

LIABILITY AND SALVAGE: *TITANIC* JURISPRUDENCE IN UNITED STATES FEDERAL COURT

by
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On May 31, 1911, the R.M.S Titanic was launched from the Harland & Wolff shipyard in Belfast, Ireland. On August 15, 2011, the District Court for the Eastern District of Virginia awarded R.M.S. Titanic, Inc., an in specie salvage award for artifacts recovered from the wreck of the Titanic. One hundred years after its launch, the Titanic still is perhaps the most famous ship in modern history and, despite its British ownership and loss in international waters, the sinking and salvage of the ship has been heavily litigated in United States courts. This Comment examines the legal history of the Titanic's admiralty jurisprudence in United States federal courts, beginning with the shipowner's effort to limit its liability, and culminating with an analysis of the eighteen-year litigation that led to the salvage award. This Comment argues that public policy is best served by court-supervised salvage awards and that recovery and restoration of historical artifacts is neither "exploitation" nor "grave robbing" as some detractors have maintained. Salvors such as R.M.S. Titanic, Inc., should be recognized for performing a valuable public service—the preservation of cultural treasures that otherwise would be lost to the natural elements—through judicially supervised compensation that provides adequate protection for wreck sites and recovered artifacts. As newer and better underwater exploration technology becomes available, more wrecks will be discovered and known wrecks that currently are inaccessible may be explored. It is important to provide incentives to those willing to assume the risks involved in this type of recovery, and clear guidance from the courts is essential for would-be salvors to evaluate whether to undertake a particular project. Judicial oversight also protects the public interest by regulating the treatment of the historical wrecks, limiting the types of artifacts that may be recovered, and controlling how those artifacts are displayed. The salvor makes a bargain with the court—the salvor is granted exclusive access to a wreck site but may not simply sell the artifacts to the highest bidder, which could deprive access to the public. The salvage award granted in R.M.S. Titanic, Inc. v. The

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Wrecked and Abandoned Vessel represents a sensible approach that should be adopted for yet-to-be-explored historical shipwrecks.

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I. INTRODUCTION

The British passenger ship *R.M.S. Titanic* struck an iceberg at 11:40 PM on April 14, 1912, and sank to the bottom of the Atlantic Ocean at 2:20 AM on April 15, with the loss of more than 1,500 lives. Although the *Titanic* was built, owned, and operated by the Oceanic Steam and Navigation Company (or, the “White Star Line”) of Great Britain, the

company was part of the International Mercantile Marine conglomerate owned by an American, J.P. Morgan, and many other prominent Americans were lost in the disaster. As a result, liability for the loss was litigated on both sides of the Atlantic, and the governments of the United States and Great Britain each held hearings to investigate the disaster.

The discovery of the wreck site in September, 1985, opened up a new chapter in the legal history of the *Titanic*. Immediate concerns arose about the preservation of the wreck site, and there was sharp disagreement among historians, scientists, and the general public as to whether the wreck should be disturbed. Dr. Robert Ballard, who discovered the *Titanic*, felt that the wreck site should be treated as a memorial, similar to the *U.S.S. Arizona* in Pearl Harbor. Ballard did not claim salvage rights to the vessel, and later published the coordinates of the wreck, effectively inviting other entities to make salvage claims. The pro-salvage argument was equally compelling—the wreck was deteriorating rapidly and, without recovery, valuable historical artifacts would be lost. The 18-year litigation that attracted the involvement of several nations, combined with the worldwide interest in recovered-artifact exhibitions, is proof that the *Titanic* still retains its historical and cultural significance 100 years after the sinking. The metaphoric potency of the “unsinkable ship” lost to hubris on its first voyage still inspires passion among those who disagree with the proper way to preserve its memory.

Part I of this Comment explores the development of the *Titanic*, its loss, and the aftermath of the sinking. The limitation of liability claim brought by the ship-owner, the White Star Line, is analyzed from its onset through its eventual resolution. Insurance claims made by the White Star Line are also examined, and the legislative reaction to the sinking—the Death on the High Seas Act (“DOHSA”)—is explored through subsequent cases that eventually superseded earlier *Titanic* holdings.

In Part II, I describe the discovery of the wreck of the *Titanic*, and the reaction to that discovery. Whether to recover artifacts or leave the wreck undisturbed has been a contentious issue, and Part II provides a brief primer on the background principles of admiralty law that promote salvage, as well as a public policy argument favoring salvage of historical shipwrecks. Quite simply, if precious artifacts are left “undisturbed” they will be lost forever, so salvage and restoration form the only responsible course. The legislative reaction to the discovery—the R.M.S. Titanic Maritime Memorial Act of 1986 (“Memorial Act”)—as well as the international Agreement Concerning the Shipwrecked Vessel RMS Titanic (“International Agreement”), are both shown to have heavily informed the eventual salvage award. I explain the process through which a salvor acquires a salvage award by acquiring a maritime lien against the vessel and then enforcing that lien through an in rem action. Finally, I discuss how R.M.S. Titanic, Inc. (“RMST”) brought its case to federal court and defended its claim against several challengers in order

to achieve salvor-in-possession status, as well as the limits that the court placed upon RMST's claim.

Part III contains an exposition of how RMST refined its salvage claim to meet the guidelines set out by the District Court for the Eastern District of Virginia, and the Court of Appeals for the Fourth Circuit. The district court granted RMST a salvage award of more than \$100 million, based upon RMST's skill in conducting the retrieval, the danger involved in diving to a wreck two miles below the ocean surface, and the care shown in the retrieval and restoration of the recovered artifacts. However, in order for RMST to receive the award, RMST first had to agree to several negotiated covenants ("the Covenants") governing its use and display of the artifacts. Part III shows how RMST met these requirements to receive its entire salvage award claim, how that salvage award was calculated, and how the court evaluated RMST's claim to determine in what form the award should be paid. RMST expended tremendous effort, at great financial and physical risk, and deserved remuneration. Granting an *in specie* award to RMST with provision for public display of recovered artifacts serves a trifecta of public policy interests: preservation of historical artifacts; public access to those artifacts; and compensation for the expertise and industry behind the recovery of those artifacts.¹ Absent recovery, the entire wreck would continue to deteriorate, leaving nothing for future generations to see and touch.

I conclude with an acknowledgement of the *Titanic's* continuing influence upon admiralty law, 100 years after the sinking. Coupled with the 18-year RMST salvage claim, the enactment of DOHSA and the Memorial Act constitute a jurisprudential legacy and influence that is unique to this ship. The enormous and unwavering tide of public interest that has followed the *Titanic* from sinking to salvage shows no sign of ebbing, and the RMST salvage award can serve as a model for future endeavors, while preserving the memory of the *Titanic*.

II. R.M.S. TITANIC: CONCEPTION, LOSS, AND DISCOVERY

A. *The Development and Design of the R.M.S. Titanic*

The forces leading to the conception of the *Titanic* were emblematic of the issues that drove the political and cultural climate at the beginning of the twentieth century. Inspired by a rival pair of British liners, built in response to German ships, the *Titanic* was the second of three planned "sister" ships designed to provide weekly sailings between Southampton,

¹ *In specie* comes from the Latin, and means "in its actual form." An *in specie* award grants some form of title to the salvor, whereas a standard award typically is paid from the sale of salvaged goods. See *R.M.S. Titanic, Inc. v. Wrecked & Abandoned Vessel*, 742 F. Supp. 2d 784, 808 (E.D. Va. 2010).

England and New York City.² In the early 1900s, with immigration to the United States at its peak, the transatlantic passenger trade was highly profitable. The revenue earned from the immigrant trade allowed for construction of ever-larger ships that catered to the wealthiest in society.

In 1897, Germany introduced a new breed of ocean liner that surpassed anything previously built—the *Kaiser Wilhelm der Grosse*—the fastest passenger ship on the Atlantic, and the largest ship in the world.³ The construction of such a vessel truly was a national effort, and the major European shipbuilding nations devoted substantial resources toward building the largest and fastest passenger ships possible. Similar to the competitions in weapons development and space exploration that would follow later in the twentieth century, the development of passenger ships consumed the public imagination and often involved government subsidies as well.

In response to the perceived German threat to its nautical supremacy, the Cunard Line of Great Britain introduced the *R.M.S. Lusitania* and *R.M.S. Mauretania* in 1907. In terms of both size and speed, these two ships were a quantum leap beyond anything previously built. While the *Lusitania* is remembered primarily for its loss in World War I, the *Mauretania* held the North Atlantic speed record for 22 years, and was perhaps the most popular and famous ship in its day.⁴ The Cunard Line negotiated a subsidy arrangement with the British Government—the government assisted with the financing for the ships' construction—and the ships were designed for modification in case of war.⁵ Both the *Lusitania* and *Mauretania* had fittings for deck guns, and additional design features that, in addition to their speed, made them attractive to the British Admiralty.⁶

The White Star Line was Cunard Line's great British rival. Unlike the Cunard Line, the White Star Line did not benefit from government subsidies. The White Star Line thus could not compete with Cunard and, accordingly, White Star was absorbed in 1902 by J.P. Morgan's conglomerate, the International Mercantile Marine.⁷ In 1907, following the introduction of the *Lusitania*, the owner of the White Star Line, J. Bruce Ismay, discussed his conception of three gargantuan sister ships with his chief builder, Lord Pirrie, owner of the Harland & Wolff shipyard in Belfast.⁸

On May 31, 1911, the first of the sister ships, *R.M.S. Olympic*, was ready to depart the shipyard and begin its commercial service with its

² See JOHN MAXTONE-GRAHAM, *THE ONLY WAY TO CROSS* 44–60 (1972).

³ See CLAS BRODER HANSEN, *PASSENGER LINERS FROM GERMANY 1816–1990*, at 63 (Edward Force trans., 1991).

⁴ MAXTONE-GRAHAM, *supra* note 2, at 10–43.

⁵ *Id.* at 11.

⁶ STEPHEN HARDING, *GREAT LINERS AT WAR* 105–07 (2007).

⁷ JOHN P. EATON & CHARLES A. HAAS, *TITANIC: TRIUMPH AND TRAGEDY* 13 (2d ed. 1995).

⁸ *Id.* at 19.

maiden voyage.⁹ On the same day, the partially completed *Titanic* was launched from its construction gantry and entered the water for the first time. Already rising in the gantry next to *Titanic*, where *Olympic* had been formed, the *R.M.S. Gigantic* was beginning to take shape. Following the launch, the *Olympic* departed with Bruce Ismay and J.P. Morgan aboard for the voyage to England, where the *Olympic* would depart for New York.¹⁰ Ismay's dream was nearing realization.

The introduction of the *Olympic* generated considerable excitement. It was the longest and largest passenger ship to date (though not the fastest; White Star Line had forgone competing for speed records and chosen to focus upon luxury). The *Titanic* attracted less notice, since it was a nearly identical replica of *Olympic*, and was not in contention for a speed record. Contrary to popular belief, the *Olympic* and *Titanic* were never advertised by their builders or owners as being "unsinkable." The source of *Titanic*'s "unsinkability" came from a British nautical journal, *The Shipbuilder*, in describing the operation of the watertight door system: "[I]n the event of [an] accident . . . the captain can, by simply moving an electric switch, instantly close the doors throughout and make the vessel practically unsinkable."¹¹

B. *Titanic in Service*

The *Titanic* had a brief service life and was resting on the bottom of the Atlantic Ocean less than two weeks after leaving the shipyard. On the morning of April 2, 1912, the *Titanic* left the Harland & Wolff shipyard for a day of sea trials, and on board for the day of testing were the owners, builders, designers, and representatives from the British Board of Trade, whose certification was required before the ship could carry passengers. The *Titanic* returned to Belfast that afternoon and was certified, and then officially handed over to the White Star Line by Harland & Wolff. Later that evening, the *Titanic* departed for a nearly daylong voyage to Southampton, from where it was scheduled to depart for New York on April 10.¹² Several hours before arriving in Southampton, the *Titanic* passed the outbound *Olympic*—the nearly identical sister ships' only encounter at sea.¹³

The *Titanic* sailed from Southampton at noon on Wednesday, April 10, 1912. While departing from the pier, the wash of its propellers caused another passenger ship, the *New York*, to be pulled from its moorings and, without quick action from several tug boat commanders, the two ships

⁹ *Id.* at 92.

¹⁰ DON LYNCH & KEN MARSCHALL, *TITANIC: AN ILLUSTRATED HISTORY* 22 (1992).

¹¹ *The White Star Liners "Olympic" and "Titanic"*, 6 *SHIPBUILDER*, Midsummer 1911, at 26 *reprinted in* OCEAN LINERS OF THE PAST: THE WHITE STAR TRIPLE SCREW ATLANTIC LINERS OLYMPIC AND TITANIC (N.Y. Graphic Soc'y Ltd. 1970).

¹² See TOM MCCLUSKIE ET AL., *TITANIC & HER SISTERS OLYMPIC & BRITANNIC* 137–41 (1998).

¹³ See LYNCH & MARSCHALL, *supra* note 10, at 10–11.

would have collided. As the *Titanic* sailed toward its first stop in Cherbourg, France, later that evening, an uncontrolled fire continued to burn in one of its coal bunkers.¹⁴ The doomed maiden voyage had begun.

After departing from Cherbourg just after midnight, the *Titanic* made one last stop at Queenstown (now Cobh), Ireland, before heading out into the Atlantic on the afternoon of April 11, 1912.¹⁵ The voyage was routine until the night of April 14. Earlier that day, the *Titanic* received warnings of pack ice and icebergs from other vessels in its vicinity and, as evening came, the weather turned frigid.¹⁶ The *Titanic* continued on at full speed as it grew dark and, at 11:40 PM, the ship struck an iceberg on its starboard (right) side. Two hours and forty minutes later, at 2:20 AM, the *Titanic* sank with a loss of 1,523 lives.¹⁷

C. Recovery and Liability

1. Rescue

After the sinking, the survivors were rescued by the *S.S. Carpathia* of the Cunard Line and brought to New York. There was no recoverable property other than the lifeboats, and immediate salvage was not an option because the *Titanic* sank in an area approximately two miles deep (which would have been beyond the reach of 1912 technology).¹⁸ The White Star Line dispatched the *MacKay Bennett* to retrieve some of the hundreds of corpses still floating in the North Atlantic. Bodies in poor condition were buried at sea, while others (including that of John Jacob Astor IV) were recovered and brought to Halifax for identification and burial by family.¹⁹

2. Hearings

The United States Senate acted immediately, adopting a resolution on April 17, and commencing a hearing on April 19, the day after the *Carpathia* arrived in New York. Crew members and passengers were called as witnesses.²⁰ Senator William Alden Smith of Michigan sought to establish negligence with the knowledge of the owner, which would have allowed suits under the Harter Act, but Smith was unsuccessful. The committee did make two major recommendations, which were quickly

¹⁴ *Id.* at 29, 33, 35; L. MARMADUKE COLLINS, *THE SINKING OF THE TITANIC: AN ICE-PILOT'S PERSPECTIVE* 15 (2002).

¹⁵ LYNCH & MARSCHALL, *supra* note 10, at 35, 37, 40.

¹⁶ JOHN P. EATON & CHARLES A. HAAS, *TITANIC: DESTINATION DISASTER* 10 (rev. ed. 1996).

¹⁷ *Id.* at 7, 16, 27, 34.

¹⁸ *Id.* at 45, 138; Robert D. Peltz, *Salvaging Historic Wrecks*, 25 TUL. MAR. L.J. 1, 7 (2000).

¹⁹ EATON & HAAS, *supra* note 16, at 99–102.

²⁰ See MCCLUSKIE ET AL., *supra* note 12, at 344, 359.

implemented—all vessels should have adequate lifeboat capacity and 24-hour radio operators.²¹

Beginning on May 2, 1912, the British Board of Trade conducted its own investigation, which was based upon a set of questions submitted by Attorney General Sir Rufus Isaacs K.C. The questions ranged from technical inquiries concerning the design and construction of the ship to post-iceberg conduct involving passengers, crew, rescuers, and potential rescuers.²²

The Board concluded that the *Titanic* was being driven too fast through an area known to contain dangerous ice conditions, but did not hold its captain, E.J. Smith, to be negligent, in part because it was a common practice on the North Atlantic. The Board of Trade itself had some liability in the disaster, since it had certified *Titanic's* lifeboat capacity, even though the lifeboats only could hold about half of the ships's full capacity of passengers and crew.²³

3. *Litigation: The Legacy of The Titanic*

In February, 1913, American claimants filed multiple lawsuits in the District Court for the Southern District of New York.²⁴ The White Star Line subsequently petitioned to limit its liability under the Limited Liability Act,²⁵ which limits the liability of the ship-owner to the value of the vessel and its pending freight, and vests authority in the district court.²⁶ Under that statute, a ship-owner may limit its liability only if that liability arises without the ship-owner's "privity or knowledge."²⁷

In *The Titanic*, the White Star Line sought to limit its liability under the statute to \$91,805.54—the value White Star had assigned to the fourteen recovered lifeboats and pending freight.²⁸ The District Court for

²¹ See EATON & HAAS, *supra* note 16, at 117; MCCLUSKIE ET AL., *supra* note 12, at 356, 359.

