REMOVAL IN ADMIRALTY: THE CIRCUITS AVOID RESOLUTION FOLLOWING THE 2011 AMENDMENTS

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OVERVIEW AND INTRODUCTION

Until very recently, district courts rejected removal premised exclusively on Admiralty jurisdiction, absent a second source of federal jurisdiction. The Federal Courts Jurisdiction and Venue Clarification Act of 2011 ("2011 Amendments") appeared to disrupt this entrenched tradition. In the wake of the 2011 Amendments, district courts, overwhelmingly in the Fifth Circuit, began to permit removal in Admiralty. However, excluding the Seventh Circuit's ruling in *Lu Junhong v. Boeing Co*.,[1] no Circuit Court explicitly permitted removal solely in Admiralty. The First, Fourth, and Fifth Circuits have declined or avoided the issue.[2] Only the Eleventh Circuit – although arguably in dicta – has forbid removal in Admiralty.[3] The remaining circuits have not squarely addressed the issue.

Discussion requires an understanding of the historical treatment of removal in Admiralty. Federal district courts possess original subject matter jurisdiction over Admiralty and maritime cases under 28 U.S.C. § 1333, which has remained substantively unchanged since the original Judiciary Act of 1789. The current version provides:

> 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.

The "saving-to-suitors" clause contained in 28 U.S.C. § 1333 permits a plaintiff to pursue an *in personam* claim, under general maritime law, in a state court with jurisdiction over the claim. Plaintiffs may elect to bring their claim under general maritime law in either state or federal court as appropriate.[4] Notably, the saving-to-suitors clause does not address removal. However, arguably in recognition and deference to the saving-to-suitors clause, district courts have traditionally held that state claims filed under general maritime law were not removable.

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[1] 792 F.3d 805, 818 (7th Cir. 2015)

[2] *Rhode Island v. Shell Oil Prods. Co., L.L.C.*, 35 F.4th 44, *61 (1st Cir. 2022) ("We need not choose sides, because even if saving-to-suitors actions are freely removable under section 1441 (and we are not saying either way), the Energy Companies still face an insurmountable obstacle."); *Mayor & City Council of Baltimore v. BP P.L.C.*, 31 F.4th 178, 226 (4th Cir. 2022) ("Because of their inadequate briefing, we decline to formally decide whether § 1441 permits removal based on the admiralty jurisdiction grant under § 1333(1)."); *Sangha v. Navig8 Shipmanagement Priv. Ltd.*, 882 F.3d 96, 100 (5th Cir. 2018) ("…there is no binding precedent from this circuit").

[3] *DeRoy v. Carnival Corp.,* 963 F.3d 1302, 1314 (11th Cir. 2020) (reasoning "if the plaintiff elects to file a maritime case in state court, that case may not be removed to federal court solely on the basis of admiralty jurisdiction.").

[4] *See e.g. DeRoy,* 963 F.3d at 1314 (reasoning "the saving-to-suitors clause generally provides a plaintiff in a maritime case alleging an in personam claim three options: (1) the plaintiff may file suit in federal court under admiralty jurisdiction . . . ; (2) the plaintiff may file suit in federal court under diversity jurisdiction; or (3) the plaintiff may file suit in state court.)(citation omitted).

While a recitation of the history of removal in Admiralty goes well beyond the parameters of this paper, the issue has been thoroughly examined in recent years.[5] The traditional rule precluding removal of a case filed in state court under general maritime law originated with the U.S. Supreme Court's decision in *Romero v. International Terminal Operating Co*.[6] The Court reasoned – arguably in dicta – that general maritime law does not provide a basis for federal question jurisdiction, reasoning that permitting removal of "savings-clause" cases would eviscerate the intention of the clause.[7] The district courts widely accepted this principle, rejecting removal in Admiralty, until the Amendments to 28 U.S.C. § 1441 enacted by the Federal Courts Jurisdiction and Venue Clarification Act of 2011.

