UNITED STATES
CONSUMER PRODUCT SAFETY COMMISSION
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Separate Statement of Commissioner Robert Adler on the Virginia Graeme Baker Pool and Spa Safety Act

On December 19, 2007, Congress passed the Virginia Graeme Baker Pool and Spa Safety Act,[1] ("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 anti-entrapment devices on public pools and spas. Today the Commission cast a series of votes on implementing the Act. I wish to discuss my votes on two issues under the Act before the Commission.

May a Complying Drain Cover be Considered an "Unblockable Drain?"

Under the VGBA, each public pool and spa must be equipped with drain covers that comply with ASME/ANSI A112.19.8, which essentially requires that the drain covers be installed in such a manner that they are tightly and permanently affixed. The Act further requires that each public pool or spa in the United States with a single main drain, other than an unblockable drain, shall be equipped, at a minimum, with one or more secondary anti-entrapment devices or systems.[2] Thus, the key issue is whether a compliant drain cover of sufficient dimensions over a single main drain renders it an unblockable drain.

An unblockable drain, as defined in the Act is a "drain of any size and shape that a human body cannot sufficiently block to create a suction entrapment hazard." I think it indisputable that a drain cover of sufficient size that fully complies with the voluntary standard would render any drain unblockable – and is clearly the best approach of any of the anti-entrapment devices or systems in the VGBA.

Some may argue, however, that the fact that the Act sets requirements for drain covers in section 1404(b) and then sets additional requirements in section 1404(c) for secondary anti-entrapment systems means that every public pool or spa must be equipped with a secondary anti-entrapment system. I would certainly read the statute as requiring the secondary anti-entrapment systems if it contained language with such a mandate, but it

[1] P.L. 110-140, Title XIV, 15 U.S.C. § 8001, et. seq.
[2] Section 1404(c)(1)(A)(ii) of VGBA.

does not. What section 1404(c)1(A)(ii) calls for, as I read it, is such systems if a pool or spa does not contain an unblockable drain.

In order to determine whether a drain cover can constitute an unblockable drain, one must look to the definition of the term "main drain." If the definition of "main drain" precludes the Commission from considering a drain cover to constitute an unblockable drain then I would agree that secondary anti-entrapment systems must be installed on all public pools and spas. I therefore turn to the definition of "main drain," which is a "submerged suction outlet typically located at the bottom of a pool or spa to conduct water to a recirculating pump."[3] Thus, the issue, succinctly stated, is whether the drain is only the suction outlet, but not the suction outlet with a drain cover. I believe that the latter, broader interpretation is more logical and sensible.

If a cover renders a pool or spa's main drain unblockable, I can see no safety reason for interpreting the words "main drain" narrowly. If Congress truly intended to bar drain covers that address the entrapment issues presented by pool and spa drains from being considered unblockable drains, one imagines that they would have said so in much clearer fashion.[4] I see no such language in the statute. Moreover, I see no convincing policy reason for adopting such an approach. If I thought that the secondary anti-entrapment systems provided substantially more safety than unblockable drains, I might be tempted to push the definition, but I note that these systems, which can be quite expensive, do not address hazards such as organ evisceration from sitting on a drain or hair entanglement in drains. In fact, the only protection that seems to address virtually all hazards is the drain cover which, if fully compliant with the voluntary standard (and of sufficient dimension), is the most cost-effective approach to safety.

In making this point, I am well aware of the concern about a drain cover coming off or not being well maintained. I have two thoughts about this. First, if the voluntary standard's requirements for ensuring that a cover stay affixed over a drain are inadequate, the voluntary standard certainly should be upgraded. I have, however, seen no evidence that the standard will fail to provide the necessary protection. Second, I fear the moral hazard implications of relying on the current secondary anti-entrapment systems to any substantial degree. If a drain cover were to come off, a pool or spa owner might choose not to worry because he or she had a secondary anti-entrapment system. But, as I just mentioned, these systems fail to protect against some of the most serious hazards to children, such as organ evisceration or hair entrapment. Thus, one might be lulled into thinking that protections exist that really do not.[5] Accordingly, I return to my conclusion that the most important safety step one could take to meet the spirit of VGBA is to install a well-made drain cover.

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[3] Section 1403(4) of VGBA.

[4] By analogy, when I think of a "cage" in the zoo, I do not imagine the fence as something separate from what I consider the cage. They are one and the same system.