²² MCCLUSKIE ET AL., *supra* note 12, at 347–50.

²³ See *id.* at 356. This regulation was based upon the registered gross tonnage of a vessel, rather than its passenger capacity. This ceiling requirement had not kept pace with the exponential growth of ships at the turn of the twentieth century. See EATON & HAAS, *supra* note 16, at 24.

²⁴ See EATON & HAAS, *supra* note 7, at 278.

²⁵ 46 U.S.C. § 30505 (2006); *The Titanic*, 209 F. 501, 501–02 (S.D.N.Y. 1913). The purpose of the act limiting liability is to encourage shipping. See *Evansville & Bowling Green Packet Co. v. Chero Cola Bottling Co.*, 271 U.S. 19, 21 (1926) (“The rule of limited liability of owners of vessels is an ancient one. It has been administered in the courts of admiralty in Europe from time immemorial and by statute applied in England for nearly two centuries. Our statutes establishing the rule were enacted to promote the building of ships, to encourage the business of navigation, and in that respect to put this country on the same footing with other countries.” (citations omitted)).

²⁶ 46 U.S.C. § 30505(a); see also *The Titanic*, 204 F. 295 (S.D.N.Y. 1912) (finding that the admiralty court has full and exclusive jurisdiction and denying a motion to modify an injunction restraining suits related to the sinking in other courts); GRANT GILMORE & CHARLES L. BLACK, JR., *THE LAW OF ADMIRALTY* 834–35 (2d ed. 1975).

²⁷ 46 U.S.C. § 30505(b).

²⁸ *The Titanic*, 209 F. at 502.

the Southern District of New York held that an American statute governing liability could not, and should not, apply to a British ship on the high seas.

“In the first place, the acts causing the damage were done, so far as appears, outside the jurisdiction of the United States and within that of other states. It is surprising to hear it argued that they were governed by the act of Congress. . . .”

. . . The Titanic was a British ship, owned by a British company, which foundered in mid-ocean from collision with an iceberg. Those facts are all that are necessary to raise the fundamental question whether her owners can obtain exemption from liability by virtue of an American law.²⁹

According to the court, expanding the statute to embrace foreign vessels would have unintended repercussive effects:

If the owners of the Titanic . . . can obtain a limitation of their liability in this court, they could have obtained it if she had foundered in the harbor of Southampton, . . . while still undoubtedly within the territorial jurisdiction of England. If they are entitled to limitation of liability in this country, they are entitled to limit their liability in all countries It seems to me that such results could not have been within the intention of Congress . . . and that the rule laid down by the Supreme Court . . . that when a collision occurs on the high seas between two vessels of the same country, the liability of their owners is to be determined by the law of the country to which the vessel belongs, applies in this case.³⁰

In denying White Star’s petition, Judge Holt also questioned the universal acceptance of the limited liability rule itself:

[T]he rule exempting shipowners from liability on surrender of the ship and freight does not seem to have ever been universally adopted throughout Europe. . . . No such rule was ever recognized in the English courts, either of admiralty or common law, until the act of 1813, which adopted the rule by statute; and it is now well settled that no such rule was ever in force in this country until the act of 1851.³¹

On appeal, the Second Circuit certified three questions to the United States Supreme Court:

A. Whether in the case of a disaster upon the high seas, where (1) only a single vessel of British nationality is concerned and there are claimants of many different nationalities; and where (2) there is nothing before the court to show what, if any, is the law of the foreign country to which the vessel belongs, touching the owner’s liability for such disaster, such owner can maintain a proceeding

²⁹ *Id.* at 511 (quoting *Am. Banana Co. v. United Fruit Co.*, 213 U.S. 347, 355 (1909)).

³⁰ *Id.* at 512.

³¹ *Id.* at 511–12 (citation omitted).

under sections 4283, 4284 and 4285, U.S. Revised Statutes and the fifty-fourth and fifty-sixth Rules in Admiralty?

B. Whether, if in such a case it appears that the law of the foreign country to which the vessel belongs makes provision for the limitation of the vessel owner's liability, upon terms and conditions different from those prescribed in the statutes of this country, the owner of such foreign vessel can maintain a proceeding in the courts of the United States, under said statutes and rules?

In the event of the answer to question B being in the affirmative:

C. Will the courts of the United States in such proceeding enforce the law of the United States or of the foreign country in respect to the amount of such owner's liability?³²

The Supreme Court held "that the first two questions must be answered in the affirmative and the third, the law of the United States."³³ Justice Holmes, writing for the Court, emphasized that the statute did not extend to outside parties, but only to those parties who sought relief in federal court: "The question is not whether the owner of the *Titanic* . . . can require all claimants to come in and can cut down rights vested under English law, as against . . . Englishmen living in England who do not appear."³⁴ Rather, the issue was "whether those who do see fit to sue in this country are limited in their recovery irrespective of the English law."³⁵ Thus, the White Star Line, owner of a ship of "British nationality" which sank in international waters resulting in claims arising from plaintiffs of varying nationalities, could seek to limit its liability in the suits brought in U.S. courts, even if no such limitations existed in England. Claimants were still free to litigate in foreign forums, unhindered by the statute because, as the Court held, "We see no absurdity in supposing that if the owner of the *Titanic* were sued in different countries . . . the local rule should be applied in each case."³⁶ Justice Holmes indicated that the statutory ability to limit liability in American courts did not flow from an ability to regulate foreign vessels in international waters; rather, Congress based its action upon its ability to regulate the scope and nature of available relief in American courts:

For on what ground was the limitation of liability allowed in *The Scotland* or *La Bourgogne*? Not on their being subject to the act of Congress or any law of the United States in their conduct—but if not on that ground, then it must have been because our statute permits a foreign vessel to limit its liability according to the act when sued in the United States.³⁷

³² *The Titanic*, 209 F. 513, 513–14 (2d Cir. 1913).

³³ *Oceanic Steam Navigation Co. v. Mellor*, 233 U.S. 718, 734 (1914).

³⁴ *Id.* at 732.

³⁵ *Id.* at 732–33.

³⁶ *Id.* at 734.

³⁷ *Id.* at 733; see also *The "Scotland"*, 105 U.S. 24, 31 (1882) ("But it is enough to say, that the rule of limited responsibility is now our maritime rule. It is the rule by which, through the act of Congress, we have announced that we propose to

Once a ship-owner petitions for limitation of liability, all other claims in American courts must cease or be consolidated.³⁸ On June 22, 1915, the trial began with initial consolidated claims totaling \$16 million.³⁹ Interestingly, among the experts consulted prior to the trial was Captain William Turner of the Cunard Line, who gave testimony on April 30, 1915.⁴⁰ Turner testified on several matters pertaining to the operation of a large ocean liner including navigation, posting of lookouts, and basic principles of buoyancy involving watertight compartments. The next day, Turner was in command of the *Lusitania* at it sailed out of New York Harbor and into history.⁴¹

Eventually, the parties reached a formal settlement on July 28, 1916, for the amount of \$664,000. The claimants agreed to end their claims in the United States and England, and they acknowledged that the White Star Line “had no ‘privity or knowledge’ of any negligence on the *Titanic*.”⁴²

Meanwhile, the district courts continued to apply the holding in *The Titanic*, despite confusion resulting from procedural limitations imposed by the 1949 *Norwalk Victory* decision,⁴³ although eventually the circuit courts would determine that DOHSA ultimately superseded *The Titanic*⁴⁴:

administer justice in maritime cases. We see no reason, in the absence of any different law governing the case, why it should not be applied to foreign ships as well as to our own, whenever the parties choose to resort to our courts for redress.”).

³⁸ 46 U.S.C. § 30511(c) (2006); FED. R. CIV. P. F(3).

³⁹ Robert D. Peltz, *The Titanic's Legacy: The History and Legal Developments Following the World's Most Famous Maritime Disaster*, 12 U.S.F. Mar. L.J. 45, 54 (1999–2000); see also EATON & HAAS, *supra* note 7, at 278.

⁴⁰ EATON & HAAS, *supra* note 7, at 277.

⁴¹ *Id.*

⁴² WALTER LORD, *THE NIGHT LIVES ON* 208–10 (1986).

⁴³ See *Black Diamond S.S. Corp. v. Robert Stewart & Sons, Ltd. (The Norwalk Victory)*, 336 U.S. 386 (1949). An American vessel owner and American charter operator petitioned for liability after the vessel *Norwalk Victory* collided with the British steamer *Merganser*, which sank in Belgian waters. The operator, Black Diamond, argued that Belgian law applied, which set liability at \$325,028.79 and Black Diamond posted a bond for this amount after being sued for \$1 million by the owner of the *Merganser*. *Id.* at 388–91. The Court reversed a dismissal of the petition that was based upon the size of the posted bond, but the Court agreed with the court of appeals' interpretation of *Mellor*: “[I]f, indeed the Belgian limitation attaches to the right, then nothing in *The Titanic* stands in the way of observing that limitation.” *Id.* at 395 (citation omitted). Justice Frankfurter indicated that the question of whether the Belgian limitation would be used depended upon whether the limitation was substantive or procedural in Belgian law. *Id.* at 388–96. For more on Justice Frankfurter's “extraordinarily obscure opinion” and “baffling hypotheses” on the procedural–substantive distinction in *The Norwalk Victory*, see GILMORE & BLACK, *supra* note 26, at 940–42.

⁴⁴ In a pair of high-profile commercial airliner disasters the D.C. and Second Circuits noted that DOHSA allows foreign actions to be brought in U.S. courts. See *In re Air Crash off Long Island, New York*, 209 F.3d 200, 208 (2d Cir. 2000); *In re Korean Air Lines Disaster of Sept. 1, 1983*, 117 F.3d 1477, 1484–85 (D.C. Cir. 1997). See also *infra* note 55. Coincidentally, the sinking of the *Titanic* helped inspire DOHSA. See

In *Petition of Chadade Steamship Company*,⁴⁵ the District Court for the Southern District of Florida strained to apply *The Titanic*, recognizing the apparent limitations of *The Norwalk Victory* when it held that Panamanian limitation law should apply in the case of the burning and sinking of the cruise ship *Yarmouth Castle*, since the limitation was a substantive law of Panama:

The Titanic must have held either that the American statute required that American law be applied regardless of the otherwise applicable foreign law; or that the application of the foreign limitation would be contrary to American public policy; or finally, that the entire limitation of liability proceedings must be classified as procedural.⁴⁶

The *Chadade* decision stands in sharp contrast to the result in *Complaint of Ta Chi Navigation (Panama) Corp. S.A.*, where the District Court for the Southern District of New York held the United States Limitation of Liability Act should apply “in the absence of any proof that the substantive law of the Republic of Panama would fix the shipowner’s liability in a lesser amount than fixed under [the Limitation of Liability Act].”⁴⁷ In *Ta Chi*, the claimants attempted to use *Chadade*, but the *Ta Chi* court drew a distinction because the Panamanian law in question did not fix the ship-owner’s liability any lower than it would have been under the Limitation of Liability Act while, in *Chadade* and *The Titanic*, the foreign laws had set higher liability limits. The *Ta Chi* court recognized the contradictory holdings in the two cases, and offered its own interpretation of the Act:

It seems difficult to reconcile the different conclusions reached in the two cases, and since *Chadade* has apparently never been cited by any court, it certainly cannot be regarded as defining the law in this Circuit.

The learned Judge in *Chadade* suggested that if his analysis of *The Titanic* and *The Norwalk Victory* were not correct, *The Titanic* should be reexamined in the light of the conflict of laws This, however, is a legislative, rather than a judicial prerogative. There is nothing ambiguous about the statute.⁴⁸

While the D.C. and Second Circuits would eventually indicate that DOHSA superseded *The Titanic*,⁴⁹ the case would have a lingering impact

infra Part II.C.5; *see also* *The Vestris*, 53 F.2d 847, 852–53 (S.D.N.Y. 1931) (citing former 46 U.S.C. §§ 761–68 (1925) (codified as amended at 46 U.S.C. § 30301–08 (2006))).

⁴⁵ 266 F. Supp. 517 (S.D. Fla. 1967).

⁴⁶ *Id.* at 523. “Although both *The Titanic* and *The Norwalk Victory* have been cited many times . . . no court seems to have been confronted by any conflict, real or apparent, between the two.” *Id.* at 521.

⁴⁷ *Complaint of Ta Chi Navigation (Panama) Corp. S.A.*, 416 F. Supp. 371, 379–80 (S.D.N.Y. 1976).

⁴⁸ *Id.* at 378–80.

⁴⁹ *See supra* note 44.

on liability actions into the twenty-first century, continuing the legacy of *Titanic* jurisprudence.

4. Insurance

The *Titanic* was insured for approximately \$7.5 million, of which Lloyd's of London provided \$5 million (£1 million in 1912) in hull insurance coverage.⁵⁰ Most of the London market took part in the endeavor:

Considered a prestigious risk to insure, cover for the hull alone was £1million – around £95million in today's money. Numerous Lloyd's syndicates put their names down on the slip to cover amounts ranging from £10,000 to £75,000. Willis was able to negotiate a favourable premium for the "unsinkable" vessel of just £7,500.⁵¹

The insurers settled quickly. Incredibly, despite the fact that that "the sinking of the *Titanic* involved the largest total loss the marine underwriters ha[d] ever had to meet from a single disaster," within two weeks of the sinking, "practically all of the policies written had been met."⁵²

5. Legislative Reaction to the Sinking

The sinking of the *Titanic* had a profound effect upon merchant shipping—it inspired enhanced international safety regulations and increased access to courts for aggrieved parties in the United States. In 1920, the United States Congress implemented DOHSA "to provide the wrongful death cause of action missing in admiralty, and to create uniformity in death actions arising beyond the boundaries of state territorial waters."⁵³ Congress had been considering the matter for some time, but the sinking of the *Titanic* brought the matter to the forefront.⁵⁴ The Act was a response to "decisions permitting the owners of . . . foreign vessels to take advantage of U.S. statutes limiting their liability."⁵⁵

⁵⁰ See *A \$5,000,000 Risk Carried by Lloyd's*, N.Y. TIMES, Apr. 16, 1912, at 7; *London Insurance \$5,000,000*, N.Y. TIMES, Apr. 24, 1912, at 3.

⁵¹ *Remembering Titanic 100 Years On*, LLOYD'S (Apr. 13, 2012), <http://www.lloyds.com/News-and-Insight/News-and-Features/Lloyds-News/Lloyds-News-2012/Remembering-Titanic-100-years-on>.

⁵² *Titanic Insurance Claims Quickly Met*, N.Y. Times, Apr. 28, 1912, at 5.

⁵³ John Edginton Ball, Comment, *Wrongful Death at Sea—The Death on the High Seas Act*, 51 CALIF. L. REV. 389, 390 (1963).

⁵⁴ Stephen R. Ginger & Will S. Skinner, *DOHSA's Commercial Aviation Exception: How Mass Airline Disasters Influenced Congress on Compensation for Deaths on the High Seas*, 75 J. AIR L. & COM. 137, 142 (2010); Robert M. Hughes, *Death Actions in Admiralty*, 31 YALE L.J. 115, 117–18 (1921).

⁵⁵ *In re Korean Air Lines Disaster of Sept. 1, 1983*, 117 F.3d 1477, 1484–85 (D.C. Cir. 1997). In this case the D.C. Circuit effectively held that DOHSA supersedes *The Titanic's* reading of the Limitation of Liability Act because "substantive provisions of the Death on the High Seas Act were not to displace foreign law in those cases in which foreign law already applied." See *supra* notes 32–33 and accompanying text.

The *Titanic* quickly vanished beneath the waves of the North Atlantic, yet it would never be forgotten. In addition to the cultural impact of the disaster, the enactment of DOHSA, the enhancement of international safety regulations, and the precedents of *The Titanic* and *The Norwalk Victory* all enshrined the *R.M.S Titanic* in American maritime law. As important as these developments were to *Titanic* jurisprudence, there was another body of law where the ill-fated ship would exert even more influence—but first, the *Titanic* would have to be located.

