

R.M.S. TITANIC: UNDERWATER CULTURAL HERITAGE'S SACRIFICE

By Elizabeth Varner¹

I. History of the *R.M.S. Titanic*

A. Shipwreck

1. Introduction

In 1912 the *R.M.S. Titanic* (*Titanic*) sunk; in 1985 Dr. Robert Ballard and the Institute of France for Research & Exploration of the Sea (IFEMER) discovered the *Titanic*, and in 1994 the legal battles began.² The stories of the *Titanic* sinking are just the tip of the iceberg – this Article presents the rest of the story.

There have been legislation, treaties, and guidelines enacted to protect the *Titanic*. International treaties and United States of America ("US") statutes and guidelines recognize the historical importance of the *Titanic* and seek to preserve the *Titanic* and her artifacts, to keep the artifacts together as a collection, to exhibit the collection to the public, and to disseminate the information to the public.

Much litigation has consumed the issue of which court has jurisdiction to adjudicate rights to the *Titanic* and who has those rights, however, as the *Titanic* is in international water. One complicating factor is the different attitudes and law of States involved towards underwater cultural heritage.³

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² *R.M.S. Titanic, Inc. v. Haver*, 171 F.3d 943, 969 (4th Cir. 1999).

³ Note that State refers to a nation State in this Article. Craig Forrest, *Has the Application of Salvage Law to Underwater Cultural Heritage Become a Thing of the Past*, 34 J. Mar. L. & Com. 309, 313 (2003)(citing Colin Martin, *Archaeology in an Underwater Environment*, in ANON., PROTECTION OF THE UNDERWATER CULTURAL HERITAGE: TECHNICAL HANDBOOK FOR MUSEUMS AND MONUMENTS 19 (1981)). Cultural property underwater is different from cultural property above the water only by its location and "describes an environmentally-imposed technique rather than a subject in its own right." *Id.* Because the wreck is underwater, often in depths that cause the

In the US, the Fourth Circuit had declared that it has *in rem* jurisdiction over the *Titanic* in the US and that R.M.S. Titanic, Inc. (RMST), had salvor-in-possessor status in the US. After RMST's status was fully litigated, the district court in the Eastern District of Virginia crafted a salvage award for RMST. The court determined that RMST was entitled to 100% of the fair market value of the salvaged objects and gave title of the artifacts to RMST. Since then, RMST has announced its intentions to sell the salvaged *Titanic* artifacts – leaving the *Titanic* and her artifacts in peril once again.

First, this Introduction outlines the history of the *Titanic* and some of the repercussions from its sinking. This section also examines the continuing public interest as well as the discovery of the *Titanic* and its salvage. In Part II, this Article reviews which parties have rights to the *Titanic*. Part III then highlights key portions of protective legislation. In Part IV, this Article discusses jurisdiction over the *Titanic*. Part V reviews what rule to apply and differences in various States' laws towards underwater cultural heritage while Part VI reviews RMST's award of title to the *Titanic* artifacts. Finally, in Part VII, this Article places the role of the *Titanic* in perspective.

2. "Iceberg right ahead"

The *Titanic* was important in the early twentieth century because it was widely touted as man's conquest over nature – a virtually indestructible ship that had mastered the sea. Almost no safety measures were followed on the ship because of this belief. When the *Titanic* sunk, it became one of the most infamous ships and maritime disasters in history, which resulted in

climate to be cool, wrecks are typically well preserved. *Id.* Most importantly, "the wreck and its contents can be considered a 'time-capsule' to the extent that, at the time of sinking, the wreck captures a point in time in history. *Id.* All the artifacts at the site will have the same time reference, improving their contextual interpretation." *Id.*

This is especially true in the case of the *Titanic* since it preserves a Pre-World War time capsule and is valuable for its context and history rather than any cargo. *Id.* Moreover, the historical importance is international as it contained persons and property from many States. *Id.*

investigations, recriminations, and changes in law and maritime practices. The *Titanic's* continued importance has resulted in many expeditions to the wreck both by salvors and by educational and government institutions to study it and retrieve artifacts.

The *Titanic* was a luxury British steamer from the White Star Line that was 882 feet long and weighed 54,328 tons.⁴ The *Titanic* left Southampton, England, to begin its maiden voyage on April 10, 1912.⁵ The ship made several stops to pick up additional passengers in France and Ireland before crossing the Atlantic on its final destination to New York.⁶ After making these stops, the ship began its transatlantic voyage with over 2,207 persons on board.⁷

Disaster struck four days into the journey. The ship's captain, Captain Edward John Smith, received three telegrams that warned him about icebergs on April 14th, but he failed to decrease the *Titanic's* speed.⁸ On the evening of April 14, 1912, the *Titanic* was traveling at its greatest speed yet at over twenty-four miles per hour when the lookout, who had been refused binoculars, telephoned the officer on watch warning, "[i]ceberg right ahead."⁹

Titanic's First Officer, William Murdoch, ordered the wheel to "hard astarboard" and reversed the engines.¹⁰ Unfortunately, this emergency maneuver directed the impact from the strongest section of the ship, the prow, to one of the weakest panels on the side of the ship.¹¹ The *Titanic* had struck an iceberg – potentially 1,600 feet high – off the coast of Newfoundland,

⁴ H.R. Rep. No. 99-393 (1985). The *Titanic* was owned by the Oceanic Steam Navigation Company of England, whose parent company was the International Navigation Company, whose parent company was International Mercantile Company, a New Jersey Corporation. *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ S. Rep. No. 806 (1912). This senate report on the causes leading to the wreck of the White Star liner "Titanic" consumed eighteen days of hearings, eighty-six witnesses, and 1,000 pages of testimony. *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

Canada, at 11:46 p.m.¹²

Many of the passengers of the *Titanic* did not wake up and prepare to evacuate because the impact was not widely felt through the big ship and no general alarm was given.¹³ The *Titanic's* operators did, however, send out a distress call twenty minutes after impact.¹⁴

The *Titanic* remained afloat for two hours and forty minutes after the impact¹⁵ while the ship's musical group was reported to play "Nearer, My God, to Thee."¹⁶

Lady Duff-Gordon, of legal and fashion fame, was a survivor from the *Titanic* who gave a contemporary account of her lifeboat view of the *Titanic's* demise noting that:

[T]he boat's stern lifted in the air and there was a tremendous explosion. After this, the *Titanic* dropped back again. The awful screaming continued. Two minutes after this there was a great explosion. The whole forward of the great liner dropped down under the waves. The stern rose 100 feet, almost perpendicularly. The boat stood up like an enormous black finger against the sky.

Little figures hung to the point of the finger and dropped into the sea. The screaming was agonizing.

I never heard such a continued chorus of utter despair and agony.

The great proud *Titanic* slowly sank as though a great hand was pushing it gently down under the waves. As it went, the screaming of the poor souls left onboard seemed to grow louder. It took the *Titanic* perhaps two minutes to sink after the last explosion. It went down slowly without a ripple.¹⁷

On the morning of April 15, 1912, at 2:20 a.m., the *Titanic* sank into the depths of the North Atlantic.¹⁸

The *California* was close enough to the *Titanic* to see the rockets launched from the *Titanic* and other distress signals, but did not respond until after the *Titanic* had already sunk as

¹² H. Rep. No. 99-393 (1985).

¹³ H. Rep. No. 99-393 (1985).

¹⁴ S. Rep. No. 806 (1912).

¹⁵ H. Rep. No. 99-393 (1985).

¹⁶ Paul Niemeyer, *Applying Jus Gentium to the Salvage of the R.M.S. Titanic in International Waters- The Nicholas J. Healy Lecture*, 36 J. Mar. L. & Com. 431, 432 (2005).

¹⁷ *Id.* Niemeyer was one of the justices who decided the RMST case in the Fourth Circuit Appeals. *Id.*

¹⁸ S. Rep. No. 806 (1912); *R.M.S. Titanic, Inc. v. Haver*, 171 F.3d 943, 951 (4th Cir. 1999).

the radio operator of the *California* slept through the disaster.¹⁹ Twenty-four-hour radio monitoring was not required at that time.²⁰ The ship *Carpathia* rushed to save the passengers and crew, but was not able to arrive before the ship sunk.²¹ Those who did not make it into a lifeboat either sunk with the ship or died in the frigid waters.²²

Captain Arthur Ronstron of the *Carpathia* only found one body in the water even though he searched for four hours.²³ While 190 bodies were later found sixty-two miles from the ship, many of the more than 1,500 people who died went down with the *Titanic*.²⁴

3. Repercussions

This tragedy resulted in recriminations and substantial changes in maritime law and safety. Both the US and United Kingdom (UK) held hearings to investigate the *Titanic* sinking.²⁵ In the US, Senator William Smith reported to Congress that one problem, which led to the disaster was:

so confident were they that both owner and builder were eager to go upon the trial trip; no sufficient tests were made of boilers or bulkheads or gearing or equipment, and no life-saving or signal devices were reviewed; officers and crew were strangers to one another and passengers to both; neither was familiar with the vessel or its implements or tools; no drill or station practice or helpful discipline disturbed the tranquility of that voyage, and when the crisis came a state of absolute unpreparedness stupefied both passengers and crew, and in their despair the ship went down, carrying as needless a sacrifice of noble women and brave men as ever clustered about the Judgment Seat in any single moment of

¹⁹ H. Rep. No. 99-393 (1985).

²⁰ H. Rep. No. 99-393 (1985).

²¹ H. Rep. No. 99-393 (1985).

²² H. Rep. No. 99-393 (1985).

²³ S. Rep. No. 806 (1912).

²⁴ *Id.*; NOAA, *R.M.S. Titanic Maritime Memorial Preservation Act of 2007, Section-by-Section Analysis*, (2007) available at <http://www.gc.noaa.gov/documents/titanic-sec-by-Sec.pdf>; National Geographic, *Discovering Titanic*, <http://photography.nationalgeographic.com/photography/photos/discovering-titanic/titanic-hole-photography.html> (last visited on Oct. 13, 2009). An exact number is impossible to calculate as safety regulations did not require that the ship leave the passenger list on land at that time, and the passenger list went down with the ship. *Id.*

²⁵ H. Rep. No. 99-393 (1985).

passing time.²⁶

The egregious dearth of safety measures increased the massive loss of life. First, there was only enough space on the lifeboats for 1,176 people, which complied with regulations at that time, but was 1,000 seats short to evacuate everyone on board. Second, of the 1,176 spaces only 706 were used because the lifeboats were not filled to capacity.²⁷ The lifeboats initially were not filled completely because the passengers did not think the *Titanic* would sink.²⁸

Both investigative tribunals recommended that "passenger vessels be equipped with watertight compartments and sufficient lifeboats and liferafts to accommodate all persons on board, life boat drills be conducted, and an international conference on vessel safety be convened."²⁹ The US Senate also enacted legislation to increase safety at sea, ratified the International Convention on the Safety of Life at Sea for passenger vessels, and required twenty-four-hour radio monitoring operations.³⁰ The International Ice Patrol was also created to monitor icebergs.³¹ The changes resulting from the *Titanic* disaster still affect current law and maritime practices.

