



U.S. CONSUMER PRODUCT SAFETY COMMISSION
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**STATEMENT OF COMMISSIONER ROBERT S. ADLER
ON THE REVOCATION OF THE INTERPRETATION OF THE TERM
“UNBLOCKABLE DRAIN” UNDER THE VIRGINIA GRAEME BAKER
POOL AND SPA SAFETY ACT**

September 28, 2011

On December 19, 2007, Congress enacted the Virginia Graeme Baker Pool and Spa Safety Act¹ (“VGBA” or “the Act”). The purpose of the Act is to prevent child drowning and entrapment in swimming pools and spas. Among other things, the Act imposes requirements for secondary anti-entrapment devices on most public pools and spas. In April 2010, I cast a vote interpreting the term “unblockable drain” as permitting public pools and spas with an “unblockable drain cover” to comply with the Act without the necessity of installing a secondary anti-entrapment device. Today, after long and painful consideration, I have decided to join with my colleagues in revoking the previous interpretation of the term “unblockable drain.” As a result of our vote today, the Commission will not allow a removable “unblockable” drain cover, by itself, to render a small, single main drain unblockable in public pools covered by the Act.

Previous Vote Interpreting the Term “Unblockable Drain”

Under the VGBA, an “unblockable drain” is defined as a “drain of any size and shape that a human body cannot sufficiently block to create a suction entrapment hazard.” In preparing for the vote in April 2010, I found no specific guidance either in the statutory language of the VGBA or its legislative history indicating whether Congress intended that drains with “unblockable drain covers” could be considered “unblockable drains.” So, when I interpreted the term, I found myself drawn to the definition that made the most sense to me at the time – one that allowed the use of a large cover that I understood to prevent the most common types of pool entrapment.²

After the April 2010 vote, however, I received numerous letters from citizens and members of Congress, including those who were intimately involved in drafting the

¹ P.L. 110-140, Title XIV, 15 U.S.C. § 8001, et. seq.

² For a comprehensive explanation of my previous vote see my separate statement at <http://www.cpsc.gov/pr/adler03032010.pdf>.

statute, who strongly disagreed with my interpretation of the statute. To a person, the members of Congress that wrote insisted that they did not intend that small, single main drains with “unblockable drain covers” be considered “unblockable drains.” In addition, I met twice with Representative Debbie Wassermann Schultz, who introduced the bill, and was unquestionably one of the members of Congress most involved in passing the VGBA, who reiterated this position. Further, every one of the citizens that wrote expressed serious objection to an interpretation of the VGBA that allowed for no backup system for a single main drain that could be obstructed.

I understand that consumers and industry alike need stability in the marketplace. They look to the decisions of regulators and rely on those decisions when purchasing, using, and manufacturing consumer products. In fact, I hesitated at first to reexamine my previous vote for this very reason. However, as a policy maker sworn to uphold the law, I believe it is my duty to listen to all points of view and when a persuasive case is made to reconsider my previous decisions. So, in response to these requests, I took it upon myself to reexamine both the safety considerations associated with “unblockable drain covers” and the legislative history of the VGBA.

Competing Policy Considerations

I have spent many hours comparing the safety of large “unblockable drain covers” used on small, single main drains to the safety of smaller drain covers with a secondary anti-entrapment device. When I cast my vote in April 2010, I believed that large “unblockable drain covers” seemed to provide a greater measure of safety than smaller drain covers with secondary anti-entrapment systems. I reached that conclusion based on my understanding that a properly installed “unblockable drain cover” always protected swimmers from the five entrapment hazards identified by CPSC better than a VGBA compliant cover plus a back-up system. Because all drain covers come off, it is no longer my conclusion that in all circumstances this is the case.

Further, at that time, I concluded that if required to install a secondary system, despite the statute’s allowance for five different back-up systems (Safety vacuum release system (SVRS), suction-limiting vent system, gravity drainage system, automatic pump shut-off system, or drain disablement) the vast majority of public pools were likely to opt for a small VGBA compliant cover and an anti-entrapment device known as an SVRS, which is among the least expensive of the back-up systems.³ My concerns have not necessarily

³ An SVRS operates by shutting down a pool’s pump if the water flow through a drain drops significantly due to a blockage in the drain. Generally speaking, automatic pump shut-off systems appear to be similarly priced to an SVRS, but their use appears to be less wide spread.

changed because the usefulness of an SVRS is essentially limited to those instances in which a swimmer's body or limb fully blocks a drain.⁴

What makes the policy call so difficult, however, is the fact that an “unblockable drain cover” can operate only if it stays on the drain. In other words, if a drain cover is improperly installed or removed and there is no secondary system then swimmers would be at risk of entrapment in the drain below.⁵

Of course, as critics of my previous vote have stated, all drain covers come off, at a minimum, for seasonal pool maintenance and repairs or to be replaced – a point I freely concede.⁶ On the other hand, some backup systems offer protection only against three of the five entrapment hazards. So the question remains as to which is the safer approach. The best I can say is that one can hypothesize various accident scenarios in which one approach is safer than the other depending on the circumstances one assumes to be in play. But neither approach is so clearly superior that all reasonable minds would agree that one is always safer than the other.

Congressional Intent

I turn now to what is the touchstone for a policy maker like me, namely, what did Congress – the folks who wrote the law – intend with respect to the implementation of the VGBA. And although neither the statutory language nor the legislative history provide clear guidance, my discussions with congressional staff and members directly involved in drafting the statute have clearly persuaded me that my previous interpretation was not what they intended. Therefore, the question arises whether I can or should reinterpret the law based on the post-enactment declarations by members of Congress. Based on my understanding of the law, I believe that I can do so. I am certainly aware that post-enactment congressional declarations are not necessarily good guides to legislative intent. To say that they are not necessarily good guides is not to say that they are never helpful. In this case, given the consistency and intensity of the views expressed, I find them to be extremely relevant.