III. CLAIMING THE *TITANIC*

A. *The Discovery of the Wreck*

On September 1, 1985, a joint French/American expedition led by Dr. Robert Ballard of the Woods Hole Oceanographic Institute discovered the wreck site of the *Titanic*. The team initially used a towed underwater sled to complete sonar scans of the ocean floor, but the first wreckage was visually identified by technicians monitoring the photographic scans conducted by the sled.⁵⁶ Ballard professed a decades-long dream to find the *Titanic* and adroitly negotiated an agreement with the United States Navy, pursuant to which Ballard's team first covertly examined the lost submarine *U.S.S. Scorpion* using the Navy's newest underwater sled, and, if time remained, Ballard was free to look for the *Titanic*.⁵⁷

B. *Salvage Principles*

The legal principles supporting the salvage of the *Titanic* are part of the greater body of ancient maritime law. Justinian's Code, drafted in the sixth century, provided a survey of maritime law, including vague references to an ancient "Rhodian" Law, a maritime code supposedly created on the Island of Rhodes.⁵⁸ The law of General Average—the right to eject cargo to save the ship, with the loss shared—is contained in the Digest of Justinian: "The Rhodian law provides that if cargo has been jettisoned in order to lighten a ship, the sacrifice for the common good must be made good by common contribution."⁵⁹

The Age of Discovery brought increased commerce and the development of the law merchant—*lex mercatoria*. "As this commerce grew in importance, maritime courts naturally arose in Atlantic and Baltic port towns and new codes took their names from the localities where they

⁵⁶ See ROBERT BALLARD WITH RICK ARCHBOLD, ROBERT BALLARD'S TITANIC 61–83 (2007).

⁵⁷ ROBERT D. BALLARD WITH MICHAEL S. SWEENEY, RETURN TO TITANIC: A NEW LOOK AT THE WORLD'S MOST FAMOUS SHIP 36–39 (2004).

⁵⁸ GILMORE & BLACK, *supra* note 26, at 3–4.

⁵⁹ DAVID W. ROBERTSON ET AL., ADMIRALTY AND MARITIME LAW IN THE UNITED STATES: CASES AND MATERIALS 379 (2d ed. 2008).

were promulgated.”⁶⁰ A collection of laws known as the Rules of Oleron is often cited as a predecessor to American maritime law. Named for a small island off the Atlantic coast of France, the Rules of Oleron were introduced into England during the twelfth century, and thus are a part of the tradition of American maritime law as well.⁶¹

The Age of Discovery also shifted the focus of shipping squarely into the Atlantic Ocean, and English law made its way to the American colonies. The Crown granted jurisdiction to colonial courts of vice admiralty.⁶² After the Revolution, federal admiralty jurisdiction was established by the Judiciary Act of 1789.⁶³ Modern admiralty jurisdiction is codified in 28 U.S.C. § 1333:

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.

(2) Any prize brought into the United States and all proceedings for the condemnation of property taken as prize.⁶⁴

American salvage law, similar to the law of average, is derived from ancient principles, and reflects a reliance upon international cohesion. “The law of salvage is sometimes said to be a part of the *jus gentium*; the statement reflects a judicial awareness that the perils of the sea are not confined by national boundaries and an acceptance of the principal that international uniformity is in such a context peculiarly desirable.”⁶⁵ Salvage is justified on the basis that those who undertake risk to save life and property should be encouraged and rewarded. Judge Smith of the District Court for the Eastern District of Virginia noted this in her opinion awarding salvage rights to RMST:

Principles of salvage law emerged over three thousand years ago, in the days of Rhodian civilization, and have since become an important part of the maritime law of nations. The purpose of salvage law is “to encourage persons to render prompt, voluntary, and effective service to ships at peril or in distress by assuring them compensation and reward for their salvage efforts.”⁶⁶

⁶⁰ GILMORE & BLACK, *supra* note 26, at 6 (footnote omitted).

⁶¹ *Id.* at 7. According to the legend of the Rules of Oleron, Richard the Lionhearted introduced the Rules to England, after his mother Eleanor of Aquitaine promulgated them in France. *Id.*

⁶² *Id.* at 9.

⁶³ *Id.* at 11; *see also* Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 76–77.

⁶⁴ 28 U.S.C. § 1333 (2006).

⁶⁵ GILMORE & BLACK, *supra* note 26, at 533. *Jus gentium* is the “law which all nations use.” BLACK’S LAW DICTIONARY 997 (Rev. 4th ed. 1968).

⁶⁶ *R.M.S. Titanic, Inc. v. Wrecked & Abandoned Vessel (Titanic 2010)*, 742 F. Supp. 2d 784, 793 (E.D. Va. 2010) (quoting *R.M.S. Titanic, Inc. v. Haver*, 171 F.3d 943, 962 (4th Cir. 1999)).

Salvage law contemplates “wrecked and abandoned” vessels such as the *Titanic*, abandoned vessels that have not sunk and, very commonly, distressed vessels that have received assistance. In order to qualify for a salvage award, there must be property involved—saving a life is not enough. Under the Salvage Act, 46 U.S.C. § 80107, life salvors—those who rescue human survivors from salvaged vessels—are entitled to share of a salvage award, but first there must be a salvage award.⁶⁷ Saving life without “salvaging the vessel or other property or preventing or minimizing damage to the environment” is not rewarded under salvage law.⁶⁸ Thus, “[l]ife salvage unaccompanied by property salvage, still goes unrewarded.”⁶⁹

As the RMST court noted, a salvage award arises in the form of a maritime lien:

Rather than obtaining title to the salvaged property, a salvor acts on behalf of the property’s owner, thereby obtaining a lien against the property saved. The salvor’s lien is exclusive and prior to all others, including the *res* owner, and it grants the salvor a possessory interest in the *res* pending satisfaction of the lien. A salvor may enforce its lien on the salvaged property by pursuing an *in rem* action before an admiralty court.⁷⁰

The lien and the *in rem* action are against the “personified” vessel itself. The doctrine of personification has its origins in early nineteenth-century case law. Justice John Marshall, riding circuit for the district of Virginia, explained the concept:

⁶⁷ 46 U.S.C. § 80107(a) (2006).

⁶⁸ *Id.*

⁶⁹ GILMORE & BLACK, *supra* note 26, at 532; *see also In re Ta Chi Navigation (Panama) Corp. S.A.*, 583 F. Supp. 1322, 1329 (S.D.N.Y. 1984) (“In order to make a claim for life salvage the claimant, in addition to saving lives, must ‘have taken part in the services rendered on the occasion of the accident giving rise to [traditional] salvage.’ If he has, ‘he is entitled to a fair share of the [traditional salvage].’ Thus, life salvage is not an additional award, but a fair share of the traditional award.”). In order to receive an award for saving lives at sea without saving property, “the courts have held that a life salvage award can be granted only to those who have forgone the opportunity to engage in the more profitable work of traditional property salvage. . . . [T]he life salvage services must be contemporaneous with the traditional salvage services in which the life salvor is entitled to share.” *Id.*; *see, e.g.*, 46 U.S.C. § 80107(a); *Roane v. Greenwich Swim Comm.*, 330 F. Supp. 2d 306, 314 n.3 (S.D.N.Y. 2004); *Markakis v. S/S Volendam*, 486 F. Supp. 1103, 1110 n.28 (S.D.N.Y. 1980).

⁷⁰ *Titanic 2010*, 742 F. Supp. 2d at 793–94 (citations omitted). *See also The “Sabine”*, 101 U.S. 384, 386 (1880) (“Suits for salvage may be *in rem* against the property saved or the proceeds thereof, or *in personam* against the party at whose request and for whose benefit the salvage service was performed. Power is vested in the Supreme Court to regulate the practice to be used in suits in equity or admiralty by the circuit or district courts as conferred by an act of Congress, which has been in force for many years. . . . Salvors, under the maritime law, have a lien upon the property saved, which enables them to maintain a suit *in rem* against the ship or cargo, or both where both are saved in whole or in part.”).

[T]his is not a proceeding against the owner; it is a proceeding against the vessel, for an offence committed by the vessel, which is not less an offence, and does not the less subject her to forfeiture, because it was committed without the authority, and against the will of the owner. It is true, that inanimate matter can commit no offence. The mere wood, iron, and sails of the ship, cannot, of themselves, violate the law. But this body is animated and put in action by the crew, who are guided by the master. The vessel acts and speaks by the master. She reports herself by the master. It is, therefore, not unreasonable, that the vessel should be affected by this report.⁷¹

In *Tucker v. Alexandroff*, Justice Brown, with literary flourish, elaborated:

A ship is born when she is launched, and lives so long as her identity is preserved. . . . In the baptism of launching she receives her name, and from the moment her keel touches the water she is transformed, and becomes a subject of admiralty jurisdiction. She acquires a personality of her own; becomes competent to contract, and is individually liable for her obligations, upon which she may sue in the name of her owner, and be sued in her own name.⁷²

Courts do not view salvage awards as mere payment for services rendered to the owners of the vessel. Salvage awards serve the public purpose of encouraging and inducing would-be salvors to take risks in order to save life and property.⁷³ In *The Blackwall*, the steam-tug *Goliah* transported two land-based fire engines out to the British cargo vessel *Blackwall*, ablaze in San Francisco harbor. The captain of the *Goliah*, at great risk to his own ship, attached a line to the burning ship while the crew of the *Goliah*, alongside members of the San Francisco fire department, managed to

⁷¹ *United States v. The Little Charles*, 26 F. Cas. 979, 982 (C.C.D. Va. 1818) (No. 15,612); *see also* *The Palmyra*, 25 U.S. (12 Wheat.) 1, 14 (1827) (“The thing is here primarily considered as the offender, or rather the offence is attached primarily to the thing; and this, whether the offence be *malum prohibitum*, or *malum in se*. The same principle applies to proceedings *in rem*, on seizures in the Admiralty.”). *See generally* Douglas Lind, *Pragmatism and Anthropomorphism: Reconceiving the Doctrine of the Personality of the Ship*, 22 U.S.F. MAR. L.J. 39, 52–55 (2009–2010).

⁷² *Tucker v. Alexandroff*, 183 U.S. 424, 438 (1902).

⁷³ *See The Blackwall*, 77 U.S. (10 Wall.) 1, 14 (1869) (“Compensation as salvage is not viewed by the admiralty courts merely as pay, on the principle of a *quantum meruit*, or as a remuneration *pro opere et labore*, but as a reward given for perilous services, voluntarily rendered, and as an inducement to seamen and others to embark in such undertakings to save life and property. Public policy encourages the hardy and adventurous mariner to engage in these laborious and sometimes dangerous enterprises, and with a view to withdraw from him every temptation to embezzlement and dishonesty, the law allows him, in case he is successful, a liberal compensation.”); *The Akaba*, 54 F. 197, 199 (4th Cir. 1893) (“The peril, hardship, fatigue, anxiety, and responsibility encountered by the salvors in the particular case; the skill and energy exercised by them; the gallantry, promptitude, and zeal displayed,—are all to be considered, and the salvors are to be allowed such a generous recompense as will encourage and stimulate similar services by others.” (quoting *Winslow v. The Baker*, 25 F. 771, 774 (S.D.N.Y. 1885)) (internal quotation mark omitted)).

save the *Blackwall*.⁷⁴ In granting the salvage claim brought by the owners of the *Goliah*, the Court explained the factors leading to an award determination:

Courts of admiralty usually consider the following circumstances as the main ingredients in determining the amount of the reward to be decreed for a salvage service: (1.) The labor expended by the salvors in rendering the salvage service. (2.) The promptitude, skill, and energy displayed in rendering the service and saving the property. (3.) The value of the property employed by the salvors in rendering the service, and the danger to which such property was exposed. (4.) The risk incurred by the salvors in securing the property from the impending peril. (5.) The value of the property saved. (6.)⁷⁵ The degree of danger from which the property was rescued.

While the determination of a salvage award is based upon the difficulty and expense of the service and the value of the property, a salvor must first prove three elements to have a valid salvage claim. First, there must be a showing of a “marine peril.” Second, the salvor’s service must have been “voluntarily rendered” and was “not required as an existing duty or from a special contract.” Finally, the salvor must show “[s]uccess in whole or in part, or that the service rendered contributed to such success.”⁷⁶

In order for a court to have jurisdiction over an *in rem* action against a vessel, whether it be a salvage, tort, or contract-related claim, the court must arrest the personified vessel as if the vessel were an individual.⁷⁷ The basis for the American concept of arrest and personification is derived from *Harmer v. Bell (The Bold Buccleugh)*, an English case that subsequently was rejected.⁷⁸ The *Bold Buccleugh* was a Scottish steamship that “ran down and sank” an English sailing ship, the *William*. The English owners of the *William* brought an *in rem* action in the English Court of Admiralty, and an arrest warrant was issued for the *Bold Buccleugh*, but the ship soon sailed to Scotland. The owners of the *William* sued and were able to get the Scottish court to grant an attachment, but the owners of the *Bold Buccleugh* paid bail, and subsequently sold the ship. When the ship returned to England, however, it was arrested under the

⁷⁴ *The Blackwall*, 77 U.S. (10 Wall.) at 8–10.

⁷⁵ *Id.* at 13–14.

⁷⁶ The “Sabine”, 101 U.S. 384, 384 (1880).

⁷⁷ See ROBERTSON ET AL., *supra* note 59, at 92; see also *Dluhos v. Floating & Abandoned Vessel*, 162 F.3d 63, 66 (2d Cir. 1998) (“Specifically, Rule D of the Supplemental Rules for Certain Admiralty Claims requires that in order to maintain an *in rem* admiralty action against a vessel, the vessel generally must be arrested. Because Mr. Dluhos did not post the bond required by the trial court, the court did not arrest the vessel and therefore lacked jurisdiction over the vessel *in rem*.”).

⁷⁸ See generally *Harmer v. Bell*, (1852) 13 Eng. Rep. 884 (P.C.); see also NICHOLAS J. HEALY & DAVID J. SHARPE, *CASES AND MATERIALS ON ADMIRALTY* 193 (3d. ed. 1999).

authority of the High Court of Admiralty.⁷⁹ The court ruled that the English *in rem* action could proceed, and the court distinguished that action from the Scottish *in personam* attachment action: “[T]he proceedings in Scotland were commenced . . . against the persons of the Defendants, and . . . the seizure of the vessel was collateral to that proceeding, for the mere purpose of securing the debt.”⁸⁰ The court emphasized that the maritime lien traveled with the ship, even when the ship is sold: “A maritime lien is the foundation of the proceeding *in rem*, a process to make perfect a right inchoate from the moment the lien attaches This claim or privilege travels with the thing, into whosoever possession it may come.”⁸¹

Once a vessel is arrested, a court will, when possible, physically seize the vessel. In the case of a wreck, where seizure is not possible, the court may order a marshal to arrest the wreck and any artifacts that have been recovered.⁸² Salvage law does not necessarily contemplate that the salvor will acquire title to a vessel or any recovered artifacts—salvage awards often are seen as a reward for services, and “only the right to compensation for service, not the right to title, usually results.”⁸³ While a court is deciding the question of title and salvage award, a salvor is granted a right of “possession,” which provides the salvor the “right to perform service and a right to a just reward.”⁸⁴ Thus, “possession” in salvage is not equivalent to the law of finds, where the “finder” becomes the owner of the found property. The law of salvage should predominate in Admiralty because of the public policy behind salvage that seeks to incentivize and reward salvors for service. By contrast, the law of finds encourages secrecy since the only goal is to acquire ownership of property. Salvors can still be rewarded amply while never acquiring title to any property.⁸⁵

C. Controversy: Is Public Policy Interest Best Served by Salvage?

The wreck of the *Titanic* is located at 41° 43' 32" north latitude and 49° 56' 49" west longitude, in the north Atlantic Ocean.⁸⁶ When Dr. Robert Ballard discovered the wreck, he did not attempt to claim salvage rights; he did, however, publish the coordinates of the wreck in his book. While Dr. Ballard is strongly opposed to salvage of the wreck, and has

⁷⁹ *Harmer*, 13 Eng. Rep. at 884–85.

⁸⁰ *Id.* at 891.

⁸¹ *Id.* at 890. Unless circumstances prevent the court from seizing the vessel in question, the salvor must bring the claim within two years. 46 U.S.C. Appx. § 730 (2006).

⁸² *R.M.S. Titanic, Inc. v. Wrecked & Abandoned Vessel (Titanic 2010)*, 742 F. Supp. 2d 784, 788 (E.D. Va. 2010).

⁸³ *Hener v. United States*, 525 F. Supp. 350, 357 (S.D.N.Y. 1981).

⁸⁴ *Id.*

⁸⁵ *Id.* at 356–58.

⁸⁶ *Titanic 2010*, 742 F. Supp. 2d at 784 (E.D. Va. 2010); BALLARD WITH ARCHBOLD, *supra* note 56, at 73.

since expressed his wish for the wreck to be preserved as a memorial,⁸⁷ he did open a Pandora's box by publishing the location of the wreck before securing any legal claim to it.

