

Curse of the Black Swan: How the Law of Salvage Perpetuates Indeterminate Ownership of Shipwrecks

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The law of salvage has traditionally determined the ownership of discovered shipwrecks. Because it grants possessory status to the first party that discovers the shipwreck pending a final determination of ownership, it offers an advantage over the law of finds by avoiding the potentially destructive effects of open conflict in the seas among competing claimants. In preserving the rights of the salvor as first finder, salvage law jurisprudence grants possessory status to the salvor without requiring positive identification of the vessel and a liberal salvage award for the salvor should an owner with superior claim be found. This article explains how salvage law jurisprudence can present challenges in the ascertainment of identity and ownership in the discovery of an unidentified ship known as the Black Swan, in which a sovereign's prospective claim of ownership can be hindered by salvage law's interest in protecting the rights of the salvor.

In May of 2007, a U.S. commercial salvage company announced that it had salvaged \$500 million worth of colonial-era gold and silver coins from a shipwreck found in international waters of the Atlantic.¹ The company that found the shipwreck, Odyssey Marine Explorations (Odyssey), claims that it has been unable to identify the origins of the sunken vessel and has taken to calling the shipwreck the "Black Swan."² Citing concerns about attracting would-be looters to the site of the vessel, Odyssey has been apprehensive in divulging more details on its find.³ Nonetheless, Odyssey's secrecy has done little to discourage the efforts of the Kingdom of Spain, who believes the discovered shipwreck to be the remains of a thirty-six gun Spanish frigate that sank two hundred years ago, the "Nuestra Señora de las Mercedes," and is convinced that Odyssey knows more than what it has publicly stated.⁴ On May 30, 2007, Spain filed suit in a U.S. district court in Flor-

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1. See Greg Allen, *Mystery, Legal Fight Surround Shipwreck Treasure*, NAT'L PUBLIC RADIO, July 5, 2007, <http://www.npr.org/templates/story/story.php?storyId=11759831&sc=emaf>.

2. See John Ward Anderson, *Will Finders Be Keepers of Lost Treasure?*, WASH. POST, Aug. 27, 2007, at A1.

3. See *id.*

4. See *id.*

ida, where the recovered artifacts are now located, in order to compel Odyssey to disclose the wreck's identity and location, halt future salvage efforts, and hand over to Spain what had already been salvaged.⁵

The ensuing legal battle has pitted a commercial salvage company that aims to make a profit from its lucrative find against a claimant seeking to assert its ownership interest as a sovereign nation. This paper attempts to explain how admiralty law's handling of an unidentified shipwreck in international waters enhances and expands the salvor's opportunities for salvage while prolonging the legal dispute over ownership. Part I explains admiralty law jurisdiction, the common law of finds, and the law of salvage. Part II focuses on Spain's difficulties in evaluating and asserting its claim of ownership when the identity of the vessel is unknown. Part III discusses how the salvor is able to conduct its salvage operations without the risk of being denied a salvage award if there should be an owner who intends to reject salvage efforts.

I. Admiralty Law

A. JURISDICTION OF SHIPWRECKS

The U.S. federal courts have the authority to handle "all Cases of Admiralty and Maritime Jurisdiction."⁶ This jurisdiction includes "maritime causes of action begun and carried on as proceedings in rem, that is, where a vessel or thing is itself treated as the offender and made the defendant by name or description in order to enforce a lien."⁷

B. LAW OF FINDS

Under the law of finds, the first finder to lawfully take actual possession or control of the shipwreck acquires title to it.⁸ A salvor who is the first finder of a shipwreck must: (1) show intent to acquire the property and take actual possession or control of it; and (2) establish that the property has been abandoned.⁹ Thus, the application of the law of finds requires a determination that the shipwreck has been abandoned by the previous owner.¹⁰ To demonstrate possession, there must be "an actual taking of the property with the intent to reduce it to possession."¹¹ But, circuit courts vary in their standards of what constitutes abandonment. For example, the Fourth Circuit has required express renunciation by the previous owner,¹² while the First, Fifth, and Eleventh Circuits implicate a presumption of

5. *Id.*; see also Claimant Kingdom of Spain's Unopposed Motion to Vacate at 1-2, *Odyssey Marine Exploration, Inc. v. The Unidentified Vessel or Vessels*, No. 8:06-CV-1685-T23-TBM (M. D. Fla. June 15, 2007).

