

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

AT&T WIRELESS SERVICES INC.,	)	
	)	
	)	
Plaintiff,	)	C.A. No. 03C-12-232 WCC
	)	
v.	)	
	)	
FEDERAL INSURANCE COMPANY,	)	
NATIONAL UNION FIRE	)	
INSURANCE COMPANY OF	)	
PITTSBURGH, PA., ST. PAUL	)	
MERCURY INSURANCE COMPANY,	)	
AND CERTAIN UNDERWRITERS	)	
OF LLOYD’S LONDON, AND	)	
CERTAIN LONDON MARKET	)	
COMPANIES,	)	
	)	
Defendants.	)	

Submitted: August 1, 2005

Decided: August 18, 2005

**MEMORANDUM OPINION**

Upon Defendants’ Faraday Capital and National Union’s Motion to Quash Plaintiff’s Notice of Partial Dismissal. **GRANTED** in part and **DENIED** in part.

Upon Plaintiff’s Motion to Dismiss. **DENIED.**

Upon Plaintiff’s Motion For a Dismissal of Defendants’ Counterclaims or a Stay of This Action. **DENIED.**

CARPENTER, J.

After oral argument and a review of the record below, as well as the parties' written submissions, the decision of the Court is as follows.

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## **I. BACKGROUND**

On February 15, 2002, TeleCorp PSC, Inc. ("TeleCorp"), a company that built and operated digital wireless networks, merged with AT&T Wireless Services, Inc. ("AWS").<sup>1</sup> As a result of this merger, TeleCorp shareholders filed numerous actions alleging that the TeleCorp directors' approval of the merger constituted a breach of their fiduciary duties. On August 20, 2003, the Delaware Court of Chancery approved a settlement of those actions in which AWS, as successor in interest to TeleCorp, agreed to pay \$47.5 million to the shareholder plaintiffs in exchange for a dismissal of their claims.

At the conclusion of this litigation, AWS sought reimbursement from its insureds for the costs incurred in defending the shareholder actions. Specifically, AWS, again, as successor in interest to TeleCorp, sought reimbursement from TeleCorp's Directors and Officers liability insurance policy holders, Federal Insurance Company ("Federal"), National Union Fire Insurance Company of Pittsburgh, PA ("National") and St. Paul Mercury Insurance Company ("St. Paul")

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<sup>1</sup> On October 26, 2004, AWS merged into Cingular Wireless, LLC but continues to operate through New Cingular Wireless Services, Inc., a subsidiary of Cingular Wireless, LLC. For purposes of the Opinion, the Court will continue to refer to the Plaintiff as AWS.

(collectively the “TeleCorp Insurers”). In addition, AWS sought reimbursement from its own Directors and Officers liability insurance policy holders, Faraday Capitol Limited (“Faraday”)<sup>2</sup> and National (collectively the “AWS Insurers”). Despite their efforts, AWS did not receive reimbursement. Consequently, on December 23, 2003, AWS filed a complaint seeking damages for breach of contract in connection with the Directors and Officers liability insurance policies sold by the TeleCorp Insurers and the AWS Insurers. The TeleCorp Insurers filed an Answer and Counterclaims to which AWS responded. After AWS amended their complaint,<sup>3</sup> on October 12, 2004 the TeleCorp Insurers filed a motion to dismiss. On October 27, 2004, the AWS Insurers also filed a motion to dismiss. On April 13, 2005, the Court held argument on the motions to dismiss and reserved judgment at the conclusion of the hearing.

While the Court was contemplating its decision, on June 17, 2005, AWS filed a virtually identical complaint as to that in the present case against the same defendants in the Superior Court in King County, Washington. Thereafter, on June 20, 2005, AWS filed a Notice of Partial Dismissal of Faraday and National pursuant to Superior Court Civil Rule 41(a)(1). On June 23, 2005, AWS filed a Motion for Dismissal of the TeleCorp Insurers pursuant to Superior Court Civil Rule 42(a)(2).

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<sup>2</sup> Faraday is referred to in the Complaint as Certain Underwriters of Lloyd’s London and Certain London Market Companies.

<sup>3</sup> On September 28, 2004, this Court granted an Order amending the original complaint to add claims of bad faith and violations of the Washington Consumer Protection Act.

