Ninth Circuit Requires US to Pay Defense Contractor Cleanup Costs

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On October 4, the Ninth Circuit reversed the District Court for the Southern District of California's decision to allocate to a government contractor 100 percent of cleanup costs for hazardous contamination at a manufacturing facility for failure to consider the involvement of the United States in contributing to that contamination, and remanded the case for additional proceedings.[1] The Court based its decision largely on existing doctrine in the Ninth Circuit, and the holding provides further support for government contractors, particularly those that contributed to the war effort in the 1940s, seeking contribution from the United States for cleanup costs incurred under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).

TDY Holdings, LLC, and TDY Industries, LLC (collectively, TDY), along with a predecessor, operated a manufacturing plant near the San Diego airport for 60 years, beginning in 1939. During the 1940s, TDY built aircraft and aircraft parts primarily to support the war effort. At the height of the war, 99 percent of TDY's work at the facility was in the service of government contracts. Operations at the site involved the use of hazardous substances—chromium compounds, chlorinated solvents, and polychlorinated biphenyls—and resulted in contamination, necessitating cleanup and remediation. After a 2007 settlement of CERCLA liability, TDY sought contribution from the United States.

The District Court held, in a previous order, that the United States was liable under CERCLA's strict-liability scheme as an owner of certain facilities at the site.[2] However, in its 2015 allocation order, the court allocated 100 percent of costs to TDY and zero percent to the United States. The District Court focused on the United States' status as an owner, rather than an operator, to distinguish the TDY facts from those found in Ninth Circuit precedent where 100 percent of costs were allocated to the United States in similar circumstances.[3] Meanwhile, in its equitable allocation analysis, the District Court raised but quickly dismissed the fact that the federal government mandated the use of chromium compounds and chlorinated solvents by TDY in its operations, and the fact that TDY complied with all applicable environmental laws during the relevant time period.

Without revisiting the question whether the United States is liable as an operator (or arranger), the Ninth Circuit picked up on the point that the federal government directed TDY to use specific

hazardous substances as part of contract specifications. According to the Ninth Circuit, it is this fact that connects *TDY Holdings* to the Ninth Circuit precedent in *Cadillac Fairview* and *United States v. Shell Oil Co*.[4] and, therefore, obliges the District Court to allocate at least some portion of cleanup costs to the United States on remand. The Ninth Circuit also highlighted contracts between TDY and the United States through 1999 that provided the United States would pay part of the environmental cleanup costs, including some costs previously incurred under CERCLA, at the site. The Ninth Circuit found that this "prior course of dealings" was a relevant consideration and weighed in favor of at least some allocation of costs to the United States.[5]

The *TDY Holdings* decision provides additional support to a government contractor seeking CERCLA contribution from the United States, but there are some limitations on the scope of the Ninth Circuit's action. The court acknowledges that the facts in *Cadillac Fairview* and *Shell Oil* provided clearer justification for allocating 100 percent of costs to the United States. In those cases, the United States had greater control over the manufacturing processes and, because of the time and resource pressures inherent in wartime manufacturing, directed that wastes be disposed of in a manner that led to contamination. Because that degree of government direction and involvement was not present in *TDY Holdings*, the Ninth Circuit hinted that "some deviation from the allocation affirmed in *Shell Oil* and *Cadillac Fairview* was warranted" on remand.[6] Moreover, the Ninth Circuit explicitly rejects the broadest position a contractor might take, i.e., that "operation undertaken for the purpose of national defense, standing alone" requires allocation to the United States.[7] In sum, there must be something more than the mere fact of a government contract in service of the war effort—such as the government's explicit requirement to use specific hazardous substances in the manufacturing process—to justify allocation of CERCLA costs to the United States.

Even accepting these caveats, the *TDY Holdings* decision is a boon for government contractors facing cleanup costs at the many facilities where manufacturing was tied to government contracts supporting military interests or the national defense. The high degree of government involvement and control present in *Cadillac Fairview* and *Shell Oil* is not required to support a claim for contribution from the United States in the Ninth Circuit. Claims based on the government's requiring use of a certain substance, for example, may allow contractors to recover from the United States some portion of response costs in an equitable allocation proceeding.

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[1] *TDY Holdings, LLC v. United States*, Case No. 15-56483, ECF No. 54-1 (9th Cir. Oct. 4, 2017). The decision reverses the decision in *TDY Holdings, LLC v. United States*, Case No. 3:07-CV-787-CAB-BGS, ECF No. 277 (S.D. Cal. July 29, 2015).

[2] *TDY Holdings, LLC*, Case No. 3:07-CV-787-CAB-BGS, ECF No. 169 (S.D. Cal. July 15, 2011).

[3] *See Cadillac Fairview/California, Inc. v. Dow Chemical Co.*, 299 F.3d 1019 (9th Cir. 2002) (allocating 100 percent of cleanup costs to the United States where contractor operated plant as an "agent" of the United States).

[4] 294 F.3d 1045 (9th Cir. 2002).

[5] *TDY Holdings, LLC v. United States*, Case No. 15-56483, ECF No. 54-1, at 13.

[6] *Id*. at 11. The court's opinion does not provide any refinement as to what degree of "deviation" would be appropriate, but in his concurring opinion, Judge Watford is more explicit, saying that the

allocation to the United States need not necessarily “be substantial” and rejecting TDY's argument that any allocation less than 50 percent would be a reversible abuse of the District Court's discretion. *Id*. at 15 (Watford, J., concurring).

[7] *Id*. at 12.