CONSTRUCTION
# UPDATE

A Newsletter for Construction Law by Autry, Horton, & Cole, LLP. Summer 2009 Volume I Issue 1

## PROTECTING YOUR ASSETS

Many contractors and developers own or operate other "side businesses" in addition to their primary development or contracting company. Such ventures might include rental real estate, investment pools, or service and supply companies. When business is doing well, contractors and developers might also purchase second homes and "toys" such as planes or boats. If these assets are not placed in the proper structure, a lawsuit can place all assets in jeopardy, even those with no connection to the lawsuit.

For example, if Mr. A owns a rental property that he bought in his own name and a tenant slips and falls on the property and suffers serious injuries, the tenant can then bring a lawsuit directly against Mr. A. A competent plaintiff's lawyer can find out 95% of all of the assets owned by Mr. A. within a few days. Assuming the tenant obtains a judgment in excess of insurance policy limits, the tenant can go after any unshielded assets of Mr. A, including the rental property, any stock owned by Mr. A. in his own companies, any other properties held directly in Mr. A's name, and any directly-held personal assets, such as boats and automobiles. If Mr. A's primary business is in the form of a subchapter S corporation, the tenant can even obtain Mr. A's stock, gain control of the company, and sell assets to meet the judgment.

By taking some relatively simple steps, contractors and developers can greatly minimize the likelihood of standing in Mr. A's shoes. Although no asset protection strategy can eliminate the possibility that creditors can reach your assets, strategic planning not only makes collection efforts more difficult, but greatly reduces the incentives for bringing lawsuits against you in the first place. For example, simply by forming an LLC and having it purchase the rental property, Mr. A could have erected one barrier that would have reduced the tenant's ability to access Mr. A's other assets. With additional layers of protection, the plaintiff's lawyer might well have concluded that pursuing Mr. A would simply be uneconomical.

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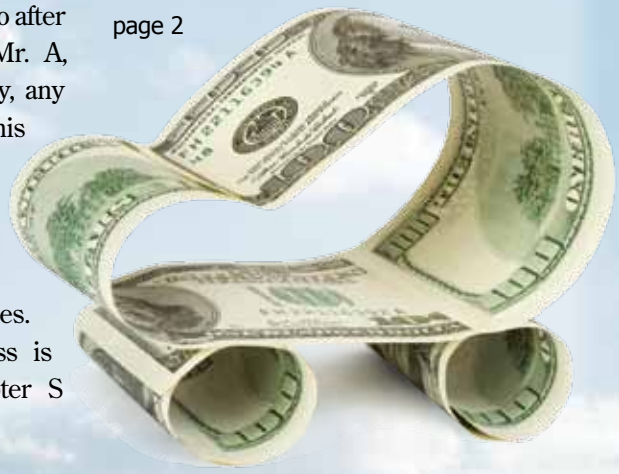

We hope you enjoy this first edition of our newsletter. Autry, Horton & Cole, LLP's construction law group, headed by George C. Reid, has many years of experience in resolving construction disputes. We provide our clients advice in minimizing the likelihood of claims and in negotiating effective contract documents to protect clients' interests in the event of such claims. In addition to litigating, mediating, and arbitrating construction disputes, our firm specializes in the business of construction, including asset protection, succession planning, and tax planning. We have advised clients ranging from national construction firms to small local subcontractors on a broad array of issues.