On June 27, 2005, AWS filed a Motion for Dismissal of Defendant's Counterclaims or a Stay of this Action. On July 8, 2005, the AWS Insurers filed a Motion to Quash the Notice of Partial Dismissal. On August 1, 2005, the Court held argument and the following is the Court's decision regarding these motions. \_\_\_\_\_

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## **II. DISCUSSION**

### **A. Faraday and National's Motion to Quash AWS' Notice of Partial Dismissal**

On June 20, 2005, AWS filed its Notice of Partial Dismissal, and purportedly, by virtue of filing the notice, dismissed the AWS Insurers from this action. In response, the AWS Insurers filed the present Motion to Quash asserting that the Notice of Partial Dismissal was not properly filed. Superior Court Civil Rule 41(a)(1) allows for voluntary dismissal by plaintiffs. It provides that: "[s]ubject to payment of costs and the provisions of Rule 23(e), *an action may be dismissed* by the plaintiff without order of the court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment."<sup>4</sup> Although AWS' notice seeks to dismiss National and Faraday, collectively as the AWS Insurers, the Court will proceed through its analysis one insurer at a time.

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<sup>4</sup> Super. Ct. Civ. R. 41(a)(1) (emphasis added).

First, National finds itself in a unique position in this action in that it is a policy holder under the collective titles of AWS Insurer and TeleCorp Insurer. Both sets of claims asserted by AWS against the AWS Insurers and the TeleCorp Insurers apply to National. The notice filed by AWS specifically states it “voluntarily dismisses, without prejudice, all claims asserted in the above-captioned action against Faraday Capitol Limited and National Union Fire Insurance Company of Pittsburgh, Pa. *arising out of or relating to the policies issued to AWS.*”<sup>5</sup> In order for a plaintiff’s voluntary notice of dismissal to be effective it must not “dismiss fewer than all claims against a particular party.”<sup>6</sup> Here, National is a party to this action as an AWS Insurer and a TeleCorp Insurer. AWS’ notice, by its own language, attempts to dismiss the claims against National as an AWS Insurer only, not as a TeleCorp Insurer. As a result, if National were to be dismissed from the action with regards to the claims against the AWS Insurers, it would be required to remain a party to the action to defend the claims against the TeleCorp Insurers. Therefore, if permitted, AWS would dismiss fewer than all claims asserted against National in this action. The Court agrees that this is not a permissible usage of Superior Court Rule 41(a)(1). Consequently, the Motion to Quash is granted with regards to National.

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<sup>5</sup> See Pl.’s Notice of Partial Dismissal (emphasis added).

<sup>6</sup> See 8 James Wm. Moore, et al. Moore’s Fed. Practice § 41.21[1].

Next, turning to Faraday and applying the same rules, the Court cannot reach the same conclusion. Faraday is only a party to the action under the claims asserted against the AWS Insurers. As such, the notice filed by AWS would dismiss all of the claims asserted against Faraday. A plaintiff under Rule 41(a)(1) has the ability to dismiss a defendant from a complaint “by selectively dismissing the claim or set of claims which compromise the entire action against that defendant.”<sup>7</sup> Here, AWS, through its notice, has selectively dismissed the claims against Faraday arising out of the policies issued to AWS, and those claims comprised the entire action against Faraday. Therefore, the Court finds that the Notice of Dismissal, as far as it pertains to Faraday, was properly filed and the Motion to Quash with regards to Faraday is denied.

#### **B. AWS’ Voluntary Motion to Dismiss**

On June 23, 2005, AWS filed its motion seeking an order of voluntary dismissal of the TeleCorp Insurers under Rule 41(a)(2). Rule 41(a)(2) states in pertinent part that "an action shall not be dismissed at the plaintiff's instance save upon order of the Court and upon such terms and conditions as the Court deems proper."<sup>8</sup> Thus, a motion under Rule 41(a)(2) for a voluntary dismissal will not be

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<sup>7</sup> *Id.*

<sup>8</sup> Super. Ct. Civ. R. 41(a)(2).

granted as a matter of right, rather, it is directed to the sound discretion of the Court.<sup>9</sup> In exercising its discretion, the Court is obliged to act in such a way as to "secure substantial justice to both parties."<sup>10</sup> To defeat the Rule 41(a)(2) motion, a defendant is required to satisfy the burden of demonstrating "plain legal prejudice."<sup>11</sup> The TeleCorp Insurers oppose this motion and urge the Court to retain jurisdiction over this case. They argue that if AWS' motion is granted, the parties will be forced to redo essentially the same litigation in a Washington court as it is reasonable to presume the TeleCorp Insurers and the AWS Insurers will brief and file another set of motions to dismiss, similar to those presently pending before the Court. They assert that granting AWS' Motion to Dismiss, and allowing them to proceed in Washington will almost certainly result in an abundant waste of judicial resources as the parties will duplicate what has already occurred in this jurisdiction.

