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Pass-Through Claims: Lessons from the ASBCA's 2025 Severin Doctrine Rulings

We often think of a settlement agreement as the final chapter of a lawsuit. However, two recent decisions from the Armed Services Board of Contract Appeals (ASBCA) serve as a reminder that even a "final" agreement can be the prologue to a new dispute.

Introduction

Our discussion starts with a basic feature of federal contracting, the government's sovereign immunity. The federal government is the single largest buyer of goods and services in the world,[1] yet the right to bring contract claims against it is strictly constrained by the limited waiver of sovereign immunity found in the Tucker Act[2] and the Contract Disputes Act.[3] Generally, only parties in direct contractual privity with the government, typically prime contractors, are permitted to sue on a federal contract.[4] Subcontractors, who often perform much of the actual work on government projects, have no such right, no matter how directly the government's actions caused their losses.

When a claim on a federal project arises from government actions, through defective specifications, differing site conditions, or other breaches, a subcontractor cannot sue the government directly. Instead, the subcontractor must rely on the prime contractor, who has privity with the government, to assert the claim on its behalf. This is known as a "pass-through" claim.

The *Severin* Doctrine traces to a 1943 decision of the Court of Claims, *Severin v. United States*.[5] In that case, a prime contractor brought delay claims against the government on behalf of itself and its subcontractor. The problem addressed by the

Severin court was that the subcontract contained an exculpatory clause that disclaimed the prime's own liability for any losses "caused by the Owner" – i.e., the government. The court denied the subcontractor's portion of the claim because the prime could invoke the exculpatory clause to avoid paying the subcontractor. The prime, therefore, had not suffered any actual injury from the government's actions.[6] Without real liability to the subcontractor, there was no real loss to recover; therefore, no valid claim.

Under the *Severin* doctrine, prime contractors can only pursue pass-through claims if the prime has paid, or remains liable to pay, the subcontractor for its damages. If there is no liability to the subcontractor, then the prime has no claim against the government. The rationale behind the rule is straightforward: The government will not pay damages to a prime contractor if it has no obligation to pass those funds along to the subcontractor who actually suffered the loss.[7] Without this rule, a prime could pocket a windfall for harm someone else suffered. The doctrine applies specifically to federal government contracts alongside the Contract Disputes Act (CDA), although similar principles may arise in state procurement.

Here's an example of *Severin* in practice: Suppose a subcontractor, in exchange for a settlement payment, signs a broad release of *all* claims against the prime, with no exceptions. The prime has now been released from all liability. The prime now owes the subcontractor nothing. Because the prime has no obligation to pay the subcontractor even if it recovers, the prime has no real stake in the claim. The pass-through claim would fail under *Severin*.[8] However, if the release states that the prime remains liable to pay the subcontractor for any amounts recovered from the government, that clause preserves the pass-through claim.[9]

The *Severin* Doctrine has not gone unchallenged. Critics argue that it promotes piecemeal litigation and leaves subcontractors, often the parties who actually suffered the government's breach, without practical recourse. Subcontractors become the victims of a power imbalance baked into the contracting structure. Remarkably, even the judge who authored the *Severin* opinion later wrote that he believed the doctrine should be overruled.[10] The doctrine persists nonetheless, and navigating it, especially in the context of settlements, requires careful legal counsel.

Through its two recent decisions in *Sauer Incorporated*, ASBCA No. 62295,[11] the ASBCA addressed what happens when a prime and subcontractor settle mid-litigation and structure that settlement to preserve the pass-through claim. The U.S. Navy argued the claim was barred. The Board disagreed.

The Dispute

Sauer, Inc. contracted with the Navy to rehabilitate a wharf at Naval Submarine Base, Kings Bay, Georgia. Its painting subcontractor, Tri-State Painting (TSI), encountered unexpected lead paint that increased costs and caused delays. TSI sued Sauer's surety under the Miller Act, where the key issue was whether a bilateral modification, Change Order No. 10, released TSI's claims. The district court found a genuine dispute over whether the parties ever agreed to that change order.[12]

Instead of going to trial, Sauer and TSI settled. Sauer paid TSI $7.85 million, agreed to pursue TSI's claims against the government, and committed to pay TSI an additional 11.5% of any recovery (up to $1.15 million). Sauer then continued its ASBCA appeal, including nearly $9 million in pass-through claims on TSI's behalf.

The Ruling

The Navy moved for partial summary judgment, arguing *Severin* barred the pass-through claim. The Board denied the motion. The settlement agreement expressly carved out "all claims and claim rights that exist as against the Government, including any and all pass-through rights." However, it also stated the parties intended to "preserve only such claims, rights, and obligations as are necessary to satisfy the existing requirements of the *Severin* doctrine." That conditional liability, where the prime pays the subcontractor "as and when" it recovers from the government, is enough.[13] The settlement agreement in *Sauer* is a model of thoughtful drafting: It expressly preserved pass-through rights and anticipated the very challenge the Navy raised.