Dr. Ballard and others who want the wreck to be undisturbed present a compelling argument—the wreck is a gravesite and should be treated with reverence. This argument has also been heard recently with respect to the rebuilding of the former World Trade Center site in New York City. Ballard has drawn an analogy to the *U.S.S. Arizona* Memorial in Pearl Harbor—where visitors may pay their respects and view the sunken battleship at the same time. Ballard has equated salvaging artifacts from the *Titanic* to diving to the wreck of the *Arizona* to take watches off the wrists of dead sailors.⁸⁸ It is an emotionally-charged argument that must be treated respectfully; however, it also overlooks the tremendous historical importance of the recovered artifacts as well as the professional recovery work that already has occurred.

There are also some profound differences between the wreck of the *Arizona* and the wreck of the *Titanic*. First, the *Titanic* is sitting almost two miles under the surface of the North Atlantic, while the *Arizona* lies in Pearl Harbor, in less than 100 feet of water.⁸⁹ Other than the few scientists, researchers, and naval personnel who have visited or will visit the wreck, the only way for someone to experience the *Titanic* is by viewing recovered artifacts in a museum, or by purchasing them. Second, while it is true that the wreck has been damaged by the recovery options, the entire wreck is deteriorating rapidly as the result of natural forces, and could collapse into an unrecognizable mass of decaying metal within 100 years.⁹⁰ The *Arizona* is newer, its hull is armored, and its proximity to the surface means that restoration to increase its “life” would be a far simpler matter than similar work upon the *Titanic*. Finally, the *Arizona* has been significantly altered since it sank, while the *Titanic* has not. Significant portions of the *Arizona*'s superstructure were cut away, and a large floating memorial was placed on top of the wreck. There does not seem to have been public opposition to the alterations to the ship and the establishment of the memorial, and it remains a popular tourist attraction.⁹¹ The attack on Pearl Harbor was a national tragedy, and the *Arizona* is a singularly appropriate memorial to the event, but that does not mean that every shipwreck should, or can, be treated the same way.

The argument that the recovery of the artifacts is simply “grave robbing” calls into question the entire purpose of archaeology. Objects have the power to inspire, and they can reveal things about their former

⁸⁷ BALLARD WITH SWEENEY, *supra* note 57, at 68–72.

⁸⁸ *Id.* at 68.

⁸⁹ See JOY WALDRON JASPER ET AL., THE USS ARIZONA: THE SHIP, THE MEN, THE PEARL HARBOR ATTACK, AND THE SYMBOL THAT AROUSED AMERICA 95 (2001).

⁹⁰ See *R.M.S. Titanic, Inc. v. Wrecked & Abandoned Vessel*, 742 F.Supp. 2d 784, 801 (2010).

⁹¹ See JASPER ET AL., *supra* note 89, at 172–73, 184–88 (2001).

owners. A goblet from which King Tutankhamun drank, whether it is made of gold or wood, has value. Even nondescript items associated with historical events have intrinsic value to researchers and collectors. Included in the author's collection is a piece of coal recovered from the *Titanic* wreck site. This particular item may not have historical significance—it is an otherwise unidentifiable piece of anthracite that would have been consumed in the ship's boilers or fireplaces—but it is from the *Titanic* and, thus, it is important. Context is extremely important with historical artifacts—a piece of deck planking known to be from Christopher Columbus's *Santa Maria* certainly would be worth more than planking recovered from a fishing boat that sank last week, even though both artifacts would just be pieces of wood. Time is a factor in recovery—opening multi-thousand-year-old tombs is acceptable, while opening day-old tombs is not. Time is also a factor in public display—a wine bottle recovered from the *Titanic* can provide a glimpse back into history—while one from the *Costa Concordia* cannot. The question is one of degree, and reasonableness.

The *Titanic* may be the most famous shipwreck in history. The legend of the “unsinkable” ship that went down on its maiden voyage continues to fascinate. The resounding success of the 1997 film *Titanic* is proof. The United States has a strong public policy of promoting the importance of history—the Smithsonian Institution and hundreds of other museums in the United States are evidence of this. Because of the cultural importance of the *Titanic*, and the danger of leaving the wreck to the forces of nature, the only sound policy decision is to recover as much as possible from the wreck, before it is too late. To “preserve” the wreck by leaving it undisturbed is to effect the permanent loss of a direct connection to the *Titanic* that could, through judicially-monitored salvage, be preserved for future generations.

D. Legislative Reaction to the Discovery: The R.M.S. Titanic Maritime Memorial Act of 1986

In 1986, Congress enacted the Memorial Act with the goal of establishing an international agreement to designate the wreck as an “international maritime memorial to those who lost their lives aboard her in 1912.”⁹² The other major purpose of the Act was to put a halt to any

⁹² See R.M.S. Titanic Maritime Memorial Act of 1986, Pub. L. 99-513, 100 Stat. 2082 (codified at 16 U.S.C. § 450rr to 450rr-6 (2006)). In 2009, a bill to amend the Memorial Act was introduced to implement the International Agreement Concerning the Shipwrecked Vessel RMS Titanic, *opened for signature* Nov. 6, 2003, <http://www.gc.noaa.gov/documents/titanic-agreement.pdf>. The amendments to the Memorial Act add provisions for civil actions and criminal sanctions and grant the Secretary of Commerce oversight power, including the right to issue permits for recovery operations. The Departments of Commerce and Homeland Security have authorization to enforce the act. See R.M.S. Titanic Maritime Memorial Preservation Act of 2009, §§ 602(a), 604(c)(9)–(11) (proposed June 2009), *available at* http://www.gc.noaa.gov/gcil_titanic-legislation.html.

salvage operations, or overly-intrusive research expeditions that might damage the wreck, until guidelines were established.⁹³

Congress provided the Administrator of the National Oceanic and Atmospheric Administration (“NOAA”) with authority to enter into international negotiations to develop a memorial and to “develop . . . guidelines for research on, exploration of, and if appropriate, salvage of the R.M.S. Titanic.”⁹⁴ The NOAA Administrator was directed to consult with the Secretary of State and “promote full participation by other interested Federal agencies, academic and research institutions, and members of the public.”⁹⁵ In 2004, the United States, Canada, France, and the United Kingdom signed the International Agreement.⁹⁶ The Agreement recognizes the “historic significance and symbolic value of, and international interest” in the *Titanic* and seeks to “ensure the protection of RMS *Titanic* and its artifacts for the benefit of present and future generations,” preferably through “*in situ* preservation.”⁹⁷ The Agreement does provide for recovery of artifacts if “justified by educational, scientific, or cultural interests, including the need to protect the integrity of RMS *Titanic* and/or its artifacts from a significant threat.”⁹⁸ The recovered artifacts must undergo professional conservation and documentation, and should be kept together as a collection and available for public use.⁹⁹ The International Agreement was signed by the United States but has not yet been ratified by Congress.¹⁰⁰

Congress promulgated the Memorial Act in 1986, approximately one year after Dr. Ballard discovered the wreck. RMST began diving in 1987 and gained court approval to continue in 1994.¹⁰¹ Commentators have suggested that the courts did not show deference to the Memorial Act in earlier holdings in the case.¹⁰² This changed in 2010 when the District Court for the Eastern District of Virginia granted the salvage award to RMST contingent upon compliance with Covenants that granted NOAA oversight function to “represent the public interest . . . consistent with

⁹³ 16 U.S.C. § 450rr (2006).

⁹⁴ *Id.* § 450rr-3; Guidelines for Research, Exploration and Salvage of *RMS Titanic*, 66 Fed. Reg. 18,905, 18,905 (Apr. 12, 2001).

⁹⁵ 16 U.S.C. § 450rr-3; *see also id.* § 450rr-4.

⁹⁶ *See* Agreement Concerning the Shipwrecked Vessel RMS Titanic, *supra* note 92; R.M.S. Titanic Maritime Memorial Preservation Act of 2009, §§ 602(a), 604(c)(9)–(11) (proposed June 2009).

⁹⁷ Agreement Concerning the Shipwrecked Vessel RMS Titanic, *supra* note 92.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *RMS Titanic International Agreement*, NOAA OFF. GEN. COUNS., http://www.gc.noaa.gov/gcil_titanic-intl.html.

¹⁰¹ *R.M.S. Titanic, Inc. v. Wrecked & Abandoned Vessel (Titanic 2010)*, 742 F. Supp. 2d 784, 788–89 (E.D. Va. 2010).

¹⁰² James A.R. Nafziger, *The Titanic Revisted*, 30 J. MAR. L. & COM. 311, 316 (1999); Peltz, *supra* note 39, at 85–86.

NOAA's authority under the RMS TITANIC Maritime Memorial Act of 1986."¹⁰³

E. Acquiring the Salvage Award: R.M.S. Titanic, Inc. v. Wrecked and Abandoned Vessel

1. Elements of the Salvage Award

RMST started diving to the wreck in 1987, when its predecessor, Titanic Ventures Limited Partnership ("TVLP"), collaborated with IFREMER, the French team involved in the discovery. The expedition made 32 dives to the wreck and recovered close to 1,800 artifacts. The artifacts were taken to France, where they were restored. The artifacts remained under French jurisdiction, and in 1993, the Office of Maritime Affairs of the Ministry of Equipment, Transportation, and Tourism granted TVLP title to the artifacts. The French artifacts were not included in the subsequent American litigation.¹⁰⁴

a. Defense: Marex v. Wrecked and Abandoned Vessel

On August 7, 1992, prior to RMST's acquisition of salvor-in-possession status, a competing salvor, Marex Titanic, Inc., filed for salvage rights in the District Court for the Eastern District of Virginia.¹⁰⁵ Titanic Ventures, RMST's predecessor, had not visited the wreck since 1987 and, while it was preparing for a future mission, Marex stepped in to make its claim.¹⁰⁶ On August 12, 1992, the court issued a warrant for the arrest of the wreck in favor of Marex, ordering the U.S. Marshal to take control of any salvaged artifacts. The court also ordered that, if the wreck was not released from in rem jurisdiction within ten days (August 22), Marex was required to publish notice of its claim. Marex did not publish notice for 32 days until September 23, 1992—the same day that RMST filed a motion to vacate the arrest and dismiss the complaint.¹⁰⁷ Because Marex already was poised to carry out a salvage operation, a hearing hastily was scheduled for two days later.¹⁰⁸

RMST then sought, and was granted, a preliminary injunction on September 28 to stop Marex from carrying out its proposed salvage operation. Several days of testimony followed, generating 425 pages of transcript. It appears that Marex had notice that the court did not approve of its tactics and so it filed a Notice of Voluntary Dismissal of the

¹⁰³ *Titanic 2010*, 742 F. Supp. 2d at 809–10, 812.

¹⁰⁴ *Id.* at 788–89.

¹⁰⁵ *Marex Titanic, Inc. v. Wrecked & Abandoned Vessel (Marex Titanic I)*, 805 F. Supp. 375, 376 (E.D. Va. 1992).

¹⁰⁶ *Marex Titanic, Inc. v. Wrecked & Abandoned Vessel (Marex Titanic II)*, 2 F.3d 544, 544–45 (4th Cir. 1993). For sake of simplicity, Titanic Ventures Limited Partnership and its successor, which became R.M.S. Titanic, Inc. in 1993, are both referred herein throughout as "RMST." See *Titanic 2010*, 742 F. Supp. 2d at 788.

¹⁰⁷ *Marex Titanic I*, 805 F. Supp. at 376.

¹⁰⁸ *Id.*

Action on October 1, 1992, under Federal Rules of Civil Procedure 41, since neither an answer nor a motion for summary judgment had yet been filed in the case.¹⁰⁹ The court refused to dismiss the action without prejudice and, thus, vacated Marex's Notice despite Marex's argument that it had complied with FRCP 41. The court held that a "voluntary dismissal may be denied by the Court if the case has gone into the merits and substantial evidence has been received at the time the notice is filed."¹¹⁰

On the day after—October 2, 1992—Titanic Ventures (RMST) agreed to the district court exercising in personam jurisdiction over it, and "both parties agreed that this gave the Court authority to determine who had exclusive salvage rights to the *Titanic*."¹¹¹ RMST filed an intervening complaint asking to be declared exclusive salvor of the wreck and the court allowed RMST to be admitted as intervenor plaintiff. The court then vacated Marex's warrant, declared RMST as "first and exclusive salvors of the *Titanic*," and permanently enjoined Marex from salvaging the *Titanic*.¹¹² It would appear that Marex lost its claim because it came to court with "unclean hands" and unlike RMST, Marex had never recovered any artifacts from the *Titanic*. RMST had not visited the wreck since 1987 but, far from "abandoning" its salvage operations as Marex had alleged, RMST had continued to work with the French government to gain title to the 1987 artifacts with the goal of public display; exercised dominion over the wreck in 1991 by allowing a non-salvage expedition by the IMAX Corporation; and planned another expedition during the "summer weather window in 1993."¹¹³

On October 16, 1992, Marex filed a Motion for Reconsideration of Court's Vacatur of Plaintiff's Voluntary Dismissal.¹¹⁴ The Court had refused to dismiss the complaint without prejudice and, on November 12, 1992, denied this subsequent motion, for two reasons.¹¹⁵ First, the Court found that the proceedings had progressed "way beyond the early stages of the case" particularly because the Court had already begun to consider the "question of who had the exclusive right to salvage the

¹⁰⁹ See *id.* at 377; *Marex Titanic II*, 2 F.3d at 545 (noting on appeal that "[a]s the facts unfolded, the district court made no secret of its feeling that Marex had misled the court in the initial hearing held on August 12, 1992. Marex realized the way the wind was blowing, and . . . filed a 'Notice of Voluntary Dismissal'"); see also FED. R. CIV. P. 41(a)(1)(i).

¹¹⁰ *Marex Titanic I*, 805 F. Supp. at 377.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ Brief of Intervening Plaintiff-Appellee at 7-9, *Titanic Ventures v. Wrecked & Abandoned Vessel*, 2 F.3d 544 (4th Cir. 1993) (No. 92-2429), 1993 WL 13122632 (1993), at *7-9.

¹¹⁴ *Id.* at *6.

¹¹⁵ *Marex Titanic I*, 805 F. Supp. at 375, 378-79.

Titanic.¹¹⁶ Second, the Court perceived Marex's action as an attempt to manipulate the proceedings to gain an advantage over RMST:

The Court finds Marex's attempt at a voluntary dismissal was a last minute attempt to get the relief it sought without going through the judicial process. . . . Throughout the proceedings, the Court finds Marex exploited the judicial process. . . . As the hearing on the merits of who had exclusive salvage rights progressed and the outlook for Marex became bleak, Marex attempted to divest this Court of jurisdiction, effectively dissolving the temporary injunction and allowing Marex to proceed with its salvage operations.¹¹⁷

The Fourth Circuit reversed the district court based upon a plain meaning reading of Rule 41: "Our task is to apply the text, not to improve upon it.' When Marex filed its notice of dismissal, Titanic Ventures had not filed an answer or a motion for summary judgment and under Rule 41(a)(1)(i) the action was terminated and the district court's interlocutory orders were vacated."¹¹⁸ The Fourth Circuit, in holding that the plain meaning of Rule 41 was dispositive, found the text to be clear and unambiguous and held the district court had committed error when it allowed RMST to intervene in a "defunct action."¹¹⁹ The Fourth Circuit, however, did acknowledge that Marex had behaved poorly: "It is especially tempting to force the plaintiff to take its medicine in a case like this, where the plaintiff's behavior has been so dissembling, if not downright fraudulent."¹²⁰

Because the Fourth Circuit held that Marex's Notice of Dismissal was valid, "the action was terminated and the district court's interlocutory orders were vacated."¹²¹ While RMST could have initiated its own "new, independent civil action" it failed to do so and, thus, the Fourth Circuit held that "the district court had no discretion to allow [RMST] to

¹¹⁶ *Id.* at 378.

¹¹⁷ *Id.* at 379.

¹¹⁸ *Marex Titanic II*, 2 F.3d at 547 (quoting *Bus. Guides, Inc. v. Chromatic Commc'ns Enters., Inc.*, 598 U.S. 533, 549 (1991)).

¹¹⁹ *Id.* at 546–47. The Fourth Circuit *Marex* holding has become a standard in Rule 41 actions. See *In re Microsoft Corp. Antitrust Litig.*, 332 F. Supp. 2d 890, 895 (D. Md. 2004) ("The Supreme Court has held that courts must give the Federal Rules of Procedure their plain meaning, so while it may be 'especially tempting' to deny plaintiff his right to dismiss in a given case, courts are obliged to adhere to the plain language of Rule 41(a)(1) (citation omitted) (quoting *Marex Titanic II*, 2 F.3d at 547)); *Winder v. Clitandre*, Civil Action No. ELH–11–708, 2011 WL 1253657, at *1 (D. Md. Apr. 1, 2011) ("If the plaintiff files a notice of dismissal before the adverse party serves it with an answer or motion for summary judgment, the dismissal is available as matter of unconditional right, and is self-executing, i.e. it is effective at the moment the notice is filed with the clerk and no judicial approval is required.") (quoting *Marex Titanic II*, 2 F.3d at 546) (internal quotation marks omitted)). Thus, the *Titanic* still sails over the rarified waters of federal civil procedure.

