

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

HARTFORD ACCIDENT AND)
INDEMNITY COMPANY and)
FIRST STATE)
INSURANCE COMPANY,)

Plaintiffs,)

v.)

1:11-cv-00075-JAW

IRVING OIL CORPORATION,)
FIREMAN'S FUND INSURANCE)
COMPANY, NATIONAL UNION)
FIRE INSURANCE COMPANY OF)
PITTSBURGH, PA, and ARROWOOD)
INDEMNITY COMPANY, formerly)
known as ROYAL INDEMNITY)
COMPANY, successor in interest to)
ROYAL INSURANCE COMPANY)
and ROYAL GLOBE INSURANCE)
COMPANY,)

Defendant.)

ORDER ON MOTION FOR VOLUNTARY DISMISSAL

Over the Defendants' objection, the Court grants the Plaintiffs' Rule 41(a)(2) motion to voluntarily dismiss without prejudice the pending complaint.

I. STATEMENT OF FACTS

On March 1, 2011, Hartford Accident and Indemnity Company and First State Insurance Company (Plaintiffs) filed a complaint for declaratory judgment in this Court against Irving Oil Corporation, Fireman's Fund Insurance Company, National Union Fire Insurance Company of Pittsburgh, PA, and Arrowood Indemnity Company (Defendants). *Compl. for Decl. J.* (Docket # 1). On April 6, 2011, the Plaintiffs moved for a voluntary dismissal under Federal Rule of Civil

Procedure 41(a)(2) on the ground that after filing the complaint, the Plaintiffs learned that Lexington Insurance Company (Lexington) had issued an insurance policy to Irving Oil Corporation. *Mot. for Voluntary Dismissal* (Docket # 34). Realizing that Lexington should have been included as a Defendant in the original Complaint and that the inclusion of Lexington would destroy the Court's diversity jurisdiction, the Plaintiffs moved to voluntarily dismiss their Complaint and requested that the Court deny all pending motions as moot. *Id.* at 1-2. On April 27, 2011, Highlands Fuel Delivery, LLC (Highlands), the corporate successor to Irving Oil Corporation, objected to the voluntary dismissal.¹ *Resp. of Def. Highlands Fuel Delivery, LLC (Formerly Known as Irving Oil Corp.), to Pls.' Mot. for Voluntary Dismissal* (Docket # 43) (*Highlands Opp'n*). On May 11, 2011, the Plaintiffs replied. *Reply in Support of Pls.' Mot. for Voluntary Dismissal* (Docket # 44).

II. DISCUSSION

The Court agrees with the Plaintiffs that their motion to dismiss without prejudice is routine and should be granted. Rule 41(a)(2) states:

(2) By Court Order; Effect. Except as provided in Rule 41(a)(1), an action may be dismissed at the plaintiff's request only by court order, on terms that the court considers proper. . . . Unless the order states otherwise, a dismissal under this paragraph (2) is without prejudice.

FED. R. CIV. P. 41(a)(2). Whether to dismiss an action without prejudice under Rule 41(a)(2) remains in the discretion of the Court. *JRA Architects & Project Managers, P.S.C. v. First Fin. Grp., Inc.*, 375 F. App'x 42, 43 (1st Cir. 2010); *Doe v. Urohealth*

¹ Highlands revealed its status as corporate successor to Irving Oil Corporation in its Motion to Dismiss or, in the Alternative, to Stay Pursuant to Federal Abstention. *Mot. of Def. Highlands Fuel Delivery, LLC (Formerly Known as Irving Oil Corporation) to Dismiss or in the Alternative to Stay Pursuant to Fed. Abstention* at 1 n.1. (Docket # 23).

Sys. Inc., 216 F.3d 157, 160 (1st Cir. 2000); *Canadian Nat'l Ry. Co. v. Montreal, Me. & Atl. Ry., Inc.*, No. 1:10-cv-452-JAW, 2011 U.S. Dist. LEXIS 70425, *8 (D. Me. Jun. 30, 2011). The First Circuit stated that “the basic purpose of Rule 41(a)(2) is to freely permit the plaintiff, with court approval, to voluntarily dismiss an action so long as no other party will be prejudiced.” *P.R. Mar. Shipping Auth. v. Leith*, 668 F.2d 601, 604 (1st Cir. 1981) (quoting *LeCompte v. Mr. Chip, Inc.*, 528 F.2d 601, 604 (5th Cir. 1976)).