6. *California v. Deep Sea Research, Inc.*, 523 U.S. 491, 501 (1998) (quoting U.S. CONST. art. III, § 2, cl. 1).

7. *Id.* (quoting *Madruga v. Superior Court of Cal., County of San Diego*, 346 U.S. 556, 560 (1954)).

8. See Kevin Berean, *Sea Hunt, Inc. v. The Unidentified Shipwrecked Vessel or Vessels: How the Fourth Circuit Rocked the Boat*, 67 BROOK. L. REV. 1249, 1252 (2002).

9. See *id.*

10. See *Columbus-Am. Discovery Group v. Atl. Mut. Ins. Co.*, 974 F.2d 450, 464 (4th Cir. 1992).

11. *Eads v. Brazelton*, 22 Ark. 499, 511 (1861).

12. See *Sea Hunt, Inc. v. Unidentified, Shipwrecked Vessel or Vessels*, 47 F. Supp. 2d 678, 685-88 (E.D. Va. 1999).

abandonment from the passage of time.¹³ The Sixth and Ninth Circuits appear to take an intermediate approach, inferring abandonment from the totality of circumstances, otherwise known as the implied abandonment test.¹⁴ If salvors are unable to demonstrate that the wreck has been abandoned, they will usually seek a salvage award under the law of salvage.¹⁵

C. LAW OF SALVAGE

Under the law of salvage, the salvor of imperiled property on navigable waters gains a right of compensation but not outright title, which is retained by the original owner.¹⁶ The elements of a salvage claim are: (1) there must be a marine peril; (2) the salvage service must be voluntarily rendered when not required by an existing duty or by special contract; and (3) the salvage efforts must be successful, in whole or in part.¹⁷ The law of salvage involves two separate proceedings. The first includes a grant of exclusive salvor-in-possession status for the salvor who first discovers the vessel followed by the grant of an award once property is actually possessed.¹⁸ At the request by the salvor through an in rem admiralty action, the salvor can be granted exclusive salvor-in-possession status by obtaining a maritime lien on the vessel, which permits the salvor to salvage the shipwreck without the interference of rival salvors.¹⁹ Salvors are entitled to a liberal salvage award that often exceeds the value of the services rendered, and if no owner claims the vessel, the salvor is normally awarded its total value.²⁰

II. Spain's Indeterminate Claim of Ownership

A. A RELAXED STANDARD OF PARTICULARITY IN PLEADING REQUIREMENTS

At issue in the case surrounding the ownership of the Black Swan is Odyssey's apparent inability to identify the vessel in the face of Spain's contentions that Odyssey is being too evasive.²¹ Specifically, Odyssey has stated in its in rem admiralty action that nothing thus far recovered in its salvage efforts appears to indicate that any third party would have a superior claim.²² Spain, convinced that Odyssey is concealing crucial information about

13. See, e.g., *Martha's Vineyard Scuba Headquarters, Inc. v. Unidentified, Wrecked & Abandoned Steam Vessel*, 833 F.2d 1059, 1065 (1st Cir. 1987); *Klein v. Unidentified, Wrecked & Abandoned Sailing Vessel*, 758 F.2d 1511, 1514 (11th Cir. 1985); *Treasure Salvors, Inc. v. Unidentified Wrecked & Abandoned Sailing Vessel*, 569 F.2d 330, 337 (5th Cir. 1978).

14. See, e.g., *Fairport Int'l Exploration, Inc. v. Shipwrecked Vessel, known as the Captain Lawrence*, 177 F.3d 491, 499-500 (6th Cir. 1999); *Deep Sea Research, Inc. v. Brother Jonathan*, 102 F.3d 379, 387-88 (9th Cir. 1996).

