

THE TITANIC VENTURE: WHO OWNS THE OCEAN DEEP?

1. INTRODUCTION

This paper does not, unfortunately, answer the question as to who owns the ocean deep, but does discuss the issues relative to those factors that will enable the enlightened reader to come to his own conclusion. The inordinate public mania for information about the TITANIC is extraordinary. This is undoubtedly caused by the motion picture of the same name as well as all of the commercial activities associated with the promotion of the picture. It is also been the subject of recent public education programs on the Discovery Channel and others, including the television attempt to recapture the salvage vessel raising a section of the TITANIC's hull, which had been imbedded in the ocean bottom some two and one half miles below.

The tragic history of the TITANIC has unfortunately been somewhat romanticized in movies and, at times, by writers without taking into account the absolute devastation and destruction of the "*unsinkable TITANIC*" on its maiden voyage to New York in April, 1912. This paper will discuss the historical background of the recent salvage activities and the more recent activities involving sunken and, at times, abandoned wrecks which have resulted in extraordinary activities on the part of salvors and others, which has precipitated substantial lawsuits. It is quite evident at the end of the day that the issue of historical preservation, although articulated as the primary rationale for these endeavors, is not necessarily the prime function of these expeditions, namely, one of profit. The TITANIC venture, however, is different in this aspect. It is all the more interesting for that reason, in that the salvors of the TITANIC have agreed not to sell any of the artifacts and have promised to keep them available for future generations for viewing at expositions, etc.

2. HISTORIC BACKGROUND OF SALVAGE

The law of salvage throughout the world is of substantial historical origin, going back to pre-Christian times. The definition of salvage is basically a simple one, namely: a marine peril, a service voluntarily rendered when not required as an existing duty or from a special contract and success in whole or in part by the service rendered which contributed to such success.¹ The basic elements that the courts would consider in evaluating whether or not the service rendered was salvage were set forth in the earlier Supreme Court decision in *The BLACKWALL*.² Courts in the United States have considered these elements and have rearranged them on various occasions in various order, depending upon the magnitude of the case as well as the substantial advances in technology.

¹ *The SABINE*, 101 U.S. 382, 384 (1879); *RMST Titanic Inc. v. Haver, et al.*, 171 F.3d 943 (4th Cir. 1999).

² 77 U.S. (10 Wall) 1 (1870).

The facts considered by courts in salvage law analysis in descending order of importance are the following:

1. Degree of danger from which the property was rescued;
2. Value of the property saved;
3. Risk incurred in saving the property from the impending peril;
4. Promptitude and skill displayed by the salvors;
5. Value of the property employed by the salvors and the danger to which it is exposed; and
6. Labor expended in rendering the salvage service.³

More recent decisions have added another element, namely, the care that the salvors have taken to preserve the wreck from an archeological viewpoint.⁴

The TITANIC case is not one of the usual salvage activities which Hollywood has managed to twist in such a fashion as to depict them as a parcel of free booters seeking to overwhelm the poor benighted vessel owner and others. Although there may well be people in the industry that still feel that way about salvors, that is not the issue which we will consider in the TITANIC venture.⁵ The author had occasion to substantially review the issue of deep sea salvage in the above mentioned article which was written before the major court decisions in the TITANIC case have come to their conclusion in 1999. However, that article does discuss the historical background of salvage as well as other issues, which are the subject of this paper.

The most recent notorious deep sea salvage operation was that in connection with the recovery of artifacts, including a large amount of gold from the S/S CENTRAL AMERICAN, which sunk off the coast of South Carolina in 1857 with a loss of over 420 souls.⁶ That case was a bitterly fought salvage operation. Litigation was brought by entrepreneurs who formed a limited partnership in Columbus, Ohio and utilized the then existing best technology to find this wreck in the South Atlantic some 8,500 feet below the surface. The first decision in the case, known as CADG I was interesting, in that the District Court found that the law of "*finds*" applied, which would be the true concept of "*finders keepers*" and not the law of salvage

³ *B/V Bureau Wijsmuller v. United States*, 702 F.2d 333 (2d Cir. 1983).

⁴ *Columbus-American Discovery Group, Inc. v. Atlantic Mutual Insurance Company, (CADG II)*, 56 F.3d 556 (4th Cir. 1995), *cert. denied*, 516 U.S. 938 (1995).

⁵ McCormack: Finders Keepers-Losers Weepers: Underwriters Problems with Deep Sea and Other Salvage Operations, 49 FICC Quarterly 87 (1998).

⁶ See, *id.* at 92-93.

in which the salvor retains a lien for his claim against the property, but does not acquire title. The Court of Appeals in its first decision was complimentary of the activities of all concerned and supported favoring the law of salvage over the law of "finds" remanding the case to the lower Court directing it to apply the law of salvage and determine the percentage of gold each underwriter claimed title to which they may be entitled.⁷ Courts, at times, do have the apt ability to turn a phrase, as might be imagined from this comment from the Circuit Court opinion:

"When Erasmus mused that 'a common shipwreck is a source of consolation to all', Adagia, IV.iii.9 (1508), he quite likely did not foresee inconsonant free-for-alls among self-styled salvors," ? [including] Ohio, British and American insurance underwriters, [which included] an heir to the Miller Brewing fortune, a Texas oil millionaire [who in the past led searches for Noah's Ark, the Loch Ness monster and the TITANIC], an Ivy League university, and an order of Catholic monks [for a price of up to \$1 billion in gold].⁸

Subsequently, the Court was called upon again to consider the distribution of the spoils (as it were) of the gold from the COLUMBUS AMERICA brought up from the deep. As of the time the salvors were making their claim, they had expended in excess of \$29.2 million with a projected salvaged bullion value of only \$21 million, which of course did not make the limited partners in the investment group of the salvor extremely happy.⁹

The Fourth Circuit in the later decision (CADG II) was by that time getting slightly annoyed at the continuing saga. One of the more erudite judges found solace in the quotation from Virgil which loosely translated, stated "*to what cannot you compel the hearts of men; oh cursed lust for gold*".¹⁰ However, the further commentary of the Court is something that may be considered in the TITANIC venture because this was not a quest for gold but a search for preservation of a historical wreck. The comments of the Court in CADG II could easily be said of the TITANIC, namely "*what (the salvors) have accomplished is, by any measure, extraordinary. We can say without hesitation that their story is a paradigm of American initiative, ingenuity and determination.*"¹¹ The salvors were awarded 92.6% of the salvaged bullion with the claimant underwriters given the balance. There was no further opinion from the Court of

⁷ Columbus American Discovery Group, Inc. v. Atlantic Mutual Insurance Co., 974 F2d 450 (4th Cir. 1992) (CADG I).

⁸ See, id. at 454 (citations omitted).

⁹ McCormack: Finders Keepers-Losers Weepers: Underwriters Problems with Deep Sea and Other Salvage Operations, 49 FICC Quarterly 87 (1998), pp. 94-95.

