From: 1 Steven F. Friedell, Benedict on Admiralty § 133 (2024)

            The identifying statement called for by Rule 9(h) does not assert that the federal court has admiralty jurisdiction, nor does it assert that admiralty law governs the case.[[1]](#footnote-1)6 It merely asserts that admiralty procedures will be applied to at least some of the issues within the case.[[2]](#footnote-2)7 Unfortunately, some courts have confused these issues.[[3]](#footnote-3)8 If a claim
-------------------------------------------------------------------------------------------------------------
 Page 8-69 (Rel. 149)
arises within the admiralty jurisdiction and some other basis of federal jurisdiction and the plaintiff or other party asserting a claim does not want the admiralty procedures to be applied (for example if it wants to have a jury trial), then the Rules of Civil Procedure do not require the plaintiff or other party asserting a claim to state anything further. To prevent any misunderstanding, it might be wise in this instance to state explicitly, “This is not an admiralty or maritime claim within the meaning of Rule 9(h).”[[4]](#footnote-4)9 A statement in a complaint that a claim is a maritime tort claim ought not to be regarded as a declaration under Rule 9(h) but rather as an assertion of the law to be applied to the claim.[[5]](#footnote-5)10

Because the 9(h) statement relates to a claim but not a case,[[6]](#footnote-6)\* a party asserting more than one claim ought to be able to identify some claims as maritime and others as non-maritime.[[7]](#footnote-7)11 Also, a defendant or third party that is bringing a claim ought to determine whether to identify that claim as maritime regardless of the choice made by the plaintiff with regard to its claim.[[8]](#footnote-8)12 When a plaintiff demands a jury trial in its complaint, the
-------------------------------------------------------------------------------------------------------------
 Page 8-71 (Rel. 149)
defendant’s assertion of Rule 9(h) in a counterclaim does not waive the defendant’s right to insist on a jury trial of the claim brought against it.[[9]](#footnote-9)13 Again, it is unfortunate that some courts have not read the rule this way.[[10]](#footnote-10)14 Rule 18 allows the joinder of admiralty and non-admiralty claims, and Rule 20 allows a claim to be brought against a vessel and another party. If some but not all of the claims are admiralty claims, and if a jury trial has been demanded for one of the non-admiralty claims, then the court ought to allow the jury to determine the issues in all claims that are closely related. An objection might be that Rule 38(e) provides, “These rules shall not be construed to create a right to trial by jury of the issues in an admiralty or maritime claim within the meaning of Rule 9(h).” However, in Fitzgerald v. United States Lines Co.,[[11]](#footnote-11)15 the Supreme Court directed that the jury that decides a Jones Act claim must also decide the related maritime claim for maintenance and cure. Although Fitzgerald preceded the 1966 amendments to the Federal Rules of Civil Procedure, the lower courts have overwhelmingly held that it still governs.[[12]](#footnote-12)16

1. 6Corley v. Long-Lewis, Inc., 965 F.3d 1222 (11th Cir. 2020); DeRoy v. Carnival Corp., 963 F.3d 1302 (11th Cir. 2020) (holding that plaintiff, a passenger on a cruise ship, could not evade a choice-of-forum provision in her contract by seeking to show that federal court lacked admiralty jurisdiction of her tort claim because she sued “at law” and not “in admiralty”); *In re* Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mexico, 2015 U.S. Dist. LEXIS 54600 (E.D. La. 2015) (a plaintiff may have a right to jury trial even if all claims are to be decided by maritime law); Hassebrock v. Air & Liquid Sys. Corp., 2015 U.S. Dist. LEXIS 143254 (W.D. Wash. 2015); Buccina v. Grimsby, 96 F. Supp. 3d 706, 2015 AMC 973 (N.D. Ohio 2015) (“Rule 9(h) is a purely procedural provision”; maritime law applied even if plaintiff did not designate her claim as a Rule 9(h) claim). [↑](#footnote-ref-1)
2. 7Greenwell v. Aztar Ind. Gaming Corp., 268 F.3d 486, 493, 2002 AMC 587, 593–94 (7th Cir. 2001), *cert. denied*, 535 U.S. 1034 (2002); Cooper v. Loper, 923 F.2d 1045, 1048, 1991 AMC 1032, 1034–36 (3d Cir. 1991); Dufrene v. Cass Marine Grp., LLC, 2019 U.S. Dist. LEXIS 18213 (E.D. La. 2019) (striking defendant’s jury trial demand because plaintiff designated claims as 9(h) claims); Continental Cas. Co. v. Scully, 2010 AMC 1959 (S.D. Cal. 2010) (counterclaim can be tried to a jury even though complaint contained admiralty claims); Voisine v. Odebrecht Constr., Inc., 2011 U.S. Dist. LEXIS 123980 (E.D. La. 2011) (Jones Act claim designated as Rule 9(h) claim).
