ADMIRALTY LAW — REMOVAL — SEVENTH CIRCUIT HOLDS THAT 2011 AMENDMENT TO 28 U.S.C. § 1441 PERMITS REMOVAL BASED SOLELY ON ADMIRALTY JURISDICTION. — *Lu Junhong v. Boeing*, 792 F.3d 805 (7th Cir.), *reh'g en banc denied*, No. 14-1825 (7th Cir. Aug. 10, 2015).

Courts have historically interpreted federal jurisdictional statutes to bar the removal of admiralty claims from state courts.[1] Recent statutory amendments have complicated the matter. Last year, in *Lu Junhong v. Boeing Co.*,[2] the Seventh Circuit ruled that Boeing could remove claims arising from the July 2013 crash of Asiana Airlines Flight 214 based on admiralty jurisdiction alone.[3] By holding that changes to 28 U.S.C. § 1441 passed in the Federal Courts Jurisdiction and Venue Clarification Act of 2011[4] permit removal of admiralty cases without another jurisdictional basis, Judge Easterbrook handed a victory to the minority view in an ongoing battle in the district courts. Given the procedural requirements for review of a removal decision, it may be some time before another circuit court decides the same issue. If more district courts follow the Seventh Circuit's lead, a flaw in the current test for admiralty jurisdiction may become more acute, potentially strengthening the case for a return to the traditional test for maritime jurisdiction.

On July 6, 2013, Asiana Airlines Flight 214 crashed into a seawall while landing in San Francisco after a trans-Pacific flight.[5] The tragedy killed three and injured dozens; many survivors filed lawsuits claiming that the Boeing 777 aircraft was defective.[6] While all federal claims were consolidated in the Northern District of California, some plaintiffs filed in the courts of Boeing's home state of Illinois.[7] Claiming that federal courts had subject matter jurisdiction over the case under both federal officer[8] and admiralty jurisdiction,[9] Boeing removed to federal court.[10]

In an unreported opinion in the Northern District of Illinois, Judge Harry D. Leinenweber remanded to the Illinois state court for lack of federal subject matter jurisdiction. The court said that Boeing had to show that the alleged tort (1) occurred on or over a navigable water-

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1 *See, e.g.*, Romero v. Int'l Terminal Operating Co., 358 U.S. 354, 379–80 (1959).
2 792 F.3d 805 (7th Cir.), *reh'g en banc denied*, No. 14-1825 (7th Cir. Aug. 10, 2015).
3 *Id.* at 807, 818.
4 Pub. L. No. 112-63, 125 Stat. 758 (codified in scattered sections of 28 U.S.C.).
5 *Lu Junhong*, 792 F.3d at 807, 816.
6 *Id.* at 807–08.
7 *Id.*
8 28 U.S.C. § 1442 (2012).
9 *Id.* § 1333.
10 *Lu Junhong*, 792 F.3d. at 808.

way and (2) had a "connection" to a traditional maritime activity.[11] The court thought that the crash had to have become inevitable over water to satisfy the first element, and ruled that it became inevitable only on impact.[12] The court then rejected the argument that federal officer jurisdiction existed.[13]

The Seventh Circuit reversed and remanded the case to the district court with instructions to rescind the remand order and transfer the case to the Northern District of California.[14] Writing for the panel, Judge Easterbrook[15] ruled that Boeing was entitled to remove the cases under admiralty jurisdiction.[16] First, the court noted that while 28 U.S.C. § 1447(d) prevents appellate review of most remand decisions, it does permit review of orders based on § 1442 federal officer jurisdiction.[17] The court then promptly rejected Boeing's argument for such jurisdiction.[18] Though Boeing participated in the airline industry's regulatory scheme by self-certifying compliance, it was never "acting under [a federal] officer."[19] However, the court ruled that because the § 1447(d) exception granted appellate review of the "order remanding a case,"[20] the court retained appellate review of the *entire* order — including its analysis of admiralty jurisdiction.[21] The court said that the decision to review admiralty jurisdiction was "entirely textual"[22]: it was based on use of the word "order" in § 1447(d) rather than on pendent jurisdiction.[23]