15. See, e.g., *Columbus-Am. Discovery Group*, 974 F.2d at 461.

16. See *id.* at 459.

17. See *The Sabine*, 101 U.S. 384, 384 (1879).

18. See Justin S. DuClos, *A Conceptual Wreck: Salvaging the Law of Finds*, 38 J. MAR. L. & COM. 25, 25-27 (2007).

19. See *id.* at 27.

20. See *Columbus-Am. Discovery Group*, 974 F.2d at 459.

21. See Scott Barancik, *Spain: Odyssey Is Playing a Game*, ST PETERSBURG TIMES, Sept. 21, 2007, at 1D.

22. See Amended Verified Complaint in Admiralty at ¶ 18, *Odyssey Marine Exploration, Inc. v. The Unidentified Shipwrecked Vessel*, No. 8:06-CV-01685-SDM-TBM (M.D. Fla. Aug. 7, 2007) (stating that Odys-

the vessel,²³ maintains that Odyssey's pleadings are not in compliance with Rules C(2)(b) and E(2)(a) of the Supplemental Rules for Admiralty and Maritime Claims.²⁴ Rule (C)(2)(B) of the Supplemental Rules states that for actions in rem, the complaint "must describe with reasonable particularity the property that is the subject of the action."²⁵ Rule E(2)(a) states that in actions in rem, "the complaint shall state the circumstances from which the claim arises with such particularity that the defendant or claimant will be able, without moving for a more definite statement, to commence an investigation of the facts and frame a responsive pleading."²⁶

The issue of the specificity of pleadings for in rem admiralty actions has arisen before in *Fathom Exploration, LLC v. The Unidentified Shipwreck Vessel or Vessels*, where the court found that the salvor, Fathom Exploration (Fathom), was required to plead with particularity regarding a shipwreck's location but was not required to positively identify the vessel before initiating action.²⁷ There, the state of Alabama had a potential claim over the vessel or vessels if the discovery was located in Alabama waters and met the requirements for being "embedded" and "abandoned" under the Abandoned Shipwreck Act.²⁸ The State argued, however, that it could not ascertain the validity of its claim of ownership because Fathom failed to properly describe the vessel or vessels or provide the exact location, making it impossible to determine from the pleading whether the ship granted title to Alabama pursuant to the statute.²⁹ The court agreed, finding that a responsive pleading by Alabama without any basis to assess the validity of its claim would necessarily be "speculative and conditional," severely hindering Alabama's efforts to actively pursue its claim of ownership.³⁰ The court held that although Fathom might not have known the name of the vessel or vessels, it surely had the precise location as well as enough data after months of research to conclude whether the shipwreck was embedded in the ocean floor.³¹ This information, even if it was "preliminary, inconclusive, and subject to revision," should have been provided in Fathom's claim in admiralty in order for Alabama to initiate an investigation and craft a sufficiently responsive pleading.³²

But, the court held that the Supplemental Rules did not require the salvor to positively identify a wreck before bringing an action for arrest of the vessel.³³ The court reasoned

sey believes the find to be that of a 17th century merchant vessel and that nothing recovered from the vessel to date "confirms an interest in the artifacts of any third party including the Kingdom of Spain.")

23. See Anderson, *supra* note 2, at A1 (quoting James A. Goold, attorney for Spain, as saying "[e]verything points to Odyssey having known exactly what ship they were looking for and having then decided to claim it was unidentified").

24. See Opposition by Claimant-Defendant Kingdom of Spain to Plaintiff's Motion for Protective Order at 3, *Odyssey Marine Exploration, Inc., v. The Unidentified Vessel or Vessels*, No. 8:06-CV-1685-T23-TBM (M. D. Fla. Sept. 19, 2007).

25. Supplemental Admiralty and Maritime Claims Rule C(2)(b) 28 U.S.C.A.

26. Supplemental Admiralty and Maritime Claims Rule E(2)(a) 28 U.S.C.A.

27. See *Fathom Exploration, LLC v. The Unidentified Shipwrecked Vessel or Vessels*, 352 F. Supp. 2d 1218, 1218 (S.D. Ala. 2005).

28. See *id.* at 1222-23. The Act grants the United States title over any abandoned shipwreck embedded in a state's submerged lands. See 43 U.S.C. § 2105(a) (2000). The United States then transfers title "to the State in or on whose submerged lands the shipwreck is located." 43 U.S.C. § 2105(c) (2000).