B. Continuing Public Interest

Despite the passage of 100 years, *Titanic's* allure still captivates public interest. Dr. Nancy Foster from the National Oceanic and Atmospheric Administration (NOAA) summarized the importance of the *Titanic* best when she noted that "the R.M.S. *Titanic* is a unique historical shipwreck because of the emotional reactions and mystique surrounding it, its perception as the world's greatest maritime disaster, and because the international community focused instant

²⁶ S. Rep. No. 806 (1912).

²⁷ *Id.*

²⁸ H. Rep. No. 99-393 (1985).

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

attention on improved safety and international cooperation."³² This continuing public fascination is shown with the plethora of successful *Titanic* museum exhibits and sales.

RMST's *Titanic* exhibition of more than 400 salvaged *Titanic* artifacts has been featured at many museums including Chicago's Museum of Science and Industry.³³ RMST claims that over fifteen million people have visited these exhibitions of salvaged *Titanic* artifacts.³⁴ In addition, the exhibition of the *Titanic* artifacts has generated millions of dollars in revenue.

Furthermore, the interest in the *Titanic* generates massive fiscal returns on *Titanic* objects that are well over what the objects are actually worth. The *Titanic* was not a treasure ship valued for its cargo. Rather, the *Titanic* was a passenger ship with cargo consisting of objects that have already disintegrated such as walnuts and orchids.³⁵ The remaining objects are passengers' property and the physical effects of the *Titanic* itself. Thus, "the value of the cargo lies instead in the popular imagination and curiosity."³⁶

While the artifacts salvaged from the *Titanic* cannot legally be sold individually, several artifacts that did not sink with the *Titanic* can be sold. Debris that floated from the wreck, souvenirs that were sold prior to the launch of the ship, and objects that were saved by the survivors have generated thousands of dollars apiece – well above the market price of the same object that was not affiliated with the *Titanic*. For example, on April 18, 2009, a sale of *Titanic* objects that had been saved by survivors netted around £300,000 at an auction ran by Andrew Aldridge.³⁷ New York auction house, Guernsey's, also sold *Titanic* objects in 2004 that had been

³² H. Rep. No. 99-393 (1985).

³³ CBS News, *Titanic Artifacts*, Sept. 5, 2000, <http://www.cbsnews.com/htdocs/titanic/frameource.html>.

³⁴ Corporate Profile, *RMS Titanic, Inc.*, <http://www.titanic-online.com/index.php4?page=448> (last visited on Oct. 8, 2009).

³⁵ James Nafziger, *Second Newport Symposium: "Sunken Treasure: Law, Technology, and Ethics": Fourth Session: Future Directions: The Titanic Revisited*, 30 J. Mar. L & Com. 311, 317 (1999).

³⁶ *Id.*

³⁷ Southern Daily Echo, *Auction of Titanic Items Raises £300,000*, Apr. 19, 2009, available at http://www.dailyecho.co.uk/news/4301482.Rare_Titanic_items_sold_for__300_000.

plucked from the water in 1912, which included a deck chair and a "19-inch section of carved English oak that made up part of the grand staircase."³⁸ Thus, the *Titanic* legacy lives on, generating massive sums of money for artifacts associated with the wreck, which spurs the race to salvage more goods. With the fiscal rewards from selling and exhibiting the artifacts, there is a strong incentive to grab as many *Titanic* artifacts as possible that is detrimental to preservation efforts.

C. Discovery and Salvage

1. Discovery

The *Titanic* rested in her watery grave for seventy-three years before being found. A joint American and French expedition, consisting of Ballard and IFEMEER, found the *Titanic* shipwreck on September 1, 1985.³⁹ It is in international waters nearly 400 miles away from Newfoundland, Canada, in 12,500 feet of water.⁴⁰ After finding the wreck, Ballard pled for a "gentle exploration" of the *Titanic*.⁴¹ The US Congress responded to the discovery by passing the RMS Titanic Maritime Memorial Act in 1986 (Act) to protect the historical significance of the *Titanic*.⁴²

2. State of the Current Wreck

The *Titanic* is currently in stable condition on the sea bed. The wreck is over two miles under the water in frigid temperatures that have preserved much of the inorganic artifacts. The *Titanic* broke into two large pieces upon sinking. Both pieces of the hull are intact, but the debris from the split has created an extensive debris field. Artifacts found within the debris field are

³⁸ National Geographic News, *Titanic Artifacts Set for Auction Block This Week*, June 7, 2004, http://news.nationalgeographic.com/news/2004/06/0607_040607_titanicauction.html.

³⁹ Interview with Ole Varmer, General Counsel, NOAA, in New Orleans, LA (Oct. 10, 2009).

⁴⁰ *Titanic, Inc. v. Haver*, 171 F.3d 943, 951 (4th Cir. 1999).

⁴¹ H. Rep. No. 99-393 (1985).

⁴² RMS Titanic Maritime Memorial Act, 16 U.S.C. §450rr (1986).

afforded less protection than artifacts within the hull.

i. Debris Field

The area not within the hull is the debris field. As the *Titanic* broke into two upon its descent, there is a significant amount of objects within the area surrounding the two halves of the hull.⁴³ Untreated organic material outside of the hull of the *Titanic* has decayed, but the debris field is littered with passengers' possessions and *Titanic* paraphernalia such as dishes.⁴⁴ Currently, the salvors and explorers can salvage and explore the debris field. Thus, the artifacts discussed in this paper are the artifacts from the debris field.

ii. The *Titanic* Hull

As many artifacts in the debris field, over 5,000 objects, have already been salvaged, salvors want access to the artifacts within the hull. The areas within the hull are an area of "isolated environments [that] create a condition of stasis where constant pressure, low temperatures, no flow, and anoxic water levels have been known to preserve organic matter for centuries."⁴⁵ However, salvage of the interior of the hull would not only disturb the final resting place of many of the dead, but it would also destabilize the ship resulting in the *Titanic* collapsing even faster.

Currently, the hull is considered sacrosanct as a gravesite. Thus, the areas that are not open to the marine environment are not to be penetrated. Consequently, RMST has not been allowed to cut holes into the hull.⁴⁶

Concerns have been expressed about the condition of the actual ship itself.⁴⁷ NOAA

⁴³ Interview with Ole Varmer, General Counsel, NOAA, in New Orleans, L.A. (Oct. 10, 2009).

⁴⁴ Guidelines for Research, Exploration and Salvage of *RMS Titanic*, Fed. Reg. Vol. 66, No. 71 (Apr. 12, 2001).

⁴⁵ NOAA Office of the General Counsel, Frequently Asked Questions Regarding the R.M.S. *Titanic*, http://www.gc.noaa.gov/gcil_titanic.html (last visited on Sept. 22, 2009).

⁴⁶ *Id.*

⁴⁷ Fed. Reg. Vol. 66, No. 71 (Apr. 12, 2001).

estimates that the hull might collapse in fifty years.⁴⁸ A UNESCO metallurgist, however, believes that the hull will be intact much longer.⁴⁹

Salvors argue they should be able to grab what they can before the metal walls of the hull collapse, which would destroy the objects within. Conversely, NOAA believes that that salvage and exploration activities should be conducted in a way that would not accelerate the rate of decay or instability of the hull, such as cutting holes in the hull to access the artifacts within the *Titanic*.⁵⁰

Finally, while Ballard recognizes that the hull will collapse one day,⁵¹ he believes the hull should be left alone, with no intent to salvage or conserve the artifacts within, because the ship is a grave site. The French and British scientists that Ballard has worked with concur with his opinion.⁵²

3. Salvage

Despite Ballard's plea for a gentle exploration, salvors descended upon the *Titanic* within two years of its discovery. Since then salvors have been embroiled in legal battles to gain possession of *Titanic* and her contents.

Salvage on the *Titanic* began in 1987.⁵³ Titanic Ventures, a Connecticut partnership, and IFEMEER began salvaging the wreck and conducted over thirty-two dives during which they recovered 1,800 objects in 1987.⁵⁴ In 1993, a French administrative agency, the Office of Maritime Affairs of the Ministry of Equipment, Transportation and Tourism, awarded title of the

⁴⁸ *Id.*

⁴⁹ Interview with Ole Varmer, General Counsel, NOAA, in New Orleans, L.A. (Oct. 10, 2009).

⁵⁰ Fed. Reg. Vol. 66, No. 71 (Apr. 12, 2001).

⁵¹ Interview with Ole Varmer, General Counsel, NOAA, in New Orleans, L.A. (Oct. 10, 2009).

⁵² H. Rep. No. 99-393 (1985).

⁵³ *R.M.S. Titanic, Inc. v. Haver*, 171 F.3d 943, 951 (4th Cir. 1999).

⁵⁴ *Id.* at 952-953.

1,800 objects salvaged from the *Titanic* in the 1987 expedition to Titanic Ventures.⁵⁵ Titanic Ventures later sold its interest in the salvage operation and recovered objects to RMST, which recovered 800 artifacts from the *Titanic* in 1993.⁵⁶

RMST also recovered artifacts on expeditions in 1994 and 1996.⁵⁷ Based on the recovery of artifacts in these expeditions, the Eastern District of Virginia awarded exclusive salvage rights to RMST in 1994 and the Fourth Circuit has affirmed that RMST was the first party to successfully salvage the *Titanic*.⁵⁸

Many parties contested RMST's exclusive salvor status and sought to obtain salvage rights themselves. For example, John Joslyn contested RMST's status as exclusive salvor of the *Titanic* in 1996, which the district court rejected.⁵⁹ The court noted that RMST's promise to preserve, keep the artifacts together in one collection, and exhibit the *Titanic* artifacts was a significant factor in their rejection of Joslyn's claim.⁶⁰

The district court issued an order in 2000 that mandated that RMST conserve the *Titanic* artifacts and not sell any objects from the *Titanic*.⁶¹ Within this order, the district court noted that "this court has continued R.M.S. Titanic, Inc. as salvor-in-possession of the wreck of the *Titanic* from year to year on the understanding that R.M.S. Titanic, Inc. would treat and preserve all artifacts recovered and would exhibit them to the public and would not sell or dispose of any

⁵⁵ R.M.S. Titanic, Inc. v. Wrecked & Abandoned Vessel, 435 F.3d 521, 525 (4th Cir. 2006). To obtain title, RMST made representations to the French Office of Maritime Affairs that the artifacts would only be "used [for] a cultural purpose and will not, therefore, be part of any operations which would lead to their dispersion, but to the exception of exhibition purposes, and none of the artifacts will be sold," which contributed to the French government granting RMST title to the objects as was seen in the French Administrator's letter on September 22, 1993 which stated that "agreed to make use of such objects in conformity with the respect due the memory of their initial owners and to not carry out any commercial transaction concerning such objects nor any sale of any one of them nor any transaction entailing their dispersion, if not for the purposes of an exhibition." *Id.*

⁵⁶ Haver, 171 F.3d at 952-953.