In deciding whether to allow a voluntary dismissal, courts generally consider a number of factors: 1) the defendant’s effort and expense of preparation for trial; 2) excessive delay and lack of diligence on the part of the plaintiff in prosecuting the action; 3) insufficient explanation for the need to take a dismissal; 4) the fact that a motion is made at a critical juncture in the ongoing processing of the case; and, 5) whether a dispositive motion has been filed. *Doe*, 216 F.3d at 160; *ZF Lemforder Corp.*, No. CV-09-83-B-W, 2009 U.S. Dist. LEXIS 53909, *3 (D. Me. Jun. 24, 2009). As a general rule, a request for dismissal without prejudice should be granted “if no prejudicial effects would result for the opposing party.” 9 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2364 (3d ed. 2008). “Accordingly, in ruling on a motion for voluntary dismissal, ‘the district court is responsible . . . for exercising its discretion to ensure that such prejudice will not occur.’” *JRA Architects*, 375 F. App’x. at 43 (quoting *Doe*, 216 F.3d at 160). Finally, the First Circuit has clarified that the district courts “need not analyze each factor or limit their consideration to these factors.” *Doe*, 216 F.3d at 160.

Applying these factors here, this case contains complex and layered issues of insurance coverage involving multiple potential insurers and it remains at its formative stages. The Complaint was filed in March, 2011 and, although there are motions to dismiss pending, there is also a motion to stay the action while a state of New Hampshire civil action is resolved. The Court will not speculate as to whether the case would be resolved at this level by the pending motions, or would be stayed, or would require discovery, further dispositive motions, and trial. Further, there is always the potential for appeal in intricate areas of insurance coverage. Thus, although a dispositive motion has been filed, the Court concludes that the Plaintiffs have not made the motion at a critical juncture, and the Defendants have not yet expended resources in the defense of this case to justify denial of the Plaintiffs' motion. There is no suggestion that the Plaintiffs either delayed in initiating this action or unduly delayed in bringing the motion to dismiss. Nor have they given an inadequate justification for the motion to dismiss.

Finally, although the Defendants have objected to the dismissal, their primary objection is that voluntary dismissal "would simply encourage [the Plaintiffs] to pursue another vexatious lawsuit down the street in Maine state court (which they recently filed even while this action remains pending), resulting in additional waste of judicial and private resources and legal prejudice to Highlands." *Highlands Opp'n* at 2. The brief answer to the Defendants' objection is that if the Plaintiffs' pursuit of a separate state action in Maine is as vexatious as the Defendants claim, the proper place to remedy the initiation of the state court

proceeding is the state court. On its face, there is nothing improper about the Plaintiffs' request for dismissal. The Plaintiffs' rationale for dismissal is consistent with case law and the civil rules. *Mack Bros. v. Me. State Hous. Auth.*, No. 10-cv-87-P-S, 2010 U.S. Dist. LEXIS 111966, *31-41 (D. Me. Oct. 19, 2010), *aff'd* 2010 U.S. Dist. LEXIS 126051 (D. Me. Nov. 29, 2010); FED. R. CIV. P. 19(b).

III. CONCLUSION

The Court DISMISSES without prejudice the Plaintiffs' Complaint.

SO ORDERED.

/s/ John A. Woodcock, Jr.
JOHN A. WOODCOCK, JR.
CHIEF UNITED STATES DISTRICT JUDGE

Dated this 30th day of September, 2011.

Plaintiff

**HARTFORD ACCIDENT AND
INDEMNITY COMPANY**

represented by **CHARLES F. MORRISSEY**
KARBAL, COHEN, ECONOMOU,
SILK & DUNNE, LLC
150 SOUTH WACKER DRIVE
SUITE 1700
CHICAGO, IL 60606
(312) 431-3700
Email: cmorrissey@karballaw.com
ATTORNEY TO BE NOTICED

PAUL W. CHAIKEN
RUDMAN & WINCHELL
84 HARLOW STREET
P.O. BOX 1401
BANGOR, ME 04401
(207) 992-2301
Email: pchaiken@rudman-
winchell.com
ATTORNEY TO BE NOTICED

WAYNE S. KARBAL
KARBAL, COHEN, ECONOMOU,
SILK & DUNNE, LLC
150 SOUTH WACKER DRIVE
SUITE 1700
CHICAGO, IL 60606
(312) 431-3700
Email: wkarbal@karballaw.com
ATTORNEY TO BE NOTICED

Plaintiff

**FIRST STATE INSURANCE
COMPANY**

represented by **CHARLES F. MORRISSEY**
(See above for address)
ATTORNEY TO BE NOTICED

PAUL W. CHAIKEN
(See above for address)
ATTORNEY TO BE NOTICED

WAYNE S. KARBAL
(See above for address)
ATTORNEY TO BE NOTICED

V.

