

**ARTICLE: Is the Jury Still Out? The Controversy Over The Traditional Rule
Requiring a Non-Jury Trial in Marine Insurance Declaratory Judgment Actions in
Federal Court**

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LexisNexis Summary

... Noting that it retained the discretion to order separate trials where factually dissimilar admiralty and diversity-based claims were presented, the court declined to do so because the counterclaim was what the authors have already termed a "mirror-image" counterclaim which raised no new or separate issues not already asserted or at least implicit in the marine insurer's Rule 9(h) complaint for declaratory judgment. ... The appellate court held that the defendant, a labor union, was entitled to a jury trial on its legal counterclaims since these were properly before the district court under the general civil jurisdictional statutes, notwithstanding the plaintiff's Rule 9(h) election to proceed under the court's admiralty jurisdiction for its in rem claim to foreclose on a first preferred ship mortgage against the vessel, and related in personal claims against the vessel owner. ... Even though it did not involve a coverage dispute arising under a policy of marine insurance, the 9th Circuit's holding in the Wilmington Trust case certainly rekindled the never completely dormant debate over this question of whether an exception to the admiralty rule of non-jury trials ought to be carved out for marine insurance declaratory judgment actions, and the decision provided new ammunition for the advocates of treating marine insurance coverage litigation as if it were no different from litigation involving automobiles or swimming pools. ... As noted, supra, the rather narrow rulings of the Supreme Court in *Beacon Theatres*, *Ellerman*, and *Fitzgerald*, holding simply that Congress, by statute, is free to grant a right to a jury trial where the Seventh Amendment does not so provide, had even prior to the *Lockheed Martin* decision been misinterpreted in a minority line of cases in order to allow a defendant to invalidate a plaintiff's election for a bench trial. ... Furthermore, a decision like that from the 4th Circuit, a decision to ignore 219 years of precedent, could only be arrived at by deliberately ignoring the silence of the Seventh Amendment regarding juries in admiralty cases, by deliberately ignoring the explicit rejection of juries in such cases by the first Congress, by deliberately ignoring the preservation of the rule against juries in admiralty by Rules 9(h) and 38(e), and by deliberately ignoring the Advisory Committee notes accompanying the Federal Rules, unambiguously affirming the rule against juries in admiralty cases and rejecting any alteration by the courts. ... In contrast to the 4th Circuit's failure to offer any persuasive reason for abandoning the practice of bench trials, courts and commentators have recognized, as the drafters of the Constitution did, that admiralty remains a highly specialized area of practice, one in which judges are far better suited to weigh facts, and are better suited to apply them to highly technical points of law.

Text

[*117] I

INTRODUCTION

Whenever that rare occasion arises in which a United States Court of Appeals decides to overturn an existing precedent, such an extraordinary circumstance must certainly be news throughout the interested legal community. When this same appellate ruling has the effect of abolishing a federal court practice that has endured for more than two hundred years, such an occasion must be recognized as big news in that same interested legal community. When the appellate court has reached its ruling only by ignoring a one hundred and fifty year old Supreme Court precedent that has been reaffirmed by numerous federal district and circuit courts, and has been reinforced by Congressional statute, such a ruling merits a banner headline. However, when the ruling is issued by two out of the three judges on the panel, with the third judge having died after oral argument but before issuance of the ruling, and the two surviving jurists essentially ignore the existing precedents, then the authors respectfully submit that we are in the presence of a scandal to which the only appropriate response is one of shock and dismay.

[*118] The foregoing is precisely what happened in 2007 when two judges on a panel of the United States Court of Appeals for the 4th Circuit held that where a marine insurance company decides to bring an action for declaratory judgment in a federal district court, asserting admiralty as the sole and exclusive basis for federal jurisdiction, and as the plaintiff in the action requests a bench trial, a request federal district courts have honored since the founding of the Republic, that request will be defeated by the opposing party's request for a jury trial on a mirror-image counterclaim.¹ Though it was not stated as such by the panel, the practical effect of the ruling in *In re Lockheed Martin Corp.* is to nullify more than two hundred years of deeply entrenched federal court precedent recognizing that where a marine insurance company acts as a plaintiff and commences a declaratory judgment action under the admiralty jurisdiction of the federal court, and the defendant/insured responds by asserting a counterclaim which all too often is nothing more than a simple allegation of breach of contract, there is no Seventh Amendment right to a jury trial, *even if the disgruntled defendant/insured would have had such a right had he brought suit first on a different jurisdictional basis.*

What took this unfortunate decision out the realm of newsworthy and into the realm of scandalous was its shoddy reasoning and the cavalier disregard demonstrated for existing Supreme Court precedent, as well as for the actual text of the federal admiralty jurisdiction statute² and the Seventh Amendment.³ The two judges from the 4th Circuit panel could have candidly admitted a desire to reexamine and alter existing precedent and to do away with bench trials in this particular variety of admiralty action. Instead, the authors will argue that the decision steered a course for intellectual dishonesty and insisted on pretending that no such precedent existed. Making an ostentatious show of fidelity to the spirit of the Seventh Amendment, the holding in *Lockheed Martin* ignored the text of the amendment and mangled beyond recognition the Supreme Court's opinions interpreting its application to the admiralty jurisdiction of the federal courts.

Then in 2009, the plot thickened when a panel of the 11th Circuit dealt with this same issue of whether there exists any right to a jury trial in a marine insurance coverage action where the insurance company is the plaintiff in a declaratory judgment action, with that 11th Circuit panel declining to follow the example of the 4th Circuit.⁴ Therefore, at this time there exists a situation in which a marine insurer filing a declaratory judgment action in [*119] Norfolk or Baltimore, situated within the 4th Circuit, must anticipate having to endure a jury trial, while that same insurer is assured of a bench trial in any action commenced in Miami or in Tampa. Depending upon the view one takes with respect to uniformity in admiralty and marine insurance law as a transcendent value in the nation's federal courts, this can be either a very good thing or a very bad thing. The authors take the admittedly quaint, and perhaps even antiquated view that such a startling

¹ In Re: [Lockheed Martin Corporation](#), 503 F.3d 351 (4th Cir.2007).

² [28 U.S.C. § 1331\(1\)](#).

³ U.S. Const. Amd. 7.

⁴ [St. Paul Fire & Marine Ins. Co. v. Lago Canyon](#), 561 F.3d 1181 (11th Cir. 2009).

conflict in the circuits is a very bad thing indeed, since the foreseeable impact of litigation decided by juries in some jurisdictions and by judges in others must inevitably be a great yawning chasm of divergent rulings where the facts and the applicable legal principles are otherwise the same. Moreover, as the authors will argue, *infra*, there are a number of considerations that are unique to marine insurance and which are best served by having the jurists who comprise the federal bench be the ones to issue the rulings in marine insurance coverage litigation, rather than juries of six civilians.

In the future, should any other circuits aim to follow the 4th Circuit, intent upon abandoning the practice of bench trials in admiralty actions, the authors would devoutly wish that any such prospective rulings will do what the 4th Circuit manifestly failed to do. Should any future rulings choose to follow the ill-founded path blazed by the 4th Circuit, they ought to do so via an honest written opinion that explains the legal basis for departing from such historic precedent. They should not resort to deception. They should at the very least explain why bench trials have suddenly become inadequate and they must answer the objections of those who favor the maintenance of the practice. They cannot be allowed to affect this kind of momentous change by stealth.

Brief Historical Review of the Jurisprudence

It has long been recognized by the Supreme Court, and the overwhelming majority of lower courts in every circuit which have faithfully followed the straightforward rule, that the Seventh Amendment does not grant to the defendant a right to a jury trial when a plaintiff elects to bring a declaratory judgment action under the federal court's admiralty jurisdiction and requests a bench trial, despite the assertion of what might be termed a "mirror-image counterclaim" on a different jurisdictional basis by that defendant.⁵ As the [*120] term itself implies, a mirror-image counterclaim describes a situation where the defendant responds to the plaintiff's complaint by asserting back against the plaintiff a claim that arises out of and is in fact inseparable from the facts and claims asserted in the complaint.⁶ In the context of marine insurance coverage litigation, where it is the marine insurer that is the plaintiff as a result of having filed a complaint seeking a declaratory judgment as to the coverage afforded under its policy, the insured/defendant might be expected to respond with a counterclaim for breach of the contract; or seeking a return of premiums; or most commonly, alleging bad faith due to the marine insurer's denial of the claim. In any event, it is always clear that the counterclaim is inseparable from the denial of the insured's claim under the policy and is nothing more than the insured's attempt to obtain from the court a rejection of the insurer's coverage position. It therefore mirrors the claim of the insurer and is distinct only in so far as it seeks a declaration that coverage exists under the policy.