⁵⁷ *Id.* at 969.

⁵⁸ *Id.* at 951.

⁵⁹ *Id.*

⁶⁰ R.M.S. Titanic, Inc. v. Wrecked & Abandoned Vessel, 286 F.3d 194, 199-200 (4th Cir. 2002).

⁶¹ *Id.*

of said artifacts."⁶²

Ballard and NOAA returned to the *Titanic* to study the shipwreck and see what changes had occurred since Ballard discovered the wreck in 1985.⁶³ Remnants of shoes, suitcases, and dishes in the debris field around the *Titanic* reminded the members of the expedition that many people had died in the *Titanic* disaster.⁶⁴

After Ballard's return to *Titanic*, the US and the UK signed the International Agreement to Preserve the *Titanic* (Agreement) on June 19, 2004, which was formed to preserve the historical importance of the *Titanic*.⁶⁵

Despite the signing of the Agreement, however, RMST continued to salvage the *Titanic*'s artifacts. Since the initial determination in 1994, RMST's status as salvor of the *Titanic* was repeatedly affirmed by the district court and by the Fourth Circuit. As such, the Fourth Circuit remanded the case for a determination of the salvage award in 2006.⁶⁶

RMST, however, failed to submit requests for a salvage award for two years, and continued to assert that it had received ownership rights to the *Titanic* artifacts from RMST's settlement with Liverpool and London, the original insurers of the *Titanic*.⁶⁷ In October 2007, the District Court of the Eastern District of Virginia rejected RMST's public claim and reprimanded RMST noting that "[t]he court will 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."⁶⁸

⁶² *Id.*

⁶³ NOAA Magazine, *Proposed Legislation Gives NOAA the Lead on Protecting RMS Titanic Wreck Site* (2007), available at <http://www.noaanews.noaa.gov/stories2007/s2896.htm>.

⁶⁴ NOAA Magazine, *"Return to Titanic" Meets Science Objectives, Reminds All that Wreck Site is Hallowed Ground: Expedition Ends Just Prior to U.S. Signing of Titanic Agreement* (2004), available at <http://www.noaanews.noaa.gov/stories2004/s2248.htm>.

⁶⁵ Fed. Reg. Vol. 66, No. 71 (Apr. 12, 2001). The US has not yet ratified the Agreement.

⁶⁶ Memorandum Opinion and Order from Rebecca Smith, United States District Court of Eastern District of Virginia (Oct. 1, 2007).

⁶⁷ *Id.*

⁶⁸ *Id.*

The district court directed RMST to submit a motion for a salvage award within sixty days. The complexity of the award resulted in drawn out proceedings.⁶⁹

On November 18, 2008, the court held a Status Hearing to evaluate *inter alia* the covenants that the US was placing on the artifacts prior to the salvage award.⁷⁰ Afterwards, an evidentiary trial was set for October 2009.⁷¹

On August 12, 2010, the United States District Court for the Eastern District of Virginia granted RMST 100% of the fair market value of the artifacts and reserved the right to decide how that award would be paid.⁷²

On August 15, 2011, the district court of the Eastern District of Virginia awarded RMST title to the artifacts in an *in specie* award as no appropriate buyer had offered to purchase the *Titanic* for the fair market price within the year.⁷³ Title to the artifacts is subject to the conditions and covenants crafted by the US government and RMST.⁷⁴

II. Rights to the Titanic

Legal rights to the *Titanic* were hotly contested because there are many parties with an interest in the *Titanic*. Scholar Thomas Schoenbaum noted that shipwrecks create a "tug of war for the spoils; the usual contestants are (1) the salvors; (2) the original owners or their successors; and (3) national or state governments and their allies, the historic preservationists."⁷⁵ The *Titanic* is even more complicated than a typical shipwreck because the *Titanic* is currently in international waters, and, therefore, is not subject to one State's exclusive jurisdiction.

⁶⁹ *Id.*

⁷⁰ Rebecca Smith, United States District Court for the Eastern District of Virginia, Status Hearing (Nov. 18, 2008).

⁷¹ Letter from Rebecca Smith, United States District Court, Eastern District of Virginia, to Robert McFarland and Lawrence Leonard (Sept. 9, 2009).

⁷² R.M.S. Titanic, Inc. v. The Wrecked and Abandoned Vessel, 742 F. Supp. 2d 784, 788 (E.D. Va. 2010).

⁷³ R.M.S. Titanic, Inc. v. The Wrecked and Abandoned Vessel, No. 2:93cv902, 2011 U.S. Dist. LEXIS 93823, at *2 (E.D. Va. Aug. 15, 2011).

⁷⁴ R.M.S. Titanic, Inc. v. The Wrecked and Abandoned Vessel, No. 2:93cv902, 2011 U.S. Dist. LEXIS 93823, at *3 (E.D. Va. Aug. 15, 2011).

⁷⁵ THOMAS SCHOENBAUM, ADMIRALTY AND MARITIME LAW §16-7 (2011).

A. Original Owners

The *Titanic*, like many historic shipwrecks, no longer has an original owner with outstanding claims, which further complicates the rights to this shipwreck.

The original owners of the *Titanic* had been compensated for the loss of the *Titanic* by their insurers, Liverpool and London Steamship Protection and Indemnity Association (LLSPIA).⁷⁶ LLSPIA had filed a claim asserting an interest in the *Titanic*, but LLSPIA and RMST settled the claim, and LLSPIA's claim was dismissed with prejudice.⁷⁷

However, this did not grant RMST ownership rights to the *Titanic* or her artifacts. After RMST claimed, in 2007, that it had acquired subrogation ownership rights from LLSPIA upon settlement as part of its ongoing attempt to acquire title in the objects on the *Titanic*, the court threatened sanctions and reprimanded RMST noting that:

RMST's assertion that it has acquired ownership rights to the artifacts via Liverpool and London is yet another attempt to circumvent this court's (and the Fourth Circuit's) repeated declarations that RMST is the salvor, and not the owner, of the artifacts from the R.M.S. *Titanic*. In short, RMST could not have acquired any rights from Liverpool and London, because Liverpool and London did not have any rights to give.⁷⁸

B. Salvors

The Fourth Circuit has awarded RMST salvor status in the US. This will be discussed in detail below.

C. Governments

Many governments and historic preservationists are involved with the *Titanic* and thus assert rights to the *Titanic*. US courts claimed *in rem* jurisdiction over the *Titanic* and *Titanic*

⁷⁶ R.M.S. *Titanic*, Inc. v. Haver, 171 F.3d 943, 952-53 (4th Cir. 1999).

⁷⁷ *Id.*

⁷⁸ R.M.S. *Titanic*, Inc. v. Wrecked & Abandoned Vessel, 531 F. Supp. 2d 691, 691-93 (E.D. Va. 2007).

artifacts.⁷⁹ The United Kingdom was the *Titanic's* flag state, which is relevant as the flag state's law applies to regulate the ship and concerns such as labor and environment when a ship is above the water.⁸⁰ France was a co-discover of the *Titanic* and 1,800 objects were within the boundaries of France for conservation when the French administrative agency ruled on the artifacts' title.⁸¹ Finally, the *Titanic* is on the Canadian continental shelf.⁸² These States are the key governmental actors who have all participated in forming the Agreement. None of these governments have exclusive rights to the *Titanic*, however.

III. Protective Legislation

Since the discovery of the *Titanic* in 1985, the US has implemented statutes and guidelines and signed international agreements to protect the *Titanic*. There is also pending legislation that would further protect the *Titanic* and implement the international agreement. Furthermore, the salvage of the *Titanic* has spurred advances in protection of underwater cultural heritage in the international community. The following analyzes key provisions of these protective measures.

A. RMS *Titanic* Maritime Memorial Act (Act)

In 1985, after the discovery of the *Titanic*, Congress began crafting legislation to protect the *Titanic*. Prior to the passage of the Act, extensive investigation was conducted, which included interviewing survivors, such as Mrs. Louise Pope, who supported research and recovery of artifacts for museums but not commercial salvage.⁸³

In 1986, Congress passed the Act to honor the people who died aboard the ship, to

⁷⁹ Interview with Ole Varmer, General Counsel, NOAA, in New Orleans, L.A. (Oct. 10, 2009).

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ H. Rep. No. 99-393 (1985). Mrs. Pope was four years old when the *Titanic* sank. She and her parents survived, but her aunt and uncle did not. *Id.*

advance ocean science, and to preserve the *Titanic*.⁸⁴ Congress explicitly recognized that the *Titanic* is of "major national and international cultural and historical significance, and merits appropriate international protection."⁸⁵ The House Report further noted that "this is the final resting place and monument for over 1,500 souls."⁸⁶ Moreover, the Act specifically notes that the purpose of the Act is to encourage development of international agreements and guidelines to conduct research and protect the *Titanic*.⁸⁷ While the guidelines have passed and an international agreement has been signed, the enacting legislation for the Agreement has not yet passed.

Both the House Report and Act stated that "pending such international agreement or guidelines, no person should physically alter, disturb, or salvage the R.M.S. Titanic in any research or exploratory activities which are conducted."⁸⁸ Congress defined "RMS Titanic" to include the actual wreck, contents, and the debris field.⁸⁹ However, the Fourth Circuit did not heed this express provision of the Act that states that no person should salvage the *Titanic*.

B. Guidelines for Research, Exploration and Salvage of *RMS Titanic*

Fifteen years after the passage of the Act and fourteen years after salvage on the *Titanic* began, NOAA created the Guidelines for Research, Exploration and Salvage of *RMS Titanic* (Guidelines) to create a legal framework for the salvage of the *Titanic* so that any salvage would be done in a way to maximize preservation efforts.

The Guidelines were approved on April 12, 2001, but, unlike the Act, they are advisory and not legally enforceable.⁹⁰ The Guidelines were developed in conjunction with the US, UK, France, and Canada and incorporate international archaeological standards that are found in the

⁸⁴ R.M.S. Titanic Maritime Memorial Act, 16 U.S.C. §450rr (1986).

⁸⁵ *Id.*

⁸⁶ H. Rep. No. 99-393 (1985).