[5] This is particularly the case for one who installs a small "compliant" drain cover that does not protect against evisceration or hair entrapment. While such a drain cover may meet the specifications of the voluntary standard, it provides much less protection than a large size, well-designed drain cover. In other words, the main focus of the Commissions's efforts should be on well-designed drain covers.

How Should the Commission Interpret the Term "Public Accommodation" in the Act?

Under VGBA, a public pool or spa includes one that is "open exclusively to patrons of a hotel or other public accommodations facility."[6] Because the term "public accommodations" is not defined in the Act, many parties have sought guidance from the Commission regarding its interpretation of these words. Notwithstanding that nothing in the statute limits the scope of the term, the Commission today voted to interpret this term narrowly, as follows:

> *Public accommodations facility* means an inn, hotel, motel, or other place of lodging *except for an establishment located within a building that contains not more than five rooms for rent or hire* and that is actually occupied by the proprietor of such establishment as the residence of such proprietor. (Emphasis added).

Upon consideration, I respectfully dissent from the Commission's exclusion of establishments with five rooms or fewer for rent. I believe that any establishment with a pool, hot tub, or spa that rents rooms to the public should be subject to the Act and that a plain language reading of the statute justifies that result.[7]

The Term "Public Accommodations" in Previous Acts: Dubious and Irrelevant Precedents: As far as I can tell, the primary reason the Commission has adopted the exclusion in the term "public accommodation" is because several other federal statutes explicitly limit it in this manner. In other words, the substantive reason for this decision has nothing to do with safety or with the legislative history of the VGBA. It has only to do with some sense that the Commission should interpret the Act in a fashion similar to other acts.

The three acts with the exclusion language before VGBA was passed that the Commission seems to have relied on are the Civil Rights Act of 1964 (CRA), the Americans with Disabilities Act (ADA), and the Danny Keysar Child Product Safety Notification Act,[8] enacted as part of the Consumer Product Safety Improvement Act (CPSIA). While these are all important laws, I think their precedential value for the VGBA is zero.

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[6] Section 1404 (c)(2)(B)(iii) of the VGBA.

[7] In fact, the Commission's approach clearly assumes that all such lodging falls within the definition of the term "public accommodation," so what they have done is to exempt some places of public accommodation – something that the statute does not call for.

[8] Section 104(c)(2)(D) of the CPSIA. This section provides that section 104 applies to any person who "owns or operates a public accommodation affecting commerce (as defined in section 4 of the Federal Firec Prevention and Control Act of 1974. (FFPCA)." Section 4 of the FFPCA defines a place of public accommodation as "any inn, hotel, or other establishment … that provides lodging to transient guests, except that such term does not include … an establishment located within a building that contains more than 5 rooms for rent or hire and that is actually occupied as a residence by the proprietor of such establishment."

First, with respect to the Civil Rights Act, a brief review of its history demonstrates, if anything, how shameful and irrelevant it is as a precedent for interpreting the term "public accommodation." The language in the statute represents to me nothing more than a bitter reminder of the struggle for civil rights in the 1960s. Essentially, the definition of public accommodation represents an obstructionist, if not racist, intent on the part of its proponents for small businesses to continue to deny food and lodging to non-white Americans.[9] Nothing in its language or rationale bears any relevance to the VGBA.

With respect to the Americans With Disabilities Act (ADA), I can see a thoughtful rationale for excluding businesses with fewer than five units. Requiring a small business owner to retrofit his or her building to accommodate wheelchairs, for example, likely would have imposed exceptionally large costs, perhaps even to the point of bankrupting such a business. Accordingly, this is a rational reason for such an exclusion under the ADA, but, as I shall discuss, its cost rationale does not extend to the VGBA.

With respect to the Danny Keysar Act, I believe that the exclusion language in that Act demonstrates just how unfortunate an exercise it is to rely on tradition where there is no rationale attached to the tradition.[10] In essence, the Keysar Act's drafters used the language because it had been used before – not for any safety concern. If cost were the concern that led to excluding five or fewer units in a motel or small hotel, the drafters surely would have also excluded small day care centers or family child care centers – yet they did not. These enterprises fall squarely within the Keysar Act's jurisdiction[11] even though they likely face similar or even greater cost challenges than small motels or hotels. The only rationale for the exclusion language in the Danny Keysar Act is a mechanical reliance on a previous precedent.

