

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF MAINE**

**JEFFERSON INSURANCE COMPANY** )  
**OF NEW YORK,** )  
 )  
**Plaintiff** )  
 )  
**v.** )  
 )  
**MAINE OFFSHORE BOATS, INC., et al.,** )  
 )  
**Defendants** )

**Docket No. 01-44-P-H**

**MEMORANDUM DECISION ON PLAINTIFF’S MOTION TO STRIKE  
AND RECOMMENDED DECISION ON DEFENDANT MAINE  
OFFSHORE BOATS, INC.’S MOTION TO DISMISS**

The plaintiff, Jefferson Insurance Company of New York, moves to strike the demands for jury trial and attorney fees set forth in the defendants’ counterclaim.<sup>1</sup> The defendants, Maine Offshore Boats, Inc. and Daniel G. Lilley, move to dismiss the complaint.<sup>2</sup> I grant the motion to strike in part and deny it in part and recommend that the court deny the motion to dismiss.

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<sup>1</sup> The document in which the counterclaim appears is confusing. It is titled Defendant’s Answers; Counterclaims; Third-Party Complaint; and Request for Jury Trial (Docket No. 3) and uses the singular term “Defendant/Counterclaimant” to begin each numbered paragraph of its answer and in paragraphs 6, 14, 15, 18, 22-24, 25, 27-29 and 30-32 and all demands for relief in the counterclaim and the singular terms “plaintiff” in paragraphs 14-15, 17, 20, 22, 23-26 and “defendant/counterclaimant” in paragraph 27 of the third-party complaint. Yet it appears that in the answer and the third-party complaint, the document means to refer to both defendants named in the initial complaint. *See, e.g.*, the first sentence of the answer and the first sentence of the third-party complaint. Answer at 1, 15. It is impossible to tell which of the defendants is the “defendant/counterclaimant” to which the counterclaim always refers in the singular. For purposes of the pending motions, I will treat the answer, counterclaim and third-party complaint as having been filed on behalf of both Maine Offshore Boats, Inc. and Daniel G. Lilley, the defendants named in the complaint.

<sup>2</sup> A letter dated April 24, 2001 from Christian C. Foster, Esq. to a deputy clerk of this court (“Letter”) states that the motion to dismiss is brought on behalf of both defendants, despite its lack of reference to Lilley. Docket No. 11.

## I. Motion to Strike

### A. Jury Trial

The complaint seeks a declaratory judgment concerning a contract for marine insurance issued to the defendants by the plaintiff. Complaint for Declaratory Judgment (“Complaint”) (Docket No. 1) at 1. It is brought in admiralty. *Id.* ¶ 3. The counterclaim alleges breach of contract, negligent misrepresentation, fraud and violation of the Unfair Claims Settlement Act, 24 M.R.S.A. § 2436-A.<sup>3</sup> Counterclaim at 9-15. The counterclaim includes a demand for jury trial, *id.* at 15, and seeks attorney fees in the request for relief that follows each of the four separate counts, *id.* at 11, 12, 14, 15. Because it brought this action in admiralty, the plaintiff contends that that the demand for jury trial must be stricken. Plaintiff/Counter-Defendant’s Motion to Strike Defendant/Counter-Plaintiffs’ Demand for Attorneys’ Fees and for Jury Trial (“Motion to Strike”) (Docket No. 7) at 3-6. It asks the court to strike the demand for attorney fees because such relief is not available in marine insurance cases. *Id.* at 7-8. The defendants<sup>4</sup> respond that they are entitled to trial by jury on the counts in their counterclaim under the “savings to suitors” clause of 28 U.S.C. § 1333(1).<sup>5</sup> Objection to Plaintiff/Counterclaim Defendant’s Motion to Strike Defendant/Counterclaim Plaintiff’s [sic] Demand for Attorney’s Fees and for Jury Trial (“Defendants’ Objection”) (Docket No. 8) at 3-4.

