates<sup>27</sup> which leach<sup>28</sup> out of the PVC, pass through the skin, and collect in the body.<sup>29</sup>

In 2001, the German magazine *Stern* commissioned chemist Hans Ulrich Krieg of the Cologne Eco-environmental Institute to study the composition of sex toys.<sup>30</sup> Krieg's findings showed that the chemical composition of many sex toys is incredibly toxic,<sup>31</sup> more toxic than anything he had seen in more than 10 years of analyzing consumer products.<sup>32</sup> The sex toys tested contained 10 or more hazardous chemicals, including "extraordinarily high" amounts of di(2-ethylhexyl) phthalate (DEHP).<sup>33</sup> Professor Hermann Kruse, a toxicologist at the University of Kiel, called that level of toxicity "sheer insanity."<sup>34</sup>

Not all sex toys are toxic. Non-toxic sex toys are available on the market as well, including some that use silicone instead of

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other chemicals which are off-gassed even if the product is never used.]).

26. *Id.* ("enorme Mengen" [enormous amounts of]).

27. *See* Section I.B *infra*.

28. Leaching is defined as "Lixiviation; removal of the soluble constituents of a substance by running water through it." *STEDMAN'S MEDICAL DICTIONARY* 848 (25th ed. 1990).

29. *See* Schuster, *supra* note 7, at 62 (noting that Jelly contains "enorme Mengen" [enormous amounts of] of phthalates which "wabern aus den 'Jelly'-Produkten, dringen durch die Haut in den Körper ein, wo sie sich in Leber, Nieren und Fettgewebe ablagern." [eventually leach out of "Jelly" products and pass through the skin into the human body, where they accumulate in the liver, kidneys and fatty tissue.]).

30. *See id.* at 60 ("[L]ieß der *stern* vier Jelly-Vibratoren und -Dildos vom Kölner Eco-Umweltinstitut auf gefährliche Chemikalien prüfen." [Stern magazine arranged for the Cologne Eco-environmental Institute to test four Jelly-made vibrators and dildos for dangerous chemicals.]).

31. *See id.* at 62. The study found ten dangerous chemical solvents, including "Toulol" [Toluene]. *See id.*

32. *See id.* ("Chemiker Hans-Ulrich Krieg, der den Test durchführte, bezeichnete diese Werte als „ganz außerordentlich hoch.“ So etwas habe er „bei Bedarfsgegenständen noch nie gefunden.“” [Chemist Hans-Ulrich Krieg, who conducted the tests, characterized these values as "extraordinarily high," and asserted that "in the area of consumer products he had never seen such a thing."]).

33. *See id.* at 60 ("Außerdem sickerten Weichmacher aus den PVC-Pimmeln. Die so genannten Phthalate, in Weich-PVC oft zu über 50 Prozent enthalten, stehen im Verdacht, den menschlichen Hormonhaushalt durcheinander zu bringen. . . ." [Furthermore, chemical softeners were found to be leaching out of the toys. These so-called phthalates, found in up to 50% of soft-PVC (Jelly) products, stand in suspicion of wrecking the human body's hormonal balance. . . .]). "Phthalate wurden in Konzentrationen von bis zu 243 000 ppm gefunden." [Phthalates were found in concentrations of up to 243,000 ppm.]. *Id.* at 60.

34. Schuster, *supra* note 7, at 60.

Jelly plastic.<sup>35</sup> One sex toy boutique, The Smitten Kitten, open since August 2003,<sup>36</sup> refuses to carry toxic sex toys, including those made from PVC.<sup>37</sup> However, most sex toy retailers still sell PVC products “because it’s cheap<sup>38</sup> and easy to work with.”<sup>39</sup>

### *B. Di(2-ethylhexyl) Phthalate, or DEHP: A Toxic Plasticizer*

#### 1. DEHP and Toxicity

DEHP is a plasticizer—a manufactured chemical for softening plastics—used in many varieties of consumer goods.<sup>40</sup> It is a colorless, mostly odorless liquid,<sup>41</sup> but it is toxic and probably carcinogenic.<sup>42</sup> In the early 1980s, the Consumer Product Safety Commission (CPSC) created the Chronic Health Advisory Panel on Di(2-ethylhexyl) Phthalate (CHAP), which reviewed scientific data about the relationship of DEHP to cancer, birth defects, and gene mutation.<sup>43</sup> The CHAP determined that DEHP in children’s toys

35. See, e.g., *id.* (noting that Bremen vibrator manufacturer Fun Factory exclusively uses “Silikon” [silicone]).

36. See Giordani, *supra* note 15.

37. See SmittenKittenOnline.com, *Store Policies*, <http://www.smittenkittenonline.com/index2.htm> (last visited Sept. 9, 2006) (follow “About Smitten Kitten” hyperlink, follow “Store Policies” hyperlink).

38. “Cheap” here meaning that markups of 500% or more are common in the sex toy industry. See Schuster, *supra* note 7, at 55 (“Handelsspannen von 500 und mehr Prozent sind in der Branche normal . . .” [Mark-ups of 500% or more are typical in the industry . . .]).

39. See Gertz, *supra* note 21 (quoting Dr. Carol Queen, co-owner of the sex toy boutique Good Vibrations.); see also Giordani, *supra* note 15 (“We have looked continually and can’t find anyone else who doesn’t carry toxic toys, so as far as we know, we’re the only ones.”); WomynsWare.com, *Sex Toy Guide Intro*, <http://www.womynsware.com/Side%20Menu/Noteworthy/Sex%20Toy%20Guide%20Intro> (last visited Oct. 13, 2006) (claiming to have “eliminate[d] . . . phthalate-leaching soft vinyl products from [their] inventory”).

40. See AGENCY FOR TOXIC SUBSTANCES AND DISEASE REGISTRY, *ToxFAQS™ FOR DI(2-ETHYLHEXYL)PHTHALATE (DEHP)* (Sept. 2002), available at <http://www.atsdr.cdc.gov/tfacts9.html> (noting that DEHP is “present in plastic products such as wall coverings, tablecloths, floor tiles, furniture upholstery, shower curtains, garden hoses, swimming pool liners, rainwear, baby pants, dolls, some toys, shoes, automobile upholstery and tops, packaging film and sheets, sheathing for wire and cable, medical tubing, and blood storage bags”).

41. See *id.*

42. See ENVIRONMENTAL PROTECTION AGENCY, *INTEGRATED RISK INFORMATION SYSTEM REPORT: DI(2-ETHYLHEXYL)PHTHALATE (DEHP)* (CASRN 117-81-7), available at <http://www.epa.gov/iris/subst/0014.htm> (last visited Sept. 13, 2006) (classifying DEHP as “B2; probable human carcinogen” because “[o]rally administered DEHP produced significant dose-related increases in liver tumor responses in rats and mice of both sexes”).