¹²⁰ *Marex Titanic II*, 2 F.3d. at 547.

¹²¹ *Id.*

intervene in the defunct action filed by Marex.”¹²² RMST would have to initiate its own action in order to regain its salvage rights.

b. Offense: R.M.S. Titanic, Inc. v. Wrecked and Abandoned Vessel

Titanic Ventures Limited Partnership became R.M.S. Titanic, Inc. on May 4, 1993, when First Response Medical, Inc., acquired all of TVLP’s interests.¹²³ That summer, RMST carried out another expedition with IFREMER, during which the team executed fifteen dives, recovered 800 artifacts, and produced more than one hundred hours of videotape. RMST brought the recovered artifacts to Norfolk, Virginia, at which point it initiated its action on August 26, 1993, by filing a complaint seeking temporary and permanent injunctions and an issuance of a Warrant of Arrest in rem (or quasi in rem) in the United States District Court for the Eastern District of Virginia, Norfolk Division. RMST also sought to be declared the “sole and exclusive owner of any items salvaged from the wreck.”¹²⁴

The Court directed the United States Marshal to arrest the wreck and all the artifacts, and the Court subsequently allowed RMST to be custodian of the wreck, in place of the Marshal. The Court Order was printed in several newspapers, including the Wall Street Journal, and interested parties were invited to file claims to the wreck or to property. One party came forward—the Liverpool & London Steamship Protection and Indemnity Association Limited—an insurer of passenger property on board the *Titanic*. RMST reached a settlement with Liverpool & London and, on June 7, 1994, Liverpool and London’s complaint was dismissed with prejudice. The Court also awarded exclusive salvage rights to RMST as salvor-in-possession.¹²⁵ The court order read:

RMS Titanic, Inc. is the salvor in possession of the wreck and wreck site of the *RMS Titanic*, including without limitation, the hull, machinery, engine, tackle, apparel, appurtenances, contents and cargo, and that RMS Titanic, Inc. is the true, sole and exclusive owner of any items salvaged from the wreck of the defendant vessel in the past and, so long as RMS Titanic, Inc. remains salvor in possession, items salvaged in the future, and is entitled to all salvage rights, and that default judgment is entered against all potential claimants who have not yet filed claims and such claims are

¹²² *Id.* at 547–48.

¹²³ *R.M.S. Titanic, Inc. v. Wrecked & Abandoned Vessel (Titanic 2010)*, 742 F. Supp. 2d 784, 788 (E.D. Va. 2010).

¹²⁴ *See* Complaint at 47, *R.M.S. Titanic, Inc. v. Wrecked & Abandoned Vessel*, 924 F. Supp. 714 (E.D. Va. 1996) (No. 93CV00902), 1994 WL 16515984; *see also Titanic 2010*, 742 F. Supp. 2d at 788.

¹²⁵ *Titanic 2010*, 742 F. Supp. 2d at 789; *see also R.M.S. Titanic, Inc. v. Wrecked & Abandoned Vessel (Titanic 2007)*, 531 F. Supp. 2d. 691, 692–93 (E.D. Va. 2007).

therefore barred and precluded so long as RMS Titanic, Inc. remains salvor in possession. . . .¹²⁶

RMST and IFREMER returned to the *Titanic* during the summer of 1994, recovering more than 1,000 artifacts, and shooting 125 hours of video.¹²⁷ RMST filed a Periodic Report of Salvor in Possession on the Progress of Recovery Operations with the Court, and the Court entered the report, noting the “successful salvage operations in June of 1987 and June of 1993.”¹²⁸

2. *Challengers & Challenges*

a. *Joslyn*

On February 20, 1996, another competing salvor challenged RMST’s salvor-in-possession order. John A. Joslyn filed a motion in the district court alleging that RMST had not “diligently” carried out salvage operations and was not financially capable of undertaking future operations.¹²⁹ Joslyn filed the motion under FRCP Rule 60(b), requesting that the court rescind the salvor-in-possession order of June 7, 1994.¹³⁰ Under Rule 60(b)(5), a party may bring a motion to relieve a judgment if it is “no longer equitable” to apply that judgment.¹³¹

RMST challenged Joslyn’s standing to bring the Rule 60(b) motion because he was not a party to the original order. The court found that Joslyn did have standing and granted his request for a hearing:

It is true that Joslyn was not a named party in the original Order. The Fourth Circuit, however, has stated that “[a]ctions *in rem*, or ‘against the thing,’ are designed to adjudicate rights in specific property against *all of the world*, and judgments in such cases are binding to the same extent.” . . . It logically follows that if the whole world are parties bound by the judgment, then the converse should also be true: the whole world are parties who may request relief from the judgment.¹³²

RMST was dealt an additional setback when the court declared that, regardless of whether Joslyn had standing, his motion had “brought to the attention of the Court the possibility that [RMST] is failing to diligently pursue its salvor-in-possession rights” and so the court had the authority to sua sponte “question whether it is equitable to continue to

¹²⁶ R.M.S. Titanic, Inc. v. Wrecked & Abandoned Vessel (*Titanic 1996 I*), 920 F. Supp. 96, 97 n.1 (E.D. Va. 1996).

¹²⁷ *Titanic 2010*, 742 F. Supp. 2d at 789.

¹²⁸ R.M.S. Titanic, Inc. v. Wrecked & Abandoned Vessel (*Titanic 1996 II*), 924 F. Supp. 714, 716 (E.D. Va. 1996).

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Titanic 1996 I*, 920 F. Supp. at 98 (quoting FED. R. CIV. P. 60(b)(5)).

¹³² *Id.* (alteration in original) (quoting *Darlak v. Columbus–Am. Discovery Grp., Inc.*, 59 F.3d 20, 22 (4th Cir. 1995), *cert. denied*, 516 U.S. 1094 (1996)).

enforce its past Order” under both Rule 60(b) and the court’s “inherent power to modify and interpret its original Order.”¹³³

The district court used a three-factor test to determine whether RMST was entitled to retain its salvor-in-possession status. The court used the standard developed in *Martha’s Vineyard Scuba Headquarters, Inc. v. The Unidentified, Wrecked and Abandoned Steam Vessel*,¹³⁴ as modified by *Moyer v. The Wrecked and Abandoned Vessel Known as the Andrea Doria*.¹³⁵ In order to survive a motion, a salvor must demonstrate that its operations are “(1) undertaken with due diligence, (2) ongoing, and (3) clothed with some prospect of success.”¹³⁶ For the operations to be ongoing, “[t]he possession . . . need not be continuous, but only as such the ‘nature and situation’ of the salvage operations permit.”¹³⁷

The Court noted that Joslyn’s complaint was centered upon the fact that RMST had not undertaken an expedition in 1995, and seemed to be in a state of financial stress that would preclude future visits to the wreck. Joslyn argued that, because RMST would not be able to visit the wreck again, RMST’s preservation work was incomplete and lacked significant value.¹³⁸

The Court determined that RMST was entitled to retain its status, under the standards informed by *Martha’s Vineyard* and *Andrea Doria*.¹³⁹ Specifically, the Court found that the expeditions of 1987, 1993, and 1994 recovered more than 3,000 artifacts, far more than other salvors had reported. RMST also had invested significant capital into the retrieval and restoration of the artifacts, and had offered the artifacts for public display. In short, the Court held that RMST had fulfilled its “promises to the Court” based upon the granting of the original salvor-in-possession award and, as a result, RMST had satisfied the “due diligence” prong of the *Martha’s Vineyard/Andrea Doria* test.¹⁴⁰

RMST’s operations also were found to be “ongoing.”¹⁴¹ RMST already had carried out several expeditions, and already had contracted with IFREMER for a 1996 expedition. The question of whether operations are ongoing turns not only on “past operations, but also on present intentions” and RMST had met that standard despite a “temporary absence from the wreck site” in part because of the pending IFREMER expedition and accompanying passenger cruises that already were largely

¹³³ *Id.* at 99.

¹³⁴ 833 F.2d 1059 (1st Cir. 1987).

¹³⁵ 836 F. Supp. 1099 (D.N.J. 1993).

¹³⁶ *Id.* at 1106 (quoting *Martha’s Vineyard*, 833 F.2d at 1061).

¹³⁷ *Id.* (quoting *Hener v. United States*, 525 F. Supp. 350, 354 (S.D.N.Y. 1981)).

¹³⁸ *R.M.S. Titanic, Inc. v. Wrecked & Abandoned Vessel (Titanic 1996 II)*, 924 F. Supp. 714, 722 (E.D. Va. 1996).

¹³⁹ *Id.* at 724.

¹⁴⁰ *Id.* at 722–23.

¹⁴¹ *Id.* at 723–24.

booked.¹⁴² Finally, RMST was found to be a viable business entity “clothed with a prospect of success.”¹⁴³ The success of the previous expeditions no longer was in question according to the Court; the only remaining question was RMST’s financial stability and ability to raise additional capital. RMST was involved in a speculative venture, but it had the potential to earn substantial income with its exhibitions, and through the sale of recovered coal.¹⁴⁴

In August of 1996, RMST was back in district court seeking an injunction that would prohibit Joslyn from conducting a photographic expedition to the wreck. The court granted the injunction on August 13, 1996, holding that RMST had “exclusive right to take any and all types of photographic images of the TITANIC wreck.”¹⁴⁵ The determination was based in part upon RMST’s agreement not to sell the artifacts. Because RMST could not raise income in the manner that a traditional salvor could, it should be allowed exclusive right to photograph the wreck, because “allowing another ‘salvor’ to take photographs of the wreck . . . is akin to allowing another salvor to physically invade the wreck and take artifacts themselves.”¹⁴⁶ Joslyn’s appeal was dismissed by the Fourth Circuit,¹⁴⁷ however, the issue of photography conflicting with salvage rights was far from resolved.

b. Lindsay

The 1996 summer expedition would inspire more litigation when Alexander Lindsay, a video producer who produced a documentary of the 1994 expedition and was working on a future project with RMST, filed an action in the District Court for the Southern District of New York. Lindsay sought a declaratory judgment naming him co-salvor entitled to a salvage award from the 1996 expedition, based upon back pay and expenses incurred for work that he had done for RMST in

¹⁴² *Id.* at 723 (citing *Andrea Doria*, 836 F.Supp. at 1107; *Bemis v. Lusitania*, 884 F.Supp. 1042, 1051 (1995)).

¹⁴³ *Id.* at 724.

¹⁴⁴ *Id.* at 724. In 1994, as part of an agreement with an international advisory committee consisting of international maritime museums, historical societies, and RMST, RMST promised not to sell any of the recovered artifacts. RMST also made the same pledge in its agreement with the French government. RMST’s promise not to sell the artifacts was a major consideration for the Court in granting salvor-in-possession status to RMST in 1994. The sale of the recovered coal, however, is permitted, since recovered coal lumps are not considered to be “artifacts” because they are not “man-made” and are “natural” objects. The National Maritime Museum of Great Britain and other parties have concurred with RMST on this issue. *Id.* at 718 & n.10.

¹⁴⁵ *R.M.S. Titanic, Inc. v. Wrecked & Abandoned Vessel (Titanic 1996 III)*, No. 2:93CV902, 1996 WL 650135, at *3 (E.D. Va. Aug. 13, 1996).

¹⁴⁶ *Id.* at *2.

¹⁴⁷ *See R.M.S. Titanic, Inc. v. Wrecked & Abandoned Vessel (Titanic 1998)*, 9 F. Supp. 2d 624, 627 (E.D. Va. 1998).

alleged reliance upon RMST's promise to produce a new film project.¹⁴⁸ The parties settled out of court in early 2000.¹⁴⁹

c. Haver

RMST was now engaged in a process where it was acquiring certain rights that would be tailored as the courts sorted out the varying interests in a shipwreck of great historical importance. Despite each setback, RMST continued to move slowly toward its goal of attaining a salvage award, all the while managing to retain its seniority. In 1998, the issue of photography initially raised by Joslyn arose again. In *R.M.S. Titanic v. Haver*, RMST retained its salvor status, but the Fourth Circuit held that other parties could visit the wreck, and photograph it, so long as those visits did not interfere with RMST's salvage operations.¹⁵⁰

The case arose when RMST sought to prevent Deep Ocean Expeditions from operating a commercial venture that was to provide paying passengers a chance to dive to the wreck and photograph it during the summer of 1998. Concerned that Deep Ocean Expedition's activities would interfere with its own planned expedition that summer, RMST filed a motion for preliminary injunction on May 4, 1998.¹⁵¹ On that same day, Christopher Haver filed an in personam action in the same court, seeking a declaratory judgment that he had a right to visit and photograph the wreck site, regardless of the preliminary injunction against photography that had been issued in the Joslyn matter. RMST then amended its motion to specifically include Haver and, on May 12, 1998, the court consolidated all of the actions since they involved the "same issues."¹⁵²

The district court granted the injunction on June 23, 1998, based upon a four-factor "hardship balancing test" that considered: "(1) the likelihood of irreparable harm to the plaintiff if the preliminary injunction is denied, (2) the likelihood of harm to the defendant if the requested relief is granted, (3) the likelihood that plaintiff will succeed on the merits, and (4) the public interest."¹⁵³ In granting the injunction, the Court praised RMST's effort:

In this case, RMST is salvaging and preserving the artifacts salvaged from the wreck for the benefit of all mankind. . . . RMST is not exploiting the wreck for profit. It does not sell artifacts. After it

¹⁴⁸ *Lindsay v. Wrecked & Abandoned Vessel R.M.S. Titanic*, No. 97 Civ. 9248(HB), 1998 WL 557591, at *2 (S.D.N.Y. Sept. 2, 1998).

¹⁴⁹ Order of Discontinuance, *Lindsay v. Wrecked & Abandoned Vessel R.M.S. Titanic*, No. 1:97-cv-09248-HB-DFE (S.D.N.Y. Jan. 10, 2000), ECF No. 112.

¹⁵⁰ *R.M.S. Titanic, Inc. v. Haver*, 171 F.3d 943, 969–71 (4th Cir. 1999), *cert. denied*, 528 U.S. 825 (1999).

¹⁵¹ *Titanic 1998*, 9 F. Supp. 2d at 628–29.

¹⁵² *Id.* at 630. Christopher Haver was one of the tourists who wished to visit the wreck site with the Deep Ocean Expeditions group and had signed up to purchase tickets for \$32,500. *Id.*

¹⁵³ *Id.* at 637.

properly treats and preserves recovered artifacts, it places them in world-wide museum exhibits for the whole world to see. . . .

In accord with salvage law, the Court finds that it is in the public interest for a single salvor to salvage the wreck of the R.M.S. TITANIC. . . . Thus, it is in the public interest for RMST to continue its operations unhindered.¹⁵⁴

The district court also justified its holding on the Fourth Circuit's dismissal of Joslyn's appeal:

The legal conclusion that RMST's salvor in possession rights encompass and include the right to exclude third-party photographers from the wreck site has not been reversed on appeal. The Fourth Circuit summarily dismissed the appeal of the August 13, 1996 Order The Fourth Circuit issued no opinion and formulated no legal conclusions on the issue. Consequently, at least in this Court, this legal conclusion has become law of the case.¹⁵⁵

The request for an injunction was, therefore "a request that the previous orders entered in this case be personalized and enforced against the new parties RMST seeks to enjoin."¹⁵⁶

Later, the Fourth Circuit reversed the injunction in regards to the prohibition against other parties visiting and photographing the wreck, as long as those other parties did not interfere with RMST's operations. The injunctions prohibiting salvage by parties other than RMST, or interfering with RMST's operations, were affirmed.¹⁵⁷

For the Fourth Circuit, the critical distinction between visiting the wreck for the purpose of retrieving artifacts and visiting to take photographs related to the nature of the *in rem* jurisdiction. RMST brought the artifacts that it retrieved to Norfolk, Virginia, and so the district court had jurisdiction over those artifacts. Total sovereignty over the entire wreck, however, was beyond the reach of any court, or any one nation.¹⁵⁸ The district court had side-stepped this issue by asserting "constructive" *in rem* jurisdiction over the wreck site—a concept strongly limited by the Fourth Circuit:

The district court has a "constructive" . . . *in rem* jurisdiction over the wreck of the *Titanic* by having a portion of it within its jurisdiction We hasten to add that as we use the term "constructive," we mean an "imperfect" or "inchoate" *in rem* jurisdiction which falls short of giving the court sovereignty over the wreck."¹⁵⁹

¹⁵⁴ *Id.* at 639–40 (citation omitted).