⁸⁷ R.M.S. Titanic Maritime Memorial Act, 16 U.S.C. §450rr (1986).

⁸⁸ *Id.*

⁸⁹ *Id.* at §450rr-1.

⁹⁰ Guidelines for Research, Exploration and Salvage of *RMS Titanic*, Fed. Reg. Vol. 66, No. 71 (Apr. 12, 2001).

International Council on Monuments and Sites International Charter on the Protection and Management of Underwater Cultural Heritage (ICOMOS UCH) and the Secretary of the Interior's Standards and Guidelines for Archeology and Historic Preservation.⁹¹

The Guidelines, following the Act, explicitly state that while research should continue to enhance the public's understanding of the *Titanic*, "pending the adoption of the international agreement or implementation of international guidelines, no person should conduct any such research or exploration activity which would physically alter, disturb, or salvage the *RMS Titanic*."⁹² Furthermore, excavation of the *Titanic* and its artifacts should only be allowed when "justified by educational, scientific, or cultural interests."⁹³ However, the Guidelines also state that these guidelines do not prevent salvage operations that are consistent with the Guidelines, but instead provides guidelines to guide salvors while protecting the ship's historical importance.⁹⁴

The Guidelines require that the salvors record the excavation activities.⁹⁵ The Guidelines also provide that all artifacts taken from the *Titanic* and the debris field should be conserved and kept together as a collection for the public.⁹⁶ The Comments note that these two requirements of maintaining the collection as a whole and retaining the collection for the public interest are consistent with the Act, the admiralty courts orders in the *in rem* action against RMST, agreements between RMST and IFREMER, and agreements between RMST and the British National Maritime Museum.⁹⁷ The Comments to the Guidelines further explain that this does not preclude selling the artifacts from the *Titanic*, but that all of the artifacts must be sold together as

⁹¹ *See id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

the artifacts give context to one another.⁹⁸

Under the Guidelines, the salvors are supposed to leave the hull alone. The Guidelines expressly state that the hull shall not be penetrated so that the human remains will not be disturbed.⁹⁹ While the ship sunk one hundred years ago, and the bodies outside of the hull of the ship no longer remain, the hull has served as a time capsule with the artifacts within the hull preserved by the frigid temperatures of the North Atlantic Ocean two and a half miles deep. This is also supported by the Act, which designated the ship as a memorial to honor the people who died on the ship. This designation and preservation of the integrity of the hull is not unusual as several famous wrecks have been designated as memorials because of the bodies entombed within them that were never removed. Thus, this provision is aimed at preserving the sanctity of many people's final resting place as well as preserving a historical treasure.

When the hull starts collapsing, however, the Guidelines provide latitude for interpreting cracks in the hull as "debris field" so that the Guidelines are flexible enough to keep the legal framework to protect the *Titanic* intact in the future.¹⁰⁰

Thus, the Guidelines provide a framework for salvors to follow that would help preserve the *Titanic*. While these provisions are not being followed in their entirety by RMST or the district court, the Agreement and court decision reflect the guidelines.¹⁰¹ Moreover, these guidelines set a new standard for how courts can deal with underwater cultural heritage.

C. UNESCO Convention on the Protection of the Underwater Cultural Heritage (UCH Convention)

⁹⁸ *Id.*

⁹⁹ *Id.* The Guidelines state that the preferred means of preserving the *Titanic* is *in situ* preservation. *Id.* Mr. Varmer believes that the correct approach to ships is like when one finds a body that there is duty to do no harm. Interview with Ole Varmer, General Counsel, NOAA, in New Orleans, L.A. (Oct. 10, 2009).

¹⁰⁰ Interview with Ole Varmer, General Counsel, NOAA, in New Orleans, L.A. (Oct. 10, 2009).

¹⁰¹ Caroline Blanco, Assistant General Counsel, National Science Foundation, Address at LCCHP Conference (Nov. 3, 2011).

The UCH Convention was adopted by UNESCO on November 2, 2001,¹⁰² and entered into force on January 2, 2009, after twenty States ratified it.¹⁰³ Forty-one States are currently party to the UCH Convention.¹⁰⁴ The US has not ratified it, however.¹⁰⁵

The UCH Convention is relevant, even though the US is not a party to it, because it establishes a framework for archeological excavations and is a strong indicator of the importance of underwater cultural heritage to the international community.¹⁰⁶

The main principles of the UCH Convention are: "obligation to preserve underwater cultural heritage", "in situ preservation as the first option", "no commercial exploitation", and "training and information sharing".¹⁰⁷

Key provisions of the UCH Convention include Articles 1 and 4. Article 1(1)(a) of the UCH Convention defines "underwater cultural heritage", which establishes the threshold for accessing the protections under this Convention. The UCH Convention defines underwater cultural heritage as "all traces of human existence having a cultural, historical or archaeological character which have been partially or totally under water, periodically or continuously, for at least 100 years."¹⁰⁸ On April 15, 2012 it was 100 years since the sinking of the Titanic, and therefore the ship now incurs the protection of the Underwater Cultural Heritage Convention.

Moreover, under Article 4 of the UCH Convention:

Any activity relating to underwater cultural heritage to which this Convention applies shall not be subject to the law of salvage or law of finds, unless it: (a) is

¹⁰² PATTY GERSTENBLITH, *ART, CULTURAL HERITAGE, AND THE LAW* 837 (2008).

¹⁰³ THOMAS SCHOENBAUM, *ADMIRALTY AND MARITIME LAW* §16-7 (2011).

¹⁰⁴ UNESCO, <http://portal.unesco.org/la/convention.asp?KO=13520&language=E&order=alpha> (last visited Jan. 11, 2012).

¹⁰⁵ UNESCO, <http://portal.unesco.org/la/convention.asp?KO=13520&language=E&order=alpha> (last visited Jan. 11, 2012).

¹⁰⁶ Elizabeth Greene, Associate Professor, Brock University, Address at LCCHP Conference (Nov. 3, 2011).

¹⁰⁷ UNESCO <http://www.unesco.org/new/en/culture/themes/underwater-cultural-heritage/frequently-asked-questions/> (last visited Jan. 11, 2012); *see also* UNESCO Underwater Cultural Heritage Convention, art. 2, Nov. 2, 2001, 41 I.L.M. 40.

¹⁰⁸ UNESCO Underwater Cultural Heritage Convention art.1(1)(a), Nov. 2, 2001, 41 I.L.M. 40.

authorized by the competent authorities, and (b) is in full conformity with this Convention, and (c) ensures that any recovery of the underwater cultural heritage achieves its maximum protection.¹⁰⁹

Several States and historic preservationist strongly believe that law of salvage and finds is not appropriate for underwater cultural heritage such as the *Titanic*.

D. The Agreement Concerning the Shipwrecked Vessel RMS Titanic

In addition to the Act and the Guidelines, the US negotiated and signed an international agreement to provide additional protection to the *Titanic*. The Agreement built on both the Act and the Guidelines.¹¹⁰ The US and UK signed the international Agreement on June 19, 2004.¹¹¹

Representatives from the US, UK, Canada, and France had worked for three years, from 1997 until 2000, on the Agreement motivated by "the awareness that, since its discovery, the wreck has been the object of a number of explorations and that over 5000 artifacts have been recovered."¹¹² These countries worked together to develop an agreement to protect the *Titanic*

¹⁰⁹ UNESCO Underwater Cultural Heritage Convention art. 4, Nov. 2, 2001, 41 I.L.M. 40.

¹¹⁰ NOAA Office of the General Counsel Frequently Asked Questions Regarding the R.M.S. Titanic, http://www.gc.noaa.gov/gcil_titanic.html (last visited on Sept. 22, 2009). *See also*, RMS Titanic Maritime Memorial Act, 16 U.S.C. §450rr-3 (1986). International guidelines:

- (a) The Administrator is directed to enter into consultations with the United Kingdom, France, Canada, and other interested nations to develop international guidelines for research on, exploration of, and if appropriate, salvage of the R.M.S. Titanic, which--
 - (1) are consistent with its national and international scientific, cultural, and historical significance and the purposes of sections 450rr to 450rr-6 of this title; and
 - (2) promote the safety of individuals involved in such operations.
- (b) In carrying out subsection (a) of this section, the Administrator shall consult with the Secretary and shall promote full participation by other interested Federal agencies, academic and research institutions, and members of the public.

See RMS Titanic Maritime Memorial Act, 16 U.S.C. §450rr-4 (1986). International agreement:

(a) Negotiations

The Secretary is directed to enter into negotiations with the United Kingdom, France, Canada, and other interested nations to develop an international agreement which provides for--

- (1) the designation of the R.M.S. Titanic as an international maritime memorial; and
- (2) research on, exploration of, and if appropriate, salvage of the R.M.S. Titanic consistent with the international guidelines developed pursuant to section 450rr-3 of this title and the purposes of sections 450rr to 450rr-6 of this title.

Id.

¹¹¹ *U.S. Signs an Accord to Safeguard Titanic Agreement Calls Ship International Memorial*, GAZETTE, June 19, 2004.

¹¹² NOAA, Final Minute of the Negotiations for an Agreement Concerning the Shipwrecked Vessel RMS Titanic (2004), available at http://www.gc.noaa.gov/documents/gcil_titanic_final_minute.pdf.

that would "foreclose financing for, and the technical ability to conduct, unregulated salvage and other potentially harmful activities."¹¹³ The representatives wanted to preserve the shipwreck and the remaining artifacts believing that the *Titanic* was of significant historical international value.¹¹⁴

The Agreement stressed that human remains should not be disturbed, non-destructive techniques should be used, and that appropriate recording and dissemination of archaeological information should be performed.¹¹⁵

Additionally, the Agreement echoed the Guidelines stating that "[t]he project collection, including any artifacts recovered during the course of the project and a copy of all supporting documentation, shall be kept together and intact in a manner that provides for public access, curation and its availability for educational, scientific, cultural and other public purposes."¹¹⁶

Thus, the Agreement, like the Guidelines, stresses protection and preservation of the *Titanic* and its contents, keeping the artifacts together as one intact collection, providing access to the public, and disseminating information about the *Titanic* and its collection.

While the US signed the Agreement in 2004, the US required implementing legislation that still has not been passed.¹¹⁷ The US State Department has sent proposed legislation to Congress multiple times to implement the Agreement.¹¹⁸ The State Department has further noted that the significance of:

¹¹³ Press Release, State Department, Proposed Legislation to Implement Agreement to Protect RMS Titanic Wreck Site Sent to Congress (July 25, 2007).

¹¹⁴ NOAA, Final Minute of the Negotiations for an Agreement Concerning the Shipwrecked Vessel RMS Titanic (2004), available at http://www.gc.noaa.gov/documents/gcil_titanic_final_minute.pdf.