Defendant

IRVING OIL CORPORATION

represented by **CHARLES JOSEPH FISCHETTE**
COVINGTON & BURLING
1201 PENNSYLVANIA AVENUE,
N.W.
WASHINGTON, DC 20004
202-662-5716
Email: cfischette@cov.com
ATTORNEY TO BE NOTICED

DAVID B. MCCONNELL
PERKINS THOMPSON, PA
ONE CANAL PLAZA
P.O. BOX 426
PORTLAND, ME 04112
774-2635
Email:
dmccconnell@perkinsthompson.com
ATTORNEY TO BE NOTICED

DAWN M. HARMON
PERKINS THOMPSON, PA
ONE CANAL PLAZA
P.O. BOX 426
PORTLAND, ME 04112
207-774-2635
Email:
dharmon@perkinsthompson.com
ATTORNEY TO BE NOTICED

PATRICIA ANNE BARALD
COVINGTON & BURLING
1201 PENNSYLVANIA AVENUE,
N.W.
WASHINGTON, DC 20004
202-662-5358
Email: pbarald@cov.com
ATTORNEY TO BE NOTICED

WILLIAM F. GREANEY
COVINGTON & BURLING
1201 PENNSYLVANIA AVENUE,
N.W.
WASHINGTON, DC 20004
Email: wgreaney@cov.com
ATTORNEY TO BE NOTICED

Defendant

**FIREMANS FUND INSURANCE
COMPANY**

represented by **MARC N. FRENETTE**
SKELTON, TAINTOR & ABBOTT
P.O. BOX 3200
95 MAIN STREET
AUBURN, ME 04212-3200
207-784-3200
Email: mfrenette@3200.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

CHRIS J. FICHTL
RIVKIN RADLER, LLP
LONG ISLAND
926 RXR PLAZA
UNIONDALE, NY 11556-0926
Email: chris.fichtl@rivkin.com
ATTORNEY TO BE NOTICED

PETER P. MCNAMARA
RIVKIN RADLER, LLP
LONG ISLAND
926 RXR PLAZA
UNIONDALE, NY 11556-0926
516-357-3045
Email: peter.mcnamara@rivkin.com
PRO HAC VICE
ATTORNEY TO BE NOTICED

Defendant

**NATIONAL UNION FIRE
INSURANCE COMPANY OF
PITTSBURGH PA**

represented by **JEFFREY T. EDWARDS**
PRETI, FLAHERTY, BELIVEAU,
PACHIOS & HALEY, LLP
PO BOX 9546
PORTLAND, ME 04112-9546
791-3000
Email: jedwards@preti.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

MARIE L. VANDAM
JACKSON & CAMPBELL, P.C.
1120 20TH STREET NW
SUITE 300
SOUTH WASHINGTON, DC 20036
202-457-1622
Email: mvandam@jackscamp.com
ATTORNEY TO BE NOTICED

RICHARD W. BRYAN
JACKSON & CAMPBELL, P.C.
1120 20TH STREET NW
SUITE 300
SOUTH WASHINGTON, DC 20036
202-457-1638
Email: rbryan@jackscamp.com
ATTORNEY TO BE NOTICED

Defendant

**ARROWOOD INDEMNITY
COMPANY**
formerly known as
ROYAL INDEMNITY COMPANY
other

represented by **SETH V. JACKSON**
ZELLE, HOFMANN, VOELBEL &
MASON LLP
950 WINTER STREET
SUITE 1300

ROYAL INSURANCE COMPANY
other
ROYAL GLOBE INSURANCE
COMPANY

WALTHAM, MA 02451
781-466-0700
Email: sjackson@zelle.com
ATTORNEY TO BE NOTICED

WM. GERALD MCELROY , JR.
ZELLE, HOFMANN, VOELBEL &
MASON LLP
950 WINTER STREET
SUITE 1300
WALTHAM, MA 02451
781-466-0700
Email: wmcelroy@zelle.com
ATTORNEY TO BE NOTICED

JAMES T. KILBRETH
VERRILL DANA LLP
ONE PORTLAND SQUARE
P.O. BOX 586
PORTLAND, ME 04112
(207) 774-4000
Email: jkilbreth@verrilldana.com
ATTORNEY TO BE NOTICED

Cross Claimant

**ARROWOOD INDEMNITY
COMPANY**

represented by **SETH V. JACKSON**
(See above for address)
ATTORNEY TO BE NOTICED

WM. GERALD MCELROY , JR.
(See above for address)
ATTORNEY TO BE NOTICED

JAMES T. KILBRETH
(See above for address)
ATTORNEY TO BE NOTICED

V.

Cross Defendant

IRVING OIL CORPORATION

represented by **CHARLES JOSEPH FISCHETTE**
(See above for address)
ATTORNEY TO BE NOTICED

DAVID B. MCCONNELL

(See above for address)
ATTORNEY TO BE NOTICED

PATRICIA ANNE BARALD
(See above for address)
ATTORNEY TO BE NOTICED

WILLIAM F. GREANEY
(See above for address)
ATTORNEY TO BE NOTICED