The Advisory Committee that drafted Rule 9(h) contemplated that a complaint that alleges the presence of diversity and admiralty jurisdiction will not be tried under the admiralty procedural rules unless the plaintiff makes a statement invoking those rules. It explained:

The allegation of diversity of citizenship might be regarded as a clue indicating an intention to proceed as at present under the saving-to-suitors clause; but this, too, would be ambiguous if there were also reference to the admiralty jurisdiction, and the pleader ought not be required to forego mention of all available jurisdictional grounds.

Other methods of solving the problem were carefully explored, but the Advisory Committee concluded that the preferable solution is to allow the pleader who now has power to determine procedural consequences by filing a suit in admiralty to exercise that power under unification, for the limited instances in which procedural differences will remain, by a simple statement in his pleading to the effect that the claim is an admiralty or maritime claim.

Notes of Advisory Committee on Rules—1966 Amendment, *reprinted in* 28 U.S.C. Appendix—Rules of Civil Procedure, Form 2 at 284 (2006). [↑](#footnote-ref-2)
3. 8*E.g.*, Bodden v. Osgood, 879 F.2d 184, 186, 1989 AMC 2312 (5th Cir. 1989) (an identifying statement under Rule 9(h) invokes the court’s admiralty jurisdiction); Foulk v. Donjon Marine Co., 144 F.3d 252, 256–57, 1998 AMC 2926 (3d Cir. 1998) (same); T.N.T. Marine Serv., Inc. v. Weaver Shipyards & Dry Docks, Inc., 702 F.2d 585, 1984 AMC 1341 (5th Cir.), *cert. denied*, 464 U.S. 847 (1983) (allegation that suit was for “breach of maritime contract and for maritime tort” constituted a 9(h) designation); Halmos v. Ins. Co. of North Am., 2010 U.S. Dist. LEXIS 147589 (S.D. Fla. 2010) (the magistrate ruled that no jury trial would be permitted where the complaint asserted diversity jurisdiction and stated that some of the claims were within the court’s admiralty jurisdiction but did not mention Rule 9(h)); White v. Donjon Shipbuilding & Repair, LLC, 2016 U.S. Dist. LEXIS 30896 (W.D. Pa. 2016), *report adopted* 2016 U.S. Dist. LEXIS 30504 (W.D. Pa. 2016) (reasoning that if a plaintiff wishes to “proceed under admiralty jurisdiction” it must include an identifying statement under Rule 9(h) or allege that the case is governed by maritime law).