COMPLICATIONS EMERGE IN 2011

Before the 2011 Amendments, 28 U.S.C. § 1441 provided as follows:

> (a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State Court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.
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> (b) Any civil action of which the district courts have original jurisdiction founded on a claim or right under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

Following the amendments, the same provisions were amended to read:

> (a) Generally.—Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.
>
> (b) Removal Based on Diversity of Citizenship.—
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> (1) In determining whether a civil action is removable on the basis of the jurisdiction under section 1332(a) of this title, the citizenship of defendants sued under fictitious names shall be disregarded.

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[5] Michael F. Sturley, *Removal into Admiralty: The Removal of State-Court Maritime Cases to Federal Court*, 46 J. MAR. L. & COM. 105, 117 (2015); Michael Schwartz, *Establishing an Unqualified Standard for Removal Under 28 U.S.C. § 1441: The Propriety of Removing Maritime Cases to Federal Court*, 55 Loy. L.A. L. Rev. 29 (2022); Matthew H. Ammerman, *The New Removal Regime*, 38 Tul. Mar. L. J. 389 (2014).
[6] 358 U.S. 354 (1959)
[7] *Id.* at 371-2.

(2) A civil action otherwise removable solely on the basis of the jurisdiction under section 1332(a) of this title may not be removed if any of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

Following the amendment, some district courts began to question the removability of Admiralty claims. The first and most often cited decision was *Ryan v. Hercules Offshore Inc.,* in which the Southern District of Texas reasoned that while *Romero* stood for the proposition that federal question jurisdiction does not encompass general maritime law claims, the 2011 Amendments to 28 U.S.C. § 1441 no longer restricted removal based on Admiralty jurisdiction.[8] Under *Ryan,* a case is removable where it falls within the original jurisdiction of federal courts and there is no express prohibition to removal.[9] Various district courts began permitting removal in Admiralty, culminating the with the Seventh Circuit's ruling in *Lu Junhong v. Boeing Co*., 792 F.3d 805, 818 (7th Cir. 2015).[10] Since 2015, the vast majority of district courts have declined to follow *Ryan*, while the Circuit Courts have largely avoided the issue.

THE CIRCUIT COURTS

In *Rhode Island v. Shell Oil Prods. Co., L.L.C.*, appellants argued that the 2011 Amendments to § 1441 removed any impediment to removal of Admiralty claims.[11] The First Circuit, noting a spilt on whether the Amendments changed the traditional rule, declined to address the issue: "[w]e need not choose sides, because even if saving-to-suitors actions are freely removable under section 1441 (and we are not saying either way), the Energy Companies still face an insurmountable obstacle."[12] The Court affirmed remand on other grounds.[13]

The Second Circuit has not ruled on the issue following the 2011 Amendments; however, various district courts within the circuit have continued to recognize the pre-2011 bar to removal of Admiralty claims absent an independent basis for federal jurisdiction.[14] The Third Circuit has similarly not ruled on the issue following the 2011 Amendments.[15] The Sixth, Eighth, Ninth, and Tenth Circuit have not directly ruled on the issue.[16]

