

## ADMIRALTY LAW

## Expert Analysis

# Treasure at Sea: Finders Are Not Always Keepers

**A** recent case confirms that what we learned in the school yard in fifth grade about “finders keepers” is not true at sea.

A valuable U.S. government data buoy detached from its mooring anchor at sea in January 2016, bringing to surface ancient maritime law of abandonment, salvage awards and finders keepers. The buoy was engaged in a multinational collaborative project called “Coordinated Canyon Experiment,” gathering data on sediment movement during underwater avalanches and turbidity currents. It was discovered floating free five miles off the coastline of Monterey Bay, Calif., by a fishing vessel whose captain snagged it and took the

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catch aboard, claiming “finders keepers.”

The fisherman in *U.S. v. Sherer* refused to release the catch without compensation. The government responded in kind, filing a

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suit against the vessel owner for conversion, trespass and injunctive relief in federal court in admiralty.<sup>1</sup> As the vessel owner quickly

learned, sea rights are determined by federal maritime law and finders are rarely keepers.

### Buried Treasure

Beginning in the 1980s, advancements in technology began to allow for deep sea salvage, leading to the discovery of ancient shipwrecks, forgotten artifacts and, in some cases, sunken treasure. As technology developed, so did the case law, with numerous parties fighting over rights to the priceless relics and turning to federal courts for relief.

A discovery of property at sea may be rewarded by either a salvage award or finders’ rights, with the latter vesting title to the discoverer in certain circumstances. To obtain title as a finder, the property must have been expressly or impliedly “abandoned.” This is often difficult to prove as courts

impose a strong presumption of non-abandonment.<sup>2</sup>

In *Columbus-America Discovery Group v. Atlantic Mut. Ins. Co.*, 974 F.2d 450 (4th Cir. 1992), a fortune in gold onboard an 1857 shipwreck off the coast of South Carolina was discovered in 1989, about 8,000 feet below the ocean surface. The wooden sailing vessel, S.S. CENTRAL AMERICA, sank in a hurricane while transporting 580 passengers and an estimated \$1 billion (present day value) worth of California “gold rush” gold to New York. But, at the time, there was no technology or equipment available to retrieve the valuable cargo. Fortunately for the cargo owners, their gold was insured by cargo policies issued in the United States and London, and thus they were paid the insurance proceeds after the sinking.

Fast forward 130 years, a treasure hunter found and began to salvage the buried treasure onboard the S.S. CENTRAL AMERICA with state-of-the-art technology, helping itself to the golden fortune. The ‘finder’ was Columbus-America Discovery Group, a company formed in 1985 to locate and recover the CENTRAL AMERICA shipwreck. Columbus-America commenced an admiralty in rem action claiming exclusive rights to access the wreck and title

to everything recovered under the law of finds.

Judgment was entered in favor of Columbus-America by the Eastern District of Virginia, awarding it title to all property recovered and issuing a permanent injunction to prevent third parties from accessing the wreck removal site. The district court held that, “In addition to achieving effective possession, Columbus-America has met the threshold requirement for application of the law of finds to abandoned shipwrecks having historical or archaeological significance. It has scrupulously avoided acts which might destroy important scientific or historical data...It has preserved information and artifacts for future generations....”<sup>3</sup>

Hearing of this, the insurers of the gold (that were still in business) surfaced. Even though the 1857 insurance claim files, not surprisingly, had been lost or destroyed, each of the insurers filed claims in federal court asserting ownership to the cargo and demanding Columbus-America surrender the booty. The insurance companies argued that, by virtue of payments made for the loss under the insurance policies, they were subrogated to the rights of the cargo owners and thus had a stake in the recovered gold.

On appeal, the U.S. Court of Appeals for the Fourth Circuit recognized that the insurers had not and could not salvage the sunken treasure in 1857, but emphasized that, as technology progressed, the insurers contacted multiple salvage companies regarding recovery of the wreck, and, at no point during those discussions did the insurers agree to abandon their rights to title. Thus, the court held that the cargo was not intentionally ‘abandoned’ by its insurers. Because of this explicit claim of title, Columbus-America could not obtain exclusive ‘ownership’ of the cargo.