43. See CONSUMER PRODUCT SAFETY COMMISSION, *CONSUMER PRODUCT SAFETY*

that might be sucked or chewed exposes children to a dangerous risk of cancer.<sup>44</sup> The CHAP found that DEHP does not cause gene mutation, but it did find that DEHP is carcinogenic to rats and mice, and causes testicular atrophy and birth defects.<sup>45</sup> The Environmental Protection Agency (EPA) notes that “DEHP has been observed to be both fetotoxic and teratogenic [birth defect-causing].”<sup>46</sup>

Though most of the relevant data has come from studies in rats and mice, two 2005 studies show a link to humans.<sup>47</sup> One showed three-month-old boys who were exposed to DEHP through breast milk produced less testosterone than the control group.<sup>48</sup> The other found a link between fetal DEHP exposure and demasculinization in baby boys.<sup>49</sup>

Part of the danger of DEHP comes from the fact that it is not chemically bound to PVC, and, therefore, it can leach out of PVC products.<sup>50</sup> The migration rate of DEHP from PVC is increased with heat, agitation, contact with lipophilic fluids<sup>51</sup> such as blood,

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REVIEW 4 (Summer 2003), available at [http://www.cpsc.gov/cpscpub/pubs/cpsr\\_nws29.pdf](http://www.cpsc.gov/cpscpub/pubs/cpsr_nws29.pdf).

44. *See id.*

45. *See* CHRONIC HEALTH ADVISORY PANEL ON DI(2-ETHYLHEXYL) PHTHALATE, REPORT TO THE U. S. CONSUMER PRODUCT SAFETY COMMISSION PART I (Sept. 1985), available at <http://www.cpsc.gov/LIBRARY/FOIA/Foia00/os/dehp1.pdf>. But see ENVIRONMENTAL PROTECTION AGENCY, *supra* note 42 (“DEHP... induced chromosomal aberrations and morphological transformation in cultured fetal Syrian hamster cells exposed in utero.”) (citations omitted).

46. ENVIRONMENTAL PROTECTION AGENCY, *supra* note 42. *See also* HEALTH CARE WITHOUT HARM, AGGREGATE EXPOSURE TO PHTHALATES IN HUMANS 14 (2002), available at <http://www.noharm.org/details.cfm?type=document&id=662> (surveying the developmental effects phthalates may cause in humans, including “altered zinc concentrations, testicular atrophy and infertility” in males).

47. *See* Peter Waldman, *From an Ingredient in Cosmetics, Toys, A Safety Concern: Male Reproductive Development Is Issue With Phthalates, Used in Host of Products; Europe, Japan Restrict Them*, WALL ST. J., Oct. 4, 2005, at A1.

48. *See id.*

49. *See* Shanna H. Swan et al., *Decrease in Anogenital Distance among Male Infants with Prenatal Phthalate Exposure*, 113 ENVTL. HEALTH PERSP. 1056, 1061 (2005) (“We report that AGD, the most sensitive marker of antiandrogen action in toxicologic studies, is shortened and testicular descent impaired in boys whose mothers had elevated prenatal phthalate exposure. These changes in male infants, associated with prenatal exposure to some of the same phthalate metabolites that cause similar alterations in male rodents, suggest that commonly used phthalates may undervirilize humans as well as rodents.”).

50. *See* HEALTH CANADA, MEDICAL DEVICES BUREAU, DEHP IN MEDICAL DEVICES: AN EXPOSURE AND TOXICITY ASSESSMENT 3 (2001), available at [http://www.hc-sc.gc.ca/dhp-mps/alt\\_formats/hpfb-dgpsa/pdf/mdim/sapdehp\\_rep\\_gcsdehp\\_rap\\_2001-04-26\\_e.pdf](http://www.hc-sc.gc.ca/dhp-mps/alt_formats/hpfb-dgpsa/pdf/mdim/sapdehp_rep_gcsdehp_rap_2001-04-26_e.pdf).

51. Lipophilic fluid is defined as: “[c]apable of dissolving, of being dissolved in,



and prolonged exposure,<sup>52</sup> all of which occur during regular use of sex toys.<sup>53</sup>

## 2. DEHP and the Law

The toxicity of DEHP has drawn federal and state regulatory attention. For example, the Environmental Protection Agency sets the Maximum Contaminant Level (MCL) for DEHP in drinking water at six parts per billion.<sup>54</sup> However, the EPA notes that no amount of DEHP can be considered safe for drinking, and it sets its Maximum Contaminant Level Goal accordingly at zero.<sup>55</sup> Also, the FDA recommends using medical supplies that do not contain DEHP in situations that could expose patients to high levels of DEHP.<sup>56</sup> Proposition 65, a California law, requires the state to publish a list of known carcinogens and teratogens every year and requires that any consumer product containing a carcinogen or teratogen on the list must be labeled accordingly.<sup>57</sup> DEHP appears on the list and is noted as having the following types of toxicity: "cancer" and "developmental, male."<sup>58</sup>

DEHP has drawn even more attention from foreign governments. Japan has banned some phthalates in food-handling equipment.<sup>59</sup> By a unanimous vote of its Competition Council, the European Union has banned the use of six phthalates in children's toys, including DEHP at concentrations above 0.1% in

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or of absorbing lipids." STEDMAN'S MEDICAL DICTIONARY 886 (25th ed. 1990).

52. See HEALTH CANADA, *supra* note 50, at 3.

53. See Giordani, *supra* note 15.

54. See ENVIRONMENTAL PROTECTION AGENCY, CONSUMER FACTSHEET ON: DI(2-ETHYLHEXYL) PHTHALATE, *available at* <http://www.epa.gov/safewater/dwh/c-soc/phthalat.html> (last visited Sept. 13, 2006) (noting that the potential health effects of short-term exposure to DEHP beyond the MCL of 6 ppb include "mild gastrointestinal disturbances, nausea, [and] vertigo" and that long-term exposure can cause "damage to liver and testes; reproductive effects; [and] cancer").

55. See *id.*

56. See FOOD AND DRUG ADMINISTRATION, FDA PUBLIC HEALTH NOTIFICATION: PVC DEVICES CONTAINING THE PLASTICIZER DEHP (July 12, 2002), *available at* <http://www.fda.gov/cdrh/safety/dehp.html> (noting also that reporting deaths and serious injuries from medical equipment, *including listed equipment known to have high concentrations of DEHP* is mandatory under the Safe Medical Devices Act of 1990) (emphasis added).