⁵ *Waring v. Clarke*, 46 U.S. 441,460 (1847); *Fitzgerald v. United States Lines*, 374 U.S. 16, 21(1963); *Harrison v. Flota*, 577 F.2d 968, 1979 AMC 824 (5th Cir.1978), *Concordia v. Panek*, 115 F.3d. 67 (1st Cir.1997), *Arkwright-Boston Manufacturers Mutual Insurance Co. v. Bauer Dredging Co., Inc.*, 74 F.R.D. 461 (S.D.Tex.1977); *Royal Insurance Co. of America v. Hansen*, 125 F.R.D. 5 (D.Mass.1988); *St. Paul Fire and Marine Insurance Co. v. Holiday Fair, Inc.*, 1996 U.S. Dist. LEXIS 3931 (S.D.N.Y.1996); *Windsor Mount Joy Mutual Insurance Company v. Johnson*, 264 F. Supp.2d 158, 2003 AMC 2174 (D.N.J.2003); *Federal Insurance Co. v. PGG Realty, LLC, et al.*, 2007 AMC 1125 (S.D.N.Y.2007), Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 2315 (2008).

⁶ As the authors use the term, "mirror-image counterclaim" refers to those circumstances in marine coverage litigation in which, after an insured suffers a loss not covered under the policy and an insurer brings suit seeking the court's declaration that there is no coverage, the insured brings a breach of contract counterclaim, asking the court for the opposite ruling, that there is coverage for the loss under the policy. Strictly speaking, all that is required to win the coverage dispute and recover from the insurer is the answer and affirmative defenses. The counterclaim is unnecessary because, in the absence of the counterclaim, a ruling in favor of the insured would still compel payment by the insurer. Furthermore, no alternative jurisdictional basis is required for the tertiary claim inevitably brought by the insured, bad faith. Since even the bad faith claim requires no additional assertion of jurisdiction, the authors contend that the real reason for bringing the counterclaim is to assert diversity as an alternative to admiralty jurisdiction, which is intended to provide the insured a basis for requesting that the underlying coverage dispute, as well as the bad faith claim, be heard before a jury instead of a judge. The only point of this maneuver is to increase the hazard to the insurer by putting at risk a figure greater, sometimes far greater, than the mere amount of the policy by compelling the insurer to litigate the dispute in front of a mercurial American jury.

Although it was not a dispute between an insurer and the insured, the Supreme Court first dealt with the applicability of the Seventh Amendment to admiralty jurisdiction in 1847 in *Waring v. Clarke*,⁷ a case arising out of a collision between two vessels. Because the collision occurred on a navigable river, the plaintiff brought suit for damages under the federal court's admiralty jurisdiction, asserted that the defendant was liable for the collision, and requested a bench trial. The defendant brought a counterclaim disputing that there was admiralty jurisdiction, asserted that the Plaintiff was liable for the collision, and asserted that because the counterclaim was brought on the basis of diversity jurisdiction, or as it was then called (pre-*Erie*) [*121] the "common law" jurisdiction of the federal court, the defendant had a Seventh Amendment right to a jury trial.

The defendant's counterclaim was yet another example of what the authors' have termed a "mirror-image counterclaim" because it was exactly the same facts and dispute, except for its request by the court for an opposite ruling; that the plaintiff was responsible for the collision and was therefore liable to the defendant. Since bringing the counterclaim did not require the assertion of a different basis of jurisdiction, the only reason for asserting an alternative basis for jurisdiction was to provide a foundation for a request for a jury trial rather than the bench trial requested by the plaintiff. The defendant argued that since he could have brought suit first under the "common law" jurisdiction of the federal court, and in so doing could have asserted his Seventh Amendment right to a jury trial, his demand for that mode of trial contained in his counterclaim should have defeated the plaintiff's election for a bench trial.

However, the Supreme Court unanimously disagreed, reminding the parties that the Seventh Amendment does not protect the right of *all* litigants to a jury trial in *all* cases. Rather, the opinion notes that the actual text of the Amendment states, "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." The text of the Amendment makes reference only to "Suits at common law," not to suits in admiralty. The Court clearly considered this distinction to be critical, indeed elemental, when it noted, that "suits at common law indicate a class, to distinguish them from suits in equity and admiralty; cases in admiralty another class distinguishable from both, *as well as the system of laws determining them as the manner of trial . . .*"⁸

The Court remarked that in the absence of any constitutional amendment, suits in admiralty, even those in which a counterclaim was made on a different jurisdictional basis, would be tried in the accustomed way, that is, by the trial court sitting without a jury. Therefore, since the Seventh Amendment only refers to suits at common law, and not to admiralty suits, the Amendment was not intended to work any change in the manner admiralty suits were tried. Furthermore, the Court noted that this reading of the Seventh Amendment is bolstered by the manner in which the Amendment was interpreted by the first Congress, in which several Congressmen who had participated in the drafting of the Amendment also drafted and voted for the Judiciary Act of 1789. Regarding juries, the Judiciary Act of 1789 states, [*122] "trials of issues of fact in the District Court, in all cases *except* civil causes of admiralty and maritime jurisdiction, shall be by jury."⁹ If the Seventh Amendment guaranteed a right to jury trials in admiralty cases, an act of Congress that denied that right would have been a nullity.

Finally, the Court noted that the "Saving-to-Suitors" clause of the Judiciary Act of 1789 further reinforced the case that the Seventh Amendment was not intended to work any change in the manner of trying suits brought under the federal court's admiralty jurisdiction. The clause states, "saving and reserving to suitors in all cases a common law . . . remedy where the common law is competent to give it."¹⁰ Since the 4th Circuit in our day had great difficulty understanding the meaning of the clause, Justice Wayne's opinion from 1847 is worth quoting at length:

"[I]ts meaning is, that in cases of concurrent jurisdiction in admiralty and common law, the jurisdiction of the latter is not taken away. The saving is for the benefit of suitors, plaintiff and defendant, when the plaintiff in a case of

⁷ [46 U.S. 441 \(1847\)](#).

⁸ *Waring*, *Id.*

⁹ [1 Stat. 73](#), § 9.

¹⁰ *Id.*

concurrent jurisdiction chooses to sue in the common law courts, so giving himself and the defendant all the advantages which such tribunals can give to suitors in them. **It certainly could not have been intended more for the benefit of the defendant than for the plaintiff, which would be the case if he could at his will force the plaintiff into a common law court, and in that way release himself and his property from all the responsibilities which a court of admiralty can impose upon both . . .**" ¹¹

To phrase the matter in another way, the effect of the "Saving-to-Suitors" clause is that where there are multiple bases for federal court jurisdiction, the plaintiff (or suitor) may elect which basis to bring suit under; a plaintiff is not compelled to bring suit under the court's admiralty jurisdiction if there is another basis for jurisdiction. But more importantly, the other effect of the Clause is that once a plaintiff has elected to bring suit under the court's admiralty jurisdiction, the defendant may not annul the consequences of that decision by bringing a mirror-image counterclaim on a different jurisdictional basis.

Since 1847, few courts have had any difficulty applying this straightforward rule. For example, in the case of *Harrison v. Flota Mercante Grancolombiana, S.A.*, the 5th Circuit Court of Appeals refused to allow the jury request of a third-party defendant to defeat the plaintiff's election to proceed under *FRCP 9(h)*. ¹² The court reasoned that to grant the defendant's request would give the defendant the power to "emasculate the election [*123] given to the plaintiff by Rule 9(h) by exercising the simple expedient of bringing in a fourth-party defendant." ¹³ The court stated that, "[b]y electing to proceed under 9(h) rather than by invoking diversity jurisdiction, the plaintiff may preclude the defendant from invoking the right to trial by jury which may otherwise exist." ¹⁴

Until very recently, in fact right up until the 4th Circuit's ruling in *Lockheed Martin*, the vast majority of federal district courts would have quickly and easily agreed with the statement made in 2007 by Judge Rakoff of the Southern District of New York when he rejected a defendant's request for a jury contained in a counterclaim and stated, "Indeed, it is hornbook law that a Rule 9(h) election for admiralty cannot be undone by the opposing party's jury demand." ¹⁵

Indeed, as "hornbook law," the quick and repeated rejection of any possibility of a jury trial in a marine insurance declaratory judgment action was recognized as being perfectly in accord with the Advisory Committee notes accompanying the merger of civil and admiralty jurisdiction in the Federal Rules of Civil Procedure in 1966. The notes for Rule 9(h) state:

"Many claims, however, are cognizable by the district courts whether asserted in admiralty or in a civil action, assuming the existence of a non-maritime ground of jurisdiction. Thus at present the **pleader** has the power to determine procedural consequences by the way in which he exercises the classic privilege given by the saving-to-suitors clause ([28 U.S.C. § 1333](#)) or by equivalent statutory provisions . . . **It is no part of the purpose of this unification to inject a right to jury trial into those admiralty cases in which that right is not provided by statute.**" ¹⁶

Right up until 2007, the caselaw is replete with examples of litigation filed by marine insurance companies asserting federal admiralty jurisdiction in order to obtain declaratory judgments as to whether or not coverage exists under a marine insurance policy for some event involving a vessel or a marine risk. With a couple of exceptions which will be reviewed, *infra*, each time the unhappy defendant made a jury demand, each time citing to the Seventh Amendment, the district court rejected that demand by noting that no such right existed. Examples abound.