If property found at sea is suspected to have been ‘abandoned,’ the finder must prove its intent to acquire the property and exercise a high degree of control over it. Control is equated with possession, either actual or constructive.<sup>4</sup> The elements for pleading a prima facie case requires a finder to commence salvage operations and exercise control over the property or the salvage site before a court can evaluate the right to ownership—a considerable and expensive risk for salvors of deep sea wrecks. The finder must turn to a federal court pursuant to admiralty rules of procedure and

obtain an order ‘arresting’ (seizing) the property and then issue notice of the proceeding to the public and all known interested parties.<sup>5</sup> The finder then proceeds in rem against the property and in personam against all intervening claimants.

### Government’s Data Buoy

In *U.S. v. Sherer*, the fishing vessel that spied the government data buoy was six miles off the coast of California when the valuable device was discovered. The captain terminated the voyage to retrieve the buoy, with visions of profit on the horizon and to his credit, removing the “hazard to navigation.”<sup>6</sup> Indeed, the tentacles of its sophisticated equipment became entangled in the ship’s propellers, requiring the captain to slowly navigate to shore with the buoy lashed to the side like the big fish strapped to the side of the fisherman’s boat as depicted in the book “The Old Man and the Sea.”<sup>7</sup>

Speaking of technology, the government located its buoy by precision GPS tracking and promptly advised the captain of government ownership and demanded its return. While the captain clearly had possession, control and an apparent attempt

to acquire the property, the valuable and functional buoy had not been expressly abandoned. Thus, despite the adage that ‘possession is nine-tenths of the law,’ the fisherman had no rights to claim title or ownership under the maritime law of finds.

According to the government’s complaint (*U.S. v. Sherer*, No. 16-cv-01479 (N.D. Cal. 2016)), the fisherman’s landlubber attorney (not

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Although the fishing boat captain had no ‘finders’ rights under maritime law, he may have been entitled to a ‘salvage award’ for his efforts. The law of salvage (as opposed to ‘finds’) is an equitable remedy in admiralty that compensates a volunteer who successfully saves property in peril.

maritime) contacted the government to argue that the captain was the rightful ‘owner’ of the buoy, and offered to sell the property back to the United States for \$45,000. In admiralty, however, there is no reward for ‘piracy.’ As a result of unseaworthy legal advice, the fisherman fought the law, and the law won, demonstrating that proper maritime legal advice would

have been a life ring to the unwary fisherman.

### Law of Salvage

Although the fishing boat captain had no ‘finders’ rights’ under maritime law, he may have been entitled to a ‘salvage award’ for his efforts. The law of salvage (as opposed to ‘finds’) is an equitable remedy in admiralty that compensates a volunteer who successfully saves property in peril.<sup>8</sup> The amount of the reward is determined on a case-by-case basis, and can be substantial. The salvor of the TITANIC, for example, was awarded 100 percent of the value of the artifacts retrieved, more than \$110 million.<sup>9</sup> In calculating a salvage award, a court will first consider if the facts truly demonstrate that a ‘salvage’ service was performed (as would-be salvors often stake a claim without facts to support it) and will then consider such factors as the risk involved to the salvor, the value of the property saved, the value of the salvor’s property at risk, and the skill, efforts and resources expended by the salvor.<sup>10</sup> The award is typically a percentage of the ‘post-casualty’ value of the salvaged property.

Salvage rewards are an incentive for a ‘good samaritan’ or

professional salvor to rescue property and/or lives in peril on the seas. In 2003, a New York tugboat crew witnessed the Staten Island Ferry collide into a concrete pier. The crash of the ANDREW J. BARBERI resulted in the death of 11 passengers and injured more than 70. The crew of Henry Marine, Inc.'s tug DOROTHY J attempted to assist the adrift ferry as it was heading toward the Verrazano Bridge, but the tug was too small to be effective alongside the hefty ferry. Instead, the tug tied up alongside the ferry to provide assistance and calm the captain and passengers, escorting the ferry to its berth on Staten Island and remaining there until rescue personnel arrived.

