BREAZEALE, SACHSE & WILSON, L.L.P.
ATTORNEYS AT LAW

Environmental Update - June, 2009

Arranger Liability Under CERCLA

The U.S. Supreme Court recently clarified 'arranger' liability under CERCLA in *Burlington Northern & Santa Fe Railway Co. v. United States*, 556 U.S. ___, May 2, 2009. This case has significance for any seller of an unused and useful product, such as pesticides, herbicides, solvents, or other chemicals, that may also be classified as a hazardous substance. The pertinent portion of the case focuses on Shell's liability for its sale of a product, in this case, a pesticide, to a company where the pesticide was leaked and spilled onto the ground during transfers of the pesticide between the delivery trucks, tanks, and other equipment.

Shell sold pesticides to Brown & Bryant (B&B) and would arrange for the delivery to B&B by common carrier. Upon delivery, the pesticides were transferred from tanker trucks to a bulk storage tank. From there, the product was transferred to bobtail trucks, nurse tanks, and pull rigs. During these transfers, leaks and spills occurred. Shell was aware of these leaks and spills. However, beginning in the late 1970's, Shell also took steps to reduce the likelihood of those spills by providing safety manuals to B&B, requiring B&B to maintain adequate storage facilities, and providing sales incentives to companies that took safety precautions. Inevitably, the pesticides seeped into the soil and groundwater, prompting EPA to list the site on the National Priority List.

The Supreme Court, noting that the phrase 'arrange for' is undefined in CERCLA, provides the phrase its ordinary meaning: the word 'arrange' "implies action directed to a specific purpose." Slip Opinion, p.10. Thus, an entity may qualify as an arranger "when it takes intentional steps to dispose of a hazardous substance." Slip Opinion, p.11. The EPA argued Shell's knowledge that its product would be leaked or spilled, when coupled with its continued participation in the deliveries, was sufficient to establish Shell's intent to dispose of a hazardous substance. The Supreme Court flatly rejects this argument, stating that "knowledge alone is insufficient to prove that an entity 'planned for' the disposal, particularly when the disposal occurs as a peripheral result of the legitimate sale of an unused, useful product." Slip Opinion, p. 12. To be liable, Shell must have entered into the sale "with the intention that at least a portion of the product be disposed of during the transfer process." Slip Opinion, p. 12.

The Court points out that each case is "fact intensive and case specific." Slip Opinion, p. 10. The lack of any direct evidence of Shell's intent to dispose of the pesticide, and Shell's actions to prevent or minimize spills and releases, played a large role in the Court's decision. With direct evidence of Shell's intent, or the absence of such preventative measures, the case may have turned out differently.

John B. King

Partner—Baton Rouge
Phone: 225.381.8014
Fax: 225.387.5397
Email: john.king@bswllp.com

John B. King's principal areas of practice include environmental and oil and gas regulatory permitting and defense, compliance assistance, toxic tort defense, and litigation.