 In *Luera v. M/V Alberta*, 635 F.3d 181, 188 (5th Cir. 2011), the court said, “Rule 9(h) appears to require an affirmative statement from the plaintiff to invoke the admiralty rules for claims cognizable under admiralty and some other basis of jurisdiction.” The court felt constrained, however, by circuit precedent to hold that “the mere assertion of admiralty jurisdiction as a dual or an alternate basis of subject matter jurisdiction for a claim is sufficient to make a Rule 9(h) election to proceed in admiralty for that claim.” *Id.* at 188–89. In a subsequent unpublished opinion, the Fifth Circuit ruled that even where the plaintiff asserted both admiralty and federal question jurisdiction, the defendant was entitled to demand a jury trial where the parties had stipulated that the plaintiff had not designated the claim as a Rule 9(h) claim. Apache Corp. v. Global Santa Fe Drilling Co., 2011 U.S. App. LEXIS 14454 (5th Cir. 2011). In *Cashman Equipment Corp. v. Rozel Operating Co.*, 2012 U.S. Dist. LEXIS 89797 (M.D. La. 2012), the plaintiff asserted admiralty and diversity jurisdiction and did not specify which claims were admiralty and which
-------------------------------------------------------------------------------------------------------------
 Page 8-69 (Rel. 149)
were diversity. It did file *in rem* claims but those were dismissed. When it later argued that its jury demand was inadvertent the court agreed with the defendants who objected to striking the demand. It reasoned, “[W]hen the plaintiff specifically invokes the federal court’s diversity subject matter jurisdiction in his complaint, the right to trial by jury under the Seventh Amendment exists.” *Id.* at \*21. [↑](#footnote-ref-3)
4. 9Buccina v. Grimsby, 889 F.3d 256 (6th Cir. 2018) (by designating the claim as not being an admiralty or maritime claim, the plaintiff was able to obtain a jury trial, but the parties were not allowed an interlocutory appeal under 28 U.S.C. § 1292(a)(3)); Dyer, *Note the Jury on the Quarterdeck: The Effect of Pleading Admiralty Jurisdiction When a Proceeding Turns Hybrid*, 63 Tex. L. Rev. 553, 542 (1984). *Accord* Apache Corp. v. Global Santa Fe Drilling Co., 2011 U.S. App. LEXIS 14454 (5th Cir. 2011); Tucker v. Cascade Gen., Inc., 2011 U.S. Dist. LEXIS 123317 (D. Or. 2011) (complaint stated, “claim is not subject to Rule 9(h)”; diversity jurisdiction existed even though plaintiff had also sued the United States because it had an independent basis for asserting jurisdiction against the United States). [↑](#footnote-ref-4)
5. 10Holder v. Fraser Shipyards, Inc., 2017 U.S. Dist. LEXIS 224307 (W.D. Wis. Sep. 12, 2017). *Contra* T.N.T. Marine Serv., Inc. v. Weaver Shipyards & Dry Docks, Inc., 702 F.2d 585, 1984 AMC 1341 (5th Cir.), *cert. denied*, 464 U.S. 847 (1983). [↑](#footnote-ref-5)
6. \* Red Star Towing & Transp. v. “Ming Giant,” 552 F. Supp. 367, 375 n. 6 (S.D.N.Y. 1982). [↑](#footnote-ref-6)
7. 11*See* Ghotra v. Bandila Shipping, 113 F.3d 1050, 1997 AMC 1936 (9th Cir. 1997), cert. denied, 522 U.S. 1107, 118 S. Ct. 1034, 140 L. Ed. 2d 101 (1998); Haskins v. Point Towing Co., 395 F.2d 737 (3d Cir. 1968).
In Luera v. M/V Alberta, 635 F.3d 181 (5th Cir. 2011), the Fifth Circuit held that a longshore worker who had sued a vessel in rem and its owner and manager in personam could have all of her claims tried to a jury. The plaintiff had alleged only diversity jurisdiction over the claims against the in personam defendants. The court reasoned that as long as the plaintiff alleged diversity jurisdiction as the sole basis for hearing the in personam claims, she is entitled under the saving-to-suitors clause and the Seventh Amendment to have those claims heard by jury. The court ruled that Fitzgerald v. United States Lines Co. allows the closely related in rem claim to also be heard by the jury. *See also* In re Oil Spill, 98 F. Supp. 3d 872 (E.D. La. 2015) (holding that the State of Alabama had properly pleaded its general maritime law claims under admiralty jurisdiction and its claims under the Oil Pollution Act of 1990 under that statute’s jurisdictional provision and federal question so that the latter claims were triable by a jury). [↑](#footnote-ref-7)