¹¹ Waring, at 461.

¹² *577 F.2d 968, 1979 A.M.C. 824 (5th Cir. 1978)*.

¹³ *Id.*, at 987.

¹⁴ *Id.*, at 986.

¹⁵ *Federal Insurance Co. v. PGG Realty, LLC, 2007 AMC 1125 (S.D.N.Y. 2006)*.

¹⁶ *F.R.C.P. 9(h)*.

Going back more than 30 years, we can see how the caselaw developed. In the case of *Arkwright-Boston Manufacturers Mutual Insurance Co. v. Bauer Dredging Co.*,¹⁷ a federal court in Texas was presented with a declaratory [*124] judgment action filed by a marine insurer seeking to have its policy ruled void due to breach by the insured. Professing surprise at finding itself named as a defendant, the insured demanded a jury trial contending that what it readily acknowledged to be the "general rule" requiring a non-jury trial "should not be followed where, as here, the plaintiff seeks declaratory relief." Noting that it was well-settled law that marine insurers may seek declaratory judgments and that such suits on a marine contract properly invoke federal admiralty jurisdiction, the court stated:

The sole question here is which party has the right to characterize this action. This being an action for declaratory relief, defendants insist that but for losing the "race to the courthouse," they, as "true plaintiffs," should now be granted the right to characterize this action on the "law" side of this court and thus obtain a jury trial.¹⁸

Citing to earlier cases, and noting that there existed an established rule precluding a jury trial where the plaintiff had designated its action as an admiralty and maritime claim, the court struck the jury demand and stated:

This court has been presented with no compelling reason to hold otherwise. If a defendant in an admiralty action for declaratory relief could so easily defeat the court's admiralty jurisdiction, it would destroy the use of such relief in maritime cases by making a mockery of the plaintiff's right to designate his action as a Rule 9(h) claim. This is not unlike a case where, because a plaintiff files his complaint in admiralty, a defendant may not demand a jury trial for a counterclaim which, had the defendant been first to the courthouse, would have been tried to a jury.¹⁹

In *Zurich Ins. Co. v. Banana Services*,²⁰ the marine insurer commenced an action in a federal district court in South Florida seeking a declaratory judgment regarding the coverage afforded under its cargo policy. The insured responded with a counterclaim presenting what were alleged to be state law claims for simple breach of the contract of insurance and for "bad faith," demanding a jury a jury trial as to the entire dispute or, in the alternative, a jury trial just on the counterclaim since the latter presented no federal admiralty law issues and, if standing alone, would not support admiralty jurisdiction under Rule 9(h). The federal court struck the ill-founded jury demand, noting the well established federal admiralty rule that "[w]here a plaintiff has denominated its claim under Rule 9(h)... there is normally no right to have a jury trial on any issue."²¹ The Southern District of Florida [*125] went further and rejected the demand for a separate trial on the breach of contract and bad faith counterclaim, unwilling to contemplate such action "because such a procedure would, in this case, undercut plaintiff's election under Rule 9(h)."²²

If defendant's counterclaim were tried separately, the rule of *Beacon Theatres v. Westover* would require that those legal issues be tried prior to the declaratory action. Because the counterclaim is so closely related to the declaratory action, resolution of the defendant's legal claims would dispose of all or most of the plaintiff's action; the net result would be to resolve the case in a jury trial, despite plaintiff's 9(h) election.²³

This potentially vexing issue of what to do when the insured responds to the marine insurer's declaratory action by filing a counterclaim alleging one or more state law causes of action, most commonly that jack-of-all-threats, a claim for alleged "bad faith," with diversity as an alternative basis for federal jurisdiction, was the subject of a ruling from a federal court

¹⁷ [74 F.R.D. 461 \(S.D. Tex. 1977\).](#)

¹⁸ [Id., at 462.](#)

¹⁹ [Id.](#)

²⁰ [1985 A.M.C. 1745 \(S.D. Fla. 1984\).](#)

²¹ [Id., at 1745.](#)

²² [Id.](#)

²³ [Id., at 1745-46.](#)

in Virginia in the case of *Homestead Ins. Co. v. Woodington Corp.*²⁴ Noting that it retained the discretion to order separate trials where factually dissimilar admiralty and diversity-based claims were presented, the court declined to do so because the counterclaim was what the authors have already termed a “mirror-image” counterclaim which raised no new or separate issues not already asserted or at least implicit in the marine insurer’s Rule 9(h) complaint for declaratory judgment. Even a claim for extra-contractual damages, the very heart and soul of a “bad faith” claim, did not present any new issue requiring a separate trial in order to avoid inconsistent results. Therefore, while the clear wording of Sec. 2202 of the federal declaratory judgment statute permitting the district court to grant “further necessary and appropriate relief based on a declaratory judgment or decree . . .” would seem to allow for a jury on a counterclaim, the court rejected the need for a jury or for a separate trial, stating:

The sole issue raised by [the insured] in its counterclaim that was not raised in Homestead’s complaint . . . is the issue of damages. In this case the counterclaim raises no new claims; instead, the named defendant has asserted the right to a jury trial on the identical issues raised in the plaintiff’s complaint. [S]hould this Court determine that coverage exists under the hull policy, it may consider the issue of damages and award to [the insured] any damages to which it would be entitled under the declaratory judgment in admiralty.²⁵

[*126] In the case of *Underwriters v. On the Loose Travel*,²⁶ marine underwriters filed a complaint in federal district court in Miami seeking to void coverage for a 53 ft sailing vessel, with the insured responding with a counterclaim and jury demand. The motion to strike the insured’s jury demand was granted, with the court stating:

In the instant action, Lloyd’s has elected to proceed under *Fed.R.Civ.P. 9(h)* and argues that this election foreclosed Counterplaintiffs’ “[d]emand for a six- person jury trial on all issues in Defendants’ Counterclaim.” The Court agrees. No right to trial by jury exists with respect to claim brought under federal admiralty jurisdiction Rule 9(h) and the Court finds that the trial by jury preclusion extends to counterclaims. [Citations omitted]. Accordingly, the Court grants Lloyd’s Motion to Strike Demand for Jury Trial.²⁷

In the case of *Windsor Mt. Joy Mutual Ins. Co. v. Johnson*,²⁸ yet again a marine insurer invoked the admiralty jurisdiction of the nation’s federal courts and commenced its declaratory judgment action in New Jersey, seeking a coverage determination. The insured’s demand for a jury was stricken by the court, affirming that a marine insurer’s invocation of admiralty jurisdiction and the Rule 9(h) election for a bench trial was expressly protected by [Rule 38\(e\) of the Federal Rules of Civil Procedure](#) which states that the Federal Rules “shall not be construed to create right to trial by jury of the issues in an admiralty or maritime claim within the meaning of Rule 9(h).”²⁹

Indeed, despite the fact that insureds continued to demand juries, as was reflected quite clearly by the always sizable number of reported decisions in which district courts issued Orders striking jury demands, most courts continued to “hold that the Federal Rules confer rights upon the plaintiff electing to sue in admiralty to determine the character of the action, which should not be disturbed by the defendant’s counterclaims.”³⁰

As the Advisory Committee seems to have quite clearly stated, and as the overwhelming weight of precedent would seem to have made abundantly clear, the defendant in a declaratory judgment action brought under the admiralty jurisdiction of the federal courts is not permitted to void the procedural consequences of the plaintiff’s election for admiralty jurisdiction

²⁴ 193 A.M.C. 1552 (E.D.Va.1992).

²⁵ *Id.*, at 1558.

²⁶ [1999 A.M.C. 1742 \(S.D. Fla. 1999\)](#).

²⁷ [Id.](#), at 1743.

²⁸ [264 F. Supp. 2d 158, 2003 A.M.C. 2174 \(D. N.J. 2003\)](#).

²⁹ [F.R.C.P. 38\(e\)](#).

