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Ninth Circuit Finds District Court Sharply Deviated from Existing Authority on CERCLA Cleanup Costs Between Military Contractor and U.S. Government When it Allocated 100 Percent of Liability to Military Contractor

Article By:

Whitney Jones Roy

Whitney Hodges

TDY Holdings v. United States, et al., 872 F.3d 1004 (9th Cir. 2017).

TDY brought suit for contribution under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) against the U.S. government relating to environmental contamination at TDY's manufacturing plant. The district court granted judgment in favor of the government after a 12-day bench trial and allocated 100 percent of past and future CERCLA costs to TDY. On appeal, the Ninth Circuit held that the district court sharply deviated from the two most "on point" decisions regarding allocation of cleanup costs between military contractors and the U.S. government when it determined the cases were not comparable, clarified the applicability of those cases, and remanded the case to reconsider the appropriate allocation of cleanup costs between TDY and the U.S. government.

From 1939 through 1999, TDY (formerly known as Ryan Aeronautical Company) owned and operated a manufacturing plant near the San Diego airport. TDY's primary customer was the U.S. government—99 percent of TDY's work at the plant between 1942 and 1945, and 90 percent of the work thereafter was done pursuant to contracts with the U.S. military. The United States also owned certain equipment at the site from 1939 to 1979. *Id.* at 1006. Chromium compounds, chlorinated solvents, and polychlorinated biphenyls (PCBs) were released at the site as a result of their use during manufacturing operations. *Id.* In some cases, the government's contracts required the use of chromium compounds and chlorinated solvents. *Id.* After passage of the Clean Water Act and other environmental laws classifying these chemicals as hazardous substances in the 1970s, TDY began environmental remediation and compliance at the site and billed the government for the "indirect costs" of that work, which the government paid. *Id.* at 1006–07. TDY incurred over $11 million in response costs at the site. *Id.* at 1007. Until the plant's closure in 1999, the government reimbursed 90 to 100 percent of TDY's cleanup costs at the site. *Id.* at 1007, 1010.

In 2004, the San Diego Unified Port District brought CERCLA claims against TDY. TDY and the Port District entered into a settlement agreement in March 2007 in which TDY agreed to cleanup releases at the site. TDY then brought suit for contribution under 42 U.S.C. § 9613(f)(1) and declaratory relief against the United States. *Id.* at 1007. The district court granted TDY's motion for partial summary judgment declaring that the United States was liable as a past owner of the site under CERCLA. *Id.* After a 12-day bench trial on equitable allocation of costs, the district court held that the contamination caused by the hazardous substances at issue was attributable to TDY's storage, maintenance, and repair practices, as well as spills and drips that occurred in the manufacturing process, rather than to the government's directives to use the chemicals. *Id.* Accordingly, the district court allocated 100 percent of the past and future response costs for remediation of the three hazardous substances to TDY. *Id.* at 1008.

On appeal, TDY argued that the district court erred (1) when it allocated liability according to "fault"; (2) that the government's role as owner rather than operator should not have been a dispositive factor in the court's allocation, and (3) that the government should bear a greater share of response costs because it specifically required use of the chemicals at the site. *Id.* The court of appeals summarily rejected TDY's first two arguments, but found that the district court did err in its analysis and application of binding authority on point: *United States v. Shell Oil Co.*, 294 F.3d 1045 (9th Cir. 2002) and *Cadillac Fairview/California, Inc. v. Dow Chem. Co.*, 299 F.3d 1019 (9th Cir. 2002). *Id.* at 1008–09. Shell Oil and Dow Chemical each produced products to support the U.S. military during World War II and incurred liability for contamination caused by hazardous chemicals that the government required to be used. In both cases, the Ninth Circuit affirmed the district courts' allocation of 100 percent of cleanup costs to the government because "the contractors' costs were 'properly seen as part of the war effort for which the American public as a whole should pay.'" *Id.* at 1009.

The Ninth Circuit disagreed with the district court's conclusion that *Shell Oil* and *Cadillac Fairview* were not comparable, but agreed that some deviation from their allocations were appropriate. *Id.* The Ninth Circuit agreed that the government exercised less control over TDY than it did over Shell Oil Co. or Dow Chemical. In support of this determination, the court noted that the government was an operator, rather than an owner, of TDY's site, that the government-owned equipment was removed from the site 20 years before TDY ceased operations, and that TDY's own practices at the site caused the contamination. *Id.* at 1010. Furthermore, the district court properly determined that "industrial operations undertaken for the purpose of national defense, standing alone, did not justify allocating all costs to the government." *Id.*

However, the Ninth Circuit held that, in allocating 100 percent of cleanup costs to TDY, the district court failed to consider that the government required TDY to use two of the three chemicals at issue beginning in the 1940s, when the need to take precautions against environmental contamination from these substances was not known. *Id.* Furthermore, the Ninth Circuit determined that "[t]he court's acknowledgement of the evolving understanding of environmental contamination caused by these chemicals, and TDY's prompt adoption of practices to reduce the release of hazardous chemicals into the environment once the hazards became known, further undercuts the decision to allocate 100 percent of the costs to TDY." *Id.* The district court also failed to consider the parties' lengthy course of dealing through 1999, when the government paid between 90 and 100 percent of cleanup costs at the plant. *Id.* Although "a customer's willingness to pay disposal costs . . . cannot be equated with a willingness to foot the bill for a company's unlawful discharge of oil or other pollutants," the Ninth Circuit nevertheless determined it should have been a relevant factor in the allocation analysis. *Id.*

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