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[8] 954 F.Supp. 2d 772 (S.D. Tex. 2013).
[9] *Id.*
[10] *See e.g.,* Wells v. Abe's Boat Rentals, Inc., 2013 U.S. Dist. LEXIS 85534 (S.D. Tex. June 18, 2013); *Bridges v. Phillips 66 Co*., 2013 U.S. Dist. LEXIS 164146 (M.D. La. Nov. 18, 2013); *Garza et al v. Phillips 66 Company, et al,* 2014 WL 1330547; *Provost v. Offshore Service Vessels, LLC*, 2014 WL 2515412 (M.D. La. 2014); *Exxon Mobil Corp. v. Starr Indemntiy & Liability Co*., 2014 WL 2739309 (S.D. Tex. 2014); *Carrigan v. M/V AMC Ambassador*, 2014 WL 35853 (S.D. Tex. 2014); *Genusa v. Asbestos Corp. Ltd*., 18 F. Supp. 3d 773 (M.D. La. 2014).
[11] 35 F.4th 44, 61 (1st Cir. 2022).
[12] *Id.*
[13] *Id.* at 62.
[14] *See e.g. Forde v. Hornblower N.Y., LLC*, 243 F. Supp. 3d 461 (S.D. N.Y. 2017); *Margaritis v. Mayo*, 2021 U.S. Dist. LEXIS 148289 (E.D. N.Y. August 6, 2021); *Nassau Cnty. Bridge Auth. v. Olsen*, 130 F. Supp. 3d 753 (E.D. N.Y. 2015)
[15] *Glazer v. Honeywell Int'l Inc*., 2017 U.S. Dist. LEXIS 71029 (D.N.J. May 10, 2017) (granting remand and reasoning "[t]he Third Circuit has not addressed the 2011 amendment in the context of admiralty jurisdiction.").
[16] *See* e.g. *In re Foss Mar. Co.,* 29 F. Supp. 3d 955, 960 (W.D. Ky. 2014) ("No Sixth Circuit authority supports the sweeping reading of the 2011 Amendments articulated by Ryan and advanced by its progeny. Appellate precedent instead counsels in favor of a limited approach, preserving the plaintiff's choice of forum where appropriate."); *Cox v. Lippus*, 570 F. Supp. 3d 547 (N.D.Ohio 2021); *Coronel v. AK Victory*, 1 F. Supp. 3d 1175, 1178 (W.D. Wash. 2014)

The Fourth Circuit recently avoided ruling on the issue in M*ayor & City Council of Baltimore v. BP P.L.C.*.[17] The court noted "Defendants aptly point out that the Venue Clarification Act of 2011 eliminated a portion of § 1441(b) that federal courts previously believed blocked the removal of Admiralty claims without another jurisdictional basis."[18] However, the court declined to address the issue directly, instead stating: "[b]ecause of their inadequate briefing, we decline to formally decide whether § 1441 permits removal based on the Admiralty jurisdiction grant under § 1333(1)."[19] The court proceeded with its analysis "under the assumption § 1441 permits removal because of the original jurisdiction grant of § 1333(1)" and determined that the plaintiff lacked Admiralty jurisdiction.[20] The court remanded the case.[21]

The Fifth Circuit has not definitely resolved the issue. In 2015, the Fifth Circuit recognized the clear disagreement between district courts and affirmed the district court's decision that a defendant's attempted removal was not improper under 28 U.S.C. § 1447.[22] In a 2018 decision, the court reasoned that there was no binding precedent in the Fifth Circuit on the issue of removal in Admiralty and decided the case on other grounds.[23]

The Seventh Circuit is the only Circuit to have squarely decided that removal in Admiralty is permissible. The court concluded that the district courts have subject matter jurisdiction over a maritime case removed to federal court.[24] After concluding that the non-Admiralty bases for removal were without merit, the court addressed the plaintiffs' argument that a case could not be removed based solely on Admiralty jurisdiction:

> Plaintiffs tell us that, even if the events come within §1333(1), Boeing still was not allowed to remove the suits under 28 U.S.C. §1441(a). Yet that section permits removal of any suit over which a district court would have original jurisdiction—and, if these suits are within the Admiralty jurisdiction, that condition is satisfied. Plaintiffs' brief asserts: "Admiralty jurisdiction does not provide a basis for removal absent an independent basis for federal jurisdiction." There plaintiffs stop; they don't explain why.

Id. at 817 (internal citations omitted).

("Both parties' arguments for or against the removal of Plaintiff's general maritime law claims focus on the language of the removal statute, 28 U.S.C. § 1441. The court concludes, however, that it is the statutory grant of admiralty jurisdiction, 28 U.S.C. § 1333, and more than 200 years of precedent interpreting this grant, that ultimately determine the removability of Plaintiff's claims.").