8. 12In re Lockheed Martin Corp., 503 F.3d 351, 358, 2007 AMC 2304 (4th Cir. 2007), cert. denied, 128 S. Ct. 2080 (2008); Wilmington Trust v. United States Dist. Court, 934 F.2d 1026 (9th Cir. 1991); Trans Bay Cable LLC v. M/V Ocean Life, 2015 U.S. Dist. LEXIS 154803 (N.D. Cal. Nov. 13, 2015); Starr Indem. & Liab. Co. v. Continental Cement Co., 2011 U.S. Dist. LEXIS 118257 (E.D. Mo. 2011); Bank Meridian, N.A. v. Motor Yacht, 2010 U.S. Dist. LEXIS 81102 (D.S.C. 2010); Continental Ins. Co. v. Industry Terminal & Salvage Co., 2006 AMC 630 (W.D. Pa. 2005) (insured filed counterclaim and demanded a jury trial to which it was entitled despite insurer’s complaint which made a Rule 9(h) election); Sphere Drake Ins. PLC v. J. Shree Corp., 184 F.R.D. 258, 1999 AMC 1480 (S.D.N.Y. 1999) (same). In Red Star Towing & Transp. v. “Ming Giant,” 552 F. Supp. 367 (S.D.N.Y. 1982), the plaintiff filed a limitation action and argued that this precluded a seaman’s widow from seeking a jury trial of her wrongful death claims. The court said that this contention was based on a misreading of Rule 9(h). It added, “It is not the whole action but the claim that may be designated as being within the admiralty jurisdiction of the court. Red Star's complaint designated Red Star's claim as being in admiralty. Whether or not Mowen designated her claims as being in admiralty depends on the pleading in which her claims were set forth, i.e., her answer.” Id at 375 n. 6. Contra Windsor Mt. Joy Mut. Ins. Co. v. Johnson, 264 F. Supp. 2d 158, 2003 AMC 2174 (D.N.J. 2003). See also Concordia Co. v. Panek, 115 F.3d 67, 1997 AMC 2357 (1st Cir. 1997) (noting the conflict and declining to decide the issue); Carefree Cartage, Inc. v. Husky Terminal & Stevendoring, Inc., 2007 U.S. Dist. LEXIS 95189 (W.D. Wash. Dec. 7, 2007) (even though the plaintiff did not allege any maritime claims, the defendant can bring third party claims under Fed. R. Civ. P. 14(a) that are within the court’s admiralty jurisdiction).
In In re Lockheed Martin Corp., 503 F.3d 351, 2007 AMC 2304 (4th Cir. 2007), cert. denied, 128 S. Ct. 2080 (2008), the court took the unusual step of doubting whether the insured’s counterclaim for damages was a “true” counterclaim. The court nonetheless concluded that an insurer’s declaratory judgment action could not deprive the insured of a jury trial if the defendant insured so demanded even though the insurer had designated its action as an admiralty or maritime claim. The court based the latter aspect of its decision on Beacon Theatres v. Westover, 359 U.S. 500 (1959).
The court seems to have arrived at the right result for the wrong set of reasons. The insured’s counterclaim was not frivolous—it was not only compulsory but was the only means by which the defendant could obtain a money judgment. Therefore, the court should have ruled that the insured had the right under rule 9(h) to demand a jury trial of its counterclaim.
It is highly doubtful, however, that a defendant in a declaratory judgment action who has not filed a counterclaim should be able to invoke Beacon Theatres to overturn the plaintiff’s Rule 9(h) designation. Declaratory judgment actions were created by federal statute in 1934, prior to the merger of law and equity, and could be brought at both law and equity. Beginning in 1961, Admiralty Rule 59 provided a means for bringing declaratory judgment actions in admiralty. In Beacon Theatres, the Court held that a defendant asserting a legal counterclaim to a declaratory judgment action that was brought in equity had the right to demand a jury trial. As Lockheed noted, Beacon Theatres has been read to teach that since declaratory judgment actions are neither legal nor equitable, when the only claim is a claim for declaratory judgment one must determine whether a party may demand a jury trial by looking “to the kind of action that would have been brought had Congress not provided the declaratory judgment remedy.” In re Lockheed Martin Corp., 503 F.3d at 359 (quoting Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 284 (1988)).