Generally, jury trial is not available on admiralty claims. *Natasha, Inc. v. Evita Marine Charters, Inc.*, 763 F.2d 468, 470 (1st Cir. 1985) (no right to jury trial in admiralty suit except as provided by statute). In cases in which a complaint raises admiralty claims and a counterclaim

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<sup>3</sup> So in the counterclaim. Counterclaim ¶ 31. No such statute exists. I assume the defendants mean to cite 24-A M.R.S.A. § 2436-A.

<sup>4</sup> Again, the document itself refers only to defendant Maine Offshore Boats, Inc., but Attorney Foster’s letter states that the objection to the motion to strike is actually filed on behalf of both defendants. Letter.

<sup>5</sup> The statute provides, in relevant part: “The district courts shall have original jurisdiction, exclusive of the courts of the States, of: (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.” 28 U.S.C. § 1333(1).

asserts one or more legal claims, as is the case here, the courts have either allowed jury trial on the counterclaim only, *e.g.*, *Wilmington Trust v. United States Dist. Court*, 934 F.2d 1026, 1032 (9th Cir. 1991), or refused to allow jury trial at all, *e.g.*, *Camrex (Holdings) Ltd. v. Camrex Reliance Paint Co.*, 90 F.R.D. 313, 317 (E.D. N.Y. 1981). The First Circuit has declined to rule on the question whether a plaintiff who invokes Fed. R. Civ. P. 9(h), as does the plaintiff here, Complaint ¶ 3, may insist that no jury trial be allowed when a complaint sounds in admiralty and a counterclaim does not. *Concordia Co. v. Panek*, 115 F.3d 67, 71 (1st Cir. 1997).

The case law cited by the defendants is distinguishable. In the only case they cite in which the factual situation is sufficiently similar to that of the instant case to require comment, *Stonewall Ins. Co. v. Sessions*, 404 F. Supp. 858 (S.D. Ala. 1975), a marine insurer filed a declaratory judgment action in federal court after the insured had filed suit in state court for breach of the same insurance contract arising out of the same incident. *Id.* at 859. The court decided to dismiss the action under the “savings to suitors clause” because the “parties and issue before both courts are identical” and the state-court action had been brought first. *Id.* at 860. That is not the case here, and the distinction is important. Here, the defendants seek to impose jury trial on the plaintiff, which has chosen to proceed without a jury under Rule 9(h); in *Stonewall*, the district court rejected an attempt by the state-court defendant to deprive the state-court plaintiff of the choice he made by bringing his claim first, in state court.

In situations much more similar to the case at hand, courts located in the First Circuit have denied jury trial on claims asserted in a counterclaim that might otherwise have been amenable to trial by jury. In *Royal Ins. Co. of Am. v. Hansen*, 125 F.R.D. 5 (D. Mass. 1988), an insurer filed a declaratory judgment action in federal court, contending that the policy at issue did not cover damages to the defendant’s yacht. The defendant filed a counterclaim alleging breach of the policy terms and

violation of a state statute prohibiting unfair and deceptive acts in the practice of the business of insurance. *Id.* at 6. The court denied the defendant's demand for jury trial on his counterclaims, after an extensive consideration of existing case law, primarily because the counterclaims were "intertwined with the main action and could not be resolved without 'prejudicing the other party or arriving at inconsistent results..'" *Id.* at 9, quoting *Koch Fuels, Inc. v. Cargo of 13,000 Barrels of No. 2 Oil*, 704 F.2d 1038, 1042 (8th Cir. 1983). In *Clarendon Am. Ins. Co. v. Rodriguez*, 1999 A.M.C. 2885, 1999 WL 33218159 (D. P.R. Oct. 4, 1999), the plaintiff insurer sought declaratory judgment that the policy at issue did not provide coverage to the defendants, who filed a counterclaim alleging breach of the insurance contract. The court found

that [the counterclaims] cannot be heard by a jury because the counterclaims are directly linked with the insurance contract in question and intertwined with the main action. The resolution of the claims and counterclaims at bar hinges on determining [the insurer's] obligations, if any, with regard to the marine insurance in question. Thus, the owners' counterclaim will not be heard in a trial by jury.