[17] 31 F.4th 178 (4th Cir. 2022); *see also Cassidy v. Murray*, 34 F. Supp. 3d 579, 584 (D. Md. 2014) (rejecting *Ryan* because "[t]he Court is not inclined to reject decades of well-established law to adopt an unsettled attempt to alter the course of removal procedures without clear, binding, precedent").

[18] *Id.* at 225.

[19] *Id.* at 226.

[20] *Id.* at 226-7, FN 19.

[21] *Id.* at 238.

[22] *Riverside Const. Co. v. Entergy Mississippi, Inc*., 2015 WL 5451433, at *3 (5th Cir. 2015).

[23] *Sangha v. Navig8 Shipmanagement Priv. Ltd*., 882 F.3d 96, 100 (5th Cir. 2018).

[24] *Lu Junhong v. Boeing Co*., 792 F.3d 805 (7th Cir. 2015).

Lastly, the Eleventh Circuit, in dicta, ruled that removal in Admiralty is not permitted following the 2011 Amendments.[25] The Eleventh Circuit reasoned that plaintiff's claims, although not invoking Admiralty jurisdiction, were nonetheless Admiralty claims subject to federal jurisdiction.[26] The plaintiff tried to plead her case to avoid a forum selection clause. The court reasoned that plaintiff's failure to expressly allege Admiralty jurisdiction did not mean that Admiralty jurisdiction ceased to exist and further reasoned that the saving-to-suitors clause does not nullify Admiralty jurisdiction over the action.[27] District courts in the Eleventh Circuit have refused removal in Admiralty.[28]

FUTURE HANDLING OF THE ISSUE

The historical precedent precluding removal in Admiralty is well established and the saving-to-suitors concerns may be well founded. However, analysis of the present statutory regime supports a legitimate argument that removal in Admiralty is no longer precluded by law.

The plain reading of § 1441(a) allows the removal of "any civil action" over which the district courts have jurisdiction, which would include a civil action over which the courts have jurisdiction under § 1333. Federal district courts indisputably have original jurisdiction over any civil case of Admiralty or Maritime jurisdiction. In *Romero v. International Terminal Operating Company,* the Supreme Court reasoned:

> All suits involving Maritime claims, regardless of the remedy sought, are cases of Admiralty and Maritime jurisdiction within the meaning of Article III whether they are asserted in federal courts or, under the savings clause, in state courts.[29]

The Fifth and Seventh Circuit rejected the argument that a case ceases to be a "case of Admiralty or maritime jurisdiction" within the original jurisdiction of the district courts when filed in state court under the saving-to-suitors clause.[30] The Eleventh Circuit similarly held that the claim sounded in Admiralty even where the plaintiff does not explicitly plead Rule 9(h).[31] The Fifth Circuit has held that Admiralty removal presents at most a procedural defect (as opposed to jurisdictional) and that any purported bar to removal does not preclude the exercise of the Court's subject matter jurisdiction under 28 U.S.C. § 1333.[32]