Please send your comments, suggestions, or questions to any of the members of our construction law group:

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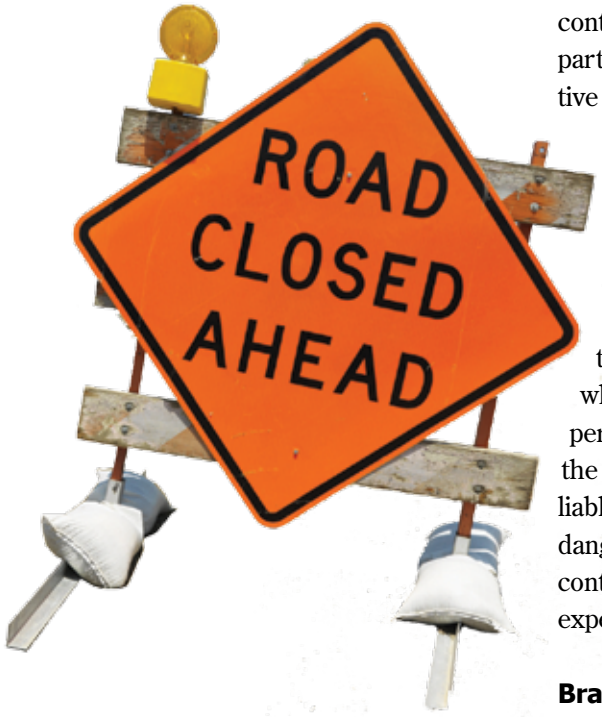
# Acceptance Doctrine:
## Still Valid . . . At Least For Now

This past February, the Georgia Supreme Court narrowly upheld the continued validity of a long-standing rule that typically benefits contractors. The Acceptance Doctrine has been relied upon by contractors to avoid liability where work is completed and then accepted by the owner, but subsequently causes injury to a third party. The Supreme Court held that based on the facts of the case before it, the Acceptance Doctrine should continue, but left open the possibility that with "the right facts," the Court might refuse to apply the doctrine.




### The Acceptance Doctrine

The Acceptance Doctrine has a long and tortuous history, and has even been abandoned in several states. According to the Georgia Supreme Court, the Acceptance Doctrine insulates a contractor from liability to third parties resulting from the defective design of the work where it performs the work without negligence, and the work is approved and accepted by the owner. Notwithstanding the owner's acceptance, however, several exceptions might apply to render a contractor liable where the contractor negligently performs the work. For example, the contractor may still be held liable for inherently or intrinsically dangerous activities or where the contractor holds itself out as an expert in the design.

### Bragg v. Oxford Construction Company

The Georgia Supreme Court believed that the facts arising in Bragg v. Oxford Constr. Co. did not present a proper case for abandoning the Acceptance Doctrine. After a serious car accident, the Braggs sued Oxford Construction Company ("Oxford') for negligent construction. Prior to the Braggs' car accident, Dougherty County (the "County") hired Oxford to repair a county-owned road. Oxford followed the County engineer's instructions when performing the road repair work. As a result of these instructions, Oxford installed a "spot overlay patch" on an area of the road where the Braggs' car accident occurred.

The Court held that because Oxford performed the requested work according to the specifications given to it by the County, and because there was no evidence that Oxford performed the assigned work in a negligent manner, Oxford could not be held liable for injuries resulting from the County's allegedly defective design of the work. The Court then indicated that when applying the Acceptance Doctrine to these facts, the liability, if any, belonged to the County that hired and accepted Oxford's work. Finally, the Court held that the facts of this case did not justify abandoning the Acceptance Doctrine in Georgia.

### The Questionable Future of the Acceptance Doctrine

In upholding the applicability of the Acceptance Doctrine, the Georgia Supreme Court indicated it would be willing to revisit the issue of the Acceptance Doctrine's continued applicability in Georgia. Several members of the Georgia Supreme Court even proposed that Georgia take a more modern approach, as have thirty-three

## PROTECTING YOUR ASSETS

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Timing is one of the keys to success protection planning. Although steps can be taken to protect assets even after a lawsuit is initiated, protection is much stronger if the plan is put in place during a period of "calm waters." Fraudulent conveyance laws must be considered if litigation is threatened or pending. So that your assets remain your assets, we encourage you to review your business and personal assets and consider whether protection planning might be appropriate.