29. See *Fathom*, 352 F. Supp. 2d at 1226.

30. *Id.*

31. See *id.*

32. *Id.*

33. See *id.* at 1225.

that to find otherwise “would do violence to time-honored admiralty principles relating to salvage.”³⁴ Requiring positive identification before commencing legal action would strip exclusive salvage rights of the protection they provide in granting the salvor the benefits of being the first to discover and salvage a shipwreck, as salvors would have to contend against a “feeding frenzy of competing salvors and claimants swarming around a shipwreck site,” risking damage to the vessel as well as the archaeological and historical value of the site.³⁵

B. EFFECTS OF PLEADING REQUIREMENTS ON SPAIN’S CLAIM

The *Fathom* case presents a tension between the law of salvage and the law of finds in an attempt to strike a balance between the competing interests of the salvor and the prospective claimant. When exclusive salvage rights can be granted without requiring positive identification of the vessel, it encourages new discoveries by salvors via ensuring the salvor will derive a benefit from its labor as well as allowing the exercise of salvage rights free from conflicts with competing salvors.³⁶ On the other hand, the law of finds is premised on fair competition whereby the find is freely available to the entire world before it is reduced to actual possession.³⁷ Granting preliminary exclusive salvage rights chills this competition in preventing the conditions that the law of finds requires by restricting the availability of the vessel to other claimants.³⁸

Fathom presents an example of this limited competition by impairing the efforts of prospective claimants to investigate and assess their claims. The lack of information did not preclude *Fathom* from initiating legal action and continuing its salvage efforts while at the same time the state of Alabama was unable to actively pursue its claim because it simply did not have enough information to proceed with an adequately responsive pleading. A similar situation appears to play out in the legal dispute over the *Black Swan*, in which *Odyssey* can maintain exclusive salvage rights while Spain preoccupies itself with legal actions to press for more information about the vessel, all while being unable to assert a claim of ownership.

As of now, Spain is unable to make a legal claim of ownership while the vessel’s origins remain a mystery. If it can be established that the *Black Swan* is indeed a ship formerly commissioned by Spain, Spain would attempt to lay claim to the vessel based on sovereign immunity under the 1902 Treaty of Friendship and General Relations Between the United States and Spain, in which by virtue of Spain appearing in court to assert its claim of ownership, *Odyssey* would have the substantial burden of showing that Spain nevertheless still had expressly abandoned the vessel.³⁹ While the doctrine of sovereign immunity

34. *Id.* at 1224.

35. *Id.* at 1225.

36. See DuClos, *supra* note 18, at 36-37 (arguing that as “the underwater environment is not conducive to a raid and plunder free-for-all because it is a dangerous environment that easily threatens survival,” salvage law provides a benefit in encouraging “more controlled conduct”).

37. See *id.* at 27.

38. See *id.*

39. The Constitution states that “Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.” U.S. CONST. art. IV, § 3, cl. 2. This clause has been interpreted as stating that the United States can only

has been established in the Third Circuit for shipwrecks where the sovereign is the United States,⁴⁰ other courts have refrained from elucidating an abandonment standard in cases where the sovereign has claimed ownership or where any owner appears at all, suggesting that such cases merit different treatment from those where no other party has appeared in court to challenge the salvor's claim.⁴¹ In addition, Spain's potential claim might be bolstered by the decision in *Sea Hunt, Inc. v. The Unidentified Shipwrecked Vessel or Vessels* ("*Sea Hunt III*"), where the Fourth Circuit granted Spain title to two Spanish vessels, *La Galga* and the *Juno* based on a finding that Spain had not expressly abandoned the vessels under Article XX of the 1763 Definitive Treaty of Peace Between France, Great Britain, and Spain.⁴² The treaty ceded "all that Spain possesses on the continent of North America" to Great Britain (later to the United States).⁴³ Such language, the court reasoned, was not explicit enough to pertain to shipwrecks under the rigorous express abandonment standard applied by the court.⁴⁴