Reviewing the district court's admiralty jurisdiction ruling, the Seventh Circuit questioned the inevitability requirement's validity. The court noted the test "lack[ed] a provenance" in any appellate court decision and, even if valid, was not relevant to the outcome.[24] The court then applied the current Supreme Court admiralty jurisdiction test. First articulated in *Executive Jet Aviation, Inc. v. City of*

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[11] Jinhua Yang v. Boeing Co., No. 13 C 6846, 2013 WL 6633075, at *2 (N.D. Ill. Dec. 16, 2013) (citing Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 527, 534 (1995)).

[12] *Id.* at *3–4.

[13] *Id.* at *7.

[14] *Lu Junhong*, 792 F.3d at 818.

[15] Judge Easterbrook was joined by Chief Judge Wood and Judge Cudahy.

[16] *Lu Junhong*, 792 F.3d at 818.

[17] *Id.* at 808.

[18] *See id.* at 810.

[19] *Id.* at 808 (alteration in original) (quoting 28 U.S.C. § 1442(a) (2012)); *see also id.* at 809 (noting the Supreme Court's rejection of similar arguments offered in Watson v. Philip Morris Cos., 551 U.S. 142 (2007)).

[20] *Id.* at 811 (quoting 28 U.S.C. § 1447(d)).

[21] *See id.* at 812–13.

[22] *Id.* at 812.

[23] *Id.*

[24] *Id.* at 814. The court noted that "by 10 seconds before impact a collision *was* certain" according to the National Transportation Safety Board's report, which was issued after the district court order. *Id.*

Cleveland[25] and most recently modified by *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*,[26] admiralty jurisdiction applies when an "'injury suffered on land was caused by a vessel on navigable water', if the cause bears a 'substantial relationship to traditional maritime activity.'"[27] In *Lu Junhong*, the equipment failures that allegedly caused the tort occurred over navigable waters while the aircraft was a "substitute for an ocean-going vessel" conducting the quintessential traditional maritime activity of transporting people across an ocean, so admiralty jurisdiction existed.[28]

The court then ruled that, following the 2011 amendments, 28 U.S.C. § 1441(b) no longer prohibits the removal of claims under admiralty jurisdiction. Section 1441(a) permits removal of any action for which the federal courts have original jurisdiction "[e]xcept as otherwise expressly provided by Act of Congress."[29] Prior to 2011, subsection (b) of the statute stated that, while defendants could remove any claim over which federal courts had original jurisdiction so long as that jurisdiction arose "under the Constitution, treaties or laws of the United States," any "other such action" required a separate jurisdictional hook.[30]

In *Romero v. International Terminal Operating Co.*,[31] Justice Frankfurter ruled that admiralty jurisdiction did not arise under the "Constitution, laws, or treaties of the United States."[32] Although the Court was analyzing § 1331 jurisdiction, because § 1441(b) is a parallel statutory provision, this holding would mean that maritime claims must be an "other" action for the purposes of § 1441(b). The Court found support for its interpretation in § 1333, which grants federal courts original jurisdiction over admiralty claims. This statute "sav[es] to suitors [plaintiffs] in all cases all other remedies to which they are otherwise entitled."[33] Historically, such remedies were to be found in state common law courts.[34] If defendants were free to remove under

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[25] 409 U.S. 249 (1972).

[26] 513 U.S. 527 (1995).

[27] *Lu Junhong*, 792 F.3d at 815 (quoting *Jerome B. Grubart*, 513 U.S. at 534). The Supreme Court has treated aircraft as "vessels" when analyzing jurisdiction. *Id.* (citing *Exec. Jet*, 409 U.S. at 271).

[28] *Id.* at 816.

[29] 28 U.S.C. § 1441(a) (2012).

[30] 28 U.S.C. § 1441(b) (2006) (amended in 2011 by Venue Clarification Act).

