

Danger: Right To Jury Trial In Admiralty Case Filed In State Court Can Be Lost By Unchallenged Removal

By: Carl R. Neil¹

Art. III, § 2 of the U.S. Constitution, of course, extends the judicial power of the United States to “all Cases of admiralty and maritime jurisdiction.” From the 1789 Judiciary Act to the present-day 28 USC § 1333, Congress has given federal and state courts concurrent jurisdiction over such cases, with a few exceptions, through the famous “saving to suitors” clause of the federal court admiralty jurisdiction statute. 28 USC § 1333 provides that federal district courts have exclusive jurisdiction over admiralty cases

“saving to suitors in all cases all other remedies to which they are otherwise entitled.”

Jury trial is not available in a case filed under 28 USC § 1333 on the admiralty side of the U.S. District Court. A plaintiff in an admiralty case can obtain a jury trial, however, by filing it in state court. The federal removal statute, 28 USC § 1441, provides in effect that a case can be removed from state court to federal court if the case could have been brought under the U.S. District Court’s original jurisdiction. State court cases are often removed by defendants to federal court if grounds exist for the case to have been originally filed under the federal court’s diversity jurisdiction (28 USC § 1332) or its federal question jurisdiction (28 USC §1331).

In *Romero v. International Terminal Operating Co.*, 358 US 354, 3 L.Ed.2d 368, 79 S.Ct. 468 (1959), the Supreme Court held that admiralty cases are not federal question cases for purposes of removal under § 1441. The court also stated that § 1441 does not permit removal of a state court case to the admiralty side of a federal court. The principal reasoning for the latter point was that to construe § 1441 otherwise would permit a defendant to deprive a plaintiff of the right under the saving to suitors clause of 28 USC § 1333 to choose a forum for filing an admiralty case which included the right of jury trial. As so construed, § 1441 permits an admiralty case to be removed to federal court by an out-of-state defendant only if there is diversity of citizenship between all plaintiffs and all defendants and the amount of controversy

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exceeds \$75,000 (28 USC § 1332) or if the case arises under a federal question other than admiralty law (28 USC § 1331). Removal under diversity or federal question jurisdiction does not deprive the plaintiff of the right of jury trial, since that right also exists under those branches of federal court jurisdiction.

But, what if a defendant which lacks grounds for removal to federal court under its diversity or federal question jurisdiction nevertheless removes the state court case to the admiralty side of the federal court's jurisdiction? The courts, perhaps surprisingly, do not hold that this cannot be done, and remand *sua sponte*. Instead, they apply 28 USC § 1447(c), providing that a motion to remand to remove the case for any ground other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under § 1446.

There's the potential trap for an unwary plaintiff's counsel. If a motion to remand a non-removable admiralty case is not filed in that 30-day period, the case stays in federal court notwithstanding improper removal. The U.S. Supreme Court in *Grubbs v. General Electric Credit Corp.*, 405 US 499, 31 L.Ed.2d 612, 92 S.Ct. 1344 (1972), held that an improperly removed case, when no timely motion to remand was filed, could remain in federal court when the federal court would have had original jurisdiction over the case had it originally been filed there. The few reported cases applying that doctrine to removal of a state court admiralty case based on the federal court having jurisdiction under 28 USC §1333 have reached the same result. *E.g.*, *Dao v. Knightsbridge International Reinsurance Corp.*, 15 F.Supp.2d 567 (D.NJ 1998). Professor Friedell, "The Disappearing Act: Removal Jurisdiction of an Admiralty Claim," 30 *Tulane Mar.L.J.* 75 (2006), argues that U.S. district Courts, after an improper removal of a state court admiralty case to the admiralty side of U.S. District Court, have inherent power to grant jury trial in such a case. Few, if any, courts have agreed with that reasoning.

The possible occurrence in practice of the described loss of jury trial may not be as esoteric as it might at first seem. Take, for example, a run-of-the-mill case which is clearly governed by U.S. admiralty law: an injury resulting from a collision between two pleasure boats, both operated by local residents, on the Columbia or Willamette Rivers in Multnomah County. The case is clearly governed by federal admiralty law, even if some non-maritime law practitioners might not recognize that point. *Foremost Ins. Co. v. Richardson*, 457 US 668, 73 L.Ed.2d 300, 102 S.Ct. 2654 (1982). Counsel for the injured plaintiff might file a personal injury

case in Multnomah County Circuit Court, knowing that there is a right to jury trial there, but possibly be unaware that the case is controlled by federal admiralty law and that defense counsel might try to remove it to federal court. If defense counsel were to attempt removal of such a case, the only possible ground would be that the court had original jurisdiction over the case on the admiralty side of the court under 28 USC § 1333. If plaintiff's counsel is not alert to the need to file within 30 days after the notice of removal a motion to remand the case to state court, the right of jury trial which the plaintiff wanted in filing the case in state court is lost, at least under current case law.