¹¹⁵ NOAA, Agreement Concerning the Shipwrecked Vessel RMS Titanic (2004) available at <http://www.gc.noaa.gov/documents/titanic-agreement.pdf>.

¹¹⁶ *Id.*

¹¹⁷ Press Release, State Department, Proposed Legislation to Implement Agreement to Protect RMS Titanic Wreck Site Sent to Congress (July 25, 2007).

¹¹⁸ Press Release, State Department, Proposed Legislation to Implement Agreement to Protect RMS Titanic Wreck Site Sent to Congress (July 25, 2007).

enacting this legislation and becoming a party to the agreement, [is that] the United States will become a leader in the international community in protecting perhaps the most important historic shipwreck in history, in accordance with the most current standards of underwater scientific, historic, and cultural resource protection, conservation and management.¹¹⁹

While the implementing legislation has not passed in Congress,¹²⁰ as recently as March 29, 2012, Senator John Kerry introduced a bill to amend the R.M.S. Titanic Maritime Memorial Act of 1986 and implement the Agreement.¹²¹

The proposed bill notes that the purpose of these additional sections is:

- (1) to ensure the protection of R.M.S. Titanic and its wreck site as—
 - (A) an international maritime memorial and grave site to those aboard the ship who perished in 1912; and
 - (B) a site of unique scientific, archeological, cultural, and historical significance for present and future generations;
- (2) to ensure that the planning and conduct of any activities directed at R.M.S. Titanic and its wreck site are consistent with applicable law, including the International Agreement; and
- (3) to call upon the Secretary of State to encourage other interested nations, especially nations with the technological capability to access R.M.S. Titanic and its wreck site, to consent to be bound by the International Agreement.¹²²

The proposed Act notes that the law of finds will not apply to the *RMS Titanic* or her artifacts.¹²³ The legislation also lists prohibited activities such as disturbing or harming the *R.M.S. Titanic* or her artifacts as well as "sell[ing], purchase[ing], barter[ing], import[ing], export[ing], or offer[ing] to sell, purchase, barter, import, export, in interstate or foreign commerce, R.M.S. Titanic property not constituting a collection" ¹²⁴

¹¹⁹ *State Department Transmits Proposed Legislation to Implement Agreement to Protect RMS Titanic Wreck Site.* US FEDERAL NEWS, June 9, 2006.

¹²⁰ Memorandum Opinion and Order from Rebecca Smith, United States District Court of Eastern District of Virginia (Oct. 1, 2007).

¹²¹ After this Article was written, Senator Kerry introduced the R.M.S. Titanic Maritime Memorial Preservation Act of 2012. S. 2279, 112th Cong. (2012); S. 1426, 112th Cong. §§601-05 (2011).

¹²² S. 2279, 112th Cong. (2012); S. 1426, 112th Cong. §602 (2011).

¹²³ S. 2279, 112th Cong. (2012); S. 1426, 112th Cong. §604 (2011).

¹²⁴ S. 2279, 112th Cong. (2012); S. 1426, 112th Cong. §604 (2011). The current draft recognizes that: the term 'collection' means each grouping of R.M.S. Titanic property, other than human remains,

These activities can be done under the proposed legislation, however, if a permit is obtained from the Secretary of Commerce and it complies with the Agreement, furthers the scientific, educational or cultural public interest, or protects the *Titanic*.¹²⁵

These prohibitions and permit system applies to all activity directed towards the *Titanic*, even if the conduct was authorized by a court prior to the effective date of the Act, with accommodations included for RMST.¹²⁶

This proposal also includes enforcement mechanisms to bolster the protections to the *Titanic*. The Act provides for civil penalties such as assessing costs against those who violate this Act to reimburse costs of responding to the violations, repairing damage to the *Titanic*, and recovering the artifacts.¹²⁷ The Act also has a criminal enforcement mechanism whereupon the guilty party might have to pay up to \$250,000 a day and serve up to five years in prison.¹²⁸

that results from recovery activities after September 1, 1985, at the wreck site of R.M.S. Titanic authorized by—(A) an order of a United States court of competent jurisdiction;(B) a permit granted by the Secretary of Commerce under section 7; or (C) an order of a court or tribunal (including any administrative body, Office of Maritime Affairs, or Receiver of Wreck) of competent jurisdiction of the United Kingdom, France, or Canada, or of a state party to the International Agreement.

S. 2279, 112th Cong. (2012).

¹²⁵ S. 2279, 112th Cong. (2012); S. 1426, 112th Cong. §604 (2011).

¹²⁶ S. 2279, 112th Cong. (2012); S. 1426, 112th Cong. §604 (2011). The proposed legislation also addresses RMST's rights noting that:

An order granting salvage rights to R.M.S. Titanic by a court of competent jurisdiction prior to the effective date of this Act shall not exempt any person from complying with this Act or any regulation or permit issued under this Act. Without prejudice to the orders of a United States Court of competent jurisdiction, issued in reference to the entity known as 'RMS Titanic, Inc.', prior to the effective date of this legislation (the status of such orders to be unaffected by this legislation), no person may obtain salvage rights to R.M.S. Titanic or R.M.S. Titanic property, after the effective date of this Act, except by an assignment or transfer of existing rights or through the orders of a United States Court of competent jurisdiction issued in reference to the entity known as 'R.M.S. Titanic, Inc.'

S. 2279, 112th Cong. (2012); S. 1426, 112th Cong. §604 (2011).

¹²⁷ S. 2279, 112th Cong. (2012); S. 1426, 112th Cong. §604 (2011).

¹²⁸ S. 2279, 112th Cong. (2012); S. 1426, 112th Cong. §604 (2011).

Another provision requires forfeiture of ships and other equipment used to violate the Act as well as the artifacts that were improperly removed from the *Titanic*.¹²⁹

IV. Jurisdiction over the *Titanic*

The issue of jurisdiction over the *Titanic* is complicated as the *Titanic* is in international waters and is not subject to any one State's jurisdiction.¹³⁰ In the US, underwater cultural heritage is subject to admiralty and maritime law.¹³¹ Federal courts have original jurisdiction over these cases.¹³² As the issue of jurisdiction affects the legal rights to the *Titanic* a brief analysis follows.

1. High Seas

International law determines the jurisdiction, and thus control, that a State can exercise over property found in international bodies of water.¹³³ Water within twelve nautical miles of a State's shorelines is considered within the territory of that State.¹³⁴ Beyond the twelve nautical miles is an area of water termed the high seas that no State has control over, which is where the *Titanic* is located.¹³⁵

Admiralty courts can exercise jurisdiction over issues that arise on the high seas.¹³⁶ However, it is a fundamental principle that one State's courts do not have jurisdiction or power over citizens or property outside of its State, and admiralty law does not grant extraterritorial

¹²⁹ S. 2279, 112th Cong. (2012); S. 1426, 112th Cong. §604 (2011).

¹³⁰ In this case, Congress explicitly disclaimed jurisdiction over the *Titanic*. R.M.S. Titanic Maritime Memorial Act, 16 U.S.C. §450rr-6 (1986) (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); R.M.S. Titanic, Inc. v. Haver, 171 F.3d 943, 969 n. 4 (4th Cir. 1999). However, the Fourth Circuit has determined that this provision did not rob the federal court of jurisdiction to adjudicate the claims against the *Titanic*.

¹³¹ PATTY GERSTENBLITH, ART, CULTURAL HERITAGE, AND THE LAW 816 (2008). This Article only concerns actors who are subject to jurisdiction within the US as the *Titanic* is in international waters and courts in other States can also adjudicate their citizens' rights to the *Titanic*.

¹³² U.S. CONST. art. 3, §2, cl. 1.

¹³³ Haver, 171 F.3d at 965.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.* at 952-953.

authority beyond the territorial boundaries of the State.¹³⁷

2. Constructive *in Rem* Jurisdiction

While the *Titanic* is not within any one State, there are mechanisms to obtain jurisdiction to adjudicate claims relating to objects in international water. One of these mechanisms is constructive *in rem* jurisdiction.

States have jurisdiction over the property within their territory.¹³⁸ Actions *in rem* are actions in regard to rights over property within a State's territory¹³⁹ Thus, *in rem* actions only affect the property before the court.¹⁴⁰ This causes complications with shipwrecks that are in international waters as these shipwrecks are not within any State's jurisdiction.

However, ships and their cargo in an *in rem* action can be actually or constructively within the court's possession.¹⁴¹ Constructive possession does not require the court's physical possession of all of the property and is based on the legal fiction that "the res is not divided and that therefore possession of some of it is constructively possession of all."¹⁴² An action that is under constructive *in rem* is not exclusive against the world as any other State would have the power to issue the same order resulting in what the Fourth Circuit termed a "shared sovereignty."¹⁴³ Constructive *in rem* jurisdiction allows the States to issue declarations about the property, but final enforcement cannot be allowed until the *in rem* property is before the court.¹⁴⁴ This legal fiction, while allowing courts to adjudicate claims over objects outside their territory, also presents a host of problems relating to the enforcement of these rulings as the objects are not within the court's territory.

¹³⁷ *Id.* at 965.

¹³⁸ *Id.* at 952-953.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ Haver, 171 F.3d at 969.

¹⁴⁴ *Id.*

In this case, there is no actual possession of the *Titanic* because the *Titanic* is not within any States' territory. However, the court found that there was constructive possession of the *Titanic*.

In 1993, RMST asked the Eastern District of Virginia to exercise *in rem* jurisdiction over the *Titanic*.¹⁴⁵ To assist the court in obtaining jurisdiction over the *Titanic*, RMST submitted a wine decanter from the *Titanic* into the possession of the court.¹⁴⁶ RMST also physically brought other objects from the *Titanic* within the territory of the Eastern District of Virginia.¹⁴⁷

The court decided that when property is outside of the State a court's "ability to adjudicate right as to them is limited, but not meaningless."¹⁴⁸ The court can adjudicate the claim, ensure enforcement within its State, and hope that it will be enforced elsewhere.¹⁴⁹

Accordingly, the Fourth Circuit found that it had constructive *in rem* jurisdiction over the wreck when any portion of the *Titanic* was within its jurisdiction and the salvor continued its salvaging operations.¹⁵⁰ Consequently, RMST retained at least two objects from the *Titanic* at all times within the Eastern District of Virginia.¹⁵¹

The court had the US Marshall arrest the *Titanic*, all objects salvaged from the *Titanic*, and all objects that were to be salvaged in the future.¹⁵² Then the court substituted the US Marshall with RMST as custodian of the *Titanic*, the wreck site, and the objects.¹⁵³ Notice of the court's order was then publicized in three newspapers: *The Virginian Pilot*, *The Wall Street*

¹⁴⁵ *Id.* at 952-953.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ Haver, 171 F.3d at 969.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.* at 952-53.