³⁰ Mark Thomas Mahfouz, Comment, Whose Interests Are More Important: Should a Plaintiff’s Rule 9(h) Designation “Trump” a Counterclaimant’s Right to a Jury Trial?, 27 Tulane Mar. L.J. 277, at 297 (2002).

by resort to the simple expedient of asserting a mirror-image counterclaim. *Simply stated, a defendant in such a situation has no Seventh Amendment right to a jury trial.* Certainly, where the party to plead first requests it, there [*127] is no prohibition against jury trials in admiralty. Only where Congress provides for a jury by statute, can a pleader's election for a bench trial in an admiralty case be annulled by a defendant's request for a jury.

However, despite the number of decisions and the consistent reasoning, the issue never went away, and in 1991, the United States Court of Appeals for the 9th Circuit was the first appellate court to allow itself to be persuaded by the Seventh Amendment argument, albeit in somewhat limited circumstances. Several district court judges soon went off the reservation and showed themselves to have been swayed by the arguments regarding the Seventh Amendment and its right to a jury trial even where the litigation under consideration was in admiralty.

II

DEPARTURES

Until 1991, the decisions on the subject were unanimous, and there appeared to be a recognized consensus that the defendant in a marine insurance declaratory judgment action brought under the admiralty jurisdiction of the federal courts by the plaintiff's election was not permitted to void the procedural consequences of the plaintiff's election for admiralty jurisdiction by resort to the simple expedient of asserting a mirror-image counterclaim. With the decision of the 9th Circuit in the case of *Wilmington Trust v. U.S. District Court for the Dist. of Hawaii*,³¹ a litigation which did not even involve a marine insurance policy nor any issues with regard to coverage under this unique species of marine contract, there first began to develop that split in authority which we now see so clearly.

In the *Wilmington Trust* case, the 9th Circuit granted a writ of mandamus requiring a jury trial on the counterclaims asserted in an action commenced under the district court's admiralty and maritime jurisdiction to foreclose a mortgage on a vessel. The appellate court held that the defendant, a labor union, was entitled to a jury trial on its legal counterclaims since these were properly before the district court under the general civil jurisdictional statutes, notwithstanding the plaintiff's Rule 9(h) election to proceed under the court's admiralty jurisdiction for its *in rem* claim to foreclose on a first preferred ship mortgage against the vessel, and related *in personal* claims against the vessel owner.³² The 9th Circuit concluded that the union's Seventh Amendment right to a jury trial on its counterclaims must be given effect over what it termed the plaintiff's mere "preference" for a bench trial [*128] where the parties' interests conflicted, citing the Supreme Court's decision in the case of *Beacon Theatres, Inc. v. Westover*.³³ As the authors will discuss more fully, *infra*, in connection with the 4th Circuit's ruling in the *Lockheed Martin* case, the *Beacon Theatres* case is not even a maritime case involving a Rule 9(h) election and is quite simply an inapposite authority upon which to rely in order to find a right to a jury in an admiralty case.

In any event, in the wake of the ruling in the *Wilmington Trust* case, courts throughout the 9th Circuit have been free to permit insureds to obtain jury determinations where the defendant has asserted a compulsory counterclaim in response to the marine insurer's declaratory judgment action. Provided only that some independent basis of federal jurisdiction be shown to exist in order to entertain the quotidian allegations of breach of contract, bad faith and breach of the implied duties of good faith and fair dealing, such claims can and commonly are the subjects of jury trial in California and the other states comprising the 9th Circuit.

Even though it did not involve a coverage dispute arising under a policy of marine insurance, the 9th Circuit's holding in the *Wilmington Trust* case certainly rekindled the never completely dormant debate over this question of whether an exception to the admiralty rule of non-jury trials ought to be carved out for marine insurance declaratory judgment actions, and the decision provided new ammunition for the advocates of treating marine insurance coverage litigation as if it were no different from litigation involving automobiles or swimming pools.

³¹ [934 F. 2d 1026 \(9th Cir. 1991\).](#)

³² [Id., at 1032.](#)

³³ [359 U.S. 500, 79 S.Ct. 948, 3 L.Ed2d 988 \(1959\).](#)

It took until 1999 for the impact of the *Wilmington Trust* case to be felt beyond the West Coast, but with the case of *Sphere Drake Ins. v. J. Shree Corp.*,³⁴ for the first time a district court judge accepted the reasoning of the 9th Circuit in a marine insurance coverage action and issued a reasoned holding which permitted the insured to have a jury trial on its compulsory counterclaims. The court stated:

There is a split of authority as to whether a defendant in an admiralty suit is entitled to a trial by jury with respect to defendant's compulsory counterclaims. Many courts have determined that a plaintiff's non-jury admiralty claim in effect "trumps" a defendant's jury demand. The United States Court of Appeals for the Ninth-Circuit, on the other hand, relying in large measure upon a decision of the United States Supreme Court, has ruled that an admiralty defendant does not lose the right to a jury trial where the defendant's claims are based upon alternative (*i.e.*, diversity) jurisdictional grounds. For the reasons set forth below, and based solely upon the facts of this case, the Court here denies the plaintiff's motion to strike defendant's jury demand.³⁵

[*129] Judge Berman of the Southern District of New York was quite well aware of the overwhelming majority view point on this contentious subject, and he even noted that the existing authority within his own district was in favor of the traditional non-jury disposition of the entire coverage litigation. As we will see again, the ruling in the *Sphere Drake* case cites the 9th Circuit's *Wilmington Trust* decision and makes the exact same questionable interpretation of the *Beacon Theatres* case, a 40-year-old year Supreme Court case which was not even an admiralty case and which in fact has been understood by other jurists as a rationale for rejecting any introduction of juries into traditional admiralty proceedings.³⁶

There are two other quite recent district court cases which bear review here because they are the only ones in which the respective jurists pronounced themselves persuaded by the reasoning of the *Wilmington Trust* case. In 2004, Judge Crabb of the Western District of Wisconsin denied an insurer's request for a bench trial, showing herself willing to selectively quote [FRCP 38](#)³⁷ and omitting the parts of the rule that obviously contradicted her decision in which she allowed a jury trial with respect to the entire coverage dispute and not only with respect to the counterclaims asserted by the insured. After citing *Beacon Theatres* and *Fitzgerald*, and posing as the brave defender of the litigant's constitutional rights, Judge Crabb quoted [FRCP 38\(a\)](#), which states, "The right of trial by jury as declared by the Seventh Amendment to the Constitution -- or as provided by a federal statute -- is preserved to the parties inviolate." But, brave as she may have been, she clearly had not read as far as section (e) of Rule 38, which states, "These rules do not create a right to a jury trial on issues in a claim that is an admiralty or maritime claim under Rule 9(h)." Even the most cursory reading of section (a) has to put the reader on notice that a right to jury trial could only be created by statute if there were some circumstances, like cases brought under the federal court's admiralty jurisdiction, to which the Seventh Amendment does not apply.

Then, in 2005, in the case of *Continental Ins. Co. v. Industrial Terminal & Salvage Co.*,³⁸ the district court judge made it abundantly clear that he was unhappy with the very nature of the declaratory judgment action, stating:

Ordinarily, the normal procedure in a case where an insurer has denied insurance coverage would be for the insured to file a breach of contract action, and thus, the insured would be the plaintiff in the action. In this case, the reverse has occurred. Nonetheless, this Court will take this opportunity to realign the parties and their respective claims in the interest of fairness and comprehensibility.³⁹

[*130] So a district court judge sitting in an obscure western Pennsylvania court-house was able to mount a lonely but effective assault upon the federal admiralty law principles that by his own admission he found both unfair and

³⁴ [1999 A.M.C. 1480 \(S.D.N.Y. 1999\)](#).

³⁵ *Id.*

³⁶ See, e.g., [Zurich Ins. Co. v. Banana Services, 1985 A.M.C. 1745 \(S.D. Fla. 1984\)](#).

³⁷ [Progressive Northern Insurance Company v. Bachmann, 314 F. Supp. 2d 820 \(W.D.Wis., 2004\)](#).

³⁸ [2006 A.M.C. 630 \(W.D. Pa. 2005\)](#).

³⁹ *Id.*

incomprehensible. Pronouncing himself unwilling to participate in a proceeding that “would essentially be encouraging the parties to engage in an inauspicious race to the courthouse,”⁴⁰ Judge Schwab denied the plaintiff marine insurance company’s motion to strike the insured’s jury demand, realigned the parties, and set the entire litigation for a jury trial. It is manifest that the chief virtue of this astounding ruling is that this procedure was in conformity with Judge Schwab’s personal preferences.