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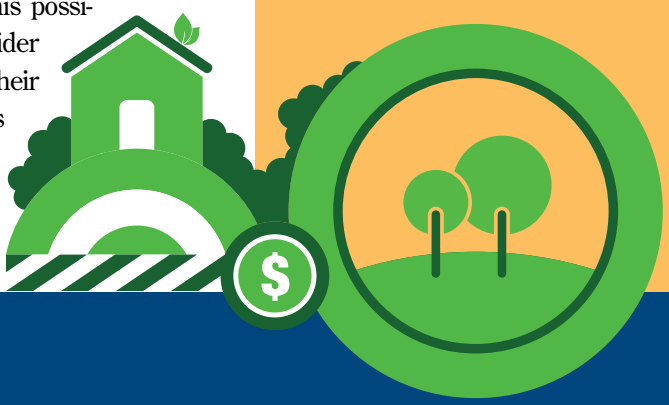
other states. The "modern rule" they advocated was the "Foreseeability Doctrine," which provides that a contractor's potential liability should be assessed "in accordance with general negligence principles." According to these general negligence principles, a contractor is liable for injury to a third person even after completion and acceptance by the owner. A contractor is liable so long as it is "reasonably foreseeable" that a third person would be injured by the contractor's negligent work. In other words, under the Foreseeability Doctrine, mere acceptance by an owner of a contractor's work would no longer insulate the contractor from liability if it was foreseeable that someone would be injured as a result of the contractor's work.

As a result of the Court's willingness to revisit the Acceptance Doctrine's applicability in the future, the continued viability of the Acceptance Doctrine in Georgia is questionable. If the Court were to replace the Acceptance Doctrine with the Foreseeability Doctrine, Georgia contractors may find their post-acceptance liability expanded with respect to claims made by third parties. Contractors should be aware of this possibility and consider modifying their agreements accordingly.



# Emergency Economic Bill Extends Home-Builder Tax Credit

Construction contractors and developers need no reminder of the difficult economic environment and the trying times that lie ahead. Contractors and developers may, nevertheless, find a much-needed stimulus to their business in a tax-related provision contained in the Energy Improvement and Extension Act of 2008 (the "Act"). The Act – which was passed in conjunction with the Emergency Economic Stabilization Act of 2008 – extended many tax credits which would have otherwise expired at the end of 2008. Particularly relevant to contractors and developers is the **New Energy Efficient Home Credit** (the "Credit"), which the Act extended until December 31, 2009. Currently, bills before the House and Senate, if enacted, would extend the credit for several additional years, and one bill would double the current credit amount.

The Credit provides contractors and developers with up to $2,000 in tax credits for each qualifying home or manufactured home that is sold, leased, or otherwise acquired during the current tax year. To qualify for the credit, a contractor must construct, substantially reconstruct, or substantially rehabilitate a home (or manufactured home) in the United States which

(1) meets certain energy efficiency requirements;
(2) is purchased or leased from the contractor after December 31, 2005, and before January 1, 2010, for use as a residence; and
(3) is substantially completed after August 8, 2005.

To qualify for the credit, a home (or manufactured home) must meet energy efficiency requirements related to (1) reducing heating and cooling energy consumption and (2) improvements in building envelope components. Satisfaction of the energy efficiency requirements must be certified by an "eligible certifier," who uses an approved software program to calculate the home's energy consumption.

### Effect of Extending the New Energy Efficient Home Credit

The Credit may provide some contractors and developers the necessary incentive to start up projects (or finally complete projects that were previously placed on hold). A tax credit, after all, is a dollar-for-dollar reduction in a taxpayer's tax bill. Further, the Credit is not limited to homes completed in the current year. A developer may qualify for the Credit for homes that were completed in prior years (after August 8, 2005), as long as the homes were sold in the current tax year. Congress' extension of the Credit may, as a result, provide an incentive for some developers to sell homes that would otherwise bulk up inventory.

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# UPDATE



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## What's Coming Up in Future Issues...

**Succession Planning**

**Restrictions on Child Labor**