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SCOPE OF DISCOVERY OF NON-PARTY WITNESS PERSONNEL RECORDS

Recently, the Beaumont Court of Appeals had the opportunity to address the discovery requests and production of non-party witness personnel records. In *In re Mobil Oil Corporation*, 2006 WL 3028063 (Oct. 26, 2006), the Ninth Court of Appeals examined a trial court's discovery ruling that required production of a non-party witness's medical and personnel records "that are not subject to privacy rights or are not privileged." Mobil had objected on many grounds, including that the information sought was not relevant to the subject matter of the litigation and production could violate the witness's privacy rights.

Mobil argued that the underlying plaintiffs made no showing that the personnel file was relevant to the underlying asbestos exposure claim, and plaintiffs should be required to serve a narrowly tailored discovery request asking only for relevant documents. Mobil argued that allowing routine discovery of entire personnel files of non-party witnesses would discourage witnesses from testifying and unnecessarily burden employers and courts who must screen the personnel files to protect privacy concerns. The underlying plaintiffs countered that Mobil, as the party resisting discovery, had the burden to prove that the requested discovery was not relevant and that Mobil failed to meet this burden.

The Beaumont Court first addressed the issue of which party had the burden to show the relevance of the personnel file. As noted by the Court, relevance to the subject matter of the pending action determines the proper scope of discovery: "Requests for production of documents may not be used simply to explore." The Beaumont Court then held the requesting party has the initial responsibility of drafting discovery requests tailored to include only matters relevant to the case. Thus, the proponent of the request for production bears the burden of demonstrating the request's relevance to the case.

At the hearing on the underlying motion to compel, the underlying plaintiffs sought the witness's entire personnel file. However, the underlying plaintiffs noted only relevancy as to the witness's employment history and involvement with asbestos. The Beaumont Court noted that the discovery request was *not* tailored to ask *only* for documents that could be shown to be relevant to the asbestos exposure claim. Because the request was overbroad and included a broad request for documents which were not relevant to the plaintiffs' asbestos exposure claim, the Court of Appeals granted mandamus relief.

FIFTH CIRCUIT VIEW OF *FRANK'S CASING*

In *Nautilus Insurance Company v. Nevco Waterproofing*, 2006 WL 2920596 (5th Circuit, Oct. 11, 2006), the Fifth Circuit intimated its narrow construction of *Excess Underwriters at Lloyd's, London v. Frank's Casing Crew & Rental Tools, Inc.*, 2005 WL 1252321 (Tex. 2005). In essence, in *Nautilus* the Fifth Circuit determined that a *Frank's Casing* right of action for reimbursement of defense fees and expenses does not accrue to an insurance carrier in the absence of a settlement. Because the underlying *Nautilus* case was resolved by

dismissal of the insured without any monetary settlement or verdict being paid by the insured, the Fifth Circuit held *Frank's Casing* did not apply and the carrier had no right of action for reimbursement of the underlying defense fees. Of course, the Texas Supreme Court's decision in *Frank's Casing* remains under re-consideration by the Texas high court.

"MANIFEST DISREGARD FOR THE LAW" SUFFICIENT TO SET ASIDE ARBITRATION AWARD

In *OneBeacon America Insurance Company v. Turner*, 2006 WL 3102578 (5th Circuit, Oct. 30, 2006), the Fifth Circuit examined what constitutes "manifest disregard for the law" sufficient to set aside an arbitration award. The Court noted that there are two steps in the "manifest disregard" analysis. First, the error must have been obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator. "Disregard" implies that the arbitrator appreciates the existence of a clearly governing principle but decides to ignore or pay no attention to it. The governing law must be well-defined, explicit, and clearly applicable. Second, the arbitration award must have resulted in a significant injustice.

Notably, the failure of an arbitrator to *apply* the law correctly is not a basis for setting aside an arbitrator's award. For a reviewing court to find the "manifest disregard" of the law required to vacate an arbitrator's award, the contesting party must show that the arbitrator was aware of the governing principle and did not follow it. Evidence in support of such position may include a record of the arbitration proceedings or evidence that the arbitral panel was aware of the governing law or principle. In the absence of such evidence, the contesting party cannot make the necessary showing, and the arbitration award shall stand.