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New Federal Safety Law “Cannonballs” Into Apartment, Condominium and Hotel Pools

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On December 19, 2008, the Virginia Graeme Baker Pool and Spa Safety Act, 15 U.S.C. § 8000 et seq. (the “Act”) became applicable to all “public pools and spas.” The Act was passed following advocacy by the parents of Virginia Graeme Baker, who drowned in a spa after being held underwater for several minutes by the spa drain. Virginia, who was seven years old at the time, was the granddaughter of James Baker, White House Chief of Staff under Ronald Reagan and Secretary of State under George H. W. Bush. Compliance with the Act could result in significant expense to some owners, but failure to comply could result in substantial fines and other penalties and may adversely affect insurance coverage for some injury or wrongful death claims arising from the use of a pool by residents or guests.

The Consumer Product Safety Commission (the “CPSC”) is charged with enforcement of the Act. The Act defines a “public pool and spa” to include not only pools and spas operated by cities and by the federal government, but also any swimming pool or spa that is open to members (“swim clubs”) or to any resident of a multiunit apartment building, apartment complex, residential real estate development, multifamily residential area or to patrons of a hotel or other public accommodations facility.

The Act requires that all pool and spa drain covers sold after December 19, 2008, meet the performance standards specified by ASME/ANSI A112.19.8, which requires that such drain covers be designed in such a fashion as to avoid the possibility of entrapment by suction or by the entanglement of hair or swimsuits in the drain cover. The Act further requires that antientanglement and suction drain covers satisfying these

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standards be installed in all public pools by December 19, 2008. If the pool or spa has a single main drain, such drain must be an "unblockable drain," or if the pool does not have an "unblockable" single main drain, then one of several safety systems that are specified in the statute, or one that the CPSC determines to be equivalent to one of the specified systems, must be installed. Multiple drain openings must be at least three feet apart and connected to the same suction system in order not to be considered part of a "single" main drain.

The National Pool Safety Foundation ("NPSF") reports that approximately 80% of approximately 300,000 public (city and community) pools in the U.S. do not comply with the new standard. There have been reports in the media of public pools closing after December 19. Due to demand prompted by the legislation, many pool operators have experienced difficulty in obtaining the new drain covers and scheduling the necessary service calls to have equipment evaluated and/or upgraded. The CPSC has indicated in a guidance document that if a public pool is closed for the season, it need not be made compliant until the pool is reopened to the public. However, the CPSC has indicated in its guidance document that it lacks the administrative discretion to delay enforcement of the Act after December 19, 2008.

In response to an inquiry from the State of Florida, the CPSC has indicated that the new federal requirements preempt state pool construction and safety standards. Los Angeles and Kern Counties, as well as other counties in California and other jurisdictions, have issued advisory notices regarding compliance with the new law. The Florida Attorney General's Office, as well as the NPSF, has indicated that there is a significant potential for confusion because the new federal standards may conflict with state standards, or owners may have insufficient time to obtain permits and perform work before the enforcement deadline becomes effective.

The most problematic compliance provisions relate to the "unblockable" main drain requirement. According to a CPSC staff guidance document, any cover must be at least 18" x 23" (the shoulder-to-waist measurements of a 99th percentile adult male) to be considered "unblockable." Local jurisdictions will have specific requirements as to the dimensions of the sump under the cover, which must be inspected and certified if it is required to be altered or reconstructed. If the drain is not "unblockable," then the owner must have installed a safety vacuum release system, a suction-limiting vent system, a

gravity drainage system, or an automatic pump shutoff system (in contrast to a manually operated shutoff switch or “panic button,” which the CPSC has specifically indicated will not comply), or another system certified by the CPSC, or must disable the drain by filling or blocking it. The CPSC has not recognized as compliant any system other than those listed above. It is estimated that upgrade costs could range from a thousand dollars for a pool that already has an unblockable drain or one of the specified systems, to \$200,000 or more, if the pool has a custom field-designed grate system and/or extensive reworking of one or more of the sumps and/or installation of additional fixtures is required.

Failure to comply subjects the owner to the same penalties applicable to a violation of the Consumer Product Safety Act, including fines in excess of one million dollars per violation and possible imprisonment. Additionally, each state’s Attorney General’s Office may enforce the Act. The CPSC has indicated that it will focus its initial enforcement efforts on wading pools and other pools designed for small children, as well as in-ground spas, which pose the most danger to young children. However, the CPSC has made clear that, notwithstanding this focus, all owners who are subject to the Act should promptly comply.

Pool owners should also be aware that even though insurers do not, so far, appear to be cancelling coverage under existing liability insurance policies, most standard liability policies contain an exclusion for losses arising out of any “willful” violation of law. Therefore, it is possible that an owner who fails to upgrade could lose insurance coverage for any incident arising because of a failure to comply with the Act.

FOR ADDITIONAL INFORMATION ON THIS ISSUE, CONTACT:



Ray Triana Mr. Triana’s practice specializes in finance, development and leasing. He regularly advises banks, insurance companies, developers, landlords, tenants and other owners of real estate on issues related to the ownership, leasing, development and disposition of real property. He also advises owners of real estate on environmental liability and compliance issues. Mr. Triana has also served as counsel to various non-profit entities in connection with tax-exempt bond transactions to finance major construction projects. He also represents owners of agricultural real estate and agribusiness

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