[31] 358 U.S. 354 (1959).

[32] *Id.* at 380. Chief Justice Marshall first articulated this idea. *See* Am. Ins. Co. v. 356 Bales of Cotton, 26 U.S. (1 Pet.) 511, 512 (1828).

[33] 28 U.S.C. § 1333(1) (2012). The statute may have been originally meant to limit removal of admiralty claims in order to preserve plaintiffs' state court remedies. *See, e.g.*, Robert Force, *Understanding the Nonremovability of Maritime Cases: Lessons Learned from "Original Intent,"* 89 TUL. L. REV. 1019, 1019–26 (2015).

[34] *See Romero*, 358 U.S. at 369–70.

admiralty jurisdiction, the Court reasoned, then the saving-to-suitors clause would be a nullity.[35] Under this precedent, Boeing could not have claimed diversity jurisdiction because it is based in Chicago,[36] and could not have removed for admiralty jurisdiction under the pre-2011 language in § 1441(b).[37]

However, the Seventh Circuit ruled *Romero* inapplicable because the 2011 amendment to § 1441(b) removed the "arising under" and "other" language under which *Romero*'s holding that maritime claims do not "arise under" federal law would have been relevant.[38] Section 1441(a) still permits federal courts to hear cases over which they have original jurisdiction while § 1333(1) still grants original jurisdiction over admiralty claims to federal courts — thus, when the language of § 1441(b) changed, the barrier to removal under admiralty jurisdiction alone was eliminated.[39]

The court did not decide what effect, if any, § 1333(1)'s saving-to-suitors clause might have on removal because the plaintiff did not argue that the clause alone could prevent removal.[40] The issue was not "the sort of contention about subject-matter jurisdiction that a federal court must resolve even if the parties disregard it."[41] The clause instead concerned choice of venue, which the plaintiffs could waive.

By deciding that the amended version of § 1441(b) does not deny defendants the power to remove admiralty claims, the Seventh Circuit has bolstered the minority position in an ongoing disagreement among district courts. The procedural steps needed to review the admiralty jurisdiction claim make it less likely that another circuit court will weigh in on the question soon. Because this ruling increases the odds that district courts will permit removal solely based on admiralty jurisdiction, it risks aggravating a defect in the current admiralty jurisdiction test.

Some district courts have interpreted the changed language in the amended § 1441(b) to permit removal under admiralty jurisdiction alone. Taking the position eventually adopted in *Lu Junhong*, the dis-

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[35] *See id.* at 371–72.

[36] *See* Response Brief of Plaintiffs-Appellees at 33, *Lu Junhong*, 792 F.3d 805 (No. 14-1825); *see also* Benjamin J. Wilson, Lu Junhong*: The Seventh Circuit Stirs the Waters of Maritime Removals*, 25 ILL. ASS'N DEF. TRIAL COUNS. Q., no. 4, 2015, at 1, 3, http://c.ymcdn.com/sites/www.iadtc.org/resource/resmgr/Publication_PDF_2/25.4.5.pdf [http://perma.cc/Z8W7-HY5C]. Boeing does not seem to have contested this assertion. *See* Reply Brief for Defendant-Appellant The Boeing Company, *Lu Junhong*, 792 F.3d 805 (No. 14-1825).

[37] *See* 28 U.S.C. § 1441(b) (2006). The forum defendant rule also applied under the pre-2011 language. *Id.*

[38] *Lu Junhong*, 792 F.3d at 817 (quoting 28 U.S.C. § 1441(b) (2012)).

[39] *See id.*

[40] *Id.* at 818.