Happily, however, aside from these three rulings, it was clear that the traditional non-jury rule has continued to enjoy the support of the vast majority of federal district court rulings.”⁴¹ The *Sphere Drake* case is now over 10 years old and it has not been followed by any other similar rulings in the always influential Southern District of New York. In fact, in the case of *Federal Ins. Co. v. PGG Realty, LLC*,⁴² decided in 2007, the insured had amended its Answer and counterclaim to assert diversity jurisdiction in support of its demand for a jury trial. Judge Rakoff rejected the jury demand as untimely, and went on to state clearly that even a timely jury demand would not be granted:

Furthermore, even were this untimely motion to be granted, PGG would still not be entitled to a jury trial in this circumstance. By electing to proceed under 9(h) rather than by invoking diversity jurisdiction, “the plaintiff may preclude the defendant from invoking the right to a trial by jury which may otherwise exist.” *Harrison v. Flota Mercante Grancolombiana, SA., 1979 AMC 824, 848, 577 F.2d 968, 986 (5th Cir. 1978)*. Accordingly, Federal’s motion to Strike the jury demand is properly granted.⁴³

III

IN RE: LOCKHEED MARTIN CORPORATION

Despite the fact that the traditional rule remained very much the strong majority view, with only the *Wilmington Trust* case and the three federal district [*131] court decisions supporting jury trials, by 2007 the situation had certainly become unclear enough so that astute counsel representing insureds in Rule 9(h) declaratory actions filed in federal court could well conclude that at the very least there existed some chance to persuade a sympathetic district court judge to at least consider joining what a bold advocate might even try to describe as a trend toward jury trials in such litigation.

Frankly, the 4th Circuit Court of Appeal’s decision in the case of *In re: Lockheed Martin Corporation*, which relied heavily on the Supreme Court’s earlier decisions in the *Beacon Theatres*, *Fitzgerald*, and *Ellerman* cases is so sloppy an application of those decisions that in the opinion of the authors it verges into the realm of the outright dishonesty.⁴⁴ The 4th Circuit ignored the powerful justifications for the special procedural rules of admiralty disputes, ignored the specifically statutory grounds that distinguished *Beacon Theatres*, *Fitzgerald*, and *Ellerman*, and most bizarre of all, read the “Saving-to-Suitors” clause to mean the exact opposite of what the Supreme Court clearly declared it to mean in *Waring*.

In re: Lockheed Martin Corporation began when National Casualty Company, which insured a vessel owned by Lockheed, filed an action for declaratory judgment seeking a declaration that Lockheed’s claims for damage to its vessel were time barred. National designated its action as a Rule 9(h) admiralty claim and requested a bench trial. Lockheed filed a mirror-image counterclaim, asserting merely that the insurer’s denial of the claim was a breach of the contract, and

⁴⁰ *Id.*, at 632.

⁴¹ See, *Great Lakes Reinsurance v. Masters*, 2008 A.M.C. 1045 (M.D. Fla. 2008); *ING Groep NV v. Stegall*, 2004 A.M.C. 2992 (D. Colo. 2004); *Windsor Mt. Joy Mut. Ins. Co. v. Johnson*, 264 F.Supp.2d 158, 2003 A.M.C. 2174 (D. N.J. 2003); *Reliance Nat’l Ins. Co. v. Hanover*, 2003 A.M.C. 715 (D. Mass. 2003); *Jefferson Ins. Co. v. Maine Offshore Boats, Inc.*, 2001 A.M.C. 2171 (D. Maine 2001).

⁴² 2007 A.M.C. 1126 (S.D.N.Y. 2007).

⁴³ *Id.*, at 1136-37.

⁴⁴ *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959), *Atlantic and Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355 (1962), *Fitzgerald v. United States Lines, Co.*, 374 U.S. 16 (1963).

requested a jury. The district court's decision⁴⁵ striking the insured's jury demand was squarely within that line of cases stating the traditional and majority view, discussed *supra*, which refuse to allow the defendant's demand for a jury to "emasculate the election given to [the plaintiff] by Rule 9(h)." ⁴⁶ Judge Williams stated:

This Court remains mindful of the consequences of curtailing a party's Seventh Amendment rights. Yet, permitting a defendant to have a jury trial on its counterclaim would vitiate a plaintiff's decision to bring a suit under Rule 9(h). This conclusion is consistent with that expressed by the Advisory Committee in their notes on the 1966 amendments to the Federal Rules of Civil Procedure.⁴⁷

Lockheed petitioned for a writ of mandamus and the 4th Circuit granted the writ and, in a poorly reasoned opinion that was resolved 2-0 due to the death of the third member of the court, came to the conclusion that, despite [*132] mountains of precedent to the contrary, the "Saving-to-Suitors" clause of *28 U.S.C. § 1331(1)* preserved a defendant's Seventh Amendment right to a jury trial, even when a marine insurance company avails itself of the remedy provided by the federal declaratory judgment statute to bring an action concerning coverage under a marine insurance policy under the court's admiralty jurisdiction. The two deciding judges stated their conclusion, echoing the reasoning of Judge Schwab in the *Continental Ins. Co. v. Industrial Terminal & Salvage Co.*⁴⁸ case from 2005:

At issue in this case is a dispute over whether an insurer is obligated to indemnify its insured for damage sustained by an insured vessel. In the usual course of events - that is, without the declaratory judgment vehicle - Lockheed would have sued National for breach of the insurance contract. And under the saving-to-suitors clause, Lockheed would have been entitled to a jury trial on that claim. Accordingly, under *Beacon Theatres*, Lockheed cannot lose its right a jury trial simply because National initiated the declaratory judgment action.⁴⁹

This conclusion, which imparts to the "Saving-to-Suitors" clause a meaning completely opposite to that recognized by the Supreme Court and the Federal Rules Drafting Committee, was premised on a careless misreading of *Beacon Theatres*, *Fitzgerald*, and *Ellerman*, all of which dealt with the availability of juries in cases where there is ordinarily no such right.

The first of these, *Beacon Theatres v. Westover*, was not even an admiralty case, but concerned the Sherman and Clayton Anti-Trust Acts and was therefore brought under the federal question jurisdiction of the court. Be that as it may, the dispute turned on whether a defendant was entitled to a jury trial when the plaintiff's original suit requested equitable relief, which would ordinarily entitle the plaintiff to elect for a bench trial. Specifically, the plaintiff brought a declaratory judgment action seeking the court's declaration that it was not liable for violations of the Sherman and Clayton AntiTrust Acts, and the plaintiff further asked the court to enjoin the defendant from bringing suit to enforce the statutory claims. The defendant countered with his anti-trust claims and requested a jury. The District Court held that the plaintiff's suit was "essentially equitable," and therefore struck the defendant's jury demand.

The Supreme Court in *Beacon Theatres* reversed that decision and ruled that the District Court was wrong to conclude that the equitable relief sought by the plaintiff precluded the defendant's right to a jury. Rather, the Supreme Court concluded that, despite the plaintiff's request for equitable relief, the [*133] defendant was entitled to have his mirror-image counterclaims heard by a jury **because his claims under the Sherman and Clayton Anti-Trust Acts were based on statutes to which the Seventh Amendment applied**. The court wrote, "Since the right to trial by jury applies to treble damages suits under the anti-trust laws, and is, in fact, an essential part of the Congressional plan for making competition rather than monopoly the rule of trade, the Sherman [Anti-Trust] and Clayton [Anti-Trust] Act issues on which Fox [the plaintiff] sought a declaration were essentially jury questions."

⁴⁵ [2006 A.M.C. 618 \(D. Maryland 2006\)](#).

⁴⁶ *Id.*, at 627, quoting from *Windsor Mt. Joy Mut. Ins. Co. v. Johnson*, 2003 A.M.C. 2174, at 2176.

⁴⁷ *Id.*, at 628.

⁴⁸ [2006 A.M.C. 630 \(W.D. Pa. 2005\)](#).

⁴⁹ [Id.](#), at 2007 A.M.C. at 2314.

Next, the 4th Circuit completely missed the point of the Supreme Court's holding in the *Ellerman* case. *Ellerman* concerned a longshoreman who, in this case, brought suit first against a vessel owner under the federal court's diversity jurisdiction and requested a jury trial. The vessel owner then impleaded the longshoreman's stevedore employer. The defendants did not assert any counterclaims, they did not assert that there was admiralty jurisdiction, and they did not challenge the plaintiff's request for a jury trial. After plaintiff won a judgment against both the vessel owner and the stevedore in the District Court, the 3rd Circuit Court of Appeals reversed the judgment against the stevedore. The Supreme Court then reversed the 3rd Circuit on the grounds that the Seventh Amendment barred the 3rd Circuit from reexamining facts found by the jury.

