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Removal into Admiralty

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I. INTRODUCTION

In the last few years, the potential removability of state-court maritime cases to federal court on the basis of admiralty jurisdiction — often described as "removal into admiralty"[1] — has become a "hot" topic in that small circle of people who care about admiralty procedure. The issue has long been a subject of debate,[2] but the majority view rejecting removal into admiralty had seemed reasonably well settled.[3] Those favoring removal into admiralty, however, have recently seized upon the Federal Courts Jurisdiction and Venue Clarification Act of 2011[4] to support their position,[5] and they have found some support in the courts.[6]

In this paper, I do not intend to revisit the established debate on which so much has already been written. I instead evaluate the new turn that the debate has taken as a result of the 2011 amendments to the governing statute,[7] and I consider how the issue may be resolved when the current litigation makes its way to the appellate courts.[8]

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[1] *E.g.* DAVID W. ROBERTSON, STEVEN F. FRIEDELL & MICHAEL F. STURLEY, ADMIRALTY AND MARITIME LAW IN THE UNITED STATES 112 (2d ed. 2008).

[2] *See*, *e.g.*, 14A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION AND RELATED MATTERS § 3674, at 618-619 (2013).

[3] *See*, *e.g.*, 14A WRIGHT, MILLER & COOPER, *supra* note 2, § 3674, at 634 (describing the no-removal-into-admiralty rule as "preferable . . . from a policy perspective, and . . . most consistent with . . . the law"); ROBERTSON, FRIEDELL & STURLEY, *supra* note 1, at 112 (noting "the majority viewpoiont").

[4] Pub. L. No. 112-63, 125 Stat. 758 (2011).

[5] *See*, *e.g.*, Kenneth G. Engerrand, *Admiralty Jury Trials Reconsidered*, 12 LOYOLA MAR. L.J. 73, 113-122 (2013).

[6] *See infra* notes 55-79 and accompanying text.

[7] *See infra* notes 52-107 and accompanying text.

[8] *See infra* notes 108-123 and accompanying text.

A. Admiralty Jurisdiction

In 1789, the First Congress passed the original Judiciary Act, which (among other things) created lower federal courts and granted them subject-matter jurisdiction over certain types of cases.[9] Of particular relevance here, section 9 granted admiralty jurisdiction to the newly created federal district courts. The key statutory text provided:

> The district courts shall . . . have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction . . . ; saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it . . . .[10]

The law today, 225 years later, is substantially the same. In the current Judicial Code, section 1333(1) 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.[11]

Congress has accordingly granted "exclusive" jurisdiction to the federal courts, but — under the so-called "saving to suitors" clause[12] — has preserved the right of "suitors" to seek other remedies elsewhere.

As a practical matter, the saving-to-suitors clause most commonly means that maritime plaintiffs may bring their actions (1) in a state court that, under its own jurisdictional rules, is

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[9] Act of Sept. 24, 1789 (First Judiciary Act), ch. 20, 1 Stat. 73 (1789).

[10] First Judiciary Act, *supra* note 9, § 9, 1 Stat. 77 (1789) (current version codified at 28 U.S.C. § 1333).

[11] 28 U.S.C. § 1333(1).

[12] Professor Black describes the saving-to-suitors clause as having "slipped almost into the category of things inevitable and immutable — the sort of quasi-constitutional statutory law, change in which (despite theoretical susceptibility to the usual processes of amendment and repeal) one feels it almost impious to contemplate." Charles L. Black, Jr., *Admiralty Jurisdiction: Critique and Suggestions*, 50 COLUM. L. REV. 259, 260 (1950).

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