¹⁵⁵ *Id.* at 636 (citation omitted).

¹⁵⁶ *Id.* at 626.

¹⁵⁷ *R.M.S. Titanic, Inc. v. Haver*, 171 F.3d 943, 969–71 (4th Cir. 1999), *cert. denied*, 528 U.S. 825 (1999).

¹⁵⁸ *Id.* at 967–69.

¹⁵⁹ *Id.* at 967; *see also Titanic 1998*, 9 F. Supp. 2d at 633.

Both the district court and the court of appeals applied the principle of *jus gentium* in recognizing RMST's salvage rights. Both opinions held that the ancient body of international law recognized the right to claim exclusive salvage rights in a shipwreck, but the Fourth Circuit noted that it would be possible to have multiple actions occurring in different countries, with each court having jurisdiction over objects brought within its jurisdiction.¹⁶⁰ This "shared sovereignty" was necessary to maintain order:

If we were to recognize an absolute limit to the district court's power that would preclude it, or essentially any other admiralty court, from exercising judicial power over wrecks in international waters, then we would be abdicating the order created by the *jus gentium* and would return the high seas to a state of lawlessness never experienced—at least as far as recorded history reveals. We refuse to abdicate in this manner.¹⁶¹

This policy is also reflected in the Memorial Act: "By enactment of sections 450rr to 450rr-6 of this title, the United States does not assert sovereignty, or sovereign or exclusive rights or jurisdiction over, or the ownership of, any marine areas or the R.M.S. Titanic."¹⁶²

RMST petitioned the United States Supreme Court in *Haver*, but was denied certiorari.¹⁶³ Meanwhile, RMST conducted a major expedition to the wreck in the summer of 1998 where it recovered "the big piece," a piece of the *Titanic's* external plating with a row of portholes still in place. In the summer of 2012, Deep Ocean Expeditions discontinued its passenger operations after a final visit the wreck of *Titanic* in honor of the centennial of the ship's sinking.¹⁶⁴

Haver has contributed to the canon of *Titanic* admiralty jurisprudence and continues to be cited. In *Fathom Exploration, LLC v. The Unidentified Shipwrecked Vessel or Vessels, Etc.*, the United States filed a motion asserting ownership in a wreck claimed by a salvor.¹⁶⁵ The United States, under Title XIV of the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, asserted that the wreck was a Civil War-era warship with ownership and full title vested in the United States. In its motion, the United States questioned whether the District Court for the Southern District of Alabama had in rem jurisdiction over the wreck.

¹⁶⁰ *Haver*, 171 F.3d at 967–69. The Fourth Circuit's reasoning was reminiscent of Justice Holmes' in *Oceanic Steam Navigation Co. v. Mellor*, 233 U.S. 718, 734 (1914) (finding "no absurdity in supposing that if the owner of the *Titanic* were sued in different countries, . . . the local rule should be applied in each case"); *see also supra* text accompanying note 36.

¹⁶¹ *Haver*, 171 F.3d at 969.

¹⁶² 16 U.S.C. § 450rr-6 (2006).

¹⁶³ *R.M.S. Titanic, Inc. v. Haver*, 528 U.S. 825 (1999).

¹⁶⁴ *See Titanic Salvage Hits Storm of Protest*, BBC NEWS, (Aug. 14, 1998), <http://news.bbc.co.uk/2/hi/science/nature/150962.stm>; *see also* William Broad, *Plunging Deep (in Pockets) to See Titanic at 100*, N.Y. TIMES, Dec. 5, 2011, at A1.

¹⁶⁵ 352 F. Supp. 2d 1218, 1221 (S.D. Ala. 2005).

The district court, citing *Haver*, noted that “jurisdiction may be perfected on a number of theories” and that, while “*in rem* actions in admiralty generally require, as a prerequisite to a court’s jurisdiction, the presence of the vessel or other res within the territorial confines of the court,” the entire vessel need not be within the court’s jurisdiction.¹⁶⁶ In denying the United States’ motion to dismiss, the court noted that in *Haver*, “where a portion of the wreck of the Titanic was within the court’s territorial jurisdiction, the district court ha[d] constructive *in rem* jurisdiction over the entire wreck as long as the salvage operation continue[d].”¹⁶⁷ *Haver* was argued unsuccessfully in a case involving the allision between a Mexican freighter and a Mexican offshore drilling unit. The plaintiff owner of the drilling right sought to have United States law apply and asserted, citing *Haver*, that, since the accident occurred in waters that may not have been technically part of Mexican territory, Mexico only had limited rights that did not include “exclusive control over navigation.”¹⁶⁸ The plaintiff had better luck with another selection from the *Titanic* songbook, by arguing that the Mexican liability limit was procedural and would not have to be followed by the district court:

[I]f the limitation “merely provides procedural machinery by which claim[s] otherwise created are brought into concurrence and scaled down to their proportionate share of limited fund” then the U.S. court need not observe the foreign limitation because the “forum is not governed by foreign rules of procedure.” . . .

. . . .

. . . [Plaintiff’s] interpretation is more in line with the distinction noted by the Supreme Court in [*Black Diamond*]. . . . The “right” created by the London Convention creates a right to limit the *remedy*, not a substantive right to recover. . . . Thus, the Court finds that the London Convention, as incorporated in the Mexican Navigation Act, is procedural. Since U.S. courts apply U.S. procedural law, the instant claim does not have to be heard in the same court in which the Mexican limitation is pending.¹⁶⁹

Haver also was cited along with *The Sabine*, as representative of admiralty salvage holdings, in a 2010 district court holding that distinguished the law of salvage from the law of finds: “After recovering lost property, the

¹⁶⁶ *Id.* at 1228 n.14 (quoting *Treasure Salvors, Inc. v. Unidentified Wrecked & Abandoned Sailing Vessel*, 569 F.2d 330, 333 (5th Cir. 1978)) (internal quotation marks omitted).

¹⁶⁷ *Id.*

¹⁶⁸ *Perforaciones Marítimas Mexicanas, S.A. de C.V. v. Grupo TMM, S.A. de C.V.*, No. G-05-419, 2007 WL 1428654, at *3 (S.D. Tex. May 10, 2007).

¹⁶⁹ *Id.* at *6–7 (second alteration in original) (quoting *Black Diamond S.S. Corp. v. Robert Stewart & Sons, Ltd. (The Norwalk Victory)*, 336 U.S. 386, 396 (1949)). It would appear that *The Titanic* is still alive and well in some areas of *Titanic* jurisprudence, notwithstanding *Korean Air Lines*.

salvor obtains a maritime lien that allows the salvor to proceed *in rem* to secure a salvage award.”¹⁷⁰

d. Madeline Albright

In 2000, RMST filed a motion for declaratory judgment against defendants Secretary of State Madeleine Albright, Secretary of Commerce William Daley, and NOAA Administrator D. James Baker. RMST sought a declaration that “defendants, by virtue of their efforts to implement the R.M.S. *Titanic* Maritime Memorial Act of 1986 . . . are unlawfully interfering with plaintiff’s exclusive salvage rights.”¹⁷¹ The federal defendants filed a motion to dismiss, which the court granted.¹⁷² The court decided that RMST’s claim was not ripe because the State Department and NOAA had not yet finalized the International Agreement mandating the oversight of the wreck, as required by the Act.¹⁷³

3. Attempts to Acquire Title to the Artifacts

RMST returned to the *Titanic* again during the summer of 2000 in a joint expedition with the P.P. Shirshov Institute of Oceanology from Russia. Two submersibles made a total of 28 dives and recovered more than 900 artifacts. The expedition also discovered a new debris field.¹⁷⁴ During this time, and continuing afterwards, RMST sold, with court approval, coal recovered from the debris field.¹⁷⁵ In 2001, following a change in management, RMST announced plans to form “The Titanic Foundation” with the goal of purchasing some of the artifacts. The district court quickly issued a sua sponte order prohibiting any transfer of artifacts until the court held a hearing.¹⁷⁶ Following the hearing and a series of appeals, the Fourth Circuit eventually affirmed the district court’s orders prohibiting any transfer of artifacts because RMST had not been granted full title:

The *Titanic* was a historic ship, and the artifacts recovered from its wreckage therefore have enhanced value. RMST currently has a unique role as the *Titanic*’s exclusive salvor, and, having performed salvage services, it has a lien in the artifacts and is entitled to a reward enforceable against those artifacts. At this stage of the

¹⁷⁰ *Odyssey Marine Exploration, Inc. v. Unidentified, Wrecked, & Abandoned Sailing Vessel*, 727 F. Supp. 2d 1341, 1344 (M.D. Fla. 2010).

¹⁷¹ *R.M.S. Titanic, Inc. v. Wrecked & Abandoned Vessel (Titanic 2000)*, No. 293CV902, 2000 WL 1946826, at *1 (E.D. Va. Sept. 15, 2000).

¹⁷² *Id.*

¹⁷³ *Id.* at *1–2.

¹⁷⁴ *R.M.S. Titanic, Inc. v. Wrecked & Abandoned Vessel (Titanic 2010)*, 742 F. Supp. 2d 784, 790 (E.D. Va. 2010).

¹⁷⁵ *R.M.S. Titanic, Inc. v. Wrecked & Abandoned Vessel (Titanic 2002)*, 286 F.3d 194, 198–99 (4th Cir.), *cert. denied*, 537 U.S. 885 (2002).

¹⁷⁶ *Id.* at 199.

proceedings, however, we cannot conclude that RMST has title to any artifacts.¹⁷⁷

After *Marex*, RMST learned the boundaries of its rights and subsequently brought its own independent claim, and was granted salvor-in-possession status. After The Titanic Foundation debacle, RMST learned the boundaries of its salvor-in-possession status. Thus, with each setback, RMST continued to work toward its goal of acquiring ownership of the artifacts by refining its approach to meet the jurisdictional and subject-matter requirements set out by the courts. Eventually, and with the guidance of the courts, RMST would accept certain restraints and conditions that were designed to both preserve the artifacts and reward RMST for its valuable service—the heart of the public policy behind salvage law.

a. Jurisdiction

RMST filed a Motion for Salvage and/or Finds Award on February 12, 2004, and an award hearing was scheduled for October 18, 2004.¹⁷⁸ As part of its motion, RMST requested the district court to rule on two preliminary questions—the extent of the federal courts’ admiralty jurisdiction and whether (and under what theory) RMST could acquire title to the recovered artifacts.¹⁷⁹ The Fourth Circuit eventually would decide the matter in an interlocutory appeal.

The first question for the court was whether it would recognize the title for the 1987 artifacts that was granted to RMST’s predecessor Titanic Ventures by the French administrator of maritime affairs in 1993. The court held “[u]nder principles of international comity,” that it would not recognize the French “administrative proceeding” that produced the award.¹⁸⁰ Although comity called for an “*American court*” to “give effect to [a foreign court’s] judgment” without an evaluation of the merits, the district court decided that the French proceeding was not a “full and fair adversary proceeding *before a court.*”¹⁸¹

Judge Rebecca Beach Smith of the Eastern District of Virginia, Norfolk Division, applied French law and held that the administrator who granted the award did not have the authority without first making factual findings as to the value of the recovered artifacts and salvage

¹⁷⁷ *Id.* at 210.

¹⁷⁸ R.M.S. Titanic, Inc. v. Wrecked & Abandoned Vessel (*Titanic 2004*), 323 F. Supp. 2d 724, 730 (E.D. Va. 2004). The claim was for “title to all of the artifacts (including portions of the hull) . . . pursuant to the law of finds . . . or, in the alternative, a salvage award in the amount of \$225 million.” R.M.S. Titanic, Inc. v. Wrecked & Abandoned Vessel (*Titanic 2006*), 435 F.3d 521, 524 (4th Cir. 2006). RMST did another expedition during the summer of 2004 that recovered 75 artifacts and found a new debris field. *Titanic 2010*, 742 F. Supp. 2d at 791.

¹⁷⁹ *See Titanic 2004*, 323 F. Supp. 2d at 726.

¹⁸⁰ *Id.* at 730–31.

¹⁸¹ *Id.* at 731.

services.¹⁸² The court also held that recognizing the French award would be contrary to United States public policy that the artifacts “should be kept together and should not be sold for commercial gain,” particularly as expressed by the Memorial Act and its implementation under the guidelines promulgated by NOAA—which, while “advisory only and . . . not legally enforceable”—nonetheless reflected the general policy.¹⁸³

On appeal, the Fourth Circuit first determined that it had jurisdiction to hear the appeal of a decision that was “not final” under 28 U.S.C. § 1291, under an admiralty exception from 28 U.S.C. § 1292(a)(3): “[i]nterlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed.”¹⁸⁴ Although this section was designed by Congress to allow parties to “appeal the finding of liability on the merits, before undergoing [lengthy damages proceedings]” in the “traditionally bifurcated” admiralty trials, the Fourth Circuit reasoned that the exception also could apply to a salvage claim, because the district court had similarly bifurcated the salvage proceeding by ruling on the “liability” (the French award and the salvage v. finds issues) while leaving open the amount of the damages (the amount of the salvage award).¹⁸⁵

Once the Fourth Circuit determined that it had jurisdiction to hear the appeal, it held that the district court did not have jurisdiction over the French award.¹⁸⁶ First, the district court did not have *in rem* jurisdiction over the 1987 artifacts because they already had been removed from the wreck site and taken to France by the time RMST commenced its action in 1993. “Because the 1987 artifacts were not in the Eastern District of Virginia; because they were not named as the *in rem* defendant in this case; and because they were not otherwise voluntarily subjected to the jurisdiction of the district court, the district court did not have *in rem* jurisdiction over them.”¹⁸⁷ Second, although a court may have “constructive possession” of the res (such as when RMST produced a wine decanter recovered from the wreck as evidence that other artifacts recovered in the 1993 expedition were in Virginia), “constructive *in rem* jurisdiction” could not be obtained over “personal property located within the sovereign limits of other nations.”¹⁸⁸ The Fourth Circuit emphasized the notion of “shared sovereignty” over wrecks that lie outside of a court’s jurisdiction—where *in rem* jurisdiction

¹⁸² *Id.* at 724, 726, 732.

¹⁸³ *Id.* at 733–34.

¹⁸⁴ 28 U.S.C. § 1292(a)(3) (2006); *R.M.S. Titanic, Inc. v. Wrecked & Abandoned Vessel (Titanic 2006)*, 435 F.3d 521, 526 (4th Cir. 2006).

¹⁸⁵ *Titanic 2006*, 435 F.3d at 526–27 (quoting *City of Fort Madison v. Emerald Lady*, 900 F.2d 1086, 1089 (8th Cir. 1993)).

¹⁸⁶ *Id.* at 528–30.

¹⁸⁷ *Id.* at 529.

¹⁸⁸ *Id.* at 529–30.

does not represent total sovereignty over the wreck—“with other nations enforcing the same *jus gentium*.”¹⁸⁹ Finally, the Fourth Circuit found no other basis upon which jurisdiction over the 1987 artifacts located in France could be claimed by the court. “RMST cannot come to a court in the United States and simply assert that that the court should declare rights against the world as to property located in a foreign country.”¹⁹⁰

b. The Law of Finds vs. The Law of Salvage

The Fourth Circuit affirmed Judge Smith’s holding that RMST could not acquire title under the law of finds, and that the law of salvage was the proper vehicle for RMST to pursue its claim:

We begin our treatment of RMST’s contention by agreeing with the district court that the law of salvage and the law of finds “serve different purposes and promote different behaviors.” The law of salvage, which has been applied to this case until now, has a favored, indeed a dignified, place within the law of nations or the *jus gentium*. The law of finds, however, is a disfavored common-law doctrine rarely applied to wrecks and then only under limited circumstances.¹⁹¹

The court noted fundamental differences between the two doctrines, showing particular concern for the contrast in incentives and rewards offered by each. Salvage law “gives potential salvors incentives to render voluntary and effective aid to people and property in distress at sea,” whereas a reliance upon the law of finds would lead one who encounters a ship in distress on the high seas to “be encouraged to refrain from attempting to save it and to entertain the idea of taking the valuable cargo for himself.”¹⁹²

Salvage law also provides an orderly judicial process that gives the salvor an exclusive maritime lien on any recovered property, and the salvor may also be granted exclusive salvor-in-possession status for property that has not yet been recovered. Perhaps the most important salvage right that ensures order is the injunction to “exclude others from participating in the salvage operations, so long as the original salvor appears ready . . . to complete the salvage project.”¹⁹³ In contrast, the law of finds encourages “acquisitive” behavior and should be applied “only when no private or public interest would be adversely affected by its application.”¹⁹⁴ The acquisitive “finders-keepers policy is but a short step from active piracy and pillaging” and will lead to “scavengers . . . crawling over [a] wreck for property to deprive the [property] owner of his

¹⁸⁹ *Id.* at 530.