*Id.* at \* 2 (citations omitted).

A careful reading of the counterclaims asserted in this action shows that they are similarly intertwined with the declaratory judgment action, hinging on a determination of the plaintiff's obligations. The First Circuit assumed without deciding in *Panek* that the *Koch Fuels* rationale would be applicable and discussed existing case law only in light of the distinction made in that case between counterclaims that are conceptually distinct from the admiralty claim (jury trial on counterclaim held possible) and those that are so closely related that inconsistent results are possible (no jury trial on counterclaims allowed). 115 F.3d at 71. Given this background, I am confident that the First Circuit would adopt the *Koch Fuels* rationale when presented with the issue directly, and I conclude that the defendants are not entitled to jury trial on their counterclaim in this case.

## B. Attorney Fees

The plaintiff contends that the defendants are not entitled to attorney fees in connection with any of the claims asserted in their counterclaim because the admiralty law which it invokes preempts any such claims. Motion to Strike at 7. The defendants object to the motion only with respect to Count IV of their counterclaim, which alleges violation of 24-A M.R.S.A. § 2436-A. Defendants' Objection at 5-6. Accordingly, the motion to strike may be granted without objection as to Counts I-III of the counterclaim.

Even if that were not the case, the motion should be granted on the merits with respect to these claims. Under admiralty law, attorney fees are not available unless a party has acted in bad faith in the litigation itself. *Templeman v. Chris Craft Corp.*, 770 F.2d 245, 250 (1st Cir. 1985). Count I of the counterclaim alleges breach of the contract of marine insurance that is the subject of the plaintiff's declaratory judgment action and can only be considered "sufficiently maritime in nature to fall within the district court's admiralty jurisdiction," *Panek*, 115 F.3d at 72, and the counterclaim does not allege that the initial action was brought in bad faith, making a demand for attorney fees inappropriate at this stage of the proceeding. In the alternative, attorney fees are not available under Maine law for breach of contract claims. *Monopoly, Inc. v. Aldrich*, 683 A.2d 506, 510 (Me. 1996). Counts II and III of the counterclaim allege state common law claims sounding in tort. Again, I need not consider whether those claims are sufficiently maritime in nature as set forth in the counterclaim to fall within this court's admiralty jurisdiction because attorney fees are not available on those claims under Maine law either. *Elliott v. Maine Unemployment Ins. Comm'n*, 486 A.2d 106, 111 (Me. 1984) ("attorneys' fees may be awarded only when provided for by statute or agreement by the parties").

Count IV of the counterclaim invokes 24-A M.R.S.A. § 2436-A, which specifically provides for recovery of reasonable attorney fees when an insurer is found to have committed one or more of

five listed forbidden acts. The counterclaim specifically alleges that the plaintiff insurer knowingly misrepresented pertinent facts or policy provisions relating to the coverage provided by the policy at issue and failed with just cause to effectuate a prompt, fair and equitable settlement of the defendants' claim although liability is alleged to be reasonably clear. Counterclaim ¶¶ 32-33. These are two of the five grounds for recovery provided by the statute. In *Southworth Mach. Co. v. F/V Corey Pride*, 994 F.2d 37 (1st Cir. 1993), the First Circuit held a Puerto Rico rule providing for attorney fees, "although part of the substantive law of" the Commonwealth, "inapplicable in an action cognizable in admiralty," but also noted that maritime law does not preempt a cause of action under state law that allows recovery of attorney fees "for an insurer's bad faith refusal to pay or settle claims," *id.* at 41. That is precisely the cause of action set forth in Count IV of the counterclaim. Therefore, the defendants are entitled to seek attorney fees in connection with Count IV.

## **II. Motion to Dismiss**

The defendants' motion to dismiss does not identify the rule of procedure pursuant to which dismissal is sought. It is not necessary to repeat here the standard for review of each subsection of Fed. R. Civ. P. 12(b) that might conceivably apply, however, because the motion is without merit under any of them.