57. See CAL. HEALTH & SAFETY CODE § 25,249.5 et seq. (West 2000).

58. See STATE OF CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY, OFFICE OF ENVIRONMENTAL HEALTH HAZARD ASSESSMENT, CHEMICALS KNOWN TO CAUSE CANCER OR REPRODUCTIVE TOXICITY (Sept. 30, 2005) at 6, *available at* [http://www.oehha.ca.gov/prop65/prop65\\_list/files/P65single093005.pdf](http://www.oehha.ca.gov/prop65/prop65_list/files/P65single093005.pdf).

59. See Waldman, *supra* note 47, at A1.

toys to be used by children “irrespective of the age group they are intended for.”<sup>60</sup> The EU has chosen not to respond to a call for a similar ban for sex toys, citing a lack of scientific evidence to justify such a ban.<sup>61</sup>

The Consumer Product Safety Commission (CPSC) claims to be “committed to protecting consumers and families from products that pose a fire, electrical, *chemical*, or mechanical hazard or *can injure children*.”<sup>62</sup> In the early 1980s, when the CPSC was studying the toxic risks of DEHP in children’s toys, it did not regulate children’s toys because it entered agreements with the industry that largely ended DEHP use in pacifiers, teething rings, and rattles.<sup>63</sup> For these items, DEHP was widely replaced by diisononyl phthalate (DINP).<sup>64</sup> Although the CPSC determined that the toxic risks of DINP to children was negligible, in 1997 and 1998 it forged new voluntary agreements with industry to end the use of DINP and dioctyl phthalate in children’s toys, and several major retailers agreed not to carry children’s toys containing phthalates.<sup>65</sup> At the same time, the CPSC received a petition calling for a ban of all phthalates in products intended for use by children under age five; it responded to the petition by following several recommended actions.<sup>66</sup> These actions included assembling a CHAP on DINP, a behavioral observation study of infant use of plastic toys, and a study of phthalate migration rates from PVC products to humans.<sup>67</sup> The CPSC found in the behavioral study that the “average mouthing time” of soft plastic toys by infants was less than two minutes a day.<sup>68</sup> The CPSC declined to enact the requested ban because it determined that the

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60. See *EU Ministers Agree to Ban Chemicals in Toys*, EURACTIV.COM, Sept. 28, 2004, <http://www.euractiv.com/Article?tcaturi=tcu:29-129891-16&type=News>.

61. See *The Ethics of Sex Toys – Part 2*, THE FWORD, Sept. 11, 2004, [www.thefword.org.uk/reviews/2004/09/the\\_ethics\\_of\\_sex\\_toys\\_part\\_2](http://www.thefword.org.uk/reviews/2004/09/the_ethics_of_sex_toys_part_2) (“Unfortunately no scientific study has yet been conducted into how sex toys are used and for how long. But unless a member state complains to us about a possible risk from sex toys containing phthalates we are not investigating this matter,” said [EU Spokesman] Thorsten Muench . . . . “There is no evidence that sex toys are used in such a way and for such a time as to generate a comparable risk.”).

62. CONSUMER PRODUCT SAFETY COMMISSION, CPSC Overview, <http://www.cpsc.gov/about/about.html> (last visited Sept. 13, 2006) (emphasis added).

63. See CONSUMER PRODUCT SAFETY COMMISSION, *supra* note 43, at 4.

64. See *id.*

65. See *id.*

66. See *id.*

67. See *id.* at 5.

68. CONSUMER PRODUCT SAFETY COMMISSION, *supra* note 43, at 5.

risk from DINP was insignificant after considering the results from the three studies.<sup>69</sup>

A recent study by the United States Public Interest Research Group (U.S. PIRG) found phthalates in fifteen out of eighteen baby toys it tested, including a soft plastic photo book called "Sassy's Who Loves Baby?" that contained DEHP despite carrying a label that read "phthalate-free."<sup>70</sup> Many of the products found to contain phthalates were made by major manufacturers like Hasbro, Random House, and Simon & Schuster.<sup>71</sup>

### C. Consumer Protection

#### 1. Federal Statutory and Regulatory Consumer Product Law

Consumer protection comes in many forms, including federal regulation. In accordance with the Fair Packaging and Labeling Act, the CPSC has the power to set labeling standards on consumer products.<sup>72</sup> If the CPSC finds that such standards as applied to a given product will not adequately protect consumers from "an unreasonable risk of injury," it may declare that product "a banned hazardous product."<sup>73</sup>

The Federal Trade Commission (FTC) also sets consumer protection standards through its rules for unfair trade practices. Section 5 of the Federal Trade Commission Act authorizes the FTC to proscribe "unfair or deceptive acts or practices in or affecting commerce."<sup>74</sup> The FTC, in determining whether an act or practice is unfair or deceptive, may consider whether the act or practice causes substantial consumer injury and is against public policy considerations.<sup>75</sup> For example, in *In re International*

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69. *See id.*

70. U.S. PIRG EDUCATION FUND, THE RIGHT START: THE NEED TO ELIMINATE TOXIC CHEMICALS FROM BABY PRODUCTS 17-18 (Oct. 12, 2005).

71. *See id.* at 17-19.

72. It has exercised this power many times. *See, e.g.*, CPSC, Safety Standard for Bicycle Helmets, 16 C.F.R. § 1203 (1998); CONSUMER PRODUCT SAFETY COMMISSION, CONSUMER PRODUCT SAFETY ALERT: NEW LABELS ON CHILDREN'S SLEEPWEAR ALERT PARENTS TO FIRE DANGERS, PREVENT BURN INJURIES BY WEARING SNUG-FITTING OR FLAME-RESISTANT GARMENTS (Jan. 23, 2001), available at <http://www.cpsc.gov/cpscpub/pubs/5125.pdf> (demonstrating how the CPSC exercises this power).

73. 15 U.S.C. § 2057 (1998).

74. 15 U.S.C. § 45(a)(1) (1997).

75. *See F.T.C. v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244 n.5 (5th Cir.