The defendants in *Ellerman* did not challenge the request for a jury trial because the suit was brought under the Jones Act, a **statute** which specifically grants to the injured seaman or his representative the right of trial by jury, even when suit is brought under the admiralty jurisdiction of the federal court.⁵⁰ Nowhere does the Supreme Court state that the longshoreman in *Ellerman* had a Seventh Amendment right to a jury trial. The only part of the Seventh Amendment that was at issue was the Amendment's second clause, that "no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law." Therefore, the 3rd Circuit acted improperly when it reversed the jury's verdict against the stevedore. The Supreme Court's only holding was that having had the jury trial that was required by the Jones Act, the Seventh Amendment's prohibition against reexamination of facts found by a jury was necessarily brought into play. Therefore, the 4th Circuit's reliance on *Ellerman* to find that a defendant in an admiralty suit has a Seventh Amendment right to a jury trial was entirely misplaced.

The very next year after *Ellerman*, the Supreme Court examined the effect of the Jones Act again in the *Fitzgerald* case, and came to the same conclusion it reached in *Beacon Theatres*, that even where there is no Seventh [*134] Amendment right to a jury trial, Congress may pass a statute that creates such a right and that statute will trump the practice in admiralty of allowing plaintiffs to elect for a bench trial. The Court, while confirming the long-standing rule recognized since *Waring* that plaintiffs may elect for a bench trial in admiralty cases, found that the Jones Act specifically entitled an injured seaman to have his claim heard before a jury. Therefore, although some of the claims made by the injured longshoreman were brought under the court's admiralty jurisdiction, and would ordinarily be tried without a jury, the court concluded that because "Congress in the Jones Act has declared that the negligence part of the claim shall be tried by a jury, we would not be free, even if we wished, to require submission of all the claims to the judge alone."⁵¹

The simple proposition, that a defendant has no Seventh Amendment right to a jury trial in admiralty cases when the plaintiff requests a bench trial, and that the only exceptions to this rule are in those cases where Congress has required it by statute, is bolstered by the opinion of the Supreme Court in the case of *The Propeller Genesse Chief v. Fitzhugh*,⁵² a ruling that came only four years after *Waring* decision. *The Genesse Chief*, which began with the collision of two vessels on Lake Ontario, concerned whether the admiralty jurisdiction of the district courts could be extended to navigable rivers by an act of Congress. The Court answered that it could, that the geographic scope of admiralty jurisdiction in the Constitution was not limited to the extent of admiralty jurisdiction as it existed in England at the time of the Revolution, and that Congress's Act of 1845 had extended the admiralty jurisdiction of the district courts to navigable rivers.

Although neither party requested a jury, making the court's statements on this point only dicta, the court did take the opportunity to expound on the effect of the Congressional Act of 1845. The Supreme Court found that the Act, which was primarily intended to extend the admiralty jurisdiction of the district courts, also "secures to the parties the trial by jury as a matter of right in the admiralty courts. Either party may demand it."⁵³ Furthermore, "In admiralty and maritime cases [unlike other cases] there is no such limitation as to the mode of proceeding and Congress may therefore in cases of that description, give either party right of trial by jury, or modify the practice of the court in any respect that it deems more

⁵⁰ [46 U.S.C.A. § 30104.](#)

⁵¹ [Fitzgerald v. United States Lines, Co., 374 U.S. at 21.](#)

⁵² [The Propeller Genesse Chief et al. v. Fitzhugh et al., 53 U.S. 446, 1999 A.M.C. 2092 \(1851\).](#)

⁵³ [Id., at 460.](#)

conducive to the administration of justice.”⁵⁴ The conclusion from this language must be this: the practice of the court would only be susceptible to Congressional modification if the language [*135] of the Seventh Amendment did not grant a defendant a right to a jury trial in admiralty cases!

As noted, *supra*, the rather narrow rulings of the Supreme Court in *Beacon Theatres*, *Ellerman*, and *Fitzgerald*, holding simply that Congress, by statute, is free to grant a right to a jury trial where the Seventh Amendment does not so provide, had even prior to the *Lockheed Martin* decision been misinterpreted in a minority line of cases in order to allow a defendant to invalidate a plaintiff’s election for a bench trial. As noted, *supra*, these several minority view cases had reached this otherwise unsupportable conclusion via the simple expedient of ignoring the important distinctions that lead the Supreme Court to make such an exception to the rule against juries in admiralty cases.⁵⁵

While there is no doubt that the Congress could create a right to jury trial in admiralty cases, as the Supreme Court acknowledged in *The Genesee Chief*, *Beacon Theatres*, *Ellerman*, and *Fitzgerald*, neither the Constitution nor the “Saving-to-Suitors” clause of 28 U.S.C. § 1331(1) creates that right. The various decisions described above, exemplified by the 4th Circuit’s *Lockheed* decision, ignored the essential statutory pillar supporting those earlier exceptions; Congress’s Act of 1845 in *The Genesee Chief*, the antitrust statutes in *Beacon Theatres*, and the Jones Act in *Ellerman* and *Fitzgerald*. Furthermore, a decision like that from the 4th Circuit, a decision to ignore 219 years of precedent, could only be arrived at by deliberately ignoring the silence of the Seventh Amendment regarding juries in admiralty cases, by deliberately ignoring the explicit rejection of juries in such cases by the first Congress, by deliberately ignoring the preservation of the rule against juries in admiralty by Rules 9(h) and 38(e), and by deliberately ignoring the Advisory Committee notes accompanying the Federal Rules, unambiguously affirming the rule against juries in admiralty cases and rejecting any alteration by the courts.

The 4th Circuit also demonstrated an inexplicable disdain for the practice of declaratory judgment when it sneeringly dismissed the plaintiff’s declaratory judgment action and accompanying request for a bench trial as a mere “race to the courthouse,” and therefore unworthy of the court’s respect.⁵⁶ In fact, deriding an insurer’s choice to protect its rights by bringing an action for declaratory judgment is a common refrain where some justification is being sought for imposing a jury trial where none would otherwise be available, as seen in the case of *Continental v. Industry Terminal*.⁵⁷ After heaping [*136] scorn on the plaintiff’s allegedly shameful race to the courthouse, and after citing only the *Wilmington* case, the court had the audacity to declare that there was no controlling caselaw directly on this point!⁵⁸ The judge’s opinion helpfully instructs readers, “Ordinarily, the normal procedure in a case where an insurer has denied insurance coverage would be for the insured to file a breach of contract action, and thus, the insured would be the plaintiff in the action.”⁵⁹

Such dismissal of the efficacy of the declaratory judgment for resolving marine insurance coverage disputes quite simply ignores the utterly obvious fact that it is utilized by marine insurers who have no desire to be held hostage with the menace of a looming or potential lawsuit. In fact, the filing of a declaratory judgment action is a routine legal tactic that exists precisely to prevent only one party from being able to menace the other, threatening to bring suit in whatever jurisdiction, and under whatever rules, may be most unfavorable to the hijacked party. It is a practice with an impeccable pedigree that has existed in the federal courts since their creation and, as noted by Judge Griesa of the Southern District of New York, is “not a mere ‘race to the courthouse,’ but is a normal and orderly procedure.”⁶⁰

IV

⁵⁴ *Id.*

⁵⁵ [Wilmington Trust v. United States District Court](#), 934 F.2d 1026 (9th Cir. 1991), [Sphere Drake Insurance PLC v. J. Shree Corporation](#), 184 F.R.D. 258, 1999 AMC 1480 (S.D.N.Y.1999).

⁵⁶ [2007 A.M.C. at 2313.](#)

⁵⁷ [Continental Ins. Co. v. Industrial Terminal & Salvage Co.](#), 2006 A.M.C. 630 (W.D. Pa. 2005).

⁵⁸ [Id.](#), at 632.

⁵⁹ *Id.*

⁶⁰ [St. Paul Fire and Marine Ins. v. Holiday Fair, Inc.](#), 1996 U.S. Dist. LEXIS 3931.

ST. PAUL FIRE & MARINE V. LAGO CANYON

The 4th Circuit's disturbing lack of candor in its decision for *In re Lockheed* is brought into even starker relief when compared to the 11th Circuit's very recent decision in *St. Paul Fire and Marine Insurance Company v. Lago Canyon*.⁶¹ *Lago Canyon* began, like so many admiralty cases, when the insurer brought suit, seeking the court's declaration that it did not breach its policy of marine insurance. As is almost always the case, the insured brought a mirror-image counterclaim on diversity grounds and requested a jury. The court for the Southern District of Florida denied the jury request and, after a three day bench trial, found that the loss was due to the failure of a hose barb which resulted from corrosion, and was therefore not a loss covered under the policy.

