

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

HERCULES INCORPORATED, a :
Delaware Corporation, :
Plaintiff, :
 :
v. : C.A. No. 02C-11-237 SCD
 :
ONEBEACON AMERICA INSURANCE :
COMPANY, et al., :
Defendants. :

Submitted: August 30, 2004
Decided: September 7, 2004

ORDER

Upon Consideration of Certain Insurance Companies in the London Market and the North River Insurance Company's Motion to Strike Hercules' Expert Designation of Allan D. Windt –
GRANTED in part; DENIED in part.

This 7th day of September, 2004, the motion of Certain Insurance Companies in the London Market and the North River Insurance Company (“Movants”) to strike Hercules’ expert designation of Allan D. Windt, and Hercules’ response thereto having been considered, it appears:

(1) The CMO, as amended, requires Hercules to designate its experts and provide opinions by February 9, 2004. The deadline for defendants was April 23, 2004. Both sides were required to identify rebuttal experts by May 21, 2004, extended by agreement to May 26, 2004. Mr. Windt’s report was provided on May 26, 2004.

(2) The report of Mr. Windt covers a number of subjects. Movants argue that Mr. Windt is not a rebuttal expert because his opinions do not rebut; he addresses a range of topics on which no previous expert has offered an opinion. Movants also argue that his opinions are inadmissible legal opinions and are inadmissible extrinsic evidence.

(3) In response, Hercules argues that the testimony of Mr. Windt is offered to “assist the jury in understanding that the positions taken by the Insurers regarding exhaustion are so extreme and at odds with the custom and practice in the industry that practitioners in the field would consider them to be totally without support. . . . [his testimony] will enable the jury to

determine that the Insurers are acting in bad faith to deny coverage based upon such frivolous positions.”

(4) By Order issued today, I have bifurcated the presentation of the bad faith claim. The bad faith trial will proceed immediately after the coverage trial, before the same jury. Additional evidence will be permitted. The plan is to have one trial follow the other, so that the need to educate the jury will be limited.

(5) Mr. Windt will be permitted to provide rebuttal testimony in the coverage trial. If there is a bad faith trial, he will be permitted to testify for Hercules during its case in chief. While it is clear upon reviewing Mr. Windt’s report that portions of it may be prohibited, that determination cannot be made without first hearing the defense case. I will reserve until completion of the defense case a determination as to the scope of the testimony which will be permitted from Mr. Windt.

IT IS SO ORDERED.

/s/ Susan C. Del Pesco
Judge Susan C. Del Pesco

Original to Prothonotary
xc: Counsel of Record