This was a helpful doctrine following the merger of law and equity when the issue became whether to characterize the declaratory judgment action as legal or equitable. See Owens-Illinois, Inc. v. Lake Shore Land Co., 610 F.2d 1185, 1189 (3d Cir. 1979). A court of equity always had discretion not to maintain a suit and would in any event dismiss the action if there was an adequate remedy at law. See Beacon Theatres, 359 U.S. at 509; Hargrove v. American Cent. Ins. Co., 125 F.2d 225, 228 (10th Cir. 1942) (insurer’s declaratory judgment action was triable as of right by jury because it had an adequate remedy at law); Aetna Cas. & Surety Co. v. Quarles, 92 F.2d 321 (4th Cir. 1937) (discretion to dismiss equitable action for declaratory judgment because related claim at law was pending). See generally Note, Right to Trial by Jury in Declaratory Judgment Actions, 3 Conn. L. Rev. 564 (1971). Further, in determining whether a claim is equitable or legal, the court must primarily consider the remedy sought. Chauffeurs, Teamsters & Helpers, Local 391 v. Terry, 494 U.S. 558, 565 (1990).
The situation is different when the underlying action is a claim for damages that is within both the admiralty and diversity jurisdictions and when the party seeking the declaratory judgment has designated that claim as maritime. It is true, for example, that had the insurer in Lockheed not sought a declaratory judgment the insured could have sued for breach of contract and demanded a jury trial because there was diversity jurisdiction. However, a court of admiralty has never dismissed an action on the grounds that there was an adequate remedy at law. Moreover, it is not helpful to consider the nature of the remedy that is sought because a claim for money damages can be brought both in admiralty and at law. It is doubtful that either the Saving to Suitors clause or the Seventh Amendment gives the defendant the right to trump
-------------------------------------------------------------------------------------------------------------
 Page 8-71 (Rel. 149)
the plaintiff’s Rule 9(h) designation where the defendant has not counterclaimed for damages. *See* Friedell, Lexis-Nexis Expert Commentary to In re Lockheed Martin, Corp. (2008). In general, Rule 9(h) preserves the right of the plaintiff to a non-jury proceeding that existed prior to the 1966 merger of admiralty and civil cases. It would be odd to think that before 1966 a respondent in almost all declaratory judgment actions brought under Admiralty Rule 59 (except those seeking purely equitable relief) would have had the right to demand a transfer of the action to the “law” side of the court. Rule 59 preserved the right to jury trial, but this was intended only for certain actions arising on the Great Lakes. See Advisory Committee Note, 29-701 Moore’s Federal Practice—Civil § 701.06. [↑](#footnote-ref-8)
9. 13Rocque v. Zetty, LLC, 2021 U.S. Dist. LEXIS 8427 (D. Me. Jan. 15, 2021). [↑](#footnote-ref-9)
10. 14E.g., Harrison v. Flota Mercante Grancolombiana, S.A., 577 F.2d 968, 1979 AMC 824 (5th Cir. 1978) (once plaintiff makes a Rule 9(h) designation the entire case including claims against fourth-party defendant must be governed by maritime procedures); Great Lakes Ins. SE v. Andersson, 525 F. Supp. 3d 205 (D. Mass. 2022); Clear Spring Prop. & Cas. Co. v. Matador Sportfishing, LLC, No. 1:21-cv-01581, 2022 U.S. Dist. LEXIS 53569, 2022 AMC 108 (M.D. Pa. Mar. 24, 2022); Great Lakes Reinsurance (UK) SE v. Herzig, 413 F. Supp. 3d 177, 2019 AMC 2683 (S.D.N.Y. 2019) (calling this the “prevailing view in this Circuit”); Starnet Ins. Co. v. La Marine Serv. LLC, 