[41] *Id.*

trict court in *Ryan v. Hercules Offshore, Inc.*[42] found the amended text unambiguous: § 1333 grants federal courts original jurisdiction over admiralty claims; § 1441(a) permits removal of claims over which the federal courts had original jurisdiction; the language of § 1441(b) no longer limits § 1441(a) to original jurisdiction arising under the Constitution, laws, and treaties of the United States; thus, litigants can remove under admiralty jurisdiction alone.[43] A minority of district courts have since followed *Ryan*'s lead.[44]

However, the majority of district courts have held that the amended statute does not permit removal under admiralty jurisdiction alone. They have put forward two compelling jurisdictional arguments. First, several courts have indicated that decisions such as *Ryan* fail to differentiate between two types of cases: (1) those brought before the federal court under admiralty law, and (2) those that could have been brought before the court under admiralty jurisdiction, but were instead brought in state court under common law pursuant to the saving-to-suitors clause.[45] Because they seek remedies "at law," cases brought under the saving-to-suitors clause are not really admiralty cases — they are state civil cases with a maritime connection brought at common law, and consequently are not subject to federal original jurisdiction under § 1333.[46] Thus, any change to § 1441 did not matter because that statute only covers cases over which the federal courts have original jurisdiction. Second, some have argued that, despite § 1441's amended text, an analysis of the legislative history, purpose, and structure of the 2011 amendments shows they constituted mere legislative "housekeeping" and were never meant to change the extant removal procedures.[47]

The Seventh Circuit's opinion bolsters the minority position. First, Judge Easterbrook's interpretation of the amended § 1441 rested on the statutory language. He noted that the text of "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,

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[42] 945 F. Supp. 2d 772 (S.D. Tex. 2013).

[43] *Id.* at 777–78.

[44] *See, e.g.*, Genusa v. Asbestos Corp., 18 F. Supp. 3d 773, 790 (M.D. La. 2014); *see also* Michael F. Sturley, *Removal into Admiralty: The Removal of State-Court Maritime Cases to Federal Court*, 46 J. MAR. L. & COM. 105, 121 (2015) (observing that *Ryan* had been "relegated . . . to a minority view").

[45] *See, e.g.*, Coronel v. AK Victory, 1 F. Supp. 3d 1175, 1179–80 (W.D. Wash. 2014); *see also* Sturley, *supra* note 44, at 107–08.

[46] *See, e.g.*, Gregoire v. Enter. Marine Servs., LLC, 38 F. Supp. 3d 749, 763–65 (E.D. La. 2014). Some courts have held that federal courts have no subject matter jurisdiction over common law maritime claims because removal cannot transform a state common law claim for which there is no federal jurisdiction into a federal admiralty law claim for which there is. *Coronel*, 1 F. Supp. 3d at 1180, 1187; *see also* Force, *supra* note 33, at 1046–47.

[47] *See* Sturley, *supra* note 44, at 124–26.

that condition is satisfied."[48] This holding implies that the lower court opinions citing legislative history or historical practice incorrectly considered material that should only have been examined if the text was ambiguous. Second, the court remarked that the saving-to-suitors clause was "not . . . the sort of contention about subject-matter jurisdiction that a federal court must resolve even if the parties disregard it."[49] Under Supreme Court precedent, courts must determine whether subject matter jurisdiction exists before moving on to the merits of the case — a decision not to confront a potential subject matter jurisdiction issue is tantamount to holding that there is no issue.[50] The Seventh Circuit thus implied that the saving-to-suitors clause does not strip federal courts of subject matter jurisdiction in the way that many of the district courts on the majority side had thought.[51]

As the first circuit court case on the issue, the *Lu Junhong* decision takes on particular significance for future courts, even beyond the Seventh Circuit. Section 1447(d)'s limit on the review of district court removal decisions explains why there has been an ongoing disagreement between district courts even within the same circuits[52] — the appeals courts cannot review lower-court decisions to resolve the splits. District courts have cited this dearth of appellate court decisions in favor of removal as a reason to rule against removal.[53] The Seventh Circuit has now produced such appellate precedent by reviewing the issue via Boeing's federal officer jurisdiction claim.[54] Much of the commentary responding to *Lu Junhong* bears this out, emphasizing the significance of the holding and its potential future impact.[55] Finally,

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[48] *Lu Junhong*, 792 F.3d at 817.

