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New Federal Swimming Pool and Spa Safety Law

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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 by a spa drain. Virginia Graeme Baker was the granddaughter of former Secretary of Sate James Baker.

The Consumer Product Safety Commission (the "CPSC") is charged with enforcement of the Act. The Act defines "public pool and spa" to include not only pools operated by state, federal or local government, but also any swimming pool or spa that is open to members ("swim clubs"), to any resident of a multiunit apartment building, apartment complex, residential real estate development or 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 cover. The Act further requires that anti entanglement suction drain covers satisfying these 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." 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. The CPSC has indicated that the new federal requirements

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preempt more permissive state pool construction, permitting and safety standards.

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." 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. The CPSC has not recognized as compliant any system other than those listed above. It is estimated that upgrade costs could range from a few hundred 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.

The National Swimming Pool Foundation ("NSPF") reports that approximately 80% of approximately 300,000 public (city and community) pools in the U.S. do not comply with the new standard. 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's website contains a page devoted to the Act, which in turn links to a PowerPoint presentation containing general information about the state of the marketplace for the relevant equipment.

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 Act provides that if funds are appropriated by Congress, the CPSC will establish a grant program for states that would provide funds for the hiring and training of enforcement personnel and the education of contractors. States would only be eligible for the funds if they enact laws that are as strict or stricter than the Act. In California, AB 1020 has been introduced by Assembly Members Emmerson and Ma (the "California Act"). The definition of "public pools" in the

California Act includes apartment, hotel and swim club pools. The most notable provisions of the California Act, based on the current draft, are that it would apply to all new construction or alteration of public pools after December 19, 2009. Further, existing public pools would be required to be retrofitted to comply by December 19, 2011. Within thirty (30) days after completion of any construction or alteration, an owner would be required to file a form that would include a statement by a contractor licensed to do work on swimming pools and related equipment, or a professional engineer, signed under penalty of perjury, that would identify the type of anti entrapment system and certify that the system has been installed. Presumably, if a retrofit is not completed as required, county health officials would be authorized to close the relevant swimming facility. Because the Act preempts state law, it would not appear that the provisions of the California Act would provide a "safe harbor" against a federal enforcement action if an owner delays a retrofit. However, the CPSC has stated that it will concentrate enforcement efforts on public spas open to children, which present the greatest entrapment hazards.

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 after December 19, 2008, in order to comply as required by the Act, could lose insurance coverage for any incident arising because of a failure to comply with the Act. As noted in the previous paragraph, the fact that the California Act might provide a longer period for compliance might not bar an insurer from raising the defense in any relevant action.

* This article was previously prepared for the Manatt Real Estate and Land Use practice group.

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