*Harvester*,<sup>76</sup> the FTC determined that a manufacturer of tractors violated the unfair practices rule because the benefit of protecting consumers from a special safety risk greatly outweighed the cost of a better warning.<sup>77</sup> The unfair practices rule, which considers whether consumers could have reasonably avoided the harm at issue, was formulated in the context of condemning cigarette manufacturers for failing to warn consumers of health risks.<sup>78</sup> The rule is largely rooted in concern for consumer sovereignty, especially the idea that undisclosed risks and hazards create hidden costs.<sup>79</sup> Few FTC cases or rules exist that find unfair practices in failure to disclose relevant safety information, though some commentators speculate that this is the result of overlapping jurisdiction with other administrative agencies, such as the CPSC.<sup>80</sup> Instead of total bans on products with particular safety risks, the FTC prefers warnings to consumers, reasoning that consumers can and should decide for themselves whether to take a given risk.<sup>81</sup> However, some consumer advocates, such as the Consumer Affairs Committee of Americans for Democratic Action, have said that mere warnings are not enough, and that "sometimes, consumer information and even clear disclaimers provide no useful consumer protection."<sup>82</sup> There is no regulation regarding the toxicity of sex toys in the United States.<sup>83</sup>

## 2. Toxic Tort Law

Toxic tort law is a body of substantive law involving toxic harm to plaintiffs, who in some cases are consumers harmed by a toxic product. Mass toxic torts possess some or all of the following

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1972). The S&H Test included a third factor, immoral/unethical/oppressive/ unscrupulous practices, but this factor was dropped from the test as unnecessarily duplicative in 1980. FEDERAL TRADE COMMISSION, FTC POLICY STATEMENT ON UNFAIRNESS, 12 (Dec. 17, 1980), noted in *In re Int'l Harvester*, 104 F.T.C. 949, 1061-62 n.43 (1984).

76. 104 F.T.C. 949 (1984).

77. See *id.* at 1066.

78. See FTC Trade Regulation Rule for the Prevention of Unfair or Deceptive Acts or Practices in the Sale of Cigarettes, 16 C.F.R. § 408 (1964).

79. See *In re Int'l Harvester*, 104 F.T.C. at 1061 ("The Commission [in applying its unfairness authority] . . . seeks to ensure that markets operate freely, so that consumers can make their own decisions.").

80. See MARY DEE PRIDGEN, CONSUMER PROTECTION AND THE LAW § 9.15 (2006).

81. See, e.g., Budget Rent A Car Corp., 54 Fed. Reg. 35 (Jan. 3, 1989) (proposed consent agreement).

82. 46 ANTITRUST & TRADE REG. REP. 288 (Feb. 23, 1989).

83. See *supra* note 23 and accompanying text.

qualities:

- (1) geographically widespread exposure to potentially harmful agents that
- (2) affects a large or indeterminate number of plaintiffs,
- (3) possibly over long time periods, even generations,
- (4) in different ways such that
- (5) there is difficulty in establishing a general theory of causation and
- (6) an inability to link a particular defendant's actions to a particular plaintiff's injuries, as well as
- (7) difficulty in determining the number of potentially responsible defendants and
- (8) in determining their relative culpability, if any, which often results in
- (9) multiple litigations that burden the courts and cause huge transactional costs, including heavy legal fees, and
- (10) which threatens the financial ability of many companies or of whole industries to respond to traditional damage awards.<sup>84</sup>

Toxic tort cases tend to arise from instances such as: exposure to toxic medical devices like the Dalkon Shield contraceptive devices;<sup>85</sup> silicone gel breast implants;<sup>86</sup> exposure to harmful consumer products such as tobacco;<sup>87</sup> and exposure to Agent Orange.<sup>88</sup>

Toxic tort cases involving product liability for chemical exposure can turn on the manufacturer's duty to warn about the danger.<sup>89</sup> Plaintiffs in such cases must begin by demonstrating causation between the defect in the product and the injury.<sup>90</sup> A duty to warn can be established by showing that "knowledge of the defect existed in the relevant industry."<sup>91</sup> Next, a plaintiff must

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84. *In re DES Cases*, 789 F. Supp. 552, 562 (E.D.N.Y. 1992).

85. *See In re A.H. Robins Co.*, 880 F.2d 694 (4th Cir. 1989).

86. *See, e.g., Spitzfaden v. Dow Corning Corp.*, 1998-1612 (La. App. 4 Cir. 12/4/2002); 833 So.2d 512.

87. *See, e.g., Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000).

88. *See, e.g., In re Agent Orange Prod. Liab. Litig.*, 611 F. Supp. 1223 (E.D.N.Y. 1985).

89. *See, e.g., James v. Chevron U.S.A., Inc.*, 694 A.2d 270, 277 (N.J. Super. 1997), *aff'd and remanded*, *James v. Bessemer Processing Co.*, 714 A.2d 898 (N.J. 1998).

90. *See Chevron*, 694 A.2d at 277.

91. *Id.* (quoting *Coffman v. Keene Corp.*, 133 N.J. 581 (1993)). In this case, the plaintiff's expert in toxicology pointed to fifty-year-old studies that were widely

show “medical causation,” or that the injury was caused by exposure to toxic chemicals manufactured by the defendant.<sup>92</sup> The plaintiff must show that the defendant’s product substantially contributed to the injury, using the proximate cause negligence test and showing sufficient frequency, regularity, and proximity of exposure to demonstrate causation.<sup>93</sup> If the plaintiff has been injured by the products of more than one manufacturer, the burden is on each defendant to prove the appropriate apportionment of liability.<sup>94</sup>

Mass toxic tort litigation is exceptionally complex and has been called clumsy and inefficient.<sup>95</sup> One treatise notes that two major themes pervade toxic tort litigation: “(1) the large volume of plaintiffs, defendants and jurisdictions involved, and (2) the difficulties inherent in proving product identification and medical causation.”<sup>96</sup>

There is no evidence of any litigation regarding the toxicity of sex toys in the United States.<sup>97</sup>

### 3. Sex Toy Manufacturers Frequently Claim that Their Products are Intended for “Novelty Use Only”

The vast majority of sex toys sold in the United States are marked “For Novelty Use Only” to protect manufacturers against customer complaints about quality or danger.<sup>98</sup> The manufacturers intend to convey the message that the sex toys they make are “a gag gift not intended for actual use,”<sup>99</sup> and that they do not stand by the quality of the product.<sup>100</sup> However, consumers

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available. *See id.*

92. *See id.*

93. *See id.* at 277-78.

94. *See* RESTATEMENT (SECOND) OF TORTS § 433(b)(2).

95. *See In re DES Cases*, 789 F. Supp. at 562 (counting the litigation complexities as “legion”).

96. LAWRENCE G. CETRULO, TOXIC TORT LITIGATION GUIDE § 1:4 (2005).

97. Exhaustive searching on Westlaw and LexisNexis, including litigation reporters, yielded no results.

98. *See* Schuster, *supra* note 7, at 60 (“„Sold as novelty only,” steht auf den meisten Sexspielzeugen . . . Durch dieses juristische Feigenblatt sind die Händler aus dem Schneider, sollte sich ein Kunde über schlappe Vibrationen, laue Lust, Materialfehler oder gar körperliche Schäden beschweren.” [The vast majority of sex toys in the U.S. are marked “Sold as novelty only.” By means of this legal fig leaf, vendors are off the hook should customers complain about faulty construction, poor performance or even bodily injury as a result of use.]).