[49] *Id.* at 818.

[50] *See, e.g.*, Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 101 (1998) (arguing that there is no "doctrine of 'hypothetical jurisdiction' that enables a court to resolve contested questions of law when its jurisdiction is in doubt").

[51] By declaring that the saving-to-suitors clause did not concern subject matter jurisdiction, the court implicitly ruled that the difference between maritime claims brought at common law in state courts under the saving-to-suitors clause and maritime claims brought under admiralty jurisdiction in federal court did not matter for jurisdictional purposes. *Compare Lu Junhong*, 792 F.3d at 818, *with, e.g.*, *Coronel*, F. Supp. 3d at 1180–89 (concluding that the court lacked jurisdiction based upon this difference).

[52] *Compare, e.g.*, Parker v. U.S. Envtl. Servs., LLC, No. 3:14-CV-292, 2014 WL 7338850, at *5–6 (S.D. Tex. Dec. 22, 2014) (ruling against removability), *with, e.g.*, Ryan v. Hercules Offshore, Inc., 945 F. Supp. 2d 772, 777–78 (S.D. Tex. 2013) (ruling that the claim was removable).

[53] *See, e.g.*, Gregoire v. Enter. Marine Servs., LLC, 38 F. Supp. 3d 749, 764 (E.D. La. 2014) (stating that "the Fifth Circuit has not indicated" that Congress intended the 2011 amendment to make substantive changes to admiralty removal).

[54] *See* Eric B. Wolff, *7th Circ. Answers Key Admiralty Law Questions*, LAW360 (Sept. 1, 2015 10:52 AM), http://www.law360.com/articles/697292/7th-circ-answers-key-admiralty-law-questions [http://perma.cc/G83P-EJ4R] ("[A]s of this writing, the Seventh Circuit is the only Court of Appeals to have addressed removal of admiralty cases under the amended statute.").

[55] *See, e.g.*, Brian O'Connor Watson, *Potential Game Changer: Admiralty Jurisdiction Serves as a Basis for Removal*, PROD. LIAB. & MASS TORTS BLOG (July 10, 2015), http://www

the decision had the support of a unanimous panel that included both Judge Easterbrook, a noted textualist, and Chief Judge Wood, head of the Seventh Circuit.[56] Such a circuit court opinion may lead more district courts to consider permitting removal under admiralty jurisdiction.

If the holding in *Lu Junhong* is more widely adopted, it may come to highlight a flaw in the Supreme Court's admiralty jurisdiction test. Traditionally, admiralty jurisdiction was location (or "situs") based — if the tort occurred on navigable waterways, then admiralty jurisdiction applied.[57] The Court later adopted the *Executive Jet* "significant relationship to traditional maritime activity" threshold requirement, because it was concerned that admiralty jurisdiction would arise by pure happenstance, unmoored from the underlying rationale of maritime law.[58]

But since the advent of the new test, courts have had to decide nebulous questions, such as the level of generality at which to consider an "activity" when deciding whether it was similar to a "traditional maritime activity."[59] Such nebulous questions have led to disparate rulings. Judge Easterbrook cited three circuit court cases in which courts ruled that transoceanic flights bore a significant relationship to traditional maritime activity and thus fell within admiralty jurisdiction,[60] and one in which the court ruled that such a flight had not borne such a relationship.[61] In other words, the same type of event occurred over international navigable waterways, yet under the current test different courts arrived at different jurisdictional results. By switching from the situs test to the *Executive Jet* test, the Court traded jurisdictional decisions based on the happenstance of where a tort occurs for jurisdictional decisions based on the happenstance of which court hears the case. In *Jerome B. Grubart*, Justice Thomas bemoaned

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.productliabilityandmasstorts.com/2015/07/potential-game-changer-admiralty-jurisdiction-law-serves-as-a-basis-for-removal [http://perma.cc/M372-3G46].

[56] *Lu Junhong*, 792 F.3d at 807.