The insured appealed, claiming that the District Court erred in striking the jury demand included in the counterclaim. The 11th Circuit disagreed. First, the court reiterated, "if there are two grounds for jurisdiction in the same [*137] case -- such as admiralty and diversity jurisdiction -- Rule 9(h) provides that the plaintiff may elect to proceed in admiralty."⁶² Second, after reminding readers that the 11th Circuit is bound by earlier 5th Circuit precedents, the court repeated the holding of the 5th Circuit in *Harrison*, "We explained that, in such dual jurisdiction cases, the plaintiff may elect to proceed in admiralty under Rule 9(h), rather than under diversity jurisdiction, **and thereby preclude a defendant from exercising his right to trial by jury.**"⁶³

The 11th Circuit even dealt directly with the defendant's contention that *Beacon Theatres* required a different outcome. The 11th Circuit approved of the plaintiff's counter-argument and repeated, "(1) *Beacon Theatres*, while involving a suit for declaratory relief, was not an admiralty case, but an antitrust case under the Sherman Antitrust Act where the Seventh Amendment right to a jury trial controlled; (2) Rule 9(h) was not at issue; (3) **there is no Seventh Amendment right to a jury trial on maritime claims.**"⁶⁴

Although the *Lago Canyon* opinion is a clear and concise summary of the argument presented in this article, that a defendant has no Seventh Amendment right to a jury trial when a plaintiff elects to bring suit under the court's admiralty jurisdiction and requests a bench trial, the case gets even more interesting when one reads the concurrence of Judge Wilson, who wrote separately to express his reservations about the 5th Circuit's holding in *Harrison*. His concurrence is the perfect distillation of every logical fallacy that led the 4th Circuit to its poor opinion in *Lockheed*.

First, while Judge Wilson's concurrence eagerly cites the Supreme Court cases dissected above, *Beacon Theatres*, *Fitzgerald*, and *Ellerman*, his concurrence demonstrates the same failure to apprehend the narrow statutory grounds that sustained those decisions. Second, after taking seven pages to completely miss the point of those three cases, Judge Wilson concludes with a stirring quote by Jefferson, describing "trial by jury as the only anchor ever yet imagined by man, by which a government can be held to the principles of its Constitution."

This is a close as one is ever likely to come to the real reason for the split between courts on the jury issue: regardless of what the Constitution may actually say, and regardless of what the Supreme Court may have interpreted the Constitution to mean, judges like Judge Wilson, Judge Schwab, and Judge Crabb simply disapprove of bench trials and wish to see all cases tried to a jury.

[*138] It is easy to have a great deal of sympathy for such a position. Considering the exalted place that juries occupy in the Anglo-American legal heritage, a desire to extend the practice of jury trials to all cases is more than understandable; it's praiseworthy.⁶⁵ However, what the authors find truly galling about such a stance is that it seeks to achieve its end, the abolition of bench trials, by an act of deception. In order to agree with Judge Wilson, Judge Crabb, and the 4th Circuit, one

⁶¹ *St. Paul Fire and Marine Insurance Company v. Lago Canyon, Inc.*, 561 F.3d 1181 (11th Cir. 2009).

⁶² *Id.*, at 1185.

⁶³ *Id.*, at 1187.

⁶⁴ *Id.*, at 1188.

⁶⁵ Rudyard Kipling, "The Reeds of Runnymede" (Magna Charta, June 15th, 1215)

must willfully turn a blind eye to the actual text of the Seventh Amendment, as well as the long history of caselaw interpreting its application to maritime cases. Since ours is not a system in which judges may indulge their own passing whims, however laudable, by misleading the litigants as to the justification for their decisions, since ours is a system that reveres precedent, a decent respect for the opinions of the litigants, and the larger legal fraternity, at least requires any honestly written opinion.

At the very least, any court that seeks to follow the 4th Circuit and extend the practice of jury trials to all admiralty cases must do two things: First, that court must candidly recognize that there has never previously been such a right. That court cannot, as the 4th Circuit did, pretend it is not altering 219 years of deeply entrenched precedent. Second, to justify such a sea change in admiralty procedure that court must forthrightly state the very good and, what's more, novel reasons that now compel such a change, and must also directly address the persuasive reasons offered for preserving the current rule.

If bench trials are to be done away with, the federal courts must explain why, suddenly, modern courts are unable to act as finders of fact in admiralty cases. But, by pretending that it was not overturning a 219 year old precedent, this is precisely the argument that the 4th Circuit completely failed to make.

Rather than argue that judges are unable to serve as fact finders, or have served poorly, an argument not made and not supported by the facts of *In re: Lockheed* or any other maritime case, the two judges from the 4th Circuit panel, and their partisans, have trained their rhetorical artillery on the mechanism of declaratory judgment, stating that but for the procedure of declaratory [*139] judgment, the parties bringing suits would have been defendants, and would have been at the mercy of the opposing party's jurisdictional choices. Despite the existence of declaratory judgment since the beginning of the Republic, and the consistent approval by courts of the power this gives to both parties to choose the forum and set the procedural consequences of that choice, the suggestion is that only one party may enjoy the privilege of choosing the time and circumstances of the looming legal confrontation.

This stance, that some litigants should be held at the mercy of others, despite the obvious creation of declaratory judgment to prevent precisely that, finds no support in precedent. Disregarding a party's choice to bring a suit for declaratory judgment under the court's admiralty jurisdiction, and disregarding the right that follows, to set the procedural consequences, "would destroy the use of such relief in maritime cases by making a mockery of the plaintiff's right to designate his action as a Rule 9(h) claim."⁶⁶

In contrast to the 4th Circuit's failure to offer any persuasive reason for abandoning the practice of bench trials, courts and commentators have recognized, as the drafters of the Constitution did, that admiralty remains a highly specialized area of practice, one in which judges are far better suited to weigh facts, and are better suited to apply them to highly technical points of law.⁶⁷

V

WHY CONTINUE WITH BENCH TRIALS?

At Runnymede, at Runnymede,
 Your rights were won at Runnymede!
 No freeman shall be fined or bound,
 Or dispossessed of freehold ground,
 Except by lawful judgment found
And passed upon him by his peers.
 Forget not, after all these years,
 The Charter Signed at Runnymede

⁶⁶ [Arkwright v. Bauer, 74 F.R.D. at 462.](#)

⁶⁷ E.g., Gary T. Sacks and Neal W. Settergren, *Juries Should Not be Trusted to Decide Admiralty Cases*, 34 J.M.L.&C. 163 (Jan. 2003).

The authors submit that there exist very good and clearly recognized reasons for not allowing juries to be involved in declaratory judgment actions involving coverage disputes arising under policies of marine insurance. First, the need for uniformity in interstate and international trade is something that has been universally acknowledged in this country beginning with the drafting of the Constitution and extending through cases too numerous to bear citation. Admiralty jurisdiction has existed in American since 1696, and its need was keenly felt by the Founders. Despite the issue of juries in admiralty cases being one of the many points of confrontation between the Colonies and Great Britain, after the Revolution the drafters of the Constitution were in general agreement that a system of national admiralty courts was needed to ensure uniformity in the treatment of maritime cases.⁶⁸

[*140] Second, while the complexity of maritime matters and the general public's unfamiliarity with them were among the original arguments for the creation of admiralty jurisdiction, this is an even greater problem today than at the Founding. Admiralty law is replete with complex doctrines such as salvage, general average, and maritime liens, all of which remain with us today. More recent additions to the gallery of maritime doctrines include limitation of shipowners' liability and liability for environmental damage created by the Oil Pollution Act and the Clean Water Act. The complexity of these doctrines makes it all the more imperative that judges, who are more keenly aware of the interstate and international implication of their decisions, be permitted to retain their fact finding role in admiralty cases. This is just as true in the context of marine insurance, where unique issues which are quite simply foreign to automobile insurance or to homeowners' insurance, arise consistently and are foreseeable. These include issues unique to marine insurance such as the duty of full disclosure by insureds, or the impact of a breach of warranty.

Third, as a consequence of the complexity of admiralty law, and the resultant reliance on judges to serve as finders of fact, admiralty law has become one of the most sophisticated and highly developed areas of the law. For 219 years, rather than simply delivering jury verdict forms to litigants, district courts, not just appellate courts, have been producing volumes of learned opinions applying the principles of admiralty law to the constantly varying factual circumstances of maritime commerce, with the full awareness of the impact these decisions will have on the course of interstate and international waterborne trade. Examples abound.