99. Gertz, *supra* note 21.

100. *See* Giordani, *supra* note 15.

rarely heed these warnings.<sup>101</sup>

"For Novelty Use Only" is a disclaimer found on many consumer goods, but it has been found to have little legal meaning. In *State v. Curtis*,<sup>102</sup> the Supreme Court of South Carolina upheld a conviction for sale of a product designed to assist in defrauding drug tests by creating false negatives.<sup>103</sup> Though the product was labeled with the disclaimer "to be used as a novelty only," it was not a sufficient defense to the charges of the sale of urine with the intent to defraud a drug or alcohol test.<sup>104</sup> In *State v. Brennan*,<sup>105</sup> the Louisiana Supreme Court affirmed a conviction for promotion of obscene devices, despite the fact that the vibrating dildo in question was labeled "Sold as a Novelty Only. This Product is not Intended as a Medical Device."<sup>106</sup> In *Original Cosmetics Products, Inc. v. Strachan*,<sup>107</sup> a court upheld a conviction for mail fraud for selling phony aphrodisiacs, in spite of fine print that read: "All items on this sheet sold as novelties only."<sup>108</sup>

#### 4. Shame as a Shield Against Legal Action

Adult products are "tough to talk about like, well, adults."<sup>109</sup> A major factor that has contributed to the success of the sex toy industry is that it largely operates in the shadows: governments, consumer groups, and the medical field are generally in denial about the very existence of the sex toy industry.<sup>110</sup> Greenpeace and the Consumer Product Safety Commission have been unresponsive to requests to investigate the toxicity of sex toys.<sup>111</sup>

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101. *See id.*

102. 591 S.E.2d 600 (S.C. 2004).

103. *See id.* at 629.

104. *See id.* at 627, 634.

105. 772 So.2d 64 (La. 2000).

106. *Id.* at 76-77.

107. 459 F. Supp. 496 (D.C.N.Y. 1978).

108. *Id.* at 502.

109. Gertz, *supra* note 21.

110. *See* Schuster, *supra* note 7, at 55 ("Zum Erfolg trägt auch bei, dass Behörden, Verbraucherschützer und selbst die Sexualmedizin aus Berührungsangst, Prüderie und Verklemmtheit vielfach so tun, als existiere die Lustmittel-Industrie gar nicht." [It also contributes to the success that government authorities, consumer advocates and even the medical field behave – out of distaste, prudishness and uptightness – as if the sex toy industry did not even exist.]).

111. *See* Giordani, *supra* note 15 (theorizing that a form of "institutional shame" about sex prevents such organizations from taking action against or even discussing dangerous products if they are related to sex). Since the interview with Ms. Giordani, Greenpeace Netherlands has conducted tests on sex toys and called

Jessica Giordani, co-owner of The Smitten Kitten, believes that Americans' "cultural shame about sex," coupled with a fear of "invasion of privacy" discourages consumers from bringing lawsuits against the manufacturers of toxic sex toys.<sup>112</sup> In Germany, where the "Novelty Use Only" disclaimer is not used, manufacturers can still rely on consumers to keep complaints to themselves<sup>113</sup> because they are ashamed.<sup>114</sup>

Similarly, defendants in sodomy cases have frequently chosen to quietly pay a fine rather than contest charges and draw attention to their private sex lives.<sup>115</sup> Fearing exposure, "almost everybody pleaded guilty" to charges related to homosexuality, and at notably higher rates than similar charges for sexuality-neutral crimes (lewd vagrancy and degeneracy versus vagrancy and disorderly conduct, for example).<sup>116</sup>

## II. Lax Regulation is Putting Consumers at Risk

### *A. Toxic Sex Toys Present a Unique Consumer Protection Problem*

There is currently no regulation specific to sex toys other than those states that ban such sales as obscene. Very few regulations govern the sale of sex toys at all other than broad laws such as those that impose a sales tax or cover toxic products generally. California's Proposition 65 is an example of a statute that requires clear and reasonable labeling of all carcinogenic consumer products.<sup>117</sup>

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for a European ban against phthalates. See *No Fun If Your Sex Toy Is Toxic*, SYDNEY HERALD SUN, Sept. 10, 2006, at 38.

112. Giordani, *supra* note 15. Ms. Giordani also believes that a major factor preventing litigation is that most people do not consider the possibility that their sex toys are toxic. *Id.*

113. See Schuster, *supra* note 7, at 60 (noting that "Auch wenn es bei uns keine Formulierung gibt, die Produkthaftung von vornherein ausschließt, protestiert kein Orion-Kunde oder Uhse-User . . . versetzt." [Even if, in Germany, legal disclaimers do not suffice to absolve the distributor of product liability, few customers of Orion or Beate Uhse protest when sex toys do not meet consumers' expectations.]).

114. See *id.* ("Man grollt, schweigt – und schämt sich." [The customer can be counted on to grumble, remain silent – and feel ashamed.]).

115. See WILLIAM ESKRIDGE, *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* 87-88 (1999).

116. See *id.*

117. See CAL. HEALTH & SAFETY CODE § 25,249.6 et seq. (West 2000) ("No person in the course of doing business shall knowingly and intentionally expose any



### 1. Sex Toys are Increasingly Common

Despite the connotations of a handful of obscenity statutes, sex toys are not just for perverts; consumers are purchasing and ostensibly using them at an increasing rate. Despite the fact that it is illegal to sell them in several states,<sup>118</sup> sex toys have become quite common, with annual sales topping \$500 million in North America and rising.<sup>119</sup> Sex toys are becoming more accessible: a consumer no longer has to go to a dedicated sex toy boutique, as some sex toys are sold by major retailers<sup>120</sup> and still more are distributed through home parties.<sup>121</sup> Even the states that ban the sale of sex toys do not ban their purchase or possession.<sup>122</sup>

### 2. The Federal Government Has Failed to Protect Consumers from Toxic Sex Toys

The problem with this widely-distributed and highly profitable<sup>123</sup> set of products is that many of them are physiologically toxic.<sup>124</sup> Among other toxins, many sex toys,

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individual to a chemical known to the state to cause cancer or reproductive toxicity without first giving clear and reasonable warning to such individual.”).

118. See, e.g., GA. CODE ANN. § 16-12-80(c) (2005); ALA. CODE § 13A-12-200.2(a) (Supp. 2005).

119. See George, *supra* note 10, at 36. See also Canadian Broadcast Company, *supra* note 10 (describing sex toy sales as “soaring”).