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 531 (citation omitted) (quoting *R.M.S. Titanic, Inc. v. Wrecked & Abandoned Vessel (Titanic 2004)*, 323 F. Supp. 2d 724, 736 (E.D. Va. 2004)).

¹⁹² *Id.* at 531, 533.

¹⁹³ *Id.* at 531–32 (quoting *Treasure Salvors, Inc. v. Unidentified Wrecked & Abandoned Sailing Vessel*, 640 F.2d 560, 567 (5th Cir. 1981) (internal quotation mark omitted)).

¹⁹⁴ *Id.* at 533.

property rights” as soon as a ship has come into distress.¹⁹⁵ The court also noted that there was no precedent for a court that has awarded salvage-in-possession to alter the status of the salvor to that of a finder.¹⁹⁶

RMST did have grounds to make its law of finds claim since the wreck of the *Titanic* is abandoned, which is an element of a common law finds claim, along with “intent to reduce property to possession” and “actual or constructive possession of the property.”¹⁹⁷ According to the court, the possession “prongs” show inherent weaknesses in relying upon finds because: (1) a would-be finder must show intent *and* acquisition, otherwise the finder gets nothing; (2) if the property was not abandoned the finder gets nothing; and (3) only the party who possesses the property will be compensated while those who merely assisted get nothing.¹⁹⁸ Despite these deficiencies, RMST clearly possessed the artifacts, so the issue of whether RMST had demonstrated the proper intent to acquire the artifacts for the purposes of a finds claim required analysis which the court subsumed into its treatment of whether the *Titanic* was “abandoned.”

The court noted the general presumption that title remains with property lost at sea, regardless of time passed, unless the owner explicitly relinquishes ownership or the property is recovered from an ancient and unclaimed wreck. However, this “presumption that property lost at sea is not abandoned is based on fundamental notions of property that underlie admiralty’s policy [of] favoring the law of salvage over the law of finds.”¹⁹⁹ Thus, while the wreck of the *Titanic* could be classified as ancient and unclaimed (except for rival later-to-the-game salvors) “[t]o apply the law of finds other than to the most exceptional of circumstances would promote behavior fundamentally at odds with the principles of mutual aid which underlie salvage law.”²⁰⁰

The court made it clear that RMST would have had a difficult burden bringing a finds claim at the outset of the litigation, so the addition of the claim at this late date was rejected for several additional reasons. First, RMST had been the court-appointed trustee of the recovered artifacts, and breaching this relationship by granting ownership now “would do violence to basic notions of trust law.”²⁰¹ Second, RMST’s recovery operations would no longer be under court supervision, which meant that RMST might no longer comply with its earlier promises. Third, other salvors who are now excluded from the wreck would attempt to apply the law of finds themselves, resulting in a mad dash for artifacts that could cause considerable damage to the wreck

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 533–34.

¹⁹⁷ *Id.* at 532 n.3.

¹⁹⁸ *Id.* at 532–33.

¹⁹⁹ *Id.* at 532.

²⁰⁰ *Id.*

²⁰¹ *Id.* at 533.

site, as well as to the resolution of any potential claims. Finally, RMST was judicially estopped from changing its status because it had maintained its position as salvor—with considerable assistance from the courts—since the beginning of the litigation to “preserve the property either for the owners or for the historic and cultural interest of the public.”²⁰² The court, in referring to the Memorial Act, noted that Congress “respect[ed] the salvage operation” by enacting “law about the *Titanic* that was only advisory.”²⁰³ That Congress promulgated the Act with allowance for RMST to continue its salvage operations was evidence to the court that RMST’s “promises and actions to protect the site and the artifacts [had] instilled in the public conscience reliance . . . that might, in the absence of such promises and actions” have inspired action in “a different form.”²⁰⁴ In other words, the Act might have precluded RMST from conducting operations had Congress suspected that RMST would attempt to claim full ownership and alienability rights. The status of the salvor who can “exclude all” in order to save and recover property for possible claimants, is generally not compatible with the finder, who can “keep all” that is found. The court noted “in the abstract” that, in other circumstances it might be possible for a salvor-in-possession to change its status to a finder, though the court was unaware of any court that had done so.²⁰⁵

c. The Law of Salvage vs. The Law of Finds

The traditional definition of a salvage award—a “reward given for perilous services, voluntarily rendered, and as an inducement to seamen and others to embark in such undertakings to save life and property”²⁰⁶—may seem conceptually difficult to reconcile with the recovery of artifacts from an abandoned shipwreck for potential profit. The Fourth Circuit described how other districts have responded to this “awkwardness” by using the law of finds on historical shipwrecks; however, the court speculated whether salvage law should be limited to its traditional application:

Thus, when we ask in this case whether RMST’s efforts were made for the “prompt and ready assistance to human sufferings”; whether they represent the “chivalry” of the salvage law “which forgets itself in an anxiety to save property, as well as life”; whether they were taken in furtherance of the role of a trustee for the property’s owner, we can only respond by questioning whether salvage law is so limited.²⁰⁷

The court concluded that the law of salvage best served the public policy of historic preservation and that, in absence of an owner, the public

²⁰² *Id.*

²⁰³ *Id.* at 534.

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *The Blackwall*, 77 U.S. (10 Wall.) 1, 14 (1870).

²⁰⁷ *Titanic 2006*, 435 F.3d at 536 (quoting *The Henry Ewbank*, 11 F. Cas. 1166, 1170 (C.C.D. Mass. 1833)).

could serve as the beneficiary of the trust relationship created by a salvage claim:

[W]e readily conclude that the salvage law is much better suited to supervise the salvage of a historic wreck. Indeed, supervising a historic wreck under the law of finds would leave the court without an ability to regulate what the finder could do with the artifacts found or how it might treat the wreck site. Because the traditional law of salvage, however, involves the creation of a trust relationship between salvor and the court on behalf of the owner, it is not a major step to apply the same principles to historic wreck, creating a trust relationship between the salvor and the court on behalf of the public interest.²⁰⁸

The court noted that it had applied salvage law in this case previously, and in other cases involving historical shipwrecks, but now was explicitly “ratify[ing] this application as appropriate to a historically or culturally significant wreck.”²⁰⁹ If a wreck is discovered and no owners or insurance companies come forward, a salvor can be appointed to “further the public interest in the wreck’s historical, archaeological, or cultural aspects and to protect the site through injunctive relief.”²¹⁰ The court may award the salvor traditional remedies, but that court will have the ability to determine how the recovered property is used in order to “promote the historical, archaeological, and cultural purposes of the salvage operation.”²¹¹ The court will determine how the salvor is paid, including *in specie* award, “full or restricted ownership,” and income from displays and research.²¹² Finally, the Fourth Circuit, in emphasizing that it was not creating a new cause of action but merely acknowledging an ongoing and emerging practice, indicated that the courts will be more accommodating to salvors who work within these guidelines:

Thus when the salvor functions in the public interest with respect to a historic wreck, the district court will more readily award it exclusive salvage-in-possession status and, in the same vein, more readily supervise the salvage operation in the public interest. Like all salvage proceedings, however, the encouragement for pursuing salvage of historic wrecks is the salvor’s ability to receive exclusive salvage-in-possession status and the promise of an appropriate salvage award, neither of which is provided to the salvor under the law of finds.²¹³

The Fourth Circuit thus vacated the district court’s order with respect to the 1987 artifacts located in France, affirmed the denial of RMST changing from salvor-in-possession to finder, and remanded the case to

²⁰⁸ *Id.*

²⁰⁹ *Id.* at 537.

²¹⁰ *Id.*

²¹¹ *Id.* at 538.

²¹² *Id.*

²¹³ *Id.*

the district court, where the final phase of the *Titanic*'s posthumous and litigious expedition would begin.²¹⁴

IV. THE SALVAGE AWARD

A. *Claiming the Salvage Award*

On October 15, 2007, Judge Smith ordered RMST to file a motion for a salvage award within 60 days. The order followed an attempt by RMST to acquire title to recovered artifacts based upon the agreement that it had reached in 1994 with Liverpool and London, the insurer that came forward at the time of the initial salvage claim. The court dismissed the attempt as “devoid of any legal or factual merit under the final orders and settled law of this case” and “blatantly misleading to the public and the investors in RMST.”²¹⁵ RMST could not have acquired title from Liverpool and London, because Liverpool and London did not have the right to grant title in the artifacts, and RMST's claim was “yet another attempt to circumvent [the district court's] (and the Fourth Circuit's) repeated declarations that RMST is the salvor, and *not the owner*, of the artifacts.”²¹⁶

On November 30, 2007, RMST filed its motion for a salvage award, and accompanying memorandum and exhibits.²¹⁷ In its motion, RMST requested a “liberal” salvage award of \$110,859,200 for the fair market value of the artifacts recovered between 1993 and 2004. Moreover, RMST asserted that, because its services were of “an extraordinarily high degree of merit,” RMST deserved to be awarded an *in specie* salvage award for the entire collection, under terms to be governed by the district court.²¹⁸

RMST claimed that it met the requirements for a salvage award: (1) that the wreck site and artifacts were in “marine peril”; (2) that RMST's services had been voluntary; and (3) that RMST's efforts had been successful. RMST also justified its award claim under the six *Blackwall* factors, and an additional seventh factor used by the Fourth Circuit—“the efforts taken by the salvor to preserve the historical and archaeological values of the shipwreck and artifacts recovered therefrom.”²¹⁹

RMST used expert opinion in its *Blackwall* factors argument. Most importantly, the fifth *Blackwall* factor—the value of the property saved—was calculated by independent appraisers Paul Zerler and Stephen H.

²¹⁴ *Id.*

²¹⁵ R.M.S. Titanic, Inc. v. Wrecked & Abandoned Vessel (*Titanic 2007*), 531 F. Supp. 2d. 691, 692–93 (E.D. Va. 2007).

²¹⁶ *Id.* at 693.

²¹⁷ See Memorandum of Law in Support of RMST's Motion for a Salvage Award, R.M.S. Titanic, Inc. v. Wrecked & Abandoned Vessel, No. 2:93cv902, 2007 WL 6432380 (E.D. Va. 2007).

²¹⁸ *Id.* at 13, 58.

²¹⁹ *Id.* at 4–31.

Rogers. According to RMST's motion, the appraisal took two years to complete, during which time other experts in the United States and Europe also were consulted by the appraisers. The value of the artifacts was based upon the collection as a whole, which was considered to be the highest value:

Fair market valuation of The TITANIC Artifacts was ascertained by comparing against other reasonably comparable assemblages of artifacts and collectibles, though because of the uniqueness of these artifacts, there are no precise comparables. Valuation of individual artifacts was based on the character of the object, its state of conservation, the scarcity of the item, and other relevant factors.²²⁰

RMST also used expert opinion to evaluate its services under *Blackwall* factors two (skill and promptitude of the salvage operation) and four (risks incurred in salvage operation).²²¹ RMST also submitted expert opinion regarding the condition of the artifacts and wreck site. Under *Blackwall* factor six, the salvor must show that the rescued property was in a high degree of danger. Expert Tom Dettweiler noted the "rapid deterioration of the wreck" in the twenty years since the salvage started, and Kenneth J. Vrana stated that "*natural* bio-chemical processes [were] seriously weakening the structural integrity of the hull and other structural components of the shipwreck."²²²

In its motion, RMST also used expert opinion to provide the basis for its argument for the additional Fourth Circuit requirement—"the degree of care that a salvor exercises in preserving the historical and archaeological value of a wreck-site and objects recovered therefrom."²²³ RMST submitted expert opinion both on the "deplorable condition" of the artifacts at the time of recovery, as well as RMST's successful restoration and conservation efforts. Additionally, RMST claimed that its surveys and mapping of the wreck site were useful as aids to researchers, and as photographic preservations of the wreck site. Finally, RMST claimed that it was ready to perform "rescue" and "forensic" archaeology within the hull before the hull completely collapses. Although RMST is not permitted to make such intrusions into the hull presently, it claimed that it has performed extensive structural studies of the hull and thus stands ready if the court "deems it advisable to lift that restriction on RMST's activities."²²⁴

The United States sought to submit its opinions as *amicus curiae* and was allowed to participate. The United States "proposed certain limitations for the court's consideration," and on April 15, 2008—the 96th anniversary of the sinking—the district court, informed by the

²²⁰ *Id.* at 11–12 (internal quotation marks omitted).

²²¹ *Id.* at 15–23.

²²² *Id.* at 23–25.

²²³ *Id.* at 25.

²²⁴ *Id.* at 25–31.

amicus brief, directed RMST to submit proposed restrictive covenants on the use of the artifacts.²²⁵

At minimum, these proposed covenants must ensure that the artifacts are conserved and curated in an intact collection that is available to the public and accessible for historical research, educational purposes, and scientific research, in perpetuity. The proposed covenants shall incorporate safeguards to ensure that they will remain effective in perpetuity, notwithstanding any further changes in circumstances. Furthermore, the proposed covenants shall guard against contingencies that might impair their future effectiveness.²²⁶

The court listed the minimum requirements to be addressed:

Specifically, these covenants, at minimum, must ensure the following: (1) that the collection is maintained as an intact collection that joins those artifacts from the *R.M.S. Titanic* awarded to RMST by a French maritime tribunal; (2) that the collection is managed according to the professional standards recognized in the NOAA Guidelines, the International Agreement and the Annexed Rules, and the federal regulations governing the curation of the federally owned and administered archaeological collections; (3) that reasonable, ongoing oversight by NOAA is implemented in order to protect the United States' interests in the *Titanic* wreck site and the artifacts recovered therefrom, and to ensure compliance with all court-imposed covenants; (4) that the collection is protected in perpetuity by ensuring that the covenants run with the collection to any subsequent purchasers and/or successors-in-interest to RMST; and (5) that the collection is protected in the event of insolvency or bankruptcy by RMST.²²⁷

RMST submitted proposed and revised covenants in June 2008. Following a series of hearings regarding disputes and evidentiary issues, RMST submitted a Post-Hearing Memorandum in Support of its Motion for a Salvage Award on December 21, 2009. The United States appeared satisfied and made no additional submissions.²²⁸ On August 12, 2010, Judge Smith issued her holding and stated that, “[a]fter almost seventeen years since the commencement of this *in rem* action, RMST’s Motion for an interim salvage award is ripe for decision.”²²⁹

B. *Elements of the Salvage Award*

On August 12, 2010, Judge Smith awarded RMST 100% of its claim—\$110,859,200—but she reserved the determination of whether to pay the

²²⁵ *R.M.S. Titanic, Inc. v. Wrecked & Abandoned Vessel (Titanic 2010)*, 742 F. Supp. 2d 784, 792 (E.D. Va. 2010).

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ *Id.* at 793.

²²⁹ *Id.* at 793–94.

award in cash or *in specie* until August 15, 2011.²³⁰ The court delayed determination to allow a time for a suitable buyer to come forward who would be able to keep the collection intact. No buyer came forward, and the court determined that there was no other way to compensate RMST other than to grant an *in specie* award. In granting title, the court emphasized that the award was conditional upon compliance with the guidelines drawn by the court:

“[T]he decision whether to grant an *in specie* award lies solely within the court’s discretion.” . . . The court further FINDS that the amount of RMST’s salvage award can only be satisfied by the court conveying title to the artifacts. Accordingly, the court GRANTS RMST title to the artifacts, specifically those recovered in the 1993, 1994, 1996, 1998, 2000, and 2004 salvage expeditions, *but such title is fully subject to the covenants and conditions that the United States, through the United States Attorney, negotiated and finalized with RMST and the court (the “Revised Covenants and Condition”).*²³¹

RMST’s award thus was contingent upon compliance with the restrictions and covenants set out in the August 12, 2010, district court decision, and the district court based its decision to award RMST 100% of its claim upon the seven-factor test used by the Fourth Circuit.²³²

Once a salvor has proved “entitlement to a salvage award” under *The “Sabine,”* a court will evaluate factors in calculating the salvage award. *The “Sabine”* requires a salvor to show that the “salved property faced a marine peril,” that the salvor voluntarily rendered service, and that the salvage effort was successful. The district court found “little doubt” that the wreck was in peril, that RMST was under no contractual duty to perform the salvage, and that the recovery of thousands of artifacts was evidence of success.²³³

The Fourth Circuit test—the six *Blackwall* factors plus the archaeological preservation element—informs “the fashioning of a salvage award” although “[t]here is no precise formula for calculating a salvage award.” RMST based its claim upon the appraised value of the recovered artifacts, but the court then was required to evaluate RMST’s claim under the seven-factor test to see if RMST’s conduct justified the award.²³⁴ Accordingly, the court began its analysis with the fifth *Blackwall* factor—“the value of the property saved”—and, since the artifacts were unique and had “no real market equivalent,” the court relied heavily upon the expert appraisal:

²³⁰ *Id.* at 788, 809. The award was based on the fair market of the artifacts recovered from the 1993, 1994, 1996, 1998, 2000, and 2004 expeditions. *Id.* at 788.