¹⁰ See, id. at 92-93; CADG II at 561.

¹¹ See CADG II at 576.

Appeals. There is still some suggestion that the salvors are concerned about how they would be in a position to obtain the greatest value from the bullion from the COLUMBUS AMERICA vessel without impacting the value of it by placing it all on the market at the same time. A reader of history would be well advised to review these decisions for a fascinating exposition of how the ingenuity of man was able to wrest from the deep ocean the spoil of a wreck sunk in extreme depths (but not at the depths of the TITANIC) over 120 years before the commencement of the salvage operations.¹²

3. HISTORY OF THE TITANIC DISASTER

As one recent author indicated in a rather succinct precis of the events *"at 11:40 p.m. on April 14, 1912 the liner TITANIC struck an iceberg in the North Atlantic, holing six compartments forward to an extent beyond the capability of the bilge pumps to overcome. The inevitable progressive flooding sank the ship; it disappeared, bow first beneath the surface at about 2:20 a.m. on the 15th."*¹³ Professor Woodward of the Department of Naval Architecture and Marine Engineering at the University of Michigan, prepared a startling chronology of the events which he had obtained from various sources as well as fleshing it out with his own surmises. The reader would be surprised to note the short time frame for this catastrophe to take place:

1. Chronology

11:40 p.m. - The collision;

- Six compartments are holed;
- Two forward-most boiler rooms are among them and begin to flood immediately. Bilge pumps are started.

11:40 p.m., et seq. - Bilge pumps continue to run (further engineering discussion omitted).

1:30 a.m. (approximately) - Wireless signals grow weak, apparently from failing power, but lights still burn.

2:05 a.m. - Last life boat lowered. Lights still on.

¹² The reader of history would also be well advised to consider a fascinating history of this activity in the Ship of Gold in the Deep Blue Sea (Kinder, 1998).

¹³ John Woodward: The Lights of the TITANIC, 30 Marine Technology, p. 100 (1993).

2:10 a.m. (approximately) - Trim by bow is sufficient to threaten operation of remaining boilers. About this time 35 engineers appear on deck, apparently having done all possible below. None survives. Lights still on.

2:18 a.m. - Trim has become severe, with stern lifted out of water. Ship breaks in two near the bulkhead separating the last boiler room from the reciprocating propulsion engine room. . . Lights go out.

2:20 a.m. - Broken off stern plunges beneath the surface, following the bow section that has disappeared a minute or two earlier.¹⁴

The wreck of the TITANIC was first discovered by Dr. Robert Ballard in 1985 and further examined in 1986 by him.¹⁵ Dr. Ballard is well known for his participation in recent Discovery Channel expeditions, which have resulted in the location of some ancient Phoenician wrecks at the bottom of the Mediterranean Sea at a depth of over 2,000 feet. These wrecks are to be considered in the context of preservation rather than salvage. Dr. Ballard is associated with the Woods Hole Institute in Woods Hole, Massachusetts and was joined in the expedition to the TITANIC site by a French group who provided the submersible used for the expedition.

Until the photography of the TITANIC wreck by Dr. Ballard and others, the general theory was that the vessel had a gash ripped open for some 300 feet after her encounter with the large iceberg. The conclusion that this is why the vessel sunk was first put forth by the British Board of Inquiry in 1912.¹⁶ However, some of the survivors felt that the ship had broken in two at the surface and the research of the authorities today supports that view. The TITANIC is now in two large pieces on the ocean bottom, almost a mile apart with much of her midship section missing and a substantial debris field between the two hull sections.¹⁷ Professor Woodward has opined, from the crew and passenger narratives, that the size of the ice mass had a displacement of 180,000 to 300,000 tons. The initial impact did not create much noise, other than scraping or bumping as the iceberg slid by the stern in its brush with the ship.¹⁸

¹⁴ See *Woodward*, *id.* at 101.

¹⁵ Woodward, et al., *The TITANIC and LUSITANIA: Final Forensic Analysis*, 33 *Marine Technology*, pp. 241-245; Ballard, R.D., *The Discovery of the TITANIC*, Madison Press Books, Toronto (1987).

¹⁶ Mersey Commission, *Report of the Court*, 1912.

¹⁷ Woodward, et al., *The TITANIC and LUSITANIA: Final Forensic Analysis*, 33 *Marine Technology*, p. 241.

¹⁸ See, *id.* at 244.

Professor Woodward opines that *"the damage to the ship during her encounter with the iceberg, consisted of popped rivets, cracks in the shell plating and torn seams below the water line, while there was a large hole punched inside of the ship above the water line in the vicinity of G Deck."* Professor Woodward further concluded that *"the gash is non-existent and should be considered as folklore."*¹⁹ It was his opinion that the slow rate of flooding, which would have been much greater had there in fact been this large hole (which he considered "folklore") made for a slow rate of flooding, which was governed by the inflow of water from tiny cleavage fractures in the plates as well as riveted seams that were pried open.²⁰ The impact occurred with the vessel proceeding at full speed of almost 20-21 knots; the water temperature was 28-30° Fahrenheit, which was a substantial factor in the overall sinking. Professor Woodward opined that the wrought iron rivets were a source of failure based upon analysis of rivets brought up by the expedition.²¹

In his most recent article, Professor Woodward opines that the TITANIC was neither an unsafe nor poorly designed vessel.²² He also referred to a fascinating paper presented at the IBA 27th Annual Conference in Vancouver, 1998 by Joseph A. Kilbourn of Bigham Englar Jones & Houston.²³

The law firm of Bigham Englar represented the cargo insurers in connection with the TITANIC litigation that commenced in New York in 1912. Lord Mersey, Chief Judge of the Probate, Divorce and Admiralty Court in the United Kingdom, presided at the hearings of the sinking conducted by the British Board of Trade. Ironically, he was the uncle of one of the founders of Bigham Englar and the former General Counsel to the White Star Line, owner of the TITANIC, which apparently did not cause any great concern in the United Kingdom at that time.²⁴ The TITANIC had three screws and an extreme length of 852.5 feet with a beam of 92.5 feet. It was driven by engines approximately 55,000 horsepower. The vertical bulkheads were not topped with a horizontal watertight bulkhead running the length of the vessel. This omission *"was mainly responsible for the sinking of the TITANIC."*²⁵ Ironically, the vessel filled the requirements of the English Merchant Shipping Act for the number of life boats, which was based upon the gross tonnage of the vessel, not by the number of passengers aboard. The TITANIC carried 16

¹⁹ Id. at 245.

²⁰ Id. at 245.

²¹ Id. at 248.

²² Woodward, TITANIC Defended, 34 Marine Technology 119 (1997).

²³ Kilbourn: The Sinking of the R.M.S. TITANIC, IBA 27th Biennial Conference 1998.

²⁴ *See, id.* at 1.