120. See Lite, *supra* note 12, at 36.

121. See McCaughey et al., *supra* note 13, at 79-82.

122. Interestingly, possession of six or more sex toys raises a presumption of intent to distribute in many of these statutes; however, possession and even purchase are not criminalized by the statutes. See, e.g., ALA. CODE § 13A-12-200.2(a)(1) (Supp. 2003) (“It shall be unlawful for any person to knowingly distribute, possess with intent to distribute, or offer or agree to distribute any obscene material or any device designed or marketed as useful primarily for the stimulation of human genital organs. . . .”); GA. CODE ANN. § 16-12-80(a)-(c) (2003) (“Any device designed or marketed as useful primarily for the stimulation of human genital organs is obscene material under this Code section.”); MISS. CODE ANN. § 97-29-105 (2000) (“A person commits the offense of distributing unlawful sexual devices when he knowingly sells . . . any three-dimensional device designed or marketed as useful primarily for the stimulation of human genital organs. . . .”); TEX. PENAL CODE ANN. § 43.23(a) (2003) (“A person commits an offense if, knowing its content and character, he wholesale promotes or possesses with intent to wholesale promote any obscene material or obscene device”), TEX. PENAL CODE ANN. § 43.23(f) (“A person who possesses six or more obscene devices or identical or similar obscene articles is presumed to possess them with intent to promote the same.”).

123. See Schuster, *supra* note 7, at 55 (“Handelsspannen von 500 und mehr Prozent sind in der Branche normal. . . .” [Mark-ups of 500% or more are typical in the industry . . .]).

124. See *id.* at 60 (“„95 Prozent der Sex-Toys sind Mist – Gefahrgüter stinkender

especially those made of jelly plastic,<sup>125</sup> contain the plasticizer di(2-ethylhexyl) phthalate (DEHP) in astonishingly massive quantities.<sup>126</sup> Also, normal use of sex toys accelerates the migration rate of DEHP from the products into the body.<sup>127</sup> The available scientific data, notably including data made available by the federal government, suggests that DEHP is both carcinogenic<sup>128</sup> and teratogenic<sup>129</sup> to humans, as well as a cause of demasculinization and lower production of testosterone in male fetuses and infants.<sup>130</sup> And yet, there are almost no laws restricting the production or sale of this toxin, not even in consumer products.<sup>131</sup> The Consumer Product Safety Commission (CPSC) declined to ban DEHP in baby toys (opting instead for a voluntary agreement with the industry),<sup>132</sup> even though it was well aware that infants suck on such toys,<sup>133</sup> and that the United States Environmental Protection Agency (EPA) had stated that the only safe level of DEHP in drinking water is zero.<sup>134</sup>

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toxischer Schrott!“, sagt Davis Masterson.” [“95 percent of sex toys are crap – dangerous goods, stinking toxic trash!” says Davis Masterson, an industry insider.]). Whether sex toys cause any moral or social harm is beyond the scope of this Note; this Note seeks to illustrate only that many sex toys made out of certain materials are objectively, physiologically toxic.

125. *See id.* at 62 (noting that jelly is “randvoll mit gefährlichen Lösungsmitteln und anderen Chemikalien, die ausgasen, auch wenn der Dildo gar nicht benutzt wird.” [full to the brim with dangerous solvents and other chemicals which are off-gassed even if the product is never used]).

126. *Id.* at 62. “Chemiker Hans-Ulrich Krieg, der den Test durchführte, bezeichnete diese Werte als „ganz außerordentlich hoch.“ So etwas habe er „bei Bedarfsgegenständen noch nie gefunden.” [Chemist Hans-Ulrich Krieg, who conducted the tests, characterized these values as “extraordinarily high,” and asserted that “in the area of consumer products he had never seen such a thing.”]. *Id.*

127. *See* HEALTH CANADA, MEDICAL DEVICES BUREAU, *supra* note 50, at 3.

128. *See* ENVIRONMENTAL PROTECTION AGENCY, *supra* note 42 (finding that DEHP is a probable carcinogen).

129. *See id.* (finding teratogenic effects in rats and mice); Waldman, *supra* note 47 (citing a study linking teratogenic effects to humans). *See also* HEALTH CARE WITHOUT HARM, *supra* note 46, at 14 (providing data on human reproductive toxicity).

130. *See* Swan et al., *supra* note 49; Waldman, *supra* note 47.

131. Proposition 65 is the lone exception. CAL. HEALTH & SAFETY CODE § 25249.5 et seq. (West 2000). Exhaustive searching on Westlaw and LexisNexis revealed no other restrictions.

132. *See* CONSUMER PRODUCT SAFETY COMMISSION, *supra* note 43, at 4.

133. *See id.* at 3.

134. *See* ENVIRONMENTAL PROTECTION AGENCY, *supra* note 54 (stating that water with any level of DEHP cannot be considered safe).

### 3. It Is Difficult for Consumers to Protect Themselves

Sex toys are becoming less taboo and more mainstream, so for many consumers, sex toys are an entirely new line of products about which they know very little. It is unlikely that many consumers can even pronounce "phthalate," much less recognize it as a dangerous toxin, but even those few who understand the risk involved with such chemicals cannot use that knowledge if they do not know the composition of the products.<sup>135</sup> If consumers do not know about the risks involved in the products they purchase, they cannot factor those risks into the decision whether to buy a product.<sup>136</sup> They also cannot choose a safer alternative to a product if they do not know that the product is dangerous.<sup>137</sup> If the market system cannot protect consumers, the government should.

#### *B. The Problem of Toxic Sex Toys Will Not Be Solved by the Status Quo*

The market system will not protect consumers, and litigation over product liability seems unlikely to have much more success. The CPSC may also be ineffective, as it has been in its failure to adequately deal with the problem of DEHP in baby toys in the 1980s.<sup>138</sup> If the CPSC continues to fail in its mission, Congress must take action to protect consumers.

#### 1. Litigation Will Not Protect Consumers

Unfortunately for consumers, litigation over products liability is neither a simple nor an effective solution to the problem of toxic chemicals in sex toys. This is, in part, because it cannot be ordinary litigation concerning ordinary injuries, but rather the much more difficult, complex, and costly toxic tort litigation.<sup>139</sup>

Direct causation of injuries such as cancer and birth defects can be very difficult to prove, and plaintiffs would likely have to

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135. American consumer protection principles emphasize the rights of consumers to know risks in making their purchasing decisions. See *In re International Harvester*, 104 F.T.C. 949, 1061 (1984) (noting that the purpose of the FTC's unfairness authority is to ensure that a rational actor in the free market system is not hindered by a lack of relevant information).