The case of *Reliance Nat'l Ins. Co. v. Hanover* is a good illustration of the valuable guidance that district court opinions can provide when a case is tried before a judge under the court's admiralty jurisdiction.⁶⁹ In *Reliance*, an insurer brought a declaratory judgment action against the vessel owner, alleging that the insured had failed to disclose the unseaworthy condition of the vessel; particularly, the rot in the mast and the poor state of the engines. After a bench trial, the court for the District of Massachusetts returned an eleven page opinion discussing the doctrine of *uberrimae fidei* ("utmost good-faith") and the insured's obligation to "fully and voluntarily disclose to the insurer all facts material to the calculation of the insurance risk." The court's opinion enlarged on the fact that in no other area of the law does the doctrine of *uberrimae fidei* apply, except to marine insurance, in recognition of the peculiar difficulty marine insurers have in assessing their risks. The court's opinion further discusses the insured's enduring obligation to keep [*141] the vessel seaworthy during the life of the policy and the application of an objective standard of reasonableness to determine what facts are material in assessing an insurance risk. The court's discussion of the extent of an insured's initial and ongoing disclosure obligations provides valuable guidance for the entire marine insurance industry.

Similarly, in the case of *Underwriters at Lloyd's v. Johnston*, after the insurer denied coverage and brought an action for declaratory judgment, the court for the District of Puerto Rico discussed the effects of an insured's misrepresentation in the renewal of an insurance policy with a different underwriter.⁷⁰ In addition to ruling that misrepresentations in the original policy voided coverage in subsequent policies, even with different underwriters, the court further clarified that the surplus lines broker who procured the policy was the agent of the insured and also failed in her duty to disclose material facts to the insurers. The court's opinion is valuable and instructive for any litigant seeking to understand the obligations of an insured towards an insurer, as well as the requirements of the agency relationship between an insured and those who procure insurance for them.

⁶⁸ See, *The Lottawanna*, 88 U.S. (21 Wall.) 558, 1996 A.M.C. 2372 (1874) where Justice Bradley noted "That we have a maritime law of our own, operative throughout the United States cannot be doubted."

⁶⁹ [Reliance v. Hanover](#), 246 F. Supp. 2d 126, 2003 AMC 715 (D. Mass. 2003).

⁷⁰ [Certain Underwriters at Lloyd's v. Johnston](#), 124 F. Supp. 2d 763, 1999 AMC 1452 (D.P.R.1999).

Yet another prime example of the benefits of district courts serving as fact-finders in actions brought under the court's admiralty jurisdiction is the case of *Continental v. Lone Eagle*, from the Southern District of New York.⁷¹ After the insured's vessel suffered damage in a storm and was declared a constructive total loss, the insurers brought a declaratory judgment action alleging that the loss of the vessel was due to corrosion and wear and tear on the vessel, rather than an insured peril. In a twenty-eight page opinion affirmed by the 2nd Circuit, the district court meticulously detailed the facts of the case and the events leading to the loss; this included the particular vessel's construction and purchase history, the procurement of the policy of insurance, the recent loss history of vessels of the same class, the particular vulnerabilities of such vessels to wastage from corrosion, the severity of the storm encountered, and a recitation of the vessel's previous surveys revealing that no adequate survey, one that would have detected the fatal corrosion, had been conducted in the four years prior to the loss.

The district court then applied these extensive factual findings in an opinion that discussed the meaning of the phrase "peril of the sea" as it is used to describe heavy weather in the marine insurance industry and the essential element of "fortuity" in finding that a loss was due to such a peril. Since the insurer alleged that the loss during the storm was due to corrosion and not a [*142] peril of the sea, the court then embarked on an in-depth explanation of the insured's obligation to prove proximate cause in marine losses and the interplay between multiple causes. The court's lengthy exposition differentiates between proximate and remote causes, reminds readers and litigants that that insured bears the burden of proving proximate cause, and notes that courts should not necessarily find that the "single cause nearest to the loss in time" is the proximate cause. Considering the staggering variety of perils and circumstances that vessels may encounter on the seas, the Southern District of New York's explanation of proximate causation is a valuable addition to the corpus of legal opinion that informs marine industries.

The cases described above are a small sampling of the types of opinions that will be lost if defendants are allowed to defeat the court's admiralty jurisdiction by the simple expedient of asserting mirror-image counterclaims. This deep well of judicial expertise, which international maritime industries depend on, would dry up if the admiralty jurisdiction of the federal courts could so easily be annihilated. First, litigants would be left with only jury verdict forms to explain the results of their cases. Similarly, courts of appeal will be left to review district court cases in the absence of a comprehensive and well reasoned explanation of the result by the presiding judge or magistrate. Second, the purging of this valuable source of judicial expertise will have the effect of increasing the uncertainty of litigants as to the current state of the law. This would be particularly harmful in the area of marine insurance, a field that thrives on dependability. Furthermore, this uncertainty can only result in more cases being appealed, as disappointed litigants seek more in-depth clarification of their legal obligations from the Courts of Appeal. Since the capacity of the courts of appeal to hear this increased case load is not getting any greater, it is all the more important to ensure that the district courts continue to produce learned opinions describing the sometimes confusing application of admiralty law to constantly evolving facts.

Furthermore, it is not only brilliant and learned district court opinions that will be lost by abolishing bench trials. The 11th Circuit's opinion in *Lago Canyon*, which includes an in depth analysis of the term "manufacturer's defect," was occasioned by the district court's failure to properly distinguish between a "manufacturing defect" and a "manufacturer's defect," as described in the policy.⁷² Had the district court case been decided by a jury, there would have been no way of knowing how a verdict was reached, and the 11th Circuit would have been left to simply guess what was on the mind of six, or upon occasion, twelve jurors. Instead, with the benefit of Judge [*143] Cohn's written opinion, which meticulously detailed the lower court's factual findings and application of the law, the lower court's error was manifest and easily correctible.

VI

CONCLUSION

Since practically every declaratory judgment action brought by a litigant can be recast as a mirror-image counterclaim by the opponent, allowing a defendant to have a jury after the plaintiff has requested a bench trial would effectively end the

⁷¹ [Continental Insurance Co. v. Lone Eagle Shipping Ltd., 952 F. Supp. 1046, 1997 AMC 1099 \(S.D.N.Y.1997\).](#)

⁷² [St. Paul Fire and Marine Insurance Company v. Lago Canyon, Inc., 561 F.3d 1181 \(11th Cir. 2009\), St. Paul Fire and Marine Insurance Company v. Lago Canyon, Inc., 2008 A.M.C. 1617 \(S.D.FLa.2008\).](#)

practice of bench trials in the federal courts. In every instance in which a plaintiff requests a bench trial, the defendant will simply repackage the action as a counterclaim on a different jurisdictional basis and request a jury trial. Following the 4th Circuit's reasoning, the jury demand will always defeat a request for a bench trial.

This is ironic because one of the reasons for allowing bench trials is that the Founders believed then, and there is good reason to believe now, that bench trials are a fairer forum for international litigants who are ordinarily very fearful of litigating in front of notoriously fickle American juries. If the opinion of the 4th Circuit is followed, the only cases in which there will be bench trials are those in which there is admiralty jurisdiction, but no diversity! In a case involving next-door neighbors whose boats collide, the plaintiff in that trial could request and receive a bench trial. But a UK insurer who seeks a declaration from a federal court concerning his policy of insurance, precisely the litigant bench trials are meant to protect, would be unable to sustain his request when his insured brings a mirror-image counterclaim for breach of contract.

What is more, as Congress has demonstrated with the Jones Act, a single sentence is all the Congressional action necessary to end the practice of bench trials in admiralty. If it so desired, Congress could go further and restrict the admiralty jurisdiction of the federal courts. As the 4th Circuit demonstrated, that which Congress can achieve by legislation, the federal courts may also achieve by diktat. The federal courts, however, having none of the democratic authority of the elected branches, depend for their legitimacy on the consistent production of high quality legal opinions honestly explaining their reasoning both to the particular litigants, and to the spectators of the legal world. That precious legitimacy is eroded when the federal courts attempt to disguise the real reasons for their opinions, as the 4th Circuit almost certainly did in *Lockheed*.

This explanation for the *Lockheed* decision, that it is nothing more than an attempt to implement a drastic change in federal court practice by stealth, [*144] without having to explain the reasons for such a change, should be apparent. It should be obvious that there is not, nor has there ever been, a Seventh Amendment right to a jury trial when suit is brought under the admiralty jurisdiction of the federal courts. One needs only to be able to read English to see that any assertion to the contrary, whether by Judge Wilson of the 11 th Circuit, Judge Traxler of the 4th Circuit, or Judge Crabb of the Western District of Wisconsin, is obviously belied by the actual text of the Seventh Amendment, the text of the Judiciary Act of 1789, and 219 years of federal court precedent.