²⁵ Id. at 4.

lifeboats and four collapsible boats which could accommodate 1,178 persons. However, on its maiden voyage, the vessel carried some 2,200 passengers.²⁶

On April 12, 1912, the TITANIC departed from Queenstown (now Cobb), Ireland for her voyage to the United States taking the southern track, which was preferred, ostensibly, to avoid floating icebergs.²⁷

On April 14th, the vessel received warnings that icebergs were within five miles of the track she was following. Later that day a second message was received reporting ice about 19 miles to the north of the track. The last message was sent by the CALIFORNIAN (which was the vessel in the immediate vicinity of the TITANIC after the sinking) about an hour and a half before the accident occurred indicating that they were stopped and surrounded by ice. The radio operator of the TITANIC seemed to ignore this message on the basis that they were busy working on the radio for personal messages on behalf of the first class passengers.²⁸ The CALIFORNIAN was about five miles from the TITANIC when the collision with the iceberg occurred, but never went to her assistance.

The TITANIC's top speed was about 22-23 knots. Apparently, it was the policy of the White Star Line to navigate its vessels at full speed day and night in clear weather with very little discretion given to the master to deviate from this policy.²⁹ At the hearings held in London this area of speed was explored.

The following colloquy took place between the Wreck Commissioner and one of the representatives of the owner: *"The Commissioner: I want to have it quite clear from you. Is your position this, that in clear weather, whether it be day or whether it be night, there should be no reduction nor need be no reduction in the speed, although the master of the ship knows he is in the ice region? Answer: that is right."*³⁰ At the time of the collision, the vessel was proceeding at a speed of about 22 knots. The officer on watch had been advised by the prior watch officer that the ship was within an area where ice had been reported. The tragedy of this incident is that there had been no lifeboat drill ever held on the TITANIC.

Hearings were also held in the United States after the sinking under the guidance of Senator William Smith from the State of Michigan, the result of which was a proposal made to place stringent regulations on maritime commerce including the necessity to carry enough lifeboats for all passengers and horizontal as well as vertical bulkheads in the construction of vessels, and many other requirements mirroring the failures found on the TITANIC.³¹ The British hearings took place in May, June and July of 1912. One of

²⁶ Id. at 6.

²⁷ Id. at 8.

²⁸ Id. at 10.

²⁹ Id. at 10.

³⁰ Id. at 11; Mersey Commission, Tr. Test. J. Bruce Ismay.

³¹ *See* Kilbourn, p. 17.

the managing directors of White Star Line, a survivor, as well as other survivors, testified. The final report was issued July 30, 1912, which exonerated the master and the management of White Star Line from any negligence.³² The words of the report regarding the conduct of Captain Smith who went down with the vessel are interesting "*he made a mistake, a very grievous mistake, but one in which in the face of the practice and past experience negligence cannot be said to have had any part; and the absence of negligence it is, in my opinion, impossible to fix Captain Smith with blame. It is, however, to be hoped that the last has been heard of the practice: (driving the vessel at full speed at all times in clear weather) and that for the future it will be abandoned for what we now know to be more prudent and wiser measures. What was a mistake in the case of the TITANIC would without doubt be negligence in any similar case in the future.*"³³

4. LITIGATION IN THE UNITED STATES 1912/1914

The owners of the TITANIC filed a Petition in the Federal Court in New York for exoneration from or limitation of liability, pursuant to the provisions of the Limitation Act of 1851. Legal jousting took place over the question of whether or not owners had the right to modify the injunction issued under the Act.³⁴ Those decisions were primarily procedural ones, going to the issue of whether or not the claimants representing estates of deceased passengers could file separate actions in the United States court, which were not subject to the injunction of the limitation action. Those decisions made no reference whatsoever to the facts of the incident itself. It was, however, addressed by the New York Federal Court in its further opinion in which it granted the objections of the claimants to the right sought by the owners of the TITANIC to commence limitation proceedings in the Federal Court in the United States.³⁵

For the first time, this opinion set forth the rather bare allegations of the owner's as to what had occurred. The TITANIC owners were seeking to limit their liability to the value of the lifeboats and pending freight, which did not exceed \$91,805.54. The issue, succinctly put, was whether the owner of a foreign vessel (namely, the British flag TITANIC) could claim exemption from liability under the Limitation of Liability Act of the United States, which the lower Court found it could not do. The matter then came before the Court of Appeals in New York some months later. The TITANIC owner was alleging that the collision with the iceberg and subsequent losses were due to an inevitable accident and not caused or contributed to by any negligence or fault on the part of the owner or those in charge of the vessel. The Court of Appeals was aware of the international implications of this proceeding and therefore requested the

³² Id. at 18.

³³ Id. at 18; Mersey Commission, Rpt. of the Ct. 1912, p. 30.

³⁴ The TITANIC, 204 Fed. 295 (S.D.N.Y. 1912), modified; In re Oceanic Steam Navigation Co., 204 Fed. 259 (2d Cir. 1913).

³⁵ The TITANIC, 209 Fed. 501 (S.D.N.Y. 1913).

Supreme Court of the United States to answer certain propositions as to whether a foreign owner could maintain such a proceeding.³⁶ The issues eventually reached the United States Supreme Court and were addressed by the Court by Justice Oliver Wendell Holmes in May, 1914.³⁷ The Supreme Court ruled that a foreign vessel owner may resort to the courts of the United States in seeking limitation of liability under the laws of the United States. There were no further decisions issued in the TITANIC initial litigation.

We are indebted to Mr. Kilbourn for the historical records of his firm which reveal that a trial on the issues was held in New York in June-July, 1915. On July 28, 1916, following extended settlement negotiations, a final decree was entered by the Court in which reference is made to the value of the passage and freight money, the quantum of the amount of the claims and the fact that the claimants and the petitioner/owner had agreed to settle and compromise their disputes. The Court then entered its order stating that the petitioner, the TITANIC's owner, was not liable for any loss, damage, injury, destruction or fatality or for any claim arising out of the sinking, that the sinking occurred without the petitioner's privity and knowledge and that it was entitled to limited liability pursuant to the existing statute. Mr. Kilbourn indicates the court record does not disclose the amount of the settlement, but suggests that there are indications that it was not more than \$200,000-300,000.³⁸ Therein rested the saga of the TITANIC and the incident which led to the deaths of over 1,500 people on her maiden voyage for over 70 years. The vessel rested in its watery grave until such time as it was discovered by Dr. Ballard in 1985, some 12,000 feet below the surface of the Atlantic Ocean, approximately 400 miles off the coast of Newfoundland.

³⁶ 209 Fed. 513 (2d Cir. 1913).

³⁷ *Oceanic Steam Navigation Co., Ltd., as owner of the Steamship TITANIC v. William J. Mallor, et al.*, 233 U.S. 718 (1914).

³⁸ Kilbourn: The Sinking of the RMS Titanic, IBA 27th Biennial Conference 1998 at 20-21.