It remains to be seen whether the Fourth Circuit's acquiescence to Spain's ownership interest establishes a precedent in admiralty law, as the opinion has been criticized for applying an express abandonment standard and for its interpretation of the 1902 and 1763 Treaties in determining that Spain had not abandoned its shipwrecks.⁴⁵ But, given the context of the decision in a case that represents the first instance where Spain actively pursued a claim of ownership over its ships,⁴⁶ it might be surmised that a U.S. court would not be so quick to dismiss the claims of a sovereign nation.⁴⁷ Indeed, the United States might be persuaded to uphold Spain's claims of ownership out of principles of international comity. In fact, the United States had previously argued in its amicus brief in *Sea Hunt III* that by acknowledging Spain's ownership claim, the United States was seeking to

abandon its property by explicit acts. Under the 1902 Treaty of Friendship and General Relations Between the United States and Spain, which granted reciprocal immunities for U.S. and Spanish shipwrecks, Spain is granted the same immunity in the abandonment of its property. See Treaty of Friendship and General Relations, art. X, U.S.-Spain, July 3, 1902, 33 Stat. 2105.

40. See *United States v. Steinmetz*, 973 F.2d 212, 223 (3d Cir. 1992) (holding the United States is presumed to have retained title to vessels sunk during the Civil War).

41. See *Fairport*, *supra* note 14, at 500 (6th Cir. 1999) ("we limit our holding to vessels formerly owned by private parties, and express no view as to the application of the express abandonment test to vessels initially owned by the United States."); see also *Martha's Vineyard*, *supra* note 13 at 1065 (1st Cir. 1987) (applying an implied abandonment standard while noting that "no person or firm appeared to assert any overall claim of ownership").

42. See *Sea Hunt, Inc. v. Unidentified Shipwrecked Vessel or Vessels*, 221 F.3d 634, 646 (4th Cir. 2000) [hereinafter *Sea Hunt III*].

43. See Definitive Treaty of Peace, Fr.-Gr. Brit.-Spain, art. XX, Feb. 10, 1763, 42 Consol. T.S. 279, 331-32.

44. See *Sea Hunt III*, 221 F.3d at 644.

45. See generally David J. Bederman, *Maritime Preservation Law: Old Challenges, New Trends*, 8 WIDENER L. SYMP. J. 163, 175-84 (2002) (discussing how the Fourth Circuit's interpretation of the 1763 Treaty is inconsistent and fails to conform with customary international law).

46. See *Sea Hunt III*, 221 F.3d at 647. In previous cases where Spanish wrecks were found to be abandoned, Spain had declined to appear in court to make a claim of ownership. See *id.* (citing *Treasure Salvors, Inc.*, 569 F.2d at 337 and *Lathrop v. Unidentified, Wrecked and Abandoned Vessel*, 817 F. Supp. 953, 956 (M.D. Fla. 1993)).

47. See *Martha's Vineyard*, 833 F.2d at 1065 (applying an implied abandonment standard while noting that no other party had appeared to claim the shipwreck). This case appears to indicate that a court would take into consideration that a claimant has appeared in court to make a claim despite an implied abandonment standard.

ensure that its own sunken vessels “are treated as sovereign ships . . . and are not subject to exploration, or exploitation, by private parties seeking treasures of the sea.”⁴⁸

All in all, the validity of Spain’s claim to the Black Swan, whether because of sovereign immunity or out of international comity, is contingent on the identity of the shipwreck. If the shipwreck was not originally a Spanish vessel, Spain cannot assert ownership on any alternative grounds, as the shipwreck, according to *Odyssey*, lies in international waters, beyond the limits of any sovereign to exercise its territorial jurisdiction to lay claim to the vessel.⁴⁹ *Odyssey*, therefore, has an interest in divulging as little information as possible so as to hinder Spain’s ability to investigate its claim and frame a responsive pleading. Even if the court should intercede and request *Odyssey* to amend its pleading, identifying the vessel may pose challenges that would take more time than simply determining title through location since, unlike identity, location would be easily ascertainable upon discovery.⁵⁰ As a result, Spain cannot assert a legal claim of ownership until it can positively identify the vessel, either by *Odyssey* providing the identity or through its own investigation should *Odyssey* be compelled to release more information. Either option requires time, which delays a final decision as to ownership since the court would likely want to consider Spain’s actions as a previous owner if Spain is able to assert its rights as a sovereign over the vessel. In the meantime, *Odyssey* is able to continue its salvage operations as the exclusive salvor.