[57] *See* Exec. Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249, 253–54 (1972).

[58] *See id.* at 267–68 (noting the "anomaly" if, for example, "two aircraft collid[e] at a high altitude, with one crashing on land and the other in a navigable river," *id.* at 267); *see also* Jerome B. Grubart, Inc. v. Great Lakes Dredging & Dock Co., 513 U.S. 527, 532–33 (1995).

[59] *See Jerome B. Grubart*, 513 U.S. at 553–54 (Thomas, J., concurring in the judgment); *see also* Matthew P. Harrington, *After the Flood: Cleaning Up the Test for Admiralty Jurisdiction over Tort*, 29 U.C. DAVIS L. REV. 1, 30–32 (1995).

[60] *Lu Junhong*, 792 F.3d at 816 (citing Miller v. United States, 725 F.2d 1311, 1315 (11th Cir. 1984); Williams v. United States, 711 F.2d 893, 896 (9th Cir. 1983); Roberts v. United States, 498 F.2d 520, 524 (9th Cir. 1974)).

[61] *Id.* (citing U.S. Aviation Underwriters, Inc. v. Pilatus Bus. Aircraft, Ltd., 582 F.3d 1131 (10th Cir. 2009)). The Seventh Circuit thought *U.S. Aviation Underwriters* was potentially distinguishable from *Miller*, *Williams*, and *Roberts* on the purpose of the flight, but did not delve deeply into the question. *See id.*

this confusion.[62] He labeled the inquiry a "balancing test" of the sort whose "faults . . . are clearest, and perhaps most destructive, in the area of jurisdiction."[63] He noted that confused lower courts fell back on totality-of-the-circumstances tests that left private actors uncertain of whether their cases would fall under admiralty jurisdiction.[64] And finally, he thought the situs test, as a bright-line rule, could avoid "wasteful litigation over threshold jurisdictional questions"[65]: if the tort occurs on a navigable waterway, admiralty jurisdiction applies.[66]

The price of a return to the location-based rule may be an increase in the number of marginal cases reaching federal court. *Executive Jet* required that the plaintiff establish a connection to a traditional maritime activity in part to avoid invocation of location-based admiralty jurisdiction in "almost absurd" situations, such as when a swimmer is injured near shore.[67] A return to the location test might reopen federal courts to such cases. But, according to Justice Thomas, "the resources needed to resolve [such cases] 'will be saved many times over by a clear jurisdictional rule'" that cuts out litigation over jurisdiction.[68]

It is plausible that Judge Easterbrook's position will gain traction among the district courts, partly because it might be some time before another circuit court weighs in. If it does, and if a surge in the number of motions to remove on the grounds of admiralty jurisdiction follows, then trial courts will be compelled to grapple more often with what has been criticized as a convoluted and unpredictable jurisdictional test. In that case, the Court may face increasing pressure to reconsider both the implications of the revisions to § 1441 and its support for the *Executive Jet* test.

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[62] *Jerome B. Grubart*, 513 U.S. at 549–54 (Thomas, J., concurring in the judgment). Though concerned that even *Executive Jet* undermined "[t]he simplicity of [the location] test," *id.* at 550, Justice Thomas thought that the *Executive Jet* "substantial relationship" test, if limited to aircraft, could work so long as the location-based test applied to traditional waterborne vessels, *id.* at 551. Despite this caveat, Justice Thomas's criticism in *Jerome B. Grubart* is pertinent. *Lu Junhong*'s removal holding will apply to cases involving traditional vessels as well as to those involving aircraft.

[63] *Id.* at 549.

[64] *Id.* at 553.

[65] *Id.* at 556.

[66] *Id.* at 555–56.

[67] *See* Exec. Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249, 255 (1972).

[68] *Jerome B. Grubart*, 513 U.S. at 555 (Thomas, J., concurring in the judgment) (quoting Sisson v. Ruby, 497 U.S. 358, 374–75 (1990) (Scalia, J., concurring in the judgment)).