5. TITANIC WRECK - REDISCOVERY AND REACTION

The wreck of the TITANIC lay hidden beneath the Atlantic Ocean some 400 miles off the coast of Newfoundland at a water depth of 2.5 miles. Although the general vicinity of the wreck was known from earlier data, it was not actively sought for and ultimately found in 1985 by Dr. Robert Ballard in the joint expedition between the United States and France utilizing the U.S. Navy research vessel KNORR.³⁹ Dr. Ballard was involved with the Woods Hole Oceanographic Institute as well as the Institut Francais de Recherches Pour l'exploitation des Mers (INFREMER). Some two years later, INFREMER joined with an American corporation, Titanic Ventures Inc. (TVI). They were subsequently involved in the joint salvage expedition that ultimately recovered over 1,800 artifacts from the wreck site.⁴⁰ Subsequent to this activity, R.M.S. Titanic Inc. (RMST) became the successor-in-interest to TVI and, thereafter, conducted salvage operations at the site from 1987 until 1994.⁴¹

It was during this period of salvage operations that the saga of the TITANIC venture truly began, although the first part of the saga was the unfortunate demise of the TITANIC on its maiden voyage with the predictable litigation outcry, both in the United States and United Kingdom, that developed shortly thereafter. There was a period of almost 70 years of repose of the hulk of the TITANIC, broken in two pieces at the bottom of the Atlantic Ocean, until the Ballard expedition referred to above. Thereafter, events started to take on a life of their own, which continues today and which impacts on the future of all deep sea ocean sites of historical wrecks and their artifacts.

The inordinate interest in the TITANIC promulgated both by the movie and the extremely successful Broadway musical about the sinking and excessive loss of life on a vessel, seems to have piqued the interest of the American public as well as some entrepreneurs and others that may have thought it a fascinating idea to join in the attempts to promote the TITANIC activities. In addition, from 1985 until now, the technology that has been developed to permit deep sea ocean exploration and recovery of certain objects has improved tremendously over the technology available in the early 1950s and 1960s. The advent of the Discovery Channel on television and the programs they have produced involving deep sea ocean exploration as well as an explanation of the technology in place and being developed in the future has meant a tremendous increment in the knowledge and awareness of the public as to what activities can be considered in the future for that part of the world which has always remained as part of the dark abyss not yet conquered by man. Since over 70% of the earth is covered by waters, many of which are

³⁹ Rachael J. Lin: *Salvage Rights and Intellectual Property: Are Copyright and Trademark Rights Included in the Salvage Rights to the R.M.S. TITANIC*, 23 Tul.Mar.L.J. 483, 496 (1999).

⁴⁰ James Nafziger: *Finding the Titanic: Beginning an International Salvage of Derelict Law at Sea*, 13 Colum-Bla.J.L. and Arts 339, 341 (1988); Lin *supra* at 496.

⁴¹ *See, R.M.S. Titanic Inc. v. The Wrecked and Abandoned Vessel, et al.*, 924 F.Supp. 714, 718 (E.D.Va. 1996); 1996 A.M.C. 2481, 2485. *See, also* Lin *supra* at 496.

extraordinarily deep oceans and hitherto unexplored at any great depth, this new technology has created a dynamic movement within the oceanographic community for research and development of new technology as well as continued exploration of the depths. It was due to this activity, as well as the daring and valor of oceanographers and others who ventured into the depths of the Atlantic, that brought us the first pictures and knowledge concerning the unfortunate actual facts relating to the tragedy that occurred on April 14, 1912.

6. THE VENTURE BEGINS

The first step in the activities that will bring us to the more recent discussions by the Court started in 1992. At that time TVI and INFREMER were the only salvors to have ever worked on the wreck of the TITANIC. However, on August 7, 1992, Marex Titanic Inc. (Marex), a Tennessee corporation, commenced litigation against the wreck of the TITANIC in the United States District Court for the Eastern District of Virginia, a most interested court in salvage activities, seeking to be named the sole and exclusive owner of any objects recovered from the TITANIC or that it be granted a salvage award. It was the same court that was considering the COLUMBUS AMERICA case. Interestingly enough, Marex had never conducted any salvage operations on the vessel at all. In order to establish the Court's jurisdiction, which was the subject of substantial controversy in later actions with RMST, a principal of Marex deposited with the Court two objects, namely, a piece of metal and a prescription bottle alleged to have been taken from the wreck. This was not altogether free from controversy, since the defendant TVI alleged that the individual had smuggled these objects from the vessel while working as a member of a prior filming expedition.⁴²

The court issued an arrest warrant, which was published 32 days later and one day after the Marex vessel began sailing toward the TITANIC. On that date (the date of the publication of the arrest) TVI's counsel sought to obtain an order from the court vacating the warrant of arrest on the grounds of factual misrepresentations by Marex and thereafter sought a preliminary injunction to preclude Marex from salvaging the TITANIC. The Court immediately began hearing on the matter involving several of TVI's witnesses. The Court then issued a temporary restraining order barring Marex from salvaging the TITANIC and further hearings were held two days later. Apparently, the District Court made no secret of its feeling that Marex had misled the Court at the initial hearing concerning the issuance of the arrest warrant. Seeing the likelihood of a debacle facing it, Marex then filed a notice of voluntary dismissal, which the District Court denied. It was on this procedural issue that the District Court and the Court of Appeals became involved.

However, TVI was not stymied by this attempt and sought to intervene in Marex's action and filed an intervening complaint asking that it be declared the TITANIC's exclusive salvor.⁴³ The District Court

⁴² *Marex Titanic Inc. v. Titanic Ventures, et al.*, 805 F.Supp. 375 (E.D. Va. 1992); *reversed*, 2 F.3d 544; 1993 A.M.C. 2799 (4th Cir. 1993).

⁴³ See *Marex*, 2 F.3d at 544.

by that time was thoroughly annoyed, since it told Marex's counsel "*it just hasn't gone well for you so now you want to dismiss the case*".⁴⁴ The Court allowed TVI's intervention, vacated the warrant of arrest it previously issued in favor of Marex and permanently enjoined Marex from taking any action toward salvaging the TITANIC. Marex later appealed this order which the Circuit Court allowed on a procedural point as to whether or not the District Court has discretion to allow TVI to intervene, which the Appellate Court said it did not. The Court of Appeals was not too pleased with the outcome stating "*one can question the wisdom of allowing a party, through adroit lawyering, to dismiss a case in order to avoid an unfavorable decision on the merits after the court has considered the evidence. It is especially tempting to force the plaintiff to take its medicine in a case like this where the plaintiff's behavior has been so dissembling, if not downright fraudulent*".⁴⁵ The Court's reversal of the District Court's order permitted Marex to voluntarily dismiss the case. Apparently Marex then disappears from the salvage scene, although the saga has just begun.