¹⁵³ *Id.*

Journal, and *The Journal of Commerce*.¹⁵⁴ However, the Fourth Circuit also declared their rulings were only effective within the US as, practically, there was not an enforcement mechanism over property and persons elsewhere.¹⁵⁵

Unfortunately, the legal fiction of *in rem* jurisdiction does not consider the interests of the *Titanic* or protect the *Titanic*. *Constructive in rem* jurisdiction creates a free-for-all between the States with an incentive to give each State's citizens maximum rights to salvage the *Titanic* before the other States allow their citizens to do so, which does not consider the preservation interests of the *Titanic*. Instead, this quite literally spurs a race to the bottom.

V. What Rule to Apply: Finds, Salvage, or International Law?

The rule of law that the court applies determines the dispensation of the underwater cultural heritage. There are many views on the appropriate rule to apply towards underwater cultural heritage such as shipwrecks. Scholar Thomas Schoenbaum explained that the three main options were:

(1) the salvage rule that the salvor does not create any ownership rights in the property saved; (2) the finders principle, informally expressed as "finders keepers, losers weepers," at least in the case of abandoned property; or (3) the international law principle that property of historical and archaeological importance should be preserved for the benefit of mankind as a whole.¹⁵⁶

The law of finds, the law of salvage and international law were all evaluated in the *Titanic* case. In maritime law, US admiralty courts resolve claims to property recovered in navigable water either under the law of salvage or finds.¹⁵⁷ The determination of a person or entity as salvor or finder is critical as it determines the rights that entity will have to the objects it recovers. These

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 969. The Fourth Circuit further clarified the legal fiction of constructive *in rem* jurisdiction noting that constructive *in rem* jurisdiction is not possible when the property over which jurisdiction is sought is in another sovereign's territory. *R.M.S. Titanic, Inc. v. Wrecked & Abandoned Vessel*, 435 F.3d 521, 530 (4th Cir. 2006).

¹⁵⁶ THOMAS SCHOENBAUM, *ADMIRALTY AND MARITIME LAW* §16-7 (2011).

¹⁵⁷ *Haver*, 171 F.3d at 966-65.

two different laws are mutually exclusive with different panoply of rights and remedies.¹⁵⁸

A. Law of Finds

One rule that can be applied to underwater cultural heritage is the law of finds. The law of finds applies to expressly and publically abandoned property as well as ancient shipwrecks where no one claims title to them.¹⁵⁹ Under the law of finds, the finder becomes the owner of the property immediately after the finder has actual or constructive possession.¹⁶⁰ Thus, under the laws of finds, the finder wrests title from the absent original owner. RMST wanted to be a finder because finders acquire title immediately, and RMST wanted title to the *Titanic* artifacts so that it could sell them. However, the court had refused to grant RMST that status.¹⁶¹

B. Law of Salvage

Another rule that can be applied to underwater cultural heritage is the law of salvage. The law of salvage has developed over thousands of years under the principal that the salvor who saves a ship and cargo in danger must be compensated by the owner.¹⁶² Under the law of salvage those that save the property do not immediately obtain title to the salvaged property.¹⁶³ The owner does not have to consent to the saving of its ship and cargo as the law presumes that the owner would want their ship salvaged.¹⁶⁴ Under the law of salvage, the salvor receives an award for salvaging the objects if the requirements for a valid claim are met. These requirements include: there was maritime peril, voluntary service was rendered unrelated to a pre-existing duty or contractual obligation, and the salvor contributed to successfully salvaging the ship or its

¹⁵⁸ *Id.*

¹⁵⁹ THOMAS SCHOENBAUM, ADMIRALTY AND MARITIME LAW §16-7 (2011).

¹⁶⁰ *Haver*, 171 F.3d at 966-65.

¹⁶¹ *Id.*

¹⁶² *Id.* at 952-53.

¹⁶³ *R.M.S. Titanic, Inc. v. Wrecked & Abandoned Vessel*, 286 F.3d 194, 206 (4th Cir. 2002).

¹⁶⁴ *Id.*

contents.¹⁶⁵

Different views abound on whether a shipwreck is still in peril as the ship has already sunk and the salvor is not preventing it from doing so. Some claim that the wreck and its contents are still in peril from the sea and could become lost or damaged while others claim that the peril has passed. Thomas Schoenbaum noted:

The concept of marine peril is stretched to its limit in the treasure salvage cases, where an ancient wreck has lain undisturbed on or in submerged lands for hundreds of years or more. Even here, some courts considering the issue hold that a marine peril exists because the vessel is still in peril of being lost through the action of the elements.¹⁶⁶

After the salvor salvages the ship and cargo, the salvor can either make a claim against the owner if the salvor can obtain in personum jurisdiction over the owner, or obtain a maritime lien against the salvaged property to secure compensation for their services.¹⁶⁷ The lien arises at the moment that the salvor saves the property and remains until the salvage award is paid by the property owner.¹⁶⁸ The salvor's lien trumps all property interest in the property thus granting the salvor a possessory interest in the property until the lien is paid off.¹⁶⁹ To enforce a maritime lien, the salvor brings an action *in rem* against the property.¹⁷⁰ The owner can discharge this lien by paying the award fixed by the court.¹⁷¹ If the owner is unwilling or unable to pay off the maritime lien the court can sell the salvaged property or award title of the property to the salvor in an *in specie* award if the sale would result in insufficient funds to pay the maritime lien.¹⁷²

In this case, the court granted RMST exclusive salvage rights and granted RMST a

¹⁶⁵ THOMAS SCHOENBAUM, ADMIRALTY AND MARITIME LAW §16-7 (2011).

¹⁶⁶ *Id.*

¹⁶⁷ R.M.S. Titanic, Inc. v. Haver, 171 F.3d 943, 952-3 (4th Cir. 1999).

¹⁶⁸ R.M.S. Titanic, Inc. v. Wrecked & Abandoned Vessel, 286 F.3d 194, 206 (4th Cir. 2002).

¹⁶⁹ Haver, 171 F.3d at 952-53.

¹⁷⁰ R.M.S. Titanic, Inc., 286 F.3d at 206.

¹⁷¹ *Id.*

¹⁷² Haver, 171 F.3d at 952-53.

maritime lien against the wreck and salvaged artifacts on June 7, 1994, because RMST was the first successful salvor.¹⁷³ As RMST obtained a lien against the *Titanic*, RMST obtained the right of exclusive possession of the *Titanic* and the objects such that other potential salvors were barred from salvaging the wreck.¹⁷⁴

In 2002 and again in 2004, RMST had requested the legal designation of finder which the district and appellate court repeatedly denied.¹⁷⁵ In 2008, after multiple attempts by RMST to change its status to finder, Judge Smith emphatically warned RMST that:

the collection, at least, is under the auspices of the court, so you nor anybody else has a choice whether to honor court orders The status of salvor-in-possession is established, what your rights are is established, and you do not own the artifacts and cannot dispose of them, and any such disposition would result in what happens when you violate court orders The company can't be put in jail, but the individual can be who made the decision.¹⁷⁶

In the case of the *Titanic*, the distinction between salvor and finder ultimately did not matter. While the law of finds immediately grants title to the objects and the law of salvage just grants an award for saving the property, the end result was the same. Under the law of salvage, if no one claims title to the shipwreck or artifacts, the court can award title to the property under the law of finds to pay the award.¹⁷⁷ As there is no owner of the *Titanic* to provide the salvage award, it was within the discretion of the court to sell the collection in a judicial sale to generate revenue to pay the salvage award or to award title of the artifacts to RMST in an *in specie* award to satisfy the maritime lien. Accordingly, on August 15, 2011, the court awarded title of the artifacts to RSMT.

C. International Law

¹⁷³ R.M.S. Titanic, Inc., 286 F.3d at 199-200; Haver, 171 F.3d at 969.

¹⁷⁴ Haver, 171 F.3d at 969.

¹⁷⁵ R.M.S. Titanic, Inc. v. Wrecked & Abandoned Vessel, 435 F.3d 521, 525 (4th Cir. 2006).

¹⁷⁶ Rebecca Smith, United States District Court for the Eastern District of Virginia, Status Hearing (Nov. 18, 2008).

¹⁷⁷ THOMAS SCHOENBAUM, ADMIRALTY AND MARITIME LAW §16-7 (2011).

However, this did not have to be the case. Many States do not apply the law of finds or salvage to historic shipwrecks as they believe that applying this legal fiction to shipwrecks that have already sunk stretches that legal fiction to the breaking point. Instead many States only apply protective legislation to the shipwrecks.

Scholar Craig Forrest explained the concerns with using the law of salvage on historic wrecks include: "the granting of ownership of artifacts to salvors in lieu of a salvage award, the splitting up of collections, and the hasty excavation techniques required to minimize commercial costs and maximize the salvage award."¹⁷⁸

Scholars such as Forrest, criticize the handling of the *Titanic* case as not reflecting sufficient concern for the international aspect of the wreck and note that the US's application of the legal principles of salvage cannot be the *jus gentium* or natural law as Justice Niemeyer of the Fourth Circuit Court of Appeals claimed.¹⁷⁹ Scholar James Nafziger, Professor at Willamette University College of Law, noted that the court in the *Titanic* had "failed to apply the clear prescriptions of Congress, executive policy, and international law," which "generated shock waves abroad."¹⁸⁰ Commentators have criticized that "private property rights are being asserted by a national court in international waters over wreck of a foreign vessel in derogation of its own state's authority to conduct foreign policy and, albeit potentially, in direct contravention of a treaty recognized in international law."¹⁸¹ In particular, Forrest was unsatisfied that Niemeyer, while purporting to apply *jus gentium*, only relied on US cases.¹⁸² Forest pointed to Canadian,

¹⁷⁸ Craig Forrest, *Has the Application of Salvage Law to Underwater Cultural Heritage Become a Thing of the Past?*, 34 J. Mar. L. & Com. 309, 321 (2003).

¹⁷⁹ Craig Forrest, *Historic Wreck Salvage: An International Perspective*, 33 Tul. Mar. L. J. 347, 356 (2009).

¹⁸⁰ James Nafziger, *The Evolving Role of Admiralty Courts in Litigation Related to Historic Wreck*, 44 Harv. Int'l L.J. 251, 255 (2003).

¹⁸¹ Forrest, *Has the Application of Salvage Law to Underwater Cultural Heritage Become a Thing of the Past?*, 34 J. Mar. L & Com. 309, 321 (2003) (citing Fletcher Tomenius, *Salvor in Possession: Friend or Foe to Marine Archaeology?*, 9 Int'l J. Cultural Prop. 263, 292 (2000)).