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[25] *DeRoy v. Carnival Corp*., 963 F.3d 1302, 1314-15 (11th Cir. 2020) (*citing Armstrong v. Ala. Power Co*., 667 F.2d 1385, 1388 (11th Cir. 1982).
[26] *Id.* at 1311-12.
[27] *Id.* at 1312-15.
[28] *Wright v. Key West Jetski, Inc*., 2021 U.S. Dist. LEXIS 51314, 85-67.
[29] 358 U.S. 354, 367 n. 23 (1959).
[30] *Baris v. Sulpicio Lines*, 932 F.2d 1540, 1546 (5th Cir. 1991), *affirmed en banc*, 101 F.3d 367 (5th Cir. 1996); *cert. den*., 520 U.S. 1181, 117 S. Ct. 1460 (1997); *Lu Junhong v. Boeing Co*., 792 F.3d 805 (7th Cir. 2015); *see also Dwyer v. Spliethoff's Bevrachtingskantoor B.V*. 2020 U.S. Dist. LEXIS 164135, *3-8 (E.D. Tex., September 8, 2020).
[31] *DeRoy v. Carnival Corp*., 963 F.3d 1302, 1314-15 (11th Cir. 2020)
[32] *Baris v. Sulpicio Lines,* 932 F.2d 1540, 1542-44 (5th Cir. 1991), *affirmed en banc*, 101 F.3d 367 (5th Cir. 1996); *cert. den.*, 520 U.S. 1181, 117 S. Ct. 1460 (1997); *Williams v. AC Spark Plugs Div. of General Motors Corp*., 985 F.2d 783 (5th Cir. 1993); *Ibarra v. Port of Houston Auth*., 526 F. Supp. 3d 202 (S.D. Tex. 2021); *Ragas v. Tennessee Gas Pipeline Co*., 136 F.3d 455, 457 (5th Cir. 1998).

The Fifth Circuit reasoned, "28 U.S.C. § 1441 creates a broad right of removal which can only be limited by an act of Congress expressly prohibiting it."[33] Absent an express prohibition to removal in the saving-to-suitors clause, a case within the original jurisdiction of the district court pursuant to 28 U.S.C. § 1333 can be removed. Under 28 U.S.C. § 1333, federal "district courts have original jurisdiction … of … [a]ny civil case of Admiralty or Maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled." The statutory language does not contain an express prohibition to removal – let alone mention removal. This language is in stark contrast to the statutory prohibition of removal in other types of actions, such as set forth in 28 U.S.C. § 1445. If Congress had intended to preclude removal under the saving-to-suitors clause, it could have done so as in 28 U.S.C. § 1445.

Courts have uniformly allowed removal of Maritime cases when there is an independent basis for jurisdiction (namely diversity or federal question).[34] And if the saving to-suitors clause without exception prohibited removal of Maritime claims, it would prohibit removal even where there was an independent basis for federal jurisdiction.[35] There is nothing ambiguous about the language of § 1441(a), and only an express prohibition to removal will preclude removal of a case over which the district courts have original jurisdiction. The saving-to-suitors clause contains no language that could remotely be considered an "express" prohibition.[36]

Based on the foregoing, there is unquestionably an argument that applicable statute no longer bars removal in Admiralty. However, despite the lack of statutory bar, the Circuit Courts appear reluctant to squarely address the issue and may continue to preclude removal in Admiralty on concerns of "federalism" or "historical development of maritime law in state courts by including the saving to suitors clause."[37]

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[33] *Baldwin v. Sears, Roebuck & Co*., 667 F.2d 458, 459 (5th Cir. 1982).
[34] *See e.g. Alexis v. Hilcorp Energy Co.,* 493 F. Supp. 3d 497 (E.D. La. 2020).
[35] *See* 14A Wright, Miller & Cooper, *Federal Practice and Procedure* § 3674 (4th ed. 2013) ("If the saving clause was interpreted as an express provision preventing removal of cases within its scope, why were savings clause cases removable when diversity of citizenship jurisdiction existed?").
[36] *See Crawford v. East Asiatic Co.,* 156 F. Supp. 571, 572 (N.D. Cal. 1957) ("The 'saving to suitors' language says nothing about a right to sue in state court, nor does it contain any reference to removal of a state action. It cannot, therefore, be treated as an express provision by Congress against removal.").
[37] *Gregoire v. Enterprise Marine Services, LLC*, 38 F.Supp.3d 749, 764 (E.D. La. 2014).

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Outside of law school, Mr. DeGiulio served as a judicial intern for the Honorable Fredericka H. Wicker of the Louisiana Fifth Circuit Court of Appeal and as a legal intern in the United States Coast Guard, Eighth District Legal Office.

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