After a salvage trial in admiralty, the Eastern District of New York awarded the tug company and its crew \$75,000 for the comfort and aid provided.<sup>11</sup> The judge found that the crew's efforts, combined with a public policy of incentivizing would-be salvors to provide aid in the future, justified such an amount.

Back to the government's data buoy. It was clearly in peril after it broke free from its deep sea mooring and a hazard to navigation. The fisherman voluntarily and successfully 'rescued' the buoy and brought it to shore. Thus, under these facts,

it would appear that all of the elements for a prima facie salvage claim were met. Having sacrificed his daily fishing profits to proceed back to shore with his propellers ensnared by the buoy's mooring equipment, the risk of the captain's efforts would have likely resulted in salvage compensation.

### Conclusion

The rights as between the government and the captain ultimately derived from an old document, not an old adage. Article IV, Section 3, Clause 2 of the U.S. Constitution vests Congress with the sole right to dispose of government property; thus, the fishing vessel could never have had a justiciable claim to title or ownership. Meanwhile, Article III, Section 2 of the Constitution vests federal courts with jurisdiction to decide and develop admiralty and maritime case law. This should have been the first stop for the fisherman to assert a claim for salvage.

In the end, the captain returned the buoy with no compensation, and both he and the government waived any and all claims against the other in exchange for a voluntary dismissal of the government's complaint. Had the captain known the law of the sea, or an admiralty attorney, he may have found he had

a potential reward for his salvage efforts, and thought twice before abandoning his own claim.



1. *U.S. v. Sherer*, No. 16-cv-01479 (N.D. Cal. filed March 31, 2016).

2. *Trueman v. Historic Steamtug N.Y.*, 120 F. Supp. 2d 228 (N.D.N.Y. 2000), affd 14 Fed. Appx. 106 (2d Cir. 2001).

3. *Columbus-America Discovery Group, Inc. v. The Unidentified, Wrecked and Abandoned Sailing Vessel S.S. CENTRAL AMERICA*, in rem, 1989 AMC 1955 (E.D. Va. 1989).

4. Rule D of the Supp. R. Adm. or Mar. Cl. & Asset Forfeiture Actions (governing the process for actions to try title or possession to maritime property); *Dluhos v. Floating & Abandoned Vessel*, 162 F.3d 63 (2d Cir. 1998) (holding vessel must be arrested for federal court to have jurisdiction over the res in salvor's in rem action seeking title).

5. *Northeast Research v. One Shipwrecked Vessel*, 729 F.3d 197 (2d Cir. 2013) (granting State of New York title to a shipwreck).

6. Jim Flannery, "Fisherman Tangled in Legal Net Over Government Science Buoy," ANGLERS JOURNAL (April 20, 2016), <http://www.anglers-journal.com/columns/news/fisherman-tangled-legal-net-government-science-buoy>.

7. Ernest Hemmingway, *THE OLD MAN AND THE SEA* (1952).

8. *The Blackwall*, 77 U.S. 1 (1870) (setting forth the criteria courts should evaluate in arriving at a salvage award).

9. *R.M.S. Titanic v. Wrecked & Abandoned Vessel, its Engines, Tackle, Apparel, Appurtenances, Cargo, etc.*, 742 F.Supp.2d 784 (E.D. Va. 2010).

10. *Reynolds Leasing Corp. v. The Tug Patrice McAllister*, 572 F.Supp. 1131 (S.D.N.Y. 1983) (employing the criteria set forth in *The Blackwall* (see E.N. 8, supra)).

11. *DOROTHY J v. City of New York*, 749 F.Supp.2d 50 (E.D.N.Y. 2010) (The author was trial counsel for plaintiff in this case).



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