136. See *id.*

137. See *id.*

138. See *supra* Section I.B.

139. See *In re DES Cases*, 789 F. Supp. 552, 562 (E.D.N.Y. 1992) (noting that toxic tort litigation is incredibly complex).

make a case that their risk for these effects had increased. The manufacturer's duty to warn about the danger could probably be established by showing that the toxicity of chemicals like DEHP is well-known, even by government agencies, and has been for many years.<sup>140</sup> Showing medical causation may present difficulties. Many factors contribute to causing cancer and birth defects and showing substantial contribution by a given manufacturer may well prove very complicated. Demonstrating the frequency, regularity, and proximity of exposure may be a substantial obstacle to litigation for its own reasons.

Also, attempting to litigate involves difficult battles over the effectiveness of the disclaimer "For Novelty Use Only."<sup>141</sup> While the case law does not support such a defense,<sup>142</sup> prospective plaintiffs may be discouraged by the obstacle of arguing whether the sex toys in question are "gag gift[s] not intended for actual use"<sup>143</sup> or not.

In addition to the reasons above, there is a high probability that plaintiffs will want to avoid participation in the litigation out of shame.<sup>144</sup> Although sex toys are becoming increasingly common, they are still considered taboo or perverse by many, as evidenced by the many states prohibiting their sale as "obscene."<sup>145</sup> Getting one plaintiff to testify about his or her sex toy use could be difficult enough, but the task of getting a substantial amount of consumers to testify about something so personal and private<sup>146</sup> is simply unrealistic. One can easily draw an analogy to defendants in sodomy cases who often chose to plead guilty and pay a relatively small fine rather than attract unwanted attention for their participation in a sexual act many consider obscene.<sup>147</sup> Many potential plaintiffs will not want to testify because of their possible exposure.

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140. See *supra* Part I.B.

141. See *supra* Section I.C.3.

142. See *supra* Section I.C.3.

143. Gertz, *supra* note 21.

144. See *supra* Part I.C.4.

145. See, e.g., ALA. CODE § 13A-12-200.2 (Supp.2003); GA. CODE ANN. § 16-12-80(c) (2003); KAN. STAT. ANN. § 21-4301(c)(3) (1995); MISS. CODE ANN. § 97-29-105 (2000); TEX. PENAL CODE ANN. § 43.23(a) (2003).

146. See generally *Williams v. A.G.*, 378 F.3d 1232, 1237 n.8 (11th Cir. 2004) (challenging the assertion that the "*Lawrence v. Texas*, 539 U.S. 558 (2003)) Court rejected public morality as a legitimate state interest that can justify criminalizing private consensual sexual conduct" and rejecting the argument that private use of sex toys may be protected by *Lawrence's* holding).

147. See ESKRIDGE, *supra* note 115, at 87.

## 2. Voluntary Agreements with Industry Will Be Ineffective

The CPSC's solution to the problem of DEHP composed baby toys like teething rings was to arrange for voluntary industry agreements instead of enacting a ban on DEHP in those products.<sup>148</sup> The CPSC requested that manufacturers of baby toys stop using DEHP, and it asked major retailers to stop carrying baby toys made with DEHP.<sup>149</sup> Despite the CPSC's claim that its mission includes protecting children from chemical-related injury,<sup>150</sup> U.S. PIRG's recent report demonstrates the total failure of the aforementioned agreements.<sup>151</sup> Examining eighteen baby toys from various manufacturers (including several major brands), the study found that fifteen of them contained DEHP.<sup>152</sup> The frequent use of DEHP in baby toys shows the ineffectiveness and impermanence of voluntary agreements with industry.

Even if the voluntary agreements had been effective, they would not be a feasible form of consumer protection for the sex toy industry for three reasons. First, the sex toy industry simply does not have an industrial representative organization of any kind that the CPSC could deal with directly.<sup>153</sup> This means that the CPSC would have to approach individual manufacturers one by one, a process that could prove tedious, especially since sex toys are not a recognized category of commerce under the NAICS,<sup>154</sup> which makes sex toy manufacturers difficult to track.

Second, sex toys are not generally distributed by large retailers with whom such agreements are traditionally reached. Even though big box stores like Kmart and Wal-Mart are starting

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148. See CONSUMER PRODUCT SAFETY COMMISSION, *supra* note 43, at 4.

149. See *id.*

150. See CONSUMER PRODUCT SAFETY COMMISSION, *supra* note 43.

151. See U.S. PIRG EDUCATION FUND, *supra* note 70.

152. See *id.*

153. See Giordani, *supra* note 15 (noting that there is one industry association "in its developing stages"—the Coalition Against Toxic Toys—though, as its name implies, its focus is on educating the consumers about choosing safe, non-toxic sex toys). There is one lobbying association in the adult industry, but its focus is and always has been adult entertainment, not sex toys. See FREE SPEECH COALITION, *supra* note 15.

154. See UNITED STATES CENSUS BUREAU, *supra* note 19; Gertz, *supra* note 21 ("In the U.S., all of the companies that manufacture adult novelties, whether they're mom-and-pop or large corporations, are privately held," explains Philip Pearl, publisher and editor in chief of *AVN Adult Novelty Business*, a trade magazine. "None are required to publish financial information, and none do."); Giordani, *supra* note 15.

to carry vibrators,<sup>155</sup> there is no evidence to say that they account for a substantial portion of sex toy sales. Again, the CPSC would face the laborious task of dealing with countless small retailers.

Third, manufacturing sex toys from PVC and DEHP is highly profitable,<sup>156</sup> and it may not be reasonable to assume that manufacturers would be willing to hold to such an agreement with so great a financial incentive to cheat. In fact, the more closely watched children's toy industry<sup>157</sup> has failed to adhere to its agreement.<sup>158</sup> An effective voluntary agreement with the sex toy industry to end the use of DEHP is neither practical nor realistic.

*C. The Federal Government Must Take a Stand Against Toxic Consumer Products*

While a small handful of states are beginning to address the problem of toxic phthalates in consumer products, their focus is primarily on cosmetic products.<sup>159</sup> A state-by-state effort that specific will take too long and provide protection that is too narrow. Additionally, those states that prohibit the sale of sex toys are hardly likely to regulate their sale, even to protect consumers.

1. Appropriate Legislation or Regulation Must Target Consumer Products Generally

Toxic sex toys are not the only consumer products that use dangerous amounts of DEHP or are otherwise toxic. For example, DEHP is used in building materials, beauty care products, health

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155. See Lite, *supra* note 12, at 36.

156. See Schuster, *supra* note 7, at 55 ("Handelsspannen von 500 und mehr Prozent sind in der Branche normal . . ." [Mark-ups of 500% or more are typical in the industry . . .]).