Finally, for those who might argue that the public has developed a reasonable expectation that the term "public accommodation" automatically and universally excludes small business units, I question this claim. Were the term that sacrosanct, I doubt that states such as Maine,[12] Maryland,[13] and Massachusetts[14] would have rejected the narrow definition relied upon by the Commission. In fact, they have resisted this approach and have insisted upon a broader interpretation. And, of course, I reiterate that the VGBA carries no such limitation.

In short, there is no hallowed tradition or thoughtful public policy basis for excluding businesses with five or fewer units from the Commission's implementation of the VGBA.

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[9] In addition, because the right of the Congress to regulate businesses that did not directly engage in commercial activities that crossed state lines was unsettled in 1964, Congress limited the Act's scope to companies whose activities clearly affected interstate commerce. See *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964) and *Katzenbach v. McClung*, 379 U.S. 294 (1964).

[10] As Gibert Chesterton stated, "Tradition means giving votes to the most obscure of all classes, our ancestors. It is the democracy of the dead."

[11] Section 104(c)(2)(B) of the CPSIA.

[12] 5 M.R.S § 4533 (2009).

[13] Md. Code Ann. § 20-301 (2009).

[14] ALM GL ch. 272, §92A (2009).

The Statutory Scheme of the VGBA: Interpreting the intent of Congress in legislation is a deadly game. Most maxims that guide statutory interpretation run into maxims that point directly in the opposite direction. That said, I note that, unlike the three acts that the Commission seems to have relied on to interpret the term "public accommodation," the VGBA does not contain language that excludes businesses with five units or less. To the contrary, the VGBA simply defines a "public pool or spa" as one that is open to "patrons of a hotel or other public accommodations facility."[15] In other words, without any hint or prodding from Congress, the Commission has taken it upon itself to narrow the scope of the law's protections simply because the VGBA uses a term that has been defined more narrowly in other statutes.

The fact that the Congress defined "public accommodation" in the three acts relied upon by the Commission with explicit language that narrowed their application yet did not do so in the VGBA strongly suggests that Congress intended a broad application of the term in the VGBA. To me, this suggests an appropriate invocation of the legal maxim, "*expressio unius est exclusio alterius*." In other words, whatever is omitted is understood to be intentionally excluded. In the case of VGBA, Congress omitted the words of limitation included in the other statutes relied upon by the Commission, so one wonders why the Commission felt it necessary to issue such a narrow interpretation, especially since the Commission's interpretation will result in greater risks to the public health and safety.

Increased Risks to Children: I think it beyond dispute that a pool, hot tub, or spa at a small B&B with four rooms made to the exact specifications of a pool, hot tub, or spa at a B&B with six rooms presents precisely the same risk of injury or death to children at both facilities. With such strong safety concerns, one looks in vain for a rationale to explain why one facility should be covered by VGBA and the other not.

The only argument that I have heard to explain the distinction suggests that the proprietor of the smaller facility might be more likely to act as a lifeguard than one at the larger facility. This argument rests upon an extremely dubious set of assumptions and is not credible. Anyone who knows anything about small hotels and B&Bs surely knows that owner-proprietors are extremely unlikely to have the spare time to monitor children at play in their pools or hot tubs. Moreover, as almost any casual traveler would know, the trend in the country today is to hire fewer and fewer lifeguards at small lodging facilities. The lack of supervision means that any child caught in a deadly drain at an exempt facility likely faces life-threatening consequences.

Cost Issues: An Unpersuasive Concern: As previously mentioned, I can easily understand a sound policy basis for excluding small hotels and B&Bs from coverage under the ADA because of costs. That basis does not exist with the housing units excluded under the Commission's approach. Nothing in VGBA requires any lodging, large or small, to install a pool, hot tub, or spa. All that it says is that once the facility's owner has made the judgment to incur the cost of installation (or to continue to offer the use of a pool, hot tub, or spa to his or her guests), he or she should take the reasonable

[15] Section 1404(c)(2)(B)(iii) of the VGBA.

steps necessary to make the pool, hot tub, or spa safe. Any safety system required under VGBA will constitute a small percentage of the costs of the pool, hot tub, or spa. In other words, no one requires the owners or proprietors to play, but if they do play, they must do so safely. One might draw an analogy to automobile ownership. No one requires a citizen to purchase a car, but if he or she does so, society requires the citizen to drive a safe car in a safe manner, with everyone having to purchase insurance to enter the roads.