

**UNITED STATES DISTRICT COURT  
DISTRICT OF MAINE**

**PORTLAND SHELLFISH  
COMPANY, INC.,** )  
 )  
 )  
 **PLAINTIFF** )  
 )  
 )  
 **v.** )  
 )  
 )  
 **PEERLESS INSURANCE** )  
 **COMPANY, et al.,** )  
 )  
 )  
 **DEFENDANTS** )

**No. 2:11-cv-66-DBH**

**ORDER ON MOTION FOR JUDGMENT ON THE PLEADINGS**

The defendant insurers' motion for judgment on the pleadings in this declaratory judgment lawsuit is **GRANTED**. Maine law is clear that the duty to defend is measured by comparing the contents of the complaint against the insurance policy. Patrons Oxford Mut. Ins. Co. v. Garcia, 707 A.2d 384, 385 (Me. 1998); see also Auto Europe, LLC v. Connecticut Indem. Co., 321 F.3d 60, 66 (1st Cir. 2003). The duty to indemnify can be determined only "after the trial of the underlying tort claim." State Farm Mut. Auto. Ins. Co. v. Koshy, 995 A.2d 651, 670 (Me. 2010); see also Home Ins. Co. v. St. Paul Fire & Marine Ins. Co., 229 F.3d 56, 66 (1st Cir. 2000). Here, no complaint has yet been filed against the insured. The insured has received a written letter seeking recovery, but nothing more as yet. The Maine Law Court has recognized exceptions to the above principles only in cases where the pertinent facts have been determined in other proceedings, State Mut. Ins. Co. v. Bragg, 589 A.2d 35, 38

(Me. 1991), or the parties have stipulated the underlying facts. Northern Sec. Ins. Co., Inc. v. Dolley, 669 A.2d 1320, 1323 (Me. 1996). Neither has occurred in this case. It is true that it seems likely that the underlying facts affecting liability will be largely undisputed (hence the insured's filing of this lawsuit), but there is no stipulation, and Maine law is clear on what is required.<sup>1</sup>

**SO ORDERED.**

**DATED THIS 21ST DAY OF JUNE, 2011**

/s/D. BROCK HORNBY  
**D. BROCK HORNBY**  
**UNITED STATES DISTRICT JUDGE**

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<sup>1</sup> Although the Complaint refers to the Uniform Declaratory Judgment Act, which Maine has adopted, the parties agree that the lawsuit is actually pursuant to the federal Declaratory Judgment Act, 28 U.S.C. § 2201. Nevertheless, neither party argues any difference between state and federal law and primarily they cite Maine cases. I therefore rely on the Maine Law Court cases.

**UNITED STATES DISTRICT COURT  
DISTRICT OF MAINE (PORTLAND)  
CIVIL DOCKET NO. 2:11cv66 (DBH)**

**Portland Shellfish Company, Inc.,**

**Plaintiff**

Represented By **Lee H. Bals**

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**v.**

**Peerless Insurance Company**

**and**

**Netherlands Insurance Company,**

**Defendants**

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