²³¹ *R.M.S. Titanic, Inc. v. Wrecked & Abandoned Vessel (Titanic 2011)*, 804 F. Supp. 2d 508, 509 (E.D. Va. 2011) (quoting *Titanic 2010*, 742 F. Supp. 2d at 808).

²³² See *Titanic 2010*, 742 F. Supp. 2d at 794.

²³³ *Id.*

²³⁴ *Id.* at 794–95.

The court recognizes the inherent difficulty in placing a fair market value on a collection of artifacts that has no real market equivalent. . . . In the absence of a more attractive alternative, the court embraces the fair market value approach taken by the appraisers.

. . . In assessing the reliability of the submitted appraisal, the court notes that Zerler has been a renowned appraiser of artifacts, fine art, and collectibles for over forty-two years. Along with Rogers, Zerler spent over 3600 hours valuing the Titanic artifacts.²³⁵

The appraisers looked at other collections of historical artifacts as part of their fair market valuation, but, “because of the uniqueness of [the] artifacts,” there were no “precise comparables.” The appraisers placed a higher value on the artifacts if kept together as a collection since the artifacts were “the only ones to originate from the Titanic wreck site.”²³⁶ The appraisers also noted that the artifacts were increasing in value based upon:

[T]he art market, the collectables market, the notoriety of the Titanic, the mystery of the Titanic and the fact that it has become a household word and a metaphor for great or major tragedies or mistakes. The increase is also due, in part, to increased notoriety following numerous exhibitions of the artifacts.²³⁷

Also considered were several items sold at auction that were saved by survivors or recovered from the ocean after the sinking, including keys and ship’s paperwork.²³⁸ Using the expert appraisals, the court found “\$110,859,200 to be an appropriate approximation of the fair market value of the artifacts[, a] figure . . . representative of the invaluable service that RMST has provided in its salvage of the Titanic.”²³⁹

The court found that the first *Blackwall* factor—“the labor expended by the salvors in rendering the salvage service”—weighed heavily in RMST’s favor, since RMST had spent more than \$9 million and 500,000 hours of labor on its salvage operations. The court also was impressed that, while most salvage operations conclude after a few days, and since “time spent on a project is no sure indication of success,” RMST had made a strong showing of “the sheer magnitude of the resources that have been devoted to the salvage of the Titanic.”²⁴⁰

²³⁵ *Id.* at 797.

²³⁶ *Id.* at 796.

²³⁷ *Id.*

²³⁸ *See id.* at 796. “Among those items, the key to the E-Deck of the Titanic recently sold, in April 2009, for £60,000 (approximately \$90,000). A third-class manifest sheet, written in eight languages, also sold in 2009 for £23,000 (approximately \$34,000). In September 2007, the key to the ship’s crew’s nest sold for £90,000 (approximately \$145,000).” *Id.* (citations omitted).

²³⁹ *Id.* at 797.

²⁴⁰ *See id.* at 794, 797–98.

RMST did not get a perfect score under the second *Blackwall* factor—"the promptitude, skill, and energy displayed in rendering the service and saving the property"—since there was an estimated 21% damage rate on some recovered artifacts, there were several failed attempts to retrieve artifacts, and several dives were canceled due to equipment failures. However, the failures emphasized the difficulty of recovery, and the damage showed the fragility of the articles themselves. Because the *Titanic* lies two and a half miles under the Atlantic, the court recognized that RMST was one of the few organizations capable of carrying out such operations due to the scarcity of the "state of the art equipment" and the need for "expertise." The court was impressed with the technology that RMST devised to recover the "Big Piece"—a 15-ton piece of the hull with portholes that required two attempts to raise.²⁴¹ Equally important was RMST's conservation process:

Each artifact undergoes an extensive cataloguing and conservation process that is dictated by the composition of the artifact, whether it be metal, ceramic, paper, or textile. Although most conservation efforts, aside from desalination, are carried out by contract conservators, this action bespeaks the level of care and expertise required, as well as RMST's commitment to preserving the condition of the artifacts.²⁴²

Overall, given "the immense level of difficulty in retrieving and caring for the Titanic artifacts," the court found that RMST had "shown a high level of skill in its salvage operations."²⁴³

The third *Blackwall* factor evaluates "the value of the property employed by the salvors in rendering the service, and the danger to which such property was exposed."²⁴⁴ The court found that RMST was required to charter various rare submersibles, robotic vehicles, and surface ships worth more than \$50 million, which was evidence of the "highly specialized equipment" needed to perform the salvage, which gave weight to this factor even though RMST did not own the equipment outright.²⁴⁵

The fourth *Blackwall* factor considers "the risk incurred by the salvors in securing the property from the impending peril."²⁴⁶ Because RMST did own the vessel used on the salvage expeditions, and because other parties (including IFREMER and the Shirshov Institute) assumed their own loss risk and personal injury liability, the court felt it would be "improper . . . to reward RMST for any risk that it expressly contracted away."²⁴⁷

²⁴¹ See *id.* at 794, 798–99.

²⁴² *Id.* at 799.

²⁴³ *Id.*

²⁴⁴ *Id.* at 794.

²⁴⁵ *Id.* at 799–800.

²⁴⁶ *Id.* at 794.

²⁴⁷ *Id.* at 800.

Nevertheless, the efforts of RMST employees exemplified the conduct that salvage awards were made to compensate:

Although RMST was not contractually liable for all of the risks involved with salvaging the Titanic, particularly the risk of loss to the vessels, employees of RMST were amongst those that took their lives in their hands to descend to the wreck site in order to collect the artifacts that are the subject of this proceeding. *It is that type of risk-taking that the salvage award is meant to compensate, in order to encourage and induce such efforts in the future, and the court recognizes the high level of risk faced by those individuals with RMST.*²⁴⁸

The court's reasoning under the sixth *Blackwall* factor—"the degree of danger from which the property was rescued"—provides a touchstone for historical salvage:

[T]he Titanic artifacts were previously lost on the bottom of the ocean, *depriving the public of all social utility in their historic symbolism and cultural beauty.* Instead, RMST has recovered those items from a fate of being lost to future generations. . . . [S]uch a rescue can be considered "the ultimate rescue from the ultimate peril[.]"

Moreover, *the wreck of the Titanic itself is in a process of bio-deterioration* that, in one projection, may lead to the deterioration of the promenade decks by the year 2030, with the decking at all levels continuing to collapse towards the keel as the walls fail. . . . [T]he court does properly acknowledge the serious danger from which these artifacts have been recovered as being another factor supporting a liberal salvage award.²⁴⁹

Such recognition of the historical value of the artifacts, as well as the value of the recovery itself, is essential in justifying salvaging awards and providing incentive to future salvors. RMST's extraordinary efforts, and the value of recovered artifacts, are both amplified when analyzed under the *Blackwall* factors—as proven by the court's grant to RMST of 100% of its requested award.

While the public has benefitted from RMST's efforts, the court recognized that RMST is a for-profit business and, since RMST was seeking title, its careful recovery and restoration work has been in its own self-interest. "Similarly, the display of the artifacts is a profitable venture, whether or not is also shares the story of the Titanic. . . ."²⁵⁰ Under the seventh Fourth Circuit factor—"the degree to which the salvors have worked to protect the historical and archeological value of the wreck and the items salvaged"²⁵¹—the court ignored RMST's profit motives and concerned itself only with the quality and care of the work. Because of "extensive evidence" of RMST's conservation, preservation, educational

²⁴⁸ *Id.* at 800–01 (emphasis added).

²⁴⁹ *Id.* at 794, 801 (emphasis added) (quoting *Columbus–Am. Discovery Grp. v. Atl. Mut. Ins. Co.*, 56 F.3d 556, 573 (4th Cir. 1995)).

²⁵⁰ *Id.* at 803.

²⁵¹ *Id.* at 794–95.

work, and cataloguing of every artifact, the court found “RMST’s efforts to be deserving of a salvage award that includes recognition of these efforts.”²⁵²

After holding that RMST was entitled to its full award, the court had to analyze any potential deductions to the award based upon (1) “Disqualifying Salvor Misconduct,” (2) “Contributions of Co-Salvors,” and (3) “Revenues from Possession of the Artifacts.”²⁵³

While a salvor must “come to the court with clean hands” and while RMST “may not have acted in the utmost good faith” with its “repeated attempts . . . to assert title . . . despite its established position as salvor-in-possession,” the court found that RMST had not engaged in disqualifying conduct.²⁵⁴ The court did previously warn RMST that it would “no longer tolerate these maneuvers by RMST to circumvent the court’s final ruling that RMST is the salvor, *and not the owner*, of the artifacts.”²⁵⁵ At the heart of the court’s concern were prior attempts by RMST to sell artifacts, but the court found no evidence that RMST actually had completed any such sales.²⁵⁶

The court did not find any deductions for contributions of co-salvors. Neither the subcontracted charterers nor the conservators were held to be co-salvors, since all parties appeared to have been paid market rates for their services.²⁵⁷ The court declined to make a deduction for revenues that RMST earned from displaying the artifacts because RMST convinced the court that its expenses for recovery and preservation outweighed any income.²⁵⁸

C. Covenants

RMST’s activities were analyzed under the Fourth Circuit’s seven-factor test in order to determine the amount of the salvage award, but compliance with the eight negotiated covenants was an explicit “condition precedent for receiving an *in specie* salvage award.”²⁵⁹ The covenants control the artifacts recovered in the 1993, 1994, 1996, 1998, 2000, and 2004 expeditions (the “Subject TITANIC Artifact Collection”—“STAC”) and have several key provisions.²⁶⁰ First, the *in specie* award, rather than a grant of full title without restraints on alienability, is a “trust for the benefit of and subject to the beneficial interest of the public.” Second, the collection must be “kept together and intact” forever. Third,

²⁵² *Id.* at 801–03.

²⁵³ *Id.* at 803–05.

²⁵⁴ *Id.* at 803–04.

²⁵⁵ R.M.S. Titanic, Inc. v. Wrecked & Abandoned Vessel (*Titanic 2007*), 531 F. Supp. 2d 691, 693 n.4 (E.D. Va. 2007).

²⁵⁶ *Titanic 2010*, 742 F. Supp. 2d at 804.

²⁵⁷ *Id.*

²⁵⁸ *Id.* at 807.

²⁵⁹ *Id.* at 810.

²⁶⁰ *See id.* at 810–12.

any sale or transfer of collection requires court approval. Finally, the covenants are “perpetual in duration” and run with the collection if it is ever sold or transferred.²⁶¹

The stated purpose of the covenants is to ensure that *Titanic* artifacts falling within the covenants’ scope are, for the benefit of the public interest, kept together and intact and are “available to posterity for public display and exhibition, historical review, scientific and scholarly research, and educational purposes.”²⁶² The covenants also mirror provisions contained in NOAA guidelines, the International Agreement, and the Memorial Act. The French artifacts are not directly subject to the covenants, but the covenants seek, “to the maximum extent possible,” to merge the collections and curate them together. The French artifacts are subject to the International Agreement, which has similar guidelines in its Article III, as well as the *in specie* award granted by the French Maritime Tribunal, which prohibits the sale of the artifacts.²⁶³

The covenants provide that “RMST shall be the first trustee” of the STAC, further indication that RMST does not “own” the articles. In order to be a trustee, an entity must be a “qualified institution” capable of preserving and displaying the artifacts, and that entity must have court approval to gain trustee status. NOAA also has the right to monitor RMST’s compliance with the covenants, and NOAA may recommend subsequent trustees and additional experts as needed.²⁶⁴

In order to preserve the artifacts, the covenants require the trustee to conserve and curate the “objects” with “professional standards current at the time.”²⁶⁵ Additionally, the trustee must meet requirements for proper “[t]ransport, exhibition, and security” and the trustee must document all “objects” following “reasonably prudent archaeological standards.”²⁶⁶ Finally, the trustee must establish a reserve account to provide a “performance guarantee for the maintenance and preservation of the Titanic Artifact Collections for the public interest.”²⁶⁷ The trustee is directed to fund the reserve account by making quarterly payments of \$25,000 for 25 years, so that, with a reasonable rate of return, “there shall be an endowment, the annual income of which . . . would be sufficient to cover the estimated annual costs and expenses” of maintaining the collection for the year.²⁶⁸ As the court stated, “[f]or these purposes the

²⁶¹ See *id.* at 810; *id.* at 809–22.

²⁶² *Id.* at 811.

²⁶³ See *id.* at 809–20; see also *R.M.S. Titanic, Inc. v. Wrecked & Abandoned Vessel (Titanic 2004)*, 323 F. Supp. 2d 724, 727–28 (E.D. Va. 2004).

²⁶⁴ See *Titanic 2010*, 742 F. Supp. 2d at 810–20.

²⁶⁵ *Id.* at 815.

²⁶⁶ *Id.*

²⁶⁷ *Id.* at 812.

²⁶⁸ *Id.* at 817.

amount of an adequate endowment will be deemed to be equal to 5 million dollars.”²⁶⁹

The covenants provide guidance for both compliance and enforcement and, like the RMST salvage award itself, the covenants offer a model for future agreements. The coordinated efforts of RMST, the courts, and the federal government have produced a harmonious arrangement that benefits the public interest, while still providing the proper incentives for future salvage operations with the grant of a liberal salvage award.

V. CONCLUSION

The best way to preserve history for future generations is to preserve history for future generations. Ever since 21-year-old David Sarnoff first began relaying updates on the sinking from his perch on the roof of Wanamaker’s Department Store,²⁷⁰ the subject of the *Titanic* has not lost its sway over American culture, and the *Titanic* also has remained a fixture in American courts. The success of the film “Titanic” in 1997, and the culmination of the RMST salvage litigation in 2011 show that the ocean liner that failed to complete its first voyage in 1912 is still very much “with us” today.

Titanic’s jurisprudence has its origins in the limitation of liability actions that led to the enactment of DOHSA. Through the discovery of the wreck and the subsequent Memorial Act, the sinking’s legacy is now enshrined in federal law. In addition, the salvage award in *R.M.S. Titanic v. The Wrecked and Abandoned Vessel* will hopefully serve as a model for future salvage of historical shipwrecks. The *Titanic* will remain “with us” in the future.

Even if one could “preserve” the wreck of the *Titanic*, it is difficult to see what form that “preservation” would take, especially given the obvious technological difficulties involved in working on the bottom of the Atlantic Ocean. The wreck certainly deteriorated between the sinking in 1912 and the discovery in 1985. Since 1985, the wreck has continued to deteriorate rapidly and, of course, salvagers have also caused damage. Shipwrecks thus are different from other historical sites because they deteriorate more rapidly and are considerably more difficult to reach. Quite simply, wrecks cannot be “restored” or “preserved” while underwater. (Of course, if it were possible to raise the entire wreck then conceivably it could be restored like an old castle.) It follows that shipwrecks like the *Titanic* should be salvaged for the same reasons that land-based historical sites are preserved or restored to their original condition. Just as it would have been inappropriate to build a parking lot over the Gettysburg battle site, it is equally inappropriate to allow wrecks like the *Titanic* to disappear. It also is not possible to bring large groups

²⁶⁹ *Id.*

²⁷⁰ See EATON & HAAS, *supra* note 7, at 181.

of visitors to the *Titanic* using current technology, and what is possible is expensive and risky. Bathing the entire wreck in permanent floodlighting so that visitors in submersibles could view the wreck also would alter the character of the site and possibly harm the ecosystem of the marine life that calls the wreck home. Repeated visits to the wreck also would likely cause damage. Granted, to those who have been privileged to visit the wreck, viewing a recovered artifact in a museum indeed may not be a very satisfying experience but, to the rest of the world, it is a chance to have direct contact with one of the most famous events of the twentieth century. One need not visit the moon to gaze at a moon rock in awe.

Given the choice between allowing every historical and cultural artifact in the wreck to be destroyed, or carefully recovering and preserving as much as possible for future generations, the latter option seems a more dignified and respectful way to honor the memory of those who were lost in the sinking. Allowing an historic shipwreck to continue to deteriorate without attempting viable salvage is not a preservation plan—it is an irresponsible lapse in responsibility to future generations. Human history must be preserved by those in a position to preserve it. The resolution in *RMST* is just and equitable, and should serve as a model for future salvage of historic shipwrecks.