

E K M A R K & E K M A R K, L.L.C.

ATTORNEYS AT LAW

February 6, 2009

Re: Pool Safety Compliance Issues

We have received numerous questions from clients regarding compliance with the federal statute and Maricopa County pool safety requirements. These statutes are intended to address the dangers presented by the suction of a single main drain in pools and spas. Children have been entrapped by the suction from such a single main drain and been grievously injured or killed as a result. We have reviewed the statutes, the interpretation of the federal law distributed by the Consumer Product Safety Commission (“CPSC”), spoken with Maricopa County officials, and spoken with members of the pool construction industry in Arizona to gather the information necessary to present the complete compliance picture to our clients. This letter summarizes the federal and Maricopa County requirements in separate sections.

In a nutshell, complying with federal and Maricopa County requirements breaks down into two parts. First, all pools and spas must have new drain covers that meet the most current anti-entrapment and anti-entanglement requirements of ASME/ANSI A112.19.8-2007. These drain covers must be properly installed according to the manufacturer’s requirements. This may require a modification or replacement of the existing drain housing, and it may require a piping modification to ensure that the proper amount of clearance (or “sump”) is present between the drain cover and the pipe to appropriately reduce suction.

Second, every pool and spa must either have a dual main drain system, a single main drain that is unblockable according to federal definitions, or a safety device that will cut off suction if there is a blockage. To best meet both the federal and Maricopa County requirements, a pool or spa needs a dual main drain system or a safety device called a Safety Vacuum Release System (“SVRS”). Let us turn to a detailed analysis of each set of requirements below.

Federal Law

A new federal law, The Virginia Graeme Baker Pool and Spa Safety Act (“VGB”), took effect on December 19, 2008. It is named after former Secretary of State James Baker’s granddaughter, who drowned as a result of becoming entrapped on the drain of a spa. It imposes new requirements on the drainage systems of all pools and spas that are open to the public and those maintained by community associations. Any pool or spa that is not currently open is not required to comply with VGB until that pool or spa re-opens. But if an association’s pool or spa is currently open and not in compliance with VGB, the association runs a grave risk of potential liability and should shut down the affected pool or spa until such time as the association has complied with the law.

VGB compliance breaks down into two parts. First, it requires that all association pools and spas install outlet fittings and drain covers that meet the most current standards set out by the American National Standards Institute and the American Society of Mechanical Engineers in ASME/ANSI A112.19.8-2007. Second, VGB requires that each association pool and spa with a single main drain have either an unblockable single main drain or employ one of a variety of safety systems.

Drain Cover Replacement

All association pools and spas must install drain covers that comply with ASME/ANSI A112.19.8-2007. Covers that meet that standard should have markings indicating that they are compliant with that standard. Drain covers also may have markings indicating whether they are for use with single or multiple drain systems and the proper portions of a pool or spa into which they may be installed (e.g., “Wall Only,” “Floor Only,” etc.). Certain drain covers also may bear a mark indicating they are VGB compliant. Note that drain covers meeting the ASME/ANSI A112.19.8-2007 have only been available for a short period of time, so if you are unsure whether your drain covers meet this standard, then it most likely does not.

These new drain covers must be installed in a manner that meets the manufacturer’s requirements in order to fully comply with VGB. First, the drain cover must be properly fitted to the pool or spa’s drain housing. Drilling new holes in the drain cover or housing is not a proper installation. If the new drain cover is not compatible with the existing housing, then that housing must be replaced with one that properly fits the new drain cover.

Second, each drain cover has a specified amount of clearance between the bottom of the cover and the top of the pipe to which it connects that is required by the manufacturer to meet ASME/ANSI A112.19.8-2007. This clearance, or “sump,” determines the velocity at which water will flow through the drain and the resulting force of its suction. Different drain covers are configured to operate in compliance with ASME/ANSI A112.19.8-2007 while using a different amount of clearance. Thus, to insure proper compliance with VGB, the sump for each drain must be verified and matched with an appropriate new drain cover. In some cases, compliance will not be possible without performing modifications to the existing drain pipes to establish the necessary sump.

We spoke to pool industry contractors who stated that to properly evaluate a drain’s sump and ensure full compliance with VGB, a pool or spa likely would need to be drained. If an association has already had its drain covers replaced without the pool or spa being drained or without documentation showing a proper verification of the sump of its drain, then it runs the serious risk of being non-compliant with VGB.

The CPSC has a list of manufacturers of approved drain covers on its Web site at www.cpsc.gov/businfo/draincman.html. While this list is not exhaustive, it provides a start to complying with this aspect of VGB.

Note that if a drain cover becomes broken, damaged, not fully secured, or missing, then VGB requires the association to immediately close the affected pool or spa until the situation is remedied.

Unblockable Drains and Multiple Main Drains

If an association's pool and spa each have unblockable drains or a multiple main drain system with new drain covers compliant with ASME/ANSI A112.19.8-2007, then no further compliance action is necessary under VGB.

An unblockable drain is defined by the CPSC as including a drain with minimum dimensions of 18" x 23", a drain with a diagonal measurement of 29" or more, a drain consisting of long channels that cannot be blocked by the body, and circulation designs that do not include fully submerged suction outlets.

A multiple main drain system is defined as consisting of at least two fully submerged suction outlets per pump in which the centers of the drain covers are at least three feet apart.