157. Cf. *id.* ("Behörden, Verbraucherschützer und selbst die Sexualmedizin aus Berührungsangst, Prüderie und Verklemmtheitvielfach so tun, als existiere die Lustmittel-Industrie gar nicht." [Government authorities, consumer advocates, and even the medical field behave – out of distaste, prudishness and uptightness – as if the sex toy industry did not even exist.]).

158. Compare CONSUMER PRODUCT SAFETY COMMISSION, *supra* note 43 (discussing the voluntary industry agreement to end the use of DEHP in baby toys) with U.S. PIRG EDUCATION FUND, *supra* note 70, at 17-19 (noting that the use of DEHP in baby toys continues, even among major manufacturers).

159. See Antionette Alexander, *State Lawmakers Push for Cosmetics' Chemical Ban*, DRUG STORE NEWS, June 6, 2005, at 60 (noting that legislators in California and New York are supporting bills to curb the use of certain chemicals, including DEHP, in cosmetic products).

care products, and even food packaging.<sup>160</sup> Because DEHP is so widely used, consumers are exposed to it in many ways: inhalation, skin contact, direct blood contact, ingestion, and genital contact. Because the ill effects of DEHP extend far beyond just sex toys,<sup>161</sup> all consumer products containing DEHP should be banned.

Further, specifically regulating sex toys is very difficult because there is no specific commercial category for them. Instead, retailers and manufacturers use generic categories like "novelty," "adult bookstores," and "miscellaneous retail."<sup>162</sup> This makes tracking sex toy sales extremely burdensome and impractical, so legislation or regulation targeted specifically at sex toys is unlikely to provide thorough and effective protection.

## 2. A Ban on DEHP and Other Toxins in Consumer Products Will Be the Only Effective Solution

Widespread use of DEHP in consumer products has already caused it to be quite common in the environment. In light of the fact that a single part of DEHP per billion parts of water is sufficient to contaminate that water,<sup>163</sup> the commonness of DEHP is unacceptable. Its use must end.

Simply banning the manufacture of DEHP is unlikely to protect American consumers from its effects because it could easily be manufactured in another country and then imported into the United States as finished product. Labeling consumer goods with warnings such as "[t]his product contains DEHP, a known carcinogen and teratogen that has been linked to asthma" may seem appealing but will not be as effective as a ban.<sup>164</sup> Invariably some consumers will ignore the warnings if they notice them at all,<sup>165</sup> just as consumers presently ignore "Novelty Use Only" warnings on sex toys.<sup>166</sup>

Rather, there should be a total ban on DEHP in all consumer

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160. See AGENCY FOR TOXIC SUBSTANCES AND DISEASE REGISTRY, *supra* note 40.

161. See *id.*

162. See Giordani, *supra* note 15 (explaining why The Smitten Kitten is registered as miscellaneous retail: "Nothing else accurately classifies what we do.").

163. See ENVIRONMENTAL PROTECTION AGENCY, *supra* note 54.

164. For an argument that warning labels "provide no useful consumer information," see 46 ANTITRUST & TRADE REG. REP. 288 (Feb. 23, 1989).

165. See *id.*

166. See Giordani, *supra* note 15.

goods. This is the only sensible way to reduce the risks associated with DEHP because its use is so prevalent even though there are many safer alternatives. This would also alleviate the difficulties associated with regulating sex toys specifically because legislators will not have to discuss an uncomfortable subject, specific tracking for a legally elusive product, or regulating a product that is illegal to sell in some states.

### 3. The Price of Safety is Eternal Vigilance

Some controversy remains over the toxic nature of DEHP.<sup>167</sup> The CPSC and EPA should continue testing DEHP to determine whether any form and quantity of human contact with DEHP is safe. The CPSC conducted similar tests in the past by forming a Chronic Health Advisory Panel (CHAP) to study the effects of certain chemicals. Though there has already been a CHAP on DEHP,<sup>168</sup> there have been many advances in knowledge of DEHP in the twenty years since the CHAP convened,<sup>169</sup> and those findings are likely to be highly relevant to a new CHAP's recommendations. Perhaps a preventative interim ban on DEHP is in order until a CHAP can issue recommendations.

### 4. Model Legislation for Banning DEHP

If the CPSC fails to ban DEHP in a timely manner, Congress may and should directly enact a ban by amending Chapter 47 of Title 15 of the United States Code.<sup>170</sup> A model of what that amendment might look like is provided below:

**15 U.S.C. § 2057c. Banning of Di(2-ethylhexyl)  
Phthalate (DEHP)**

**(a) In general**

Except as provided in subsection (b) of this section, di(2-ethylhexyl) phthalate (DEHP) shall be considered a banned hazardous product under section 2057 of this title.

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167. See, e.g., EUROPEAN COUNCIL FOR PLASTICIZERS AND INTERMEDIATES, SOME INCORRECT STATEMENTS BY HEALTH CARE WITHOUT HARM, July 10, 2002, available at <http://www.ecpi.org/index.asp?page=14> (arguing that concerns over the toxicity of DEHP are unfounded).

168. See CONSUMER PRODUCT SAFETY COMMISSION, *supra* note 43, at 4.

169. See, e.g., Waldman, *supra* note 47 (noting recent discoveries of direct links between DEHP and ill effects in humans).

170. See, e.g., 15 U.S.C. §§ 2057a-2057b (2000) (banning butyl nitrate and isopropyl nitrate directly, rather than through the Consumer Product Safety Commission).



(b) Definitions

For purposes of this section:

- (1) The term "di(2-ethylhexyl) phthalate" includes di(2-ethylhexyl) phthalate (DEHP), bis(2-ethylhexyl) phthalate (BEHP), any of the synonyms for di(2-ethylhexyl) phthalate as recognized by the United States Environmental Protection Agency, and mixtures containing these chemicals.

(c) Effective date

This section shall take effect on January 1, 2007.

## **Conclusion**

Sex toys made from physiologically toxic materials create a dangerous, even deadly hazard to unsuspecting consumers. This is unacceptable, but it is only one facet of a larger problem: the proliferation of toxic materials like di(2-ethylhexyl)phthalate (DEHP). When such materials are known to be toxic, their use in consumer goods should not be tolerated.

The Consumer Product Safety Commission (CPSC) thus far has failed to curb the proliferation of DEHP, and if its failure continues, Congress should step in and ban DEHP by statute. If the CPSC chooses to continue to permit the use of DEHP, it owes the American people a duty to justify its decision to do so with extensive studies and good science.

The implications of this Note reach beyond just DEHP: products that are known to contain materials so toxic that they can cause cancer and birth defects should be banned, especially when there are safer alternative materials available. The short-term costs of using safer material will surely pale in comparison to the long-term costs of health care for those injured by toxic products.