7. ARRIVAL OF RMST

RMST, in an arrangement which is not completely described in the court documents, became the successor-in-interest to TVI. After the problem they had with Marex and the dismissal of the action granting TVI salvor-in-possession status, RMST, as successor-in-interest, re-filed its claim against the wreck for exclusive salvage rights with the District Court in Norfolk in 1993. On August 23, 1993, they filed a complaint seeking to be declared the sole and exclusive salvor. Notice of given to interested parties. The only party to file claim (a P&I Club in London) was ultimately removed from the case by a settlement. Since there were no other outstanding claims, the Federal Court in Norfolk entered an order on June 7, 1994 conferring salvor-in-possession status of the TITANIC to RMST and granting it the exclusive rights over any items salvaged from the TITANIC while it remained salvor-in-possession.⁴⁶

RMST successfully completed a salvage expedition during the short 1994 weather window. This was a period of only three months during each year that the weather conditions were sufficient to permit salvage operations.⁴⁷ Essentially, it was the Court's order of June 7, 1994 that was the crux of the ensuing litigation that resulted from the order.

In February, 1996, a competing salvor, John Joslyn, filed a claim to supercede the prior order of the Court naming RMST as salvor because they failed to diligently salvage the vessel, had evidenced no

⁴⁴ Id. at 544.

⁴⁵ Id. at 547.

⁴⁶ RMS Titanic, Inc., successor-in-interest to Titanic Ventures v. The Wrecked and Abandoned Vessel, et al., 924 F.Supp. 714, 722-24 (E.D. Va. 1996).

⁴⁷ Id. at 722.

intention to salvage it in the future and was financially incapable of utilizing its rights.⁴⁸ An evidentiary hearing was held at which the President of RMST testified that they lost almost \$10 million since it was incorporated. The Court ruled from the bench, in view of the weather window approaching, that RMST was the proper salvor and that it should remain in this status as sole salvor. The decision is interesting because it sets forth the corporate history of RMST and the events and activities they had undertaken and planned to undertake in the future. There included exhibitions for which they had contracts, a projected two hour documentary, receiving finances through the sale of videos and coal they had picked up at the wreck site, organizing cruises to the wreck site, etc. The surprising part about this particular salvage operation was that RMST would not sell the artifacts and had agreed to keep them for exhibition in various countries.⁴⁹

The interesting part of this decision in 1996 was that RMST had not visited the site of the wreck since the 1994 expedition. This was now June, 1996 when they were contemplating another window of opportunity. The Court found that RMST had been committed to its role as a caretaker of the artifacts and had kept its promise to maintain and preserve those artifacts.⁵⁰ As part of the planned expedition in August, 1996, RMST planned to raise a small piece of the hull presently lying on the sea bed physically detached from the wreck.⁵¹

The Court then went into an interesting and erudite discussion of the applicable salvage law which has been referred to *supra*.⁵² After a thorough exposition of the law of salvage⁵³ the Court found that RMST had acted as a true salvor-in-possession, having exercised due diligence to salvage the wreck. *"This case deals with one of the most famous shipwrecks in history, and thus the archeological preservation of the wreck itself as well as the recovered artifacts is of extreme importance to this Court. In addition, unlike the majority of the wrecked vessels which are easily accessible to divers, the TITANIC lies two and a half miles below the ocean surface and the use of a manned submersible is required to reach it."*⁵⁴ The Court considered the difficulties in financing and organizing the expeditions. It found the actions of RMST as well as salvor were reasonable, particularly since a prior expedition had recovered almost 3,600 artifacts.

⁴⁸ *Id.* at 716.

⁴⁹ *Id.* at 718.

⁵⁰ *Id.* at 718.

⁵¹ *Id.* at 719.

⁵² *Cf.*, McCormack: Finders Keepers-Losers Weepers: Underwriters Problems with Deep Sea and Other Salvage Operations, 49 FICC Quarterly 87 (1998).

⁵³ 924 F.Supp. 714 at 719-21.

⁵⁴ *See id.* at 722.

One of the more crucial holdings of this opinion was that RMST had been dedicated to the preservation of the archeological integrity of the wreck site as well as the preservation of the retrieved artifacts. ". . . Finally, RMST has done more than merely preserve the site and the artifacts; it has made the artifacts available to the public through exhibitions, thereby benefitting the public more than the requisite on-site archeological preservation could do."⁵⁵ Ultimately the Court found in favor of RMST that the testimony indicated "a strong probability for a successful 1996 expedition, thus clothing RMST with a prospect of success."⁵⁶ The Court, therefore, denied the Joslyn motion to intervene. The Court also required RMST to make more periodic reports.

It also granted RMST's application for a preliminary injunction on August 13, 1996 with its ruling being consistent with its two previous orders regarding the TITANIC.⁵⁷ This action was required by a reintroduction of the dispute between Joslyn and RMST concerning a proposed photographic expedition that he wanted to conduct at the wreck site. The Court's injunction barred Joslyn from conducting "search, survey, salvage operations or obtaining any image or photography of the TITANIC wreck or wreck site."⁵⁸ In its decision, the Court's comments were of significance because of the future arguments raised in the Fourth Circuit Court of Appeal concerning the exclusivity of the right to photograph and the issue of intellectual property rights. The Court granting the injunction stating "the activity Joslyn contemplates is exactly the type of activity the Court contemplated in its May, 1996 order giving RMS Titanic exclusive possession. The Court specifically referred to video sales, film documentaries and television broadcasts as inventive marketing ideas that RMS Titanic must resort to since it is not selling the artifacts. It is clear at the presence of another in the marketplace would diminish the rights the Court has granted RMS Titanic."⁵⁹

The matter, insofar as court activity, rested there for a period of almost two years until 1998 when RMST planned another expedition. The tranquility of the North Atlantic was to be disturbed once again by the dogfight that ensued over the TITANIC venture. Once again, the Federal Court in Norfolk was called upon to consider another application by RMST seeking to prevent another interloper (at least according to RMST) from infringing upon their spot in the North Atlantic.⁶⁰ In this case RMST moved for

⁵⁵ Id. at 724.

⁵⁶ Id. at 724.

⁵⁷ R.M.S. Titanic Inc. v. The Wrecked and Abandoned Vessel, 1996 A.M.C. 2497; (E.D.Va. 1996).

⁵⁸ See id. at 2498.

⁵⁹ Id. at 2497. See, also, Lin supra at fn. 39.