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<sup>9</sup> See *ASX Inv. Corp. v. Newton*, Del. Ch., C.A. No. 13452, Allen, C. (May 18, 1994), Mem. Op. at 5 (stating dismissal under Rule 41(a)(2) is within sound discretion of court and not a matter of right).

<sup>10</sup> See *Draper v. Gardner Defined Plan Trust*, 625 A.2d 859, 863 (Del. 1993); *Lunn v. United Aircraft Corp.*, 26 F.R.D. 12, 13 (D. Del.1960); 9 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2364 at 274 (1996) (stating determination is within sound discretion of court and its order is reviewable only for abuse of discretion).

<sup>11</sup> See *Draper*, 625 A.2d at 863. See also *ASX Inv. Corp.*, at 5 (stating motion generally granted unless doing so would cause defendant to suffer "plain legal prejudice").

Courts look to four factors in determining whether a defendant would suffer "plain legal prejudice" by the granting of a motion for a voluntary dismissal:

- (1) the defendants' effort and expense in preparation for trial;
- (2) excessive delay and lack of diligence on the part of plaintiff in prosecuting the action;
- (3) insufficient explanation for the need to take a dismissal; and
- (4) the fact that a motion for summary judgment has been filed by the defendant.<sup>12</sup>

Applying these factors to the present circumstances the Court finds that a dismissal in this case is not appropriate.

First, the Court must agree that AWS has diligently presented this litigation in an appropriate manner and any delay is not solely related to their conduct. From the very first meeting of counsel with the Court, there was agreement by counsel that the first matter that needed to be resolved was a series of dismissal motions that the AWS Insurers and TeleCorp Insurers intended to file. A filing deadline and a briefing schedule that accommodated counsels' schedule was created and because of the busy calendars of both counsel and the Court, a tentative trial date of November 7, 2005 was also established. While the Court agrees that the November trial date is now unrealistic, it must point out that any delay that has occurred was the result of numerous revisions to the briefing schedule regarding the motions to dismiss to accommodate counsels' schedule and not related to any activity by the Court.

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<sup>12</sup> See *Draper*, 625 A.2d at 864.



Therefore the Court notes a particular objection to the suggestion made by AWS that the present motions should be granted because the Washington filed litigation has set a “realistic” trial date of December 4, 2006. If counsel is really serious about proceeding to trial in 2006, it makes no sense to remove this matter to Washington where there will again be months of delay to handle the dismissal motions which will be identical to these now pending before this Court. In addition, this Court is willing to schedule this matter for trial as early as June of 2006 but is also available in the fall of 2006 and believes it is the only forum that today can establish a trial date that is realistic and counsel will be obligated to meet. In any event, to the extent there has been delay, it is a collective one caused by the demands of counsel and it appears, except for discovery, the litigation has proceeded as contemplated by the attorneys in this matter.

That does not suggest, however, that there has not been considerable effort and expense associated with this litigation. Dispositive motions have been filed and extensively briefed, and the Court heard arguments lasting hours regarding these matters. The Court and counsel have made a significant effort to focus the litigation in a manner that would avoid unnecessary expense and would provide for a logical consideration of the issues raised by AWS. While the case is a year or more away from trial, the Court is convinced that significant resources have been expended that

will have to be reproduced if the case is moved to another venue at a tremendous expense to all parties.

Most important to the Court's determination is the explanation offered by AWS for its request to dismiss the matter. AWS asserts three reasons. First, AWS suggests that, at least in its estimation, it is now clear that Washington law will apply to most of the claims in the present action and therefore it makes sense to allow the Washington Court to apply and interpret their laws. The TeleCorp Insurers and the AWS Insurers, on the other hand, argue that it is not clear whether Washington, Virginia or Delaware law will apply. Even if the Court assumes that Washington law would apply to most of the issues in this case, the Delaware Courts are well-accustomed to applying the laws of foreign jurisdictions<sup>13</sup> and at least since the filing of AWS' amended complaint in October of 2004, the potential applicability of Washington law would have been apparent to AWS. The AWS' sudden revelation of the significance of Washington law in these proceedings is suspect at best.