Single Main Drain Systems

If an association's pool or spa has a single main drain that is not unblockable, then VGB requires that pool or spa to have a backup protection system to relieve vacuum pressure if someone gets caught in the drain. Permissible safety systems include: (i) a Safety Vacuum Release System ("SVRS"), (ii) a Suction-Limiting Vent System, (iii) a Gravity Drainage System, (iv) an Automatic Pump Shut-Off System, or (v) a device or system that disables the drain. If your pool or spa with a single main drain does not already have one of these safety systems in place, then we recommend that you close that pool or spa immediately until it is VGB compliant.

For most associations facing this requirement, a SVRS is likely to be the easiest safety system to install on an existing pool or spa. And since a SVRS also meets the requirements set forth by Maricopa County (as discussed below), it will enable an association to comply with all applicable laws.

Enforcement and Liability

VGB compliance is a very serious issue, and an association and its Board run a serious risk of liability if a non-compliant pool or spa is permitted to stay open. The CPSC has stated that the current maximum penalty for a violation of VGB is \$1.825 million, and Congress is considering legislation that would increase this penalty to \$10 million or higher. Furthermore, a willful violation of VGB could result in criminal penalties, including additional fines or imprisonment.

Board members who knowingly refuse to bring an association's pool or spa into compliance, or who refuse to close a non-compliant pool or spa, may be liable for breaching their fiduciary duties to the association. As a result, it is possible that individual Board members could be held personally liable for penalties or damages incurred by their association. Any

penalties or damages for such knowing disregard of a federal statute also may not be covered by the association's insurance policies.

We have spoken with Maricopa County officials, and they state that they will not be inspecting pools and spas for compliance with VGB. However, the risks involved are such that we recommend closing any non-compliant pool or spa despite the lack of inspections at this time.

Becoming Compliant

The Maricopa County Environmental Services Department (the "County"), which regulates association pools and spas, issued a directive on December 16, 2008 setting forth permit requirements for work related to VGB compliance. The County requires that installation of a dual main drain system, a SVRS, and "installation of VGB compliant drain covers with associated field fabricated sump" be performed only after obtaining a permit from the County.

Plans for the work must be submitted by a licensed commercial pool contractor, a licensed architect, or a licensed engineer and must be approved prior to the work being performed. Permits for SVRS installation cost \$165 and permits for drain system modifications cost \$250. Review time for a permit is stated to be 30 days or less. However, expedited review can be obtained for paying twice the normal fee. The County states pool and spa owners who had work previously conducted without a permit must submit plans and pay the expedited fee for review, along with possible fees for investigation of the work. Any deficiencies found in the work will have to be changed.

In a previous directive issued on October 28, 2008, the County stated, "No County permit is needed for owners to replace drain covers with like size and configured drain covers, unless the cover replacements is part of a piping modification." However, in light of the housing and sump requirements for proper installation of VGB-compliant drain covers, it is likely that many installations would require a piping modification of some sort, making a permit necessary. A County official we spoke with also stated that going forward all drain cover replacements must obtain a permit so that the County can confirm that the sump requirements for the new cover are met.

We have been informed by the County that associations that had work performed on their pool or spa by a licensed commercial pool contractor to comply with VGB prior to December 12, 2008, can submit plans for that work at this time and pay only the regular permit fee, not fees for expedited review or investigation. For those associations that had their drain covers replaced prior to the County's most recent directive by someone other than a licensed commercial pool contractor, such a contractor must be retained to evaluate the prior installation and ensure that all VGB requirements are met. That contractor must then obtain a permit, paying the expedited fees and investigative costs required for already-completed work.

Maricopa County

In addition to the requirements of VGB, the County has its own association pool and spa safety requirements in the Maricopa County Revised Code for Semipublic Swimming Pools. By

January 1, 2014, each pool with a single main drain must meet several requirements. First, each such pool must have drain covers that comply with ASME/ANSI A112.19.8M. This requirement will be satisfied by any pool that properly installs new drain covers in compliance with VGB.

Second, if the pool is remodeled prior to January 1, 2014, then a hydraulically balanced dual main drain system must be installed at the time of remodeling. Such a system must provide for at least three feet between the edges of the two drains. Note that this is different from the requirement of VGB, which requires three feet between the centers of the two drains.

Finally, if a remodel is not performed on the pool, then a SVRS or Safety Vacuum Release Device may be installed prior to January 1, 2014 to meet the County requirements. Our understanding is that if a SVRS is installed now, then a later remodel of the pool will not require a dual main drain system.

Note, again, that installation of a SVRS will result in compliance with both VGB and County requirements. As such, it represents the easiest method to ensure compliance with all applicable laws.

Practical Considerations

Our understanding is that a reputable licensed commercial pool contractor should be willing to provide an association with written documentation establishing that new drain covers were properly installed to meet housing and sump requirements. Similarly, such a contractor can install a SVRS and provide documentation of that installation. Maintain such documentation in your association's records to establish that you relied on an expert opinion that your pool and spa is in proper compliance with the laws.

Licensed commercial pool contractors we spoke with estimated that the cost of properly installing new drain covers, which includes draining the pool and performing any necessary housing or sump modifications, will range between \$1,500.00 and \$2,300.00. The cost to install a SVRS will range between \$2,200.00 and \$3,000.00, depending upon the characteristics of a pool or spa's drainage system. There are pool pumps available that incorporate a SVRS, so an association in need of replacing a pump could handle both jobs with one piece of new equipment. Expect the cost of such a combined system to range between \$2,600.00 and \$3,600.00. If you would like a recommendation for a licensed commercial pool contractor, please let us know.

If you have any questions or concerns about these issues, please do not hesitate to contact us. Thank you for the opportunity to assist you in making your communities better.

Sincerely,

/s/ Eric J. Boyd
Eric J. Boyd