⁶⁰ See, RMS Titanic Inc., successor-in-interest to Titanic Ventures v. The Wrecked and Abandoned Vessel, et al., 9 F.Supp. 2d 624 (E.D.Va. 1998).

another preliminary injunction enjoining certain parties from visiting the wreck site to view and photograph the wreck. In a lengthy decision, which is the latest in this continuing saga in to the Federal Court, the Court granted the application. Its lengthy opinion alluded to prior recovery of items, particularly those of RMST in the 1996 expedition which recovered 74 objects and produced approximately 125 miles of videotape. This also resulted in the Discovery Channel producing three hours of television programming based upon that expedition, which was aired in April, 1997.⁶¹

RMST learned about a planned commercial venture to provide members of the public with transportation to the wreck site and the opportunity to dive and photograph the TITANIC for \$32,500 per person.⁶² The entity seeking to go to the wreck, Deep Ocean Expeditions (DOE), would use one of the Russian submersibles, which was the submersible utilized in the opening shots of the film TITANIC. That photographic expedition was to take place in August, 1998 right in the middle of the RMST window of opportunity for salvage. The promotional material for this enterprise by DOE acknowledged the salvor-in-possession claim recognized by the American courts under admiralty law awarded to RMST.⁶³

On May 4, 1998, RMST filed a motion for a preliminary injunction to prevent these entrepreneurs from visiting the wreck site and photographing the wreck. Prompt hearings then ensued. Some month and a half later, in a June 23, 1998 decision of 32 pages, the Court granted the preliminary injunction to RMST. In addition to that issue, another alleged interloper entered the scene, namely Christopher S. Haver (Haver), who filed a separate action against RMST seeking a declaratory judgment that he had a right to enter the wreck site and photograph the wreck. Mr. Haver's status was as a passenger on the proposed expedition of DOE and intended to pay the \$32,500 to photograph and videotape the wreck solely for his own personal use.⁶⁴ The Court consolidated his action with the salvage claim of RMST. The Court's order granted the injunction applied to both actions (DOE and Haver).

A hearing was held on May 27th on the application of RMST for a preliminary injunction. There were a substantial amount of preliminary and procedural maneuvers that may be of interest to counsel, but not necessarily to the reader, since the result was the same, as far as the District Judge was concerned. RMST basically was arguing that unless they got the injunction, their entire summer expedition program of 1998 was in jeopardy, since they already paid the French entity INFREMER a down payment toward the charter cost of their submersible to be utilized in the expedition. That expedition planned to recover a piece of the hull that broke off and which had fallen back into the ocean during the original attempt to lift it.

⁶¹ See id. at 627.

⁶² Id. at 628.

⁶³ Id. at 629.

⁶⁴ Id. at 630.

There was also a planned live television broadcast scheduled with the Discovery Channel in mid-August at the wreck site to see this phenomenon together with a special to be aired on or about that date with NBC's program "Dateline". The argument raised by RMST was that they would carry out dive operations 24 hours a day and, therefore, a shuttle expedition of DOE with tourists would threaten their operations.⁶⁵ An interesting issue was that Haver and the group planning the tourist expedition told the Court that they would move the scheduling date and not dive until September or during the evening hours when they anticipated RMST would not be conducting salvage operations. Due to some procedural machinations that were going on as to whether or not Haver actually appeared, etc., the District Court viewed the written filings of Haver with substantial skepticism.

A substantial part of the opinion discussed the procedural maneuverings as to whether or not the court had *in rem* jurisdiction. It found that it had exercised constructive *in rem* jurisdiction over the wreck itself based upon the presence within the judicial district of physical items salvaged from the wreck.⁶⁶ The Court then found that its exercise of that jurisdiction was consistent with international law, particularly since the wreck lay in international waters.

In somewhat of a bootstrap argument it concluded that "*the recognized international rights at stake are minimally infringed upon. Restricting freedom of navigation of a few square miles of the vast North Atlantic Ocean is hardly a significant intrusion.*"⁶⁷ The Court then got to the nub of the issue, which was whether its prior orders of June 7, 1994 and May 10, 1996, granting RMST salvor-in-possession rights included the right to exclude others from visiting the wreck site to photograph the wreck. In a further interesting discussion of law and facts, the Court found that it did because RMST had the right to salvage the wreck free from the interference of others, including interference with RMST's active operations and interference with the wreck itself.⁶⁸ The Court also considered the economics of the situation, in that RMST should be able to exclude third party photographers in order to at least recoup its investment in the operations.⁶⁹

The balance of the opinion was an analysis by the Court of the elements in considering the request for a preliminary injunction, which the Court found had been met by RMST. Other factors considered were the potential loss of contracts and agreement for the television rights, etc. for the summer salvage operation as well as the fact that the wreck had been damaged due to the prior dive of the Mir submersible in 1996.

⁶⁵ Id. at 630.

⁶⁶ Id. at 632.

⁶⁷ Id. at 634.

⁶⁸ Id. at 634.

⁶⁹ Id. at 636.

The Court also considered the RMS TITANIC Memorial Act of 1986, which Congress had passed in the hope and expectation that the countries involved would be able to get together to resolve the problems of activities on the wreck. No treaty, however, had ever been negotiated, nor did it appear that negotiations would ever begin in the 12 years that had taken place since the act was passed. The important aspect of the Court's decision of this point was that it recognized that the wreck was in international waters without any country having territorial jurisdiction over it and, therefore, "*the only law that governs is the internationally recognized principles of admiralty and maritime law (including the law of salvage)*".⁷⁰ It then proceeded to consider issues involving the world famous historic shipwreck, including advancing technology, numerous undersea explorer salvage companies and thrill seekers desiring to exploit the wreck and no international agreement or enforceable rules to govern that exploitation.⁷¹ The Court, therefore, considered that its reliance upon salvage law was the proper method and, under that concept, a preliminary injunction should issue.

It considered again what the Federal Court in Norfolk had done in the past in the Columbus-American case, namely the preservation of the shipwreck's archeological and historical integrity. Courts administering salvage law recognized these policies and rewarded the salvor who preserves or enhances the historical value of a wreck.⁷² The Court concluded that RMST was salvaging and preserving the artifacts for the benefit of all mankind. Although it was a for-profit company, its role was more of a scientific and educational undertaking than a capitalist enterprise.⁷³ In finding that the Haver photographic expedition would only disrupt RMST's operation and devalue its salvor-in-possession rights, it enjoined the DOE expedition from going ahead. A significant comment in the Court's opinion that "*RMST's salvor-in-possession rights will be devalued if the photographic expedition is allowed because the exclusive right to photograph the wreck is included in the salvor-in-possession rights.*" It is criticized substantially in a recent article on the issue of intellectual property rights and the TITANIC.⁷⁴ The Court recognizing that it may be infringing on international law and freedom of the seas stated that "*nothing in the opinion and order shall be construed as restraining customary rights of surface navigation on the high seas which do not otherwise violate the specific restrictions set forth above.*"⁷⁵

⁷⁰ Id. at 639.

⁷¹ Id. at 639.

⁷² Columbus-American Discovery Group, Inc. (CADG I) v. Atlantic Mutual Insurance Company, 974 F.2d 450, 468 (4th Cir. 1992).

⁷³ 9 F.Supp. 2d 624 at 640.

⁷⁴ *See Lin, supra* at 505-506.

⁷⁵ 9 F.Supp. 2d 624 at 640.