Next, AWS suggests that a potential contract reformation issue has surfaced. This issue could potentially require an equitable resolution, a charge typically given to the Delaware Chancery Court. The Washington Court's jurisdiction includes the power to render remedies at law and at equity. As such, AWS asserts that the more

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<sup>13</sup> The Court is not making any determination at this time whether Delaware, Washington or some other jurisdiction's law will apply.

comprehensive jurisdiction of the Washington Court could better serve this case. Here too, the Court finds this explanation does not justify a dismissal. The Delaware State Constitution gives the Supreme Court the authority to allow Superior Court judges to sit in the capacity of Vice Chancellor by Designation in order to adjudicate equitable issues in a case<sup>14</sup> that involved both issues of law and equity and this is a practice that is accepted and recognized by the Supreme Court as an appropriate use of its limited judicial resources. The Court is confident that if requested such a designation would be approved in a case of this magnitude.

Finally, the TeleCorp Insurers contend that by AWS' filing of an affidavit in opposition to their motion to dismiss, their action has transformed the motion to one for summary judgment and is a factor the Court should consider in denying AWS' motion. While the Court is not willing to accept the TeleCorp Insurers' argument particularly when it does not intend to consider the affidavit in its decision on the motion, it is also convinced that summary judgment is not the key dispositive element to this factor. Instead, what is important is whether some action has been taken by a defendant that perhaps would dispose of the litigation and whether the plaintiff's motion would significantly undermine and frustrate that effort. Clearly this would occur here. In the ninth inning of the Court's decision that may significantly impact

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<sup>14</sup> See Del. Const. Art. IV Sect 13(2).

the litigation, AWS is attempting to take their ball and bat and move to a ball field that they believe will be a better forum for their hitting style. This Court agrees with Chancellor Chandler that neither equity or fairness would be served by such action<sup>15</sup> and AWS' request is nothing more than an effort to obtain a perceived tactical advantage.

Based upon the above, the Court finds that there is an insufficient explanation by AWS for the need to dismiss this action and further, after considering all the factors together, finds that the TeleCorp Insurers have satisfied their burden of demonstrating plain legal prejudice from what is perceived as mere forum shopping to obtain a litigation advantage. Justice requires that AWS litigate in the jurisdiction they have deliberately chosen and in which they have forced the defendants to proceed.<sup>16</sup> This decision is further required since even if AWS' motion was granted, the counterclaims would remain, and the unacceptable and unproductive possibility of piecemeal litigation in this matter which would be prejudicial to all parties would occur. Therefore, AWS' voluntary Motion to Dismiss is denied.

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<sup>15</sup> *In re Walt Disney Co. Litig.*, 1997 WL 118402 at \*3 (Del. Ch. 1997).

<sup>16</sup> *See id.*

### **C. AWS' Motion for a Dismissal of Counterclaims or Stay**

On June 27, 2005 AWS filed a Motion for a Dismissal of Defendants' Counterclaims or a Stay of this Action. The TeleCorp Insurers<sup>17</sup> contest this motion and as such filed a memorandum to that effect on July 26, 2005. AWS argues that if its Motion to Dismiss is granted then the only remaining claims in this action would be the alleged counterclaims of the Telecorp Insurers. Therefore, AWS concludes those counterclaims should be dismissed or, in the alternative, stayed pending resolution of all matters before the Washington courts. However, as stated above, AWS' Motion to Dismiss is denied. Therefore, AWS' justification for its Motion for a Dismissal of Counterclaims becomes moot. The Court concludes, therefore, that AWS' Motion for Dismissal of Defendant's Counterclaims or a Stay of this Action is denied.

### **D. Conclusion**

Except for the dismissal of Faraday which was effectuated by the notice filed by AWS, based upon the reasons set forth in this opinion, the remaining parties and litigation will continue as an active case in this jurisdiction.

IT IS SO ORDERED.

/s/ William C. Carpenter, Jr.  
Judge William C. Carpenter, Jr.

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<sup>17</sup> National, Federal and St. Paul are the only defendants who filed counterclaims.