III. Salvage Award

Odyssey’s interest in securing a salvage award if it is not granted title is also dependent on the identity of the wreck. Although the owner has the right to refuse unwanted salvage,⁵¹ this right of refusal is not effective until the salvor, “acting as a reasonable person, has determined or could determine, the ownership of the object of salvage.”⁵² For instance, in *Sea Hunt III*, the court affirmed the district court’s denial of a salvage award because the salvor knew before bringing legal action that it had discovered a Spanish ship, thus alerting it to the possibility of Spain’s ownership claim and refusal of salvage activity.⁵³ In the case of the Black Swan, because Spain’s ownership remains indeterminate,

48. Brief for the United States as Amici Curiae Supporting the Kingdom of Spain, *Sea Hunt, Inc. v. The Unidentified Shipwrecked Vessel or Vessels*, 221 F.3d 634 (2000) (No. 99-2035), 1999 WL 33613886. See also Berean, *supra* note 8, at 1289 (“Indeed, the call from Spain to recognize the La Galga and the Juno as maritime graves and the first ever request from Spain for international cooperation, which the United States sought to comply with, likely played a role in the Fourth Circuit’s willingness to diverge from traditional admiralty law.”).

49. See United Nations Convention on the Law of the Seas, art. 303, ¶ 2, Dec. 11, 1982, part XIII, 21 I.L.M. 1245, 1326 (1982) (prohibiting removal of archaeological and historical objects at sea from within the contiguous zone described in Article 33 without the coastal State’s approval).

50. See *Fathom*, 352 F. Supp. 2d at 1225, n.9 (acknowledging that “there may be situations where a salvor expends untold thousands of man-hours to identify a submerged wreck” as well as “situations where identifying a wreck is as simple as reading the painted name of the vessel from the inscription on its intact stern or bow”). *Odyssey*’s pleadings appear to suggest the former situation. See Amended Verified Complaint, *supra* note 22.

51. See *Sea Hunt III*, 221 F.3d at 647-48, n.2 (“It is the right of the owner of any vessel to refuse unwanted salvage.”).

52. *Tidewater Salvage, Inc., v. Weyerhaeuser Co.*, 633 F.2d 1304, 1307 (9th Cir. 1980).

53. See *Sea Hunt III*, 221 F.3d at 647-48, n.2.

the knowledge of an ownership claim and a likely refusal of salvage⁵⁴ cannot be imputed to Odyssey. As there is no owner for Odyssey to force upon unwanted salvage, Odyssey is able to take advantage of an opportunity to conduct more extensive salvage efforts without the risk of being denied a salvage award. This could spur Odyssey to concentrate on its salvage operations at the expense of efforts at gathering more information to identify the vessel, maintaining the cloud of uncertainty surrounding ownership of the vessel and further hindering Spain's ability to investigate or assert a claim of ownership.

IV. Conclusion

The cumulative effect of admiralty law in cases where an unidentified shipwreck is found in international waters is that the salvor receives a two-fold benefit as first-finder with preliminary exclusive salvage rights. First, because the sovereign's interest is subject to the vessel's origin and identity, the salvor can exercise control over the vessel for the time being while the sovereign, as a potential owner, can only speculate on the validity of its claims and is hindered in pursuing decisive legal action. Also, the nature of salvage law in permitting salvage awards while ownership remains inconclusive encourages the salvor to focus its efforts on salvage rather than efforts to identify the vessel, exacerbating the sovereign's difficulties in pursuing a legal claim. What results is the protracted and increasingly heated legal dispute over the Black Swan, in which salvage law has removed undesirable competition from the oceans but has replaced it with an equally contentious conflict to be waged in the U.S. admiralty courts.

54. See Office of Ocean Affairs; Protection of Sunken Warships, Military Aircraft, and Other Sunken Government Property, 69 Fed. Reg. 5647 (Feb. 5, 2004) ("The Embassy of Spain accordingly wishes to give notice that salvage or other disturbance of sunken vessels or their contents is not authorized and may not be conducted without express consent by an authorized representative of the Kingdom of Spain.").