8. THE SUMMER OF 1998-THE RACE TO THE COURT FOR RESOLUTION OF THE ISSUE - WHO OWNS THE OCEAN DEEP

As indicated above, the Court granted the application of RMST for a preliminary injunction in an order of June 23, 1998. This order enjoined Haver and all of the other entities involved in the attempt to have the excursion to the wreck in August and September put on hold until such further order of the Court was issued. The order specifically enjoined all of the parties from interfering with the rights of RMST to exclusively exploit the wreck and conduct a search or salvage operation as well as obtaining any image video or photograph of the wreck. That order precipitated what undoubtedly was the most hectic and involved summer for all counsel involved in this litigation. There were almost daily or weekly lengthy legal memoranda on the respective issues that each perceived should be resolved by the Court of Appeals on these hard fought and fascinating issues. The Order of June 23, 1998 was immediately appeared to the Fourth Circuit.

The primary proponent and participant in the process that led to this frenetic activity with the Court of Appeals was Haver, the individual who had signed-up for the expedition to the wreck in a Russian submersible at the rather exorbitant figure of \$32,000. He indicated this would be a lifetime experience and therefore was being prevented from having the benefit of enjoying such an experience by the preclusive order of the Court of June 23rd. Succinctly, this was the basic issue for Haver, which was put in excellent legal language by his counsel in Washington, who also argued some other substantive issues. The crux of the objections raised by Haver was that the Court's order intended to protect a *for profit* American Company, RMST, from interference with a salvage expedition and exclusive rights to photograph the wreck. The order applied to a British Virgin Islands Company (DOE) headquartered in the Island of Man, which, in conjunction with Russia's Shirshov Institute of Oceanography (which would supply the submersibles) wanted to conduct a September expedition to observe and photograph the vessel, without engaging in any way in salvage operations (at least according to the position of Haver). The Court's order had specifically enjoined the Russian government, its research vessels as well as Explorer Club members who appeared on the scene as friends of the Court, plus some individuals, both of whom were retired U.S. Navy officers with long standing activities in salvage operations.

1. HAVER APPLICATION TO COURT OF APPEALS FOR STAY

The main legal issue raised by Haver in the application for a stay was that the order prohibited naval operations since the expedition originally discovering the TITANIC was a joint expedition between the French government and the United States. It also violated the longstanding principle of international law that no nation may exercise sovereignty over the high seas and violated the international law principle of freedom of the seas. The lower Court's comment that its order did not exclude customary rights of freedom of navigation on the high seas did not prevent that order from violating the principles of the United Nations Convention on the Law of the Sea (UNCLOS) which, unfortunately, the United States has yet to sign.

With regard to the legal issues of salvage law, Haver contended that the Court's exercise of *in rem* jurisdiction violated longstanding principles of admiralty law, which required that a vessel actually be within the territorial jurisdiction of the court before that jurisdiction may be exercised. Haver also objected to the Court's method of acquiring *in rem* jurisdiction as not proper under admiralty law, which he claims the court indicated it had acquired when RMST produced in court a single wine decanter in 1993. This theme goes throughout the entire argument of Haver. It is more of a procedural issue as to whether or not the proper arrest procedures were met. Finally, Haver contended that the Court's order created a dangerous precedent, which would provide "*a basis for courts all over the world to assert jurisdiction over (and issue orders affecting) any vessel located anywhere in the world. If U.S. government supports a U.S. court asserting such jurisdiction, the legal basis for raising objections to similar orders by courts of other countries will be severely undercut.*"⁷⁶

On June 29, 1998, some six days after the issuance of the District Court order, Haver filed an application with the Fourth Circuit Court of Appeals for a stay pending appeal. In essence, it contended that the lower Court's order should not be enforced for various reasons, including the fact that Haver and others will suffer irreparable harm if a stay was not issued. It should be noted that there was only a three month window of opportunity for any salvor to get to the wreck during the months of June, July and August. One of the issues was that the original Haver expedition on the Russian submersible was to take place in August, but Haver and DOE indicated they would postpone it until September and, therefore, arguably not interfere in any way with the RMST venture. Haver contended he would suffer from the loss of the photographic opportunity and quoted testimony from the Chairman of RMST, George Tulloch, at the hearing in May, 1998. According to Mr. Tulloch, when he visited the wreck the first time "*it is like meeting Napoleon or being the first to view the great pyramids of Egypt . . . the expedition represents the pinnacle of our careers. There is no greater legend or mystery of the sea than Titanic. This mission is primary in our lives.*"⁷⁷ The District Court did not seem to be as impressed with this argument, since it characterized it as "*nostalgic injury, sentimental harm, and quixotic harm.*"⁷⁸

The Haver application for a stay received substantial responses from the other parties, which basically set the tone for the arguments raised by Haver and DOE and for the group organizing the underwater expedition, which permeated their future filings with the Court. The time frame was important. Haver was arguing that no one from RMST would suffer any harm if a stay was issued because the expedition would take place in September after RMST ostensibly would have concluded its operations for

⁷⁶ Comment on access to the wreck site of the RMS TITANIC contained within Haver's documents submitted to the Court of Appeals for a stay. I acknowledge the kind assistance of counsel for Haver, RMST and the *amicus* counsel for furnishing the briefs and other data filed with the Fourth Circuit Court of Appeals.

⁷⁷ Haver brief: Application for Stay, p. 54.

⁷⁸ 9 F.Supp. 2d 624 at 638.

the summer. Haver also raised the issue of a strong public interest in allowing public access to view the TITANIC with reference to some legislation passed in 1986 that never went anywhere concerning the potential to develop a treaty designating the TITANIC an international maritime memorial.⁷⁹

The traditional July 4th vacation unfortunately was not enjoyed by counsel for RMST who, on July 7, 1998, filed an 83 page opposition to Haver's application for a stay pending appeal. This discussed the various procedural and technical issues. The basic argument was that the application was premature and should have made it in the first instance to the District Court. Haver's position on that was what relevance would that have made, since the District Court made it very clear how he felt about the entire matter and Haver's actions. In any event, there were a good number of technical issues raised that did not go to the substance of the arguments as to whether or not the court should grant a stay. RMST took the contrary position, namely that they would suffer irreparable harm (which was the same argument raised by Haver). RMST argued, however, that they were on the verge of signing agreements for the use of the French submersible as well as the activities of the Discovery Channel, etc., all of which would then be severely impacted, if they were unable to continue with the operation in the Summer of 1998. Their position was that the wreck was deteriorating and unless they got the ability to obtain video for the planned documentary, it would cause a significant monetary loss to RMST because it would be impossible to capture the same shots again due to the deterioration of the wreck.⁸⁰

The more potent arguments raised by RMST was that Haver had no standing to prosecute the appeal since he was a mere potential ticket holder set up as a strawman by the expedition leader DOE who want to continue to sell tickets at \$32,000 per person. A somewhat telling argument was made by RMST that the proponents of the trip, DOE, would pay a refund of all monies and therefore Haver would receive a refund of his down payment and suffer no loss.⁸¹

Not to be outdone, counsel for Haver filed their reply in support of the application for the stay on July 9th, thus obviously further ruining the July 4th holiday weekend for another large group of individuals. This 23 page document was the response to the legal memorandum of RMST in opposition to a stay and contained a rehash and restatement of its position set forth quite extensively in their original memorandum of June 29th in support of the stay. One of the more interesting comments was the harm alleged by Haver that he would incur by the Court's continued injunction that prevented him from going to the wreck. His counsel claimed that if "*Haver were sailing to Europe, an injunction merely required him to avoid a limited area of the ocean during the time that appellee (RMST) was actually conducting salvage operations, then the injunction might be a permissible 'minor restriction' on Haver's right to travel*

⁷⁹ RMS Titanic Maritime Memorial Act of 1986, Pub.L.No. 99-53, 100 Stat. 2032 (1986) codified at 16 U.S.C. § 450RR, *et seq.*

⁸⁰ RMST Brief in Opposition to Haver's Stay Application, pp. 73-74.