On reconsideration, the Navy argued this conflicted with *George Hyman Construction Co. v. United States*.[14] In that case, a subcontractor signed an unconditional release that everyone agreed was valid; the claim was dead. Later, the parties signed a new agreement attempting to "revive" the released claim solely

to create standing to sue the government. The U.S. Court of Federal Claims held this was impermissible because you cannot bring a claim back from the dead through a new agreement.

The Board distinguished the situation in *Sauer*. Here, the parties genuinely disputed whether Change Order No. 10 was ever a valid release in the first place; the district court had found "a clear and lively dispute" on that very issue. Because the underlying release was contested, the claim was never completely extinguished. The settlement did not "revive" a dead claim; it resolved a live controversy over whether the claim had ever died at all. As the Board explained, the settlement "converted a disputed, unliquidated liability into a settled, partially liquidated liability ($7.85 million paid) with a remaining contingent component." The Board recognized this distinction: Settling a live dispute is not the same as resurrecting a dead claim.

What This Means

Sauer confirms that a properly structured settlement agreement can preserve pass-through claims against the government, even after a contentious litigation between prime and subcontractor. For prime contractors, the key to this is drafting with *Severin* in mind and ensuring the agreement expressly carves out any claims against the government from any general release. Courts looking at this issue have held that conditional liability works. "As and when" recovery provisions satisfy the doctrine, meaning primes need not fully reimburse the subcontractor before pursuing the claim. An agreement to pay the subcontractor "as and when" the prime recovers on the pass-through claim is sufficient. Where a dispute exists over whether a release was ever validly executed, that unresolved controversy can itself defeat a *Severin* defense, distinguishing the case from impermissible "revival" scenarios like *George Hyman*.

For subcontractors, the lesson is equally important: When settling with your prime, ensure the agreement preserves your path to recovery from the government. The specific language matters. In *Sauer*, it made all the difference.

More broadly, primes and subcontractors pursuing pass-through claims need to formalize the arrangement in a claims prosecution or liquidating agreement. This can be done as a clause in the original subcontract or a separate agreement. The

agreement typically addresses who controls the litigation, who bears the costs, what cooperation is required, and how any recovery will be allocated. It can also include certifications and indemnities to protect the prime, who must certify the claim to the contracting officer, even though the underlying damages belong to the subcontractor.

Thoughtful planning on the front end can avoid pitfalls that have foreclosed many pass-through claims.

This blog was drafted by Spencer Fane attorneys Henry Hong and Jeff Wieland of the Construction Industry Market Team. For more information, visit spencerfane.com.

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[1] *See* Rothe Dev. Corp. v. U.S. Dept. of Defense, 499 F.Supp.2d 775 n.62 (W.D. Tex. 2007), *rev'd on other grounds*, 545 F.3d 1023 (Fed. Cir. 2008) ("The Court takes judicial notice of the fact that the federal government is the single largest consumer of goods and services in the world.").

[2] 28 U.S.C. § 1491.

[3] 41 U.S.C. § 7101 et seq.

[4] See 41 U.S.C. § 7104(b)(1) "[A] contractor may bring an action directly on the claim in the United States Court of Federal Claims, notwithstanding any contract provision, regulation, or rule of law to the contrary." The term "contractor" is defined as "a party to a Federal Government contract other than the Federal Government." 41 U.S.C. §7101(7).

[5] 99 Ct. Cl. 435 (1943).

[6] *See Severin*, 99 Ct. Cl. at 443.

[7] *See Severin*, 99 Ct. Cl. at 442–44.

[8] *See* MW Builders, Inc. v. United States, 136 Fed. Cl. 584, 588 (2018).

[9] *See* W.G. Yates & Sons Constr. Co. v. Caldera, 192 F.3d 987, 991–92 (Fed. Cir. 1999).

[10] See Cont'l Ill. Nat. Bank & Trust Co. of Chicago v. U.S., 112 Ct. Cl. 563, 568 (1949) (Madden, J., dissenting) ("And although I wrote the court's opinion in the Severin case, I should be glad to

see it overruled, for, upon further consideration, I think it introduces to [sic] large an element of the accidental into our decisions in these frequently recurring cases involving subcontractors.").

[11] *Sauer Inc.*, ASBCA No. 62295 (Aug. 13, 2025); *Sauer Inc.*, ASBCA No. 62295 (Nov. 18, 2025).

[12] United States for Use and Benefit of TSI Tri-State Painting, LLC v. Fed. Ins. Co., No. 2:16-cv-00113, 2022 WL 1477441, at *6 (S.D. Ga. May 10, 2022).

[13] *See Caldera*, 192 F.3d at 991–92.

[14] 30 Fed. Cl. 170 (1993).