

# CBCA opinion provides clarity on Anti-Assignment Act's murky 'operation of law' exception

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The Anti-Assignment Act, referring to both the Assignment of Contracts Act and Assignment of Claims Act, which prohibits the assignment of government contracts and claims, respectively, has had a fairly uneven applicatory history. On June 27, the U.S. Civilian Board of Contract Appeals (CBCA) did its best to clarify the legislation's "operation of law" exception as it relates to contractor mergers and acquisitions.

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*The government contended the assignment of the contract from TransPro to ATS was improper under the Anti-Assignment Act.*

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The CBCA sided with the government contractor, agreeing that following a merger, the surviving entity was entitled to perform on the former entity's contract, by "operation of law," regardless of the alleged misrepresentation, in *ATS Trans LLC dba Around the Sound/TransPro v. Department of Veterans Affairs*.<sup>1</sup>

In the *ATS* case, TransPro, Inc. (TransPro) began performing on a Department of Veterans Affairs (VA) contract in July 2014. In December 2015, TransPro and Around the Sound (ATS) merged, effective January 1, 2016. With the merger, ATS assumed all TransPro liabilities, ATS became the surviving organization, and TransPro ceased to exist. Following the merger, "contractor personnel, management, and resources dedicated to the contract remained the same."

On January 8, 2021, ATS submitted a claim to the VA for its failure to pay for work performed under the contract; however, the VA denied the claim arguing that "ATS did not perform any work beyond that required by the contract."

ATS appealed to the CBCA and the VA filed a motion to dismiss for lack of jurisdiction because ATS lacked privity with the government. Specifically, the government contended the assignment of the contract from TransPro to ATS was improper under the Anti-Assignment Act, while ATS insisted the assignment was valid pursuant to the "operation of law exemption."

In *Erwin v. United States*, the Supreme Court initially carved out the "operation of law" exception, applying it to assignments when "there has been a transfer of a title."<sup>2</sup> *Erwin* identified two fundamental scenarios where the "operation of law" exception should apply — intestacy and bankruptcy.<sup>3</sup>

However, the Court failed to mention corporate mergers or acquisitions.<sup>4</sup> The exception is of judicial production. Therefore, the application is not explicitly applied and is open for interpretation.

Since *Erwin*, the bounds of the exception have been poked and prodded, leaving its application murky. *Seaboard Air Line Ry. v. United States* — a 1921 Supreme Court case — holds a claim payable to a company acquired by another is still payable to the successor company applying the "operation of law" exception to corporate transactions; however, 74 years later, the United States Court of Federal Claims held that the exception did not allow a company — who bought another company's assets and contracts — to submit claims for work performed on the transferred contract, finding the attempted assignment of a claim — and contract — invalid.<sup>5</sup>

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*The CBCA agreed with ATS that its acquisition constitutes an "operation of law."*

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In *ATS*, the CBCA found that assignments occurring under the "operation of law" exemption "where in essence the contract continues with the same entity, but in a different form" do not run afoul of the Anti-Assignment Act, and do not require an express government novation.

The CBCA agreed with ATS that its acquisition constitutes an "operation of law," citing *Erwin* and its progeny as precedent, stating, "Courts have applied the exception to statutory mergers, concluding that such assignments do not present the danger that the statute was designed to obviate."

The VA's second argument that ATS's misrepresentation as TransPro makes the "operation of law" exception inapplicable. The CBCA disagreed, emphasizing the purpose of the statute rather than the statute's strict statutory language.

The Anti-Assignment Act's main purpose is to prevent people from buying claims against the government "which might then be improperly urged upon officers of the United States." The other legislative purpose, inferred from the statute, is to prevent multiple claims, resulting in improper payments and wasteful government investigations.

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The CBCA leveraged that legislative intent to argue "where 'the purposes [of the Anti-Assignment Act] are not impinged, a transfer should be allowed to stand.'" Further, the CBCA summarized its denial of the Motion to Dismiss, stating "there was a valid merger between ATS and TransPro, such that by operation of law, TransPro's contract was assigned to ATS. Given this valid assignment, ATS is a contractor under the [Contract Disputes Act]."

In a concurring opinion, CBCA Judge Joseph Vergilio dismissed the VA's argument related to privity. Judge Vergilio agreed, "the appellate ... demonstrated that it operates as a matter of law in its own name, as well as in its own name doing business as the original contractor with the agency."

"I do not feel compelled to say more than this and would spare the reader unneeded background and history," he concluded.

While the "operation of law" exception to the Anti-Assignment Act has been inconsistently applied, here, the CBCA provided a clarifying opinion. Corporate transactions seem to conform with the "operation of law" exception more concretely and are given similar respect as the classic cases of intestacy and bankruptcy currently enjoy. The CBCA held that contracts could be transferred to the successor contractor, making the question of privity moot.

Further, it was noteworthy that the CBCA compared the facts before them with the purpose of the statute rather than the statutory text. In scenarios where the facts do not result in the activities the statute is designed to prevent, the exception should apply, and the contract should transfer.

### Notes

<sup>1</sup> <https://bit.ly/3wtWkwL>

<sup>2</sup> 97 U.S. 392, 397 (1878).

<sup>3</sup> 97 U.S. at 397.

<sup>4</sup> *Id.*

<sup>5</sup> 256 U.S. 655 (<https://bit.ly/3SQuiF2>); 33 Fed. Cl. 459, 461.

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