¹⁸² *Id.* at 358.

Australian, New Zealand, South African and British law – none of which applied the law of salvage to historical wrecks.¹⁸³

Canada and the UK – two of the four parties that negotiated the Agreement – do not apply salvage law to shipwrecks. In one Canadian case, the Canadian court rejected the law of salvage as the shipwreck was not in peril by being underwater, and the court feared that "the wreck might, however, be in danger from the salvage activity itself, especially from the unskilled recovery of artefacts."¹⁸⁴ An Irish court likewise determined that a shipwreck was no longer under maritime law, but archeological law.¹⁸⁵

Thus, some parties who assisted in negotiating the Agreement refuse to apply salvage law to shipwrecks of cultural importance, which refutes Niemeyer's claim in the *Titanic* opinion where he stated that the district court's opinion of RMST's rights were "consistent with the salvage law which is part of the *jus gentium*, and we expect that whether RMST had returned property from the TITANIC to an admiralty court in England or France or Canada, the court would, by applying the same principles, have reached the same conclusions."¹⁸⁶

It is worrisome that the Fourth Circuit inserted itself into an international issue involving a historic shipwreck outside their jurisdiction, ignored a US statute and, while purporting to apply *jus gentium*, did not address other States' regulations that do not allow exploitation of historic shipwrecks.

VI. Award

Many considerations exist in crafting a salvage award for a historic shipwreck. The court must evaluate several factors to determine the amount of the award as well as how the award will

¹⁸³ *Id.* at 364.

¹⁸⁴ *Id.* at 365 (*citing* Her Majesty The Queen in Right of Ontario v. Mar-Dive Corp., 1997 AMC 1000, 1062-63 (Ont. Ct. 1997)).

¹⁸⁵ *Id.* (*citing* In re La Lavia, 3 I.R. 413 (H.Ct. 1994)(Ir.)).

¹⁸⁶ *Id.*

be satisfied. In this case, in addition to determining the salvage award and how the award was to be satisfied, the court also oversaw the creation of conditions and covenants for the *Titanic* artifacts in anticipation of an *in specie* award.

A. Salvage Award Factors and Options

In crafting a salvage award, the court must determine what the award should be and then how the award should be paid. The Fourth Circuit has noted that the factors to determine the salvage award were set out in *In re The Blackwall* and *Columbus-America Discovery Group v. Atlantic Mutual Insurance Company*.¹⁸⁷

Six of the factors are:

(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.) The degree of danger from which the property was rescued."¹⁸⁸

The seventh factor is the "degree to which the salvors have worked to protect the historical and archeological value of the wreck and the items saved."¹⁸⁹

There are three main salvage award options if there is no entity to pay the salvage award. First, the court can sell objects at a judicial auction.¹⁹⁰ Second, the court can grant an *in specie* award.¹⁹¹ Finally, the court can deny or limit the salvage award if the salvor does not take

¹⁸⁷ R.M.S. Titanic, Inc. v. Wrecked & Abandoned Vessel, 286 F.3d 194, 206-09 (4th Cir. 2002).

¹⁸⁸ *Id.* at 206 (citing *In re The Blackwall*, 77 US 1 (1870)).

¹⁸⁹ *Columbus-America Discovery Group v. Atl. Mut. Ins. Co.*, 974F.2d 450, 468 (4th Cir. 1992). Ironically, while the Fourth Circuit applied this factor in the *Columbus-America* case finding that the salvors had worked to protect the historical and archeological value, there was disagreement in the archeological community that the salvors had done so. PATTY GERSTENBLITH, ART, CULTURAL HERITAGE, AND THE LAW 826 (2008).

¹⁹⁰ Interview with Ole Varmer, General Counsel, NOAA, in New Orleans, L.A. (Oct. 10, 2009).

¹⁹¹ *Id.*

precautions to protect historically important objects.¹⁹²

B. Evaluation of the Award

1. Evaluation of Award Factors

The district court for the Eastern District of Virginia reviewed the *Blackwall* and *Columbus-American* factors to determine RMST's appropriate award.

In regard to *Blackwall* Factor 1, the court found that RMST had expended a significant amount of effort as it spent more than 500,000 hours salvaging and conserving *Titanic* artifacts and expended more than \$9,049,000.¹⁹³ When evaluating *Blackwall* Factor 2, the court found that RMST exhibited skill in their salvage efforts despite having damaged an estimated twenty-one percent of the artifacts in their salvage efforts, that thirteen artifacts were not recovered despite serious attempts, and that multiple ROV dives were not completed.¹⁹⁴

Under *Blackwall* Factor 3, the value of the property, the equipment that RMST chartered to retrieve the artifacts was expensive, which the court evaluated as being indicative of the specialized nature of the equipment.¹⁹⁵ For example, two of the vessels that RMST used were jointly evaluated at \$54,000,000.00.¹⁹⁶ The court looked at the depth of the wreck, the limited number of submersibles that could conduct the salvage effort, that RMST had developed new tools to salvage artifacts at this depth, and had successfully brought up the largest artifact from

¹⁹² Nafziger, *Second Newport Symposium*, *supra* note #, at 324 (1999)(citing *Klein v. Unidentified Wrecked and Abandoned Sailing Vessel*, 758 F.2d 1511, 1515, 1985 AMC 2970 (11th Cir. 1985) (quoting the district court to the effect that unscientific removal of artifacts did more to create a marine peril than to prevent it); *MDM Salvage, Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel*, 631 F. Supp. 308, 1987 AMC 537 (S.D. Fla. 1986) (salvors denied relief from interlopers because they failed to protect wreck's archaeological integrity); *Chance v. Certain Artifacts Found and Salvaged from The Nashville*, 606 F. Supp. 801, 1985 AMC 609 (S.D. Ga. 1984), *aff'd*, 775 F.2d 302, 1986 AMC 1216 (11th Cir. 1985) (salvors denied award because of their failure to exercise sufficient care in rescuing an historic vessel)).

¹⁹³ *R.M.S. Titanic, Inc. v. Wrecked & Abandoned Vessel*, 742 F. Supp. 2d 784, 798 (E.D. Va. 2010).

¹⁹⁴ *Id.* at 799.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 798.

the deep ocean.¹⁹⁷

When evaluating the risk that the salvors incurred, *Blackwall* Factor 4, the court found that while RMST had contracted away their liability, the employees of RMST faced physical discomfort and the risk of death in the deep dives and that the wreck laid over 400 nautical miles offshore and was only accessible during the summer in hurricane season.¹⁹⁸ In regard to *Blackwall* Factor 5, the court found the fair market value to be \$110,859,200.00 based on appraisals proffered by RMST.¹⁹⁹ Under *Blackwall* Factor 6, the amount of danger from which the property was rescued, the court determined that objects in deep water were at risk of loss and deprived the public of its historical and cultural value.²⁰⁰ Moreover, the court considered the eventual deterioration of the *Titanic* to further increase the danger to the objects.²⁰¹

Finally, under the *Columbus-America I* factor, the amount of effort expended to protect the archeological and historical value of the salvaged artifacts, the court found that RMST had cared for and conserved the artifacts as well as extensively exhibiting them to the public along with educational programs.²⁰² The court also noted that RMST had built and maintained an extensive database on the artifacts and studied them in situ.²⁰³

The court did not find RMST's repeated attempts to claim title to the artifacts nor its attempts to sell the artifacts without title to constitute conduct sufficient to disqualify them from receiving a salvage award.²⁰⁴

Upon listening to expert testimony regarding the appropriate amount for the award, the court awarded RMST 100% of the fair market value of the *Titanic* artifacts from the 1993-2004

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 800.

¹⁹⁹ *Id.* at 797.

²⁰⁰ *Id.* at 800.

²⁰¹ *Id.*

²⁰² *Id.* at 801-2.

²⁰³ *Id.* at 802.

²⁰⁴ *Id.* at 803-4.

expeditions.²⁰⁵

After determining the amount of the award, the court considered how RMST's award was to be satisfied. The court reserved the right to determine whether to dispose of the artifacts in a judicial sale or to give them to RMST in an *in specie* award.²⁰⁶ The court expressed concern that an *in specie* award might result in a perpetual legal battle with RMST over the covenants attached to the artifacts.²⁰⁷

On August 15, 2011, however, the court granted the artifacts to RMST in an *in specie* award as no suitable purchaser had come forward.²⁰⁸ The award of title of the artifacts was subject to conditions and covenants.²⁰⁹ Thus, the artifacts themselves have become the award, with the court granting title of the artifacts to RMST, which is what RMST had sought since the beginning.

2. Conditions and Covenants

Starting in 2008, the court had RMST draft conditions and covenants in the event that RMST did receive an *in specie* award.²¹⁰ These conditions and covenants were negotiated with NOAA and overseen by the court.²¹¹ The court wanted covenants in the award that "tries to capture that the in specie salvage award is an award in the form of title, subject to the beneficial interest of the public in the historical, archaeological, scientific, and cultural aspects of the

²⁰⁵ *Id.* at 808. Testimony included a comparison to the *Columbus-America*, which the expert had testified at, that the salvage of the *Titanic* involved more effort than the *Columbus-America*. *Id.* at 808 n. 35. The salvors of the *Columbus-America* received 90% of the fair market value of the salvaged objects. *Id.* at 808.

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ R.M.S. Titanic, Inc. v. The Wrecked and Abandoned Vessel, No. 2:93cv902, 2011 U.S. Dist. LEXIS 93823, at *2 (E.D. Va. Aug. 15, 2011).

²⁰⁹ R.M.S. Titanic, Inc. v. The Wrecked and Abandoned Vessel, No. 2:93cv902, 2011 U.S. Dist. LEXIS 93823, at *3 (E.D. Va. Aug. 15, 2011).

²¹⁰ R.M.S. Titanic, Inc. v. Wrecked & Abandoned Vessel, 742 F. Supp. 2d 784, 792 (E.D. Va. 2010).

²¹¹ PATTY GERSTENBLITH, ART, CULTURAL HERITAGE, AND THE LAW 829(2008).

artifacts."²¹² Justice Smith looked to the public interest, the Agreement, Guidelines, and previous cases in making this decision.²¹³

In 2011, the title of the artifacts was granted to RMST subject to conditions and covenants that govern the artifacts' dispensation, care, management, and conservation even if the collection is transferred.²¹⁴ The conditions and covenants have eight sections and an annex. The first section lists the purposes of the conditions and covenants.²¹⁵ A list of definitions comprises the second section.²¹⁶ The third section lists required methods to ensure the unity and integrity of the artifacts.²¹⁷ The fourth section evaluates the proper management of the artifacts.²¹⁸ NOAA's ability to oversee compliance with the conditions and covenants is explained in the fifth section.²¹⁹ The sixth section lists the procedure for sale of the artifacts.²²⁰ The importance of protection of the collection in the event of bankruptcy is detailed in the seventh section.²²¹ The eighth section lists the remaining provisions.²²² Annex A lists the court's considerations in evaluating whether an institution is qualified to become a Trustee of the collection.²²³

Pursuant to the conditions and covenants, the court's award to RMST was a trust for the benefit of the public²²⁴ such that the collection must be kept together and available for the public display and exhibition, research, and education.²²⁵

The court for the Eastern District of Virginia will continue to have pending jurisdiction

²¹² Rebecca Smith, United States District Court for the Eastern District of Virginia, Status Hearing (Nov. 18, 2008).