The defendants contend, without citation to authority, that the existence of disputed factual issues precludes a declaratory judgment determination as a matter of law. Motion to Dismiss Plaintiff's Declaratory Judgment Action ("Motion to Dismiss") (Docket No. 9) at 3-4. This standard is familiar in the context of summary judgment but is clearly unavailable as a ground for dismissal. A declaratory judgment by its very nature involves the resolution of disputes of fact and law. *E.g.*, *General Star Indem. Co. v. Duffy*, 191 F.3d 55, 58 (1st Cir. 1999) (discussing factual disputes in action for declaratory judgment brought by insurer).

The defendants next assert that their counterclaim alleging fraud requires dismissal of the declaratory judgment action. Motion to Dismiss at 4-5. According to the defendants, every declaratory judgment action may be dismissed by a defendant's simple assertion of fraud in response.<sup>6</sup> Merely to state the proposition is to demonstrate its hollowness. None of the relatively aged case law cited by the defendants in support of their position is apposite. In none of those cases did the defendant, merely by bringing counterclaims, induce the court to dismiss a declaratory judgment action. In *Panama Processes S.A. v. Cities Serv. Co.*, 362 F. Supp. 735, 737 (S.D. N.Y. 1973), the complaint for declaratory relief, standing alone, did not seek relief that would resolve the controversy between the parties. In *Piedmont Fire Ins. Co. v. Aaron*, 138 F.2d 732, 733-34 (4th Cir. 1943), the only issue remaining in the federal declaratory judgment action after settlement by several parties was also pending in a state-court action that had been brought before the federal action was initiated. In *Sun Oil Co. v. Transcontinental Gas Pipe Line Corp.*, 108 F. Supp. 280, 281-83 (E.D. Pa. 1952), the plaintiff, knowing that it was about to be sued in Texas, initiated a declaratory judgment proceeding in Pennsylvania and the court, noting that it was exercising its discretion, dismissed the Pennsylvania action as unacceptable forum-shopping. None of these cases is sufficiently similar to the instant action to be of any persuasive force in support of the defendants' position, and the applicability of the remaining case law they cite to this case is even more difficult to discern.

The Fifth Circuit, in *Rowan Cos. v. Griffin*, 876 F.2d 26 (5th Cir. 1989), identified several factors that a court may consider in determining whether to decide a declaratory judgment suit.

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<sup>6</sup> Particularly wide of the mark is the defendants' contention that they are entitled to dismissal of the complaint merely because they have alleged bad faith. Reply to Plaintiff's Response to Defendant's [sic] Motion to Dismiss Complaint for Declaratory Judgment (Docket No. 12) at 5-6. As the case the defendants themselves cite makes clear, there must be some evidence of unclean hands before the court, not merely an allegation, before the plaintiff will be barred from seeking equitable relief. *Texaco Puerto Rico, Inc. v. Department of Consumer Affairs*, 60 F.3d 867, 880 (1st Cir. 1995). While the defendants' argument might be made at the summary judgment stage — although the defendants' assumption that a declaratory judgment action can only seek equitable relief might be open to question at that point — it is inappropriate in the context of a motion to dismiss.

For example, declaratory judgment relief may be denied because of a pending state court proceeding in which the matters in controversy between the parties may be fully litigated, because the declaratory complaint was filed in anticipation of another suit and is being used for the purpose of forum shopping, because of possible inequities in permitting the plaintiff to gain precedence in time and forum, or because of inconvenience to the parties or witnesses.

*Id.* at 29 (citations omitted). The defendants' submissions, despite the hyperbolic tone of their arguments, do not establish any of these factors. The defendants have not shown any reason why the complaint should be dismissed.

### III. Conclusion

For the foregoing reasons, the plaintiff's motion to strike is **GRANTED** as to the defendants' demand for jury trial and as to the defendants' demand for attorney fees on Counts I-III of their counterclaim and otherwise **DENIED**. Further, I recommend that the defendants' motion to dismiss be **DENIED**.

### NOTICE

*A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.*

*Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.*

Date this 7th day of May, 2001.

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David M. Cohen  
United States Magistrate Judge

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