As a matter of law, I see no impediment to my relying on such statements where they have persuaded me that my interpretation, reasonable to me at the time, was in fact inconsistent with what many members of Congress intended at the time of passage.

⁴ CPSC staff have identified five types of entrapment risks: (i) full body entrapment, (ii) hair entrapment, (iii) evisceration from sitting on a drain, (iv) limb entrapment, and (v) mechanical entrapment (e.g., jewelry or necklaces caught in a drain).

⁵ The ASME/ANSI standard requires drain covers to be firmly and strongly attached using corrosion resistant screws that are securely inserted and designed to avoid threading, greatly reducing the chance of a cover coming off inadvertently or accidentally.

⁶ Another area where data is lacking is how many reported incidents of entrapment were related to covers being removed for pool maintenance or repair as opposed to drain cover failure. Relatedly, I would like to see VGBA compliant drain covers that do not need to be removed for pool maintenance or repair.

Again, based on the communications I received⁷ and the discussions I had with Representative Wasserman Schultz and others⁸, I have been persuaded that my interpretation is not what was intended when the law was written.⁹

Revoking the Previous Commission Interpretation of the Term “Unblockable Drain”

Given the close call between the safety implications and/or benefits of the two interpretations and my belief that my previous interpretation is contrary to congressional intent, I have cast my vote today to revoke the Commission’s previous definition of the term “unblockable drain.” As a result of today’s vote, it is my understanding that the Commission’s Staff Technical Guidance, dated June 2008, will be updated to note that “placing a removable unblockable drain cover over a blockable drain shall not constitute an unblockable drain.” The revised Guidance will state that a drain is “unblockable” if a suction outlet, including the sump, has a perforated (open) area that cannot be shadowed by the area of the 18" x 23" Body Blocking Element of ASME/ANSI A112.19.8-2007 and that the rated flow through any portion of the remaining open area (beyond the shadowed portion) cannot create a suction force in excess of the removal force values in Table 1 of that Standard.

I am aware that some owners of public pools may have purchased and installed “unblockable drain covers.”¹⁰ It would be a fine thing if I, as a policy maker, could require both “unblockable drain covers” and secondary anti-entrapment systems. In that way, safety would be clearly be enhanced. Alas, I cannot do that. But for those who did install “unblockable drain covers,” it is my hope that they will continue to use their

⁷ See e.g., September 27, 2011 Letter from Representatives Waxman, Butterfield, Larson, Wasserman-Schultz, and Himes and Senators Rockefeller, Pryor, Durbin, Nelson, and Blumenthal. See also September 27, 2011 Letter to Chairman Tenenbaum from Representative Wolf. All related letters are on file with the Commission Secretary.

⁸ To review the various meetings that I have held on this issue see my meeting logs at <http://www.cpsc.gov/library/foia/meetings/mtg10/poolSafetyAdler.pdf>; <http://www.cpsc.gov/library/foia/meetings/mtg10/apspAdler.pdf>; <http://www.cpsc.gov/library/foia/meetings/mtg10/apspAdlerPhone.pdf>; <http://www.cpsc.gov/library/foia/meetings/mtg10/ZACAdler.pdf>; <http://www.cpsc.gov/library/foia/meetings/mtg10/nsfAdler.pdf>; <http://www.cpsc.gov/library/foia/meetings/mtg10/adler09232010a.pdf>; and <http://www.cpsc.gov/library/foia/meetings/mtg11/adler10142010.pdf>.

⁹ I have also been told that secondary systems are called for because of the Act’s focus on “layers of protection” to prevent drownings and pool entrapments. As a public health official, I find this concept to be appealing, but find it extremely puzzling that the only mention of it is in section 1402(4) of the Act, which on its face seems to apply only to residential swimming pools, not public pools. Why the Act seems to adopt such a narrow scope is unclear.

¹⁰ My understanding of the anecdotal data is that the number is relatively small and certainly smaller than I had anticipated. This may be because as it turns out, the large “unblockable drain covers” typically exceed the cost of installing an SVRS system, so financial considerations probably weigh against the installation of many unblockable drain covers as a way of complying with VGBA.

“unblockable drain covers” in conjunction with the back-up systems that they will need to install.¹¹

I hope to see the day when technology moves us even further forward in terms of safety. The VGBA explicitly allows for the Commission to determine that other secondary systems are equally effective as, or better than the five systems outlined. For example, I would like to see someone market a drain cover with a “dead-man switch” that shuts off the pool pump immediately upon the removal of the drain cover. Until that time, however, in order to give public pool owners sufficient time to make any necessary changes to their pools, I voted for a compliance date of May 28, 2012. For those public pool owners affected by our vote today, the Commission will not begin enforcing this change in our interpretation until the start of the pool season next year. In addition, I offered an amendment that was adopted unanimously by my colleagues to solicit “written comments regarding the ability of those who have installed VGBA compliant unblockable drain covers as described at 16 CFR 1450.2(b) to come into compliance with our revocation by May 28, 2012.” I look forward to receiving those comments on this important issue.

¹¹ To be clear, nothing in the Commission’s action today should affect the use of a properly installed, properly rated VGBA compliant drain cover – large or small. The action only speaks to whether a back-up system is needed.