²¹³ *Id.*

²¹⁴ R.M.S. Titanic, Inc. v. Wrecked & Abandoned Vessel, 742 F. Supp. 2d 784, 810 (E.D. Va. 2010).

²¹⁵ *Id.*

²¹⁶ *Id.* at 810-11.

²¹⁷ *Id.* at 812-13.

²¹⁸ *Id.* at 815-16.

²¹⁹ *Id.* at 816-17.

²²⁰ *Id.* at 819-20.

²²¹ *Id.* at 821-22.

²²² *Id.* at 822.

²²³ *Id.* at 822-23.

²²⁴ *Id.* at 810.

²²⁵ *Id.* at, 810, 813.

over the collection and any Trustee must submit itself to *in personam* jurisdiction of the court.²²⁶ Permission from the court must be obtained to sell or transfer the collection with the sale being subject to court approval as well as the conditions and covenants.²²⁷ Moreover, the Titanic artifacts can only be sold or transferred to an appropriate institution as laid out in the conditions and conventions.²²⁸

Deaccessioning is subject to guidelines and ethical considerations with ultimate approval of the court required.²²⁹ The Trustee of the collection, RMST, or any later Trustee, is required to set aside \$25,000 a quarter to build a five million dollar endowment for the *Titanic* artifacts over twenty-five years, the annual income of which is to provide care and conservation of the collection.²³⁰

C. Sale of *Titanic* Artifacts

²²⁶ *Id.* at, 819.

²²⁷ *Id.* The collection of *Titanic* artifacts can be sold to a qualified oversea institution. *Id.* at 820.

²²⁸ *Id.* To determine if the institution is appropriate, the court will consider if the institution is qualified to:

- (a) Accession, label, catalog, store, maintain, inventory and conserve the TITANIC Collections on a long-term basis using reasonable museum and archival practices; and
- (b) Comply with the following, as appropriate to the nature and content of the collection;
 - (1) Maintain complete and accurate records of the TITANIC Collections
 - (2) Dedicate the requisite facilities, equipment and space in the physical plant to properly store, study and conserve the collection. Space used for storage, study, conservation and, if exhibited, any exhibition must not be used for non-curatorial purposes that would endanger or damage the collection;
 - (3) Keep the TITANIC Collections under physically secure conditions within storage, laboratory, study and any exhibition areas
 - (4) Require staff and any consultants who are responsible for managing and preserving the STAC to be qualified professionals;
 - (5) Handle, store, clean, conserve and, if exhibited, exhibit the TITANIC Collections in a [appropriate] manner
 - (6) Store site forms, field notes, artifacts inventory lists, computer disks and tapes, catalog forms and a copy of the final report in a manner that will protect them from theft and fire
 - (7) Inspect the collection for possible deterioration and damage, and perform only those actions as are absolutely necessary to stabilize the collection and rid it of any agents of deterioration;
 - (8) Conduct inventories to verify the location of the material remains, associated records and any other Federal personal property that is furnished to the repository; and
 - (9) Provide access to the collection by the public and researchers.

Id. at 823-24.

²²⁹ *Id.* at 815.

²³⁰ *Id.* at 817.

After receiving title to the *Titanic* artifacts, RMST announced its intention to sell them through Guernsey's auction house in New York on April 11, 2012.²³¹ All assets and rights of RMST were to be sold at this auction with all of the *Titanic* artifacts being sold in one lot subject to the conditions and covenants.²³² The auction house announced that the appraised value of these artifacts and RMST's intangible rights is 189 million dollars.²³³ The future purchaser must obtain court approval as well as abide by nineteen pages of conditions and covenants.²³⁴

VII. Conclusion: Role of the *Titanic* in Perspective

The *Titanic* has had a unique role in history – both when it sank and currently as a model for the future preservation of underwater cultural heritage. While the *Titanic* has suffered through the unregulated attention paid her, it is possible that the injuries visited upon her will serve as a lesson that can guide future preservation of shipwrecks. Upon being questioned about the *Titanic* and advancement in preservation laws for shipwrecks, Ballard suggested "[i]t's the sacrificial lamb . . . one whose demise promises life for others of its kind."²³⁵

Undeniably, the *Titanic* has suffered through the salvage efforts and other attention paid her. Ballard's and Nafziger's predictions were well founded when they warned that the advances in underwater excavation would "throw[] open the pyramids of the deep for appreciation or plunder."²³⁶ Despite the efforts of the Act, the Guidelines and the Agreement, the *Titanic* has been extensively salvaged and damaged by submersibles visiting the wreck. In the 2004 expedition to determine how the *Titanic* had fared since its discovery, Ballard and his crew found that while little changes had occurred due to the maritime environment, submarines had damaged

²³¹ Guernseys, <http://www.guernseys.com/Guernseys%20New/titanic.html> (last visited Jan. 15, 2012).

²³² *Id.*

²³³ *Id.*

²³⁴ Patricia Cohen, *Responsible Bidders Sought for Titanic Auction*, NY TIMES, Jan. 5, 2012, available at <http://artsbeat.blogs.nytimes.com/2012/01/05/responsible-bidders-sought-for-titanic-auction/?scp=2&sq=titanic&st=cse>.

²³⁵ Leigh Dayton, *Titanic Task for Museums*, THE AUSTRALIAN, June 29, 2004.

²³⁶ Nafziger, *Second Newport Symposium*, 30 J. Mar. L. & Com. 311, 312.

parts of the *Titanic* where they had been either bumping into or landing on the deck of the *Titanic*.²³⁷

While the *Titanic* has suffered, the fight to preserve the *Titanic* has also drawn international attention to protecting underwater cultural heritage. Ashley Roach, a retired State Department lawyer, noted that "the *Titanic* is the first major shipwreck in international waters to receive such close scrutiny."²³⁸ Leigh Dayton, a writer for an Australian newspaper, noted that the *Titanic* "has begun a new journey. It is the flagship for myriad vessels that lie undiscovered beneath the waters of the world. It is also a symbol for the heritage crowd, eager to see shipwrecks – noble or humble – recognised as cultural sites."²³⁹

Already, *Titanic* has been influential in preserving underwater culture around the world.²⁴⁰ The lessons learned from the salvage of the *Titanic* can be used on other historic shipwrecks in the future.²⁴¹ Ulrike Guerin, of the Secretariat of the 2011 UNESCO Convention

²³⁷ NOAA Magazine, "Return to Titanic", *Meets Science Objectives, Reminds All that Wreck Site is Hallowed Ground: Expedition Ends Just Prior to U.S. Signing of Titanic Agreement* (2004), available at <http://www.noaanews.noaa.gov/stories2004/s2248.htm>.

²³⁸ Fox News, *Future of Titanic Artifacts in Judge's Hands*, Mar. 26, 2009, available at <http://www.foxnews.com/story/0,2933,510356,00.html>.

²³⁹ Leigh Dayton, *Titanic Task for Museums*, THE AUSTRALIAN, June 29, 2004.

²⁴⁰ Forrest, *Application of Salvage Law*, 34 J. Mar. L. & Com. 309, 313 (2003) (citing Colin Martin, *Archaeology in an Underwater Environment*, in ANON., PROTECTION OF THE UNDERWATER CULTURAL HERITAGE: TECHNICAL HANDBOOK FOR MUSEUMS AND MONUMENTS 19 (1981)).

²⁴¹ The ideal is to get the most archeological objects to the surface following archeological standards. However, there are two schools of thought on how to do this; extreme archeologists believe that only archeologists should excavate the objects and extreme salvors believe that salvors should have the right to take what they otherwise have a legal right to take. Nafzinger and Varmer both believe that a strict approach that favors either archeologists or salvors is not a favorable solution. Nafzinger, *Second Newport Symposium*, 30 J. Mar. L. & Com. 311, 327. Instead, they call for collaboration of both interests. *Id.*

While extremists on either side take polar views of whether historic ship wrecks should be excavated at all, except by archeologist, a blending of these two approaches would be ideal. Salvors have the money and archeologists have the knowledge and the unbiased interest in preserving the artifacts. Salvors typically have to look to the bottom line such that it is in their best interest to snatch and grab artifacts, which is cheaper than preserving them. However, the government, which typically is the ultimate funder of archeologists, does not have the resources to fully excavate the thousands of shipwrecks, which is why salvors could be useful. Thus, a balance of these two approaches would be best

If these two groups worked together and used preservation methods to salvage the artifacts then the artifacts could be brought to the surface and be protected – meeting both groups' goals.

noted that "*Titanic* can help us as much as we can help *Titanic*."²⁴² For example, the Guidelines and Agreement provide a legal framework for preserving artifacts in salvage efforts.²⁴³ Jim Walpole, NOAA General Counsel, believes that the Agreement "has potential as a model for protection of other shipwrecks and submerged marine resources well beyond the territorial jurisdiction of other nations."²⁴⁴ The court's covenants in the *in specie* award to protect the historical importance of the *Titanic* artifacts will also be of precedential value to future shipwreck preservation efforts.

Thus, while *Titanic* has suffered greatly through past salvage efforts, and is still in peril, hopefully her sacrifice will help preserve other shipwrecks in the future. On the other hand, *Titanic* should also stand as a warning that if the most renowned shipwreck in the world can encounter such difficulties in preservation – with a specific government Act, Guidelines, and an Agreement to protect it – then any lesser-known shipwreck is in grave danger from being stripped of their valuable artifacts without the benefit of archeological standards and recording.

²⁴² Ulrike Guerin, Secretariat of the 2001 Convention, Address at LCCHP (Nov. 3, 2011).

²⁴³ Interview with Ole Varmer, General Counsel, NOAA, in New Orleans, L.A. (Oct. 10, 2009).

²⁴⁴ NOAA Magazine, "*Return to Titanic*", *Meets Science Objectives, Reminds All that Wreck Site is Hallowed Ground: Expedition Ends Just Prior to U.S. Signing of Titanic Agreement* (2004), available at <http://www.noaanews.noaa.gov/stories2004/s2248.htm>.