2017 U.S. Dist. LEXIS 113874 (E.D. La. 2017); American S.S. Owners Mut. Prot. & Indem. Ass’n v. Lafarge N. Am., Inc., 2008 U.S. Dist. LEXIS 58458 (S.D.N.Y. 2008) (where defendant’s counterclaim arose out of same contract and involved the same operative facts); Great Lakes Reins. (UK) PLC v. Masters, 2008 AMC 1045 (M.D. Fla. 2008); Davis v. Baker Hughes Oilfield Operations, Inc., 2007 U.S. Dist. LEXIS 13594 (E.D. La. 2007); Ik Yacht Design v. M/Y Constellation, 2006 U.S. Dist. LEXIS 113809 (S.D. Fla. 2006); ING Group v. Stegall, 2004 AMC 2992 (D. Colo. 2004). The Eleventh Circuit followed Harrison as it constitutes earlier panel precedent. St. Paul Fire & Marine Ins. Co. v. Lago Canyon, Inc., 561 F.3d 1181 (11th Cir. 2009). In a concurring opinion, Judge Wilson criticized Harrison and concluded that the defendant “should be entitled to a jury trial on its ‘legal’ counterclaim even though [the plaintiff] sought declaratory judgment and invoked admiralty jurisdiction … .” Id. at 1199. See also Norwegian Hull Club v. N. Star Fishing Co. LLC, 2023 U.S. Dist. LEXIS 41100 (N.D. Fla. 2023); New York Marine & Gen. Ins. Co. v. Boss Interior Contractors. Inc., 2021 U.S. Dist. LEXIS 74244 (S.D. Fla. Apr. 16, 2021); Great Lakes Reinsurance (UK) PLC v. Soriano, 2015 WL 12778783 (S.D. Fla. 2015) (defendant conceded that if plaintiff’s declaratory judgment action proceeded to trial, then it and the counterclaim for breach of contract would be subject to a non-jury trial); Travelers Prop. Cas. Co. of Am. v. Ivy Marine Consultants, 2015 U.S. Dist. LEXIS 59023 (S.D. Ala. 2015) (denying defendant the right to demand a jury on counterclaim and third-party claim because court was bound by Harrison and Lago Canyon “regardless of any chink in their analytical armor”); Norwalk Cove Marina, Inc. v. S/V/ Odysseus, 100 F. Supp. 2d 113 (D. Conn. 2000) (calling this the majority view). The Fifth Circuit’s latest jurisprudence in this area seems to be moving closer to the proper reading of Rule 9(h). See supra note 11.
In *In re Hanson Marine Properties*, Case No. 2:20-cv-958-SPC-MRM, 2022 U.S. Dist. LEXIS 79350, at \*4–5, 2022 AMC 164 (M.D. Fla. May 2, 2022), the court said, “When a plaintiff pursues its claim under admiralty jurisdiction, that choice applies to the entire litigation.” The court therefore struck a jury demand in a crossclaim. The court went on to note that the crossclaim was based solely on the court’s admiralty jurisdiction and that that the parties were from the same state. See id., at \*5. [↑](#footnote-ref-10)
11. 15374 U.S. 16 (1963). [↑](#footnote-ref-11)
12. 16E.g., Concordia Co. v. Panek, 115 F.3d 67, 71–72, 1997 AMC 2357 (1st Cir. 1997); Moncada v. Lemuria Shipping Corp., 491 F.2d 470 (2d Cir.), cert. denied, 417 U.S. 947 (1974); Foulk v. Donjon Marine Co., 144 F.3d 252, 260 n. 7, 1998 AMC 2926 (3d Cir. 1998); Vodusek v. Bayliner Marine Corp., 71 F.3d 148, 1996 AMC 330 (4th Cir. 1995); Daniel v. Ergon, Inc., 892 F.2d 403, 409 (5th Cir. 1990); Ingram River Equip. v. Pott Indus., 816 F.2d 1231, 1235, 1987 AMC 2343 (8th Cir. 1987); Ghotra v. Bandila Shipping, 113 F.3d 1050, 1997 AMC 1936 (9th Cir. 1997), cert. denied, 522 U.S. 1107 (1998); Harville v. Johns-Manville Prods. Corp., 731 F.2d 775, 779, 1986 AMC 731 (11th Cir. 1984); In re Great Lakes Dredge & Dock Co., 1996 U.S. Dist. LEXIS 5553, \*10 (N.D. Ill. Apr. 25, 1996); Gyorfi v. Partrederiet Atomena, 58 F.R.D. 112, 1973 AMC 1823 (N.D. Ohio 1973). Contra McCann v. Falgout Boat Co., 44 F.R.D. 34, 1968 AMC 650 (S.D. Tex. 1968); Sanderlin v. Old Dominion Stevedoring Corp., 281 F. Supp. 1015 (E.D. Va. 1968). [↑](#footnote-ref-12)