⁸¹ *See id.* at 70.

*to Europe. In such a situation, travel is not actually deterred and impending travel is not an object. Here, Haver seeks to travel to the site of the Titanic to view it. The injunction prohibits Haver from traveling to view the Titanic at any time, whether or not RMST is actively conducting salvage operations or, indeed, is anywhere near the site. It patently deters travel and has preventing such travel as its object.*⁸² The Court of Appeals issued an order on Haver's application denying the stay and ordered the parties to move forward with an expeditious schedule of filing legal memoranda in support of their positions.

2. THE SAGA CONTINUES -- ARGUMENTS TO THE FOURTH CIRCUIT COURT OF APPEALS

It is indeed fascinating to read the voluminous and learned documents of counsel for all parties, which started with the Haver first filing on June 29th and concluded with the last filing on July 9th (relative to the stay application), all within two to three weeks after the issuance of the Court's order granting the injunction. The stage was then set for the formalistic and structured activities of the Circuit Court in considering the positions not only of the parties, but those of the friends of the court, or *amicus curiae* as lawyers are wont to call these participants. Essentially, these can be individuals, companies or entities that seek to assist the court and, therefore, appear on behalf of their entities as a friend of the court to point out to the court certain areas and issues that may be relevant that neither or only one of the parties may have articulated or in which the Court may obtain assistance. The identity of these *amicus* are quite fascinating in the context of what side was being picked to support.

On August 21, 1998, the normal appellate process commenced. On that date, Haver filed his opening legal brief with the Court of Appeals in support of his argument that the District Court was erroneous in numerous respects. A substantial portion of that argument had already been raised with the Court of Appeals on Haver's prior application for a stay, which was denied. The 41 page new legal memorandum contained a fascinating discussion of the historical background of the Titanic case, the activities that had taken place over the last five to seven years as well as the argument of the substantive harm which Haver faced by his inability to view and photograph the TITANIC. The issues raised are similar to those which I have discussed earlier about the feelings faced by RMST President, George Tulloch, and others including the comments of RMST's counsel who made his own dive to the TITANIC in a Russian submersible in 1993.⁸³ Haver continued his argument that the District Court's comparison of the harms allegedly to be sustained to Haver as well as to RMST was irrational. This was because the Court insisted on comparing the RMST harm to Haver's harm, if Haver and the expedition went to the site in August and refused to consider whether RMST would suffer any harm if they did the dive in September. A further argument by Haver was the injunction infringed on Haver's right to international travel, which was

⁸² Haver's Reply Brief in Support of its Application for a Stay Pending Appeal, pp. 21-21.

⁸³ Brief of Appellant Haver to the Fourth Circuit, pp. 35-36.

a continuing deprivation on liberty without due process at law. This is a theme that Haver continued throughout his various written arguments to the Court of Appeals.

The Advisory Council on Underwater Archeology (Council) then weighed in to the argument on the same date by filing their *amicus curiae* brief with the Fourth Circuit on the side of Haver. The Council's purpose was to preserve and protect underwater archeological sites, to encourage the maintenance of the high ethical and research standards in underwater archeology, to educate the public and sport diving community about the need for conservation of underwater archeological resources and encourage appropriate public access to these unique sites.⁸⁴ Their position was that the District Court's opinion was contrary to the law and standards regarding access to the use and study and preservation of historical wrecks. It deprived the lay and professional public of access to uncontrolled information upon a unique example of humankind's underwater cultural heritage.⁸⁵ Their argument seemed to be based almost exclusively on the Titanic Maritime Memorial Act of 1986⁸⁶ and the Abandoned Shipwreck Act of 1987.⁸⁷

In the author's opinion, those two acts are not relevant, nor were they relevant to the issue of the TITANIC, a wreck two and one half miles in the ocean bottom some 400 miles off the coast of Newfoundland. The Council raised an issue, which is a matter of substantial concern to those in the deep sea and commercial salvage activities, namely the International Council on Monuments and Sites (ICOMOS), International Charter on the Protection of Underwater Culture Heritage as well as the current UNESCO Draft Convention on protection of underwater culture heritage.⁸⁸ This is an issue that has occupied the Maritime Law Association of the United States as well as the Interagency Task Force of various U.S. government organizations that are involved in this activity.

There is not a unanimity of opinion among the commercial salvors and archeological community as to where this projected Convention activity would be taking those concerned in such issues. The Council's viewpoint, however, is that the lower Court had erected a wall around the TITANIC which should be dismantled because if the Court had the power to deal with it, it should require RMST to work with interested government agencies, underwater archeologists and other experts and interests to develop a program for the use and preservation of the TITANIC and the wreck site, which is in keeping with the

⁸⁴ *Amicus* Brief Advisory Council, p. 2.

⁸⁵ *See id.* at p. 3.

⁸⁶ *Supra* at fn. 80.

⁸⁷ 43 U.S.C. § 2101 *et seq.*

⁸⁸ *Amicus* Brief Advisory Council pp. 7-8.

sense of Congress and Executive Branch of the U.S. government as expressed in the Titanic Maritime Memorial Act.⁸⁹

A further *amicus* surfaced, namely the Columbus American Discovery Group (CADG), whose notoriety was set forth in their own intricate litigation in the same District Court and Court of Appeals in the famous COLUMBUS-AMERICA salvage.⁹⁰ Their brief followed that of the Advisory Council by four days, but had a different viewpoint. Its rationale for appearing was stated to be "*a view to providing whatever insight it may offer to the Court on the practical results that accrue from failing to follow the basic tenets of the law in the context of the new, developing and highly entrepreneurial field of deep ocean exploration.*"⁹¹ Their basic position was that they wanted the Court of Appeals to uphold the broad protections for the right of discoveries in the deep ocean, to maintain the broad exercise of jurisdiction in international waters to maintain the rule of law of the sea and also to have the Court reverse and remand to the District Court for an evidentiary hearing for the freedom of all to conduct discovery free from "*the improper personal viewpoints of the district judge.*"⁹² CADG was concerned about the potential practical consequences of the diminishment of rights of discoverers in the highly expensive and risky new field of deep ocean exploration.⁹³

They concurred with the District Court's conclusion that RMST had the exclusive right to control access to the wreck and exercise broad intellectual property rights, such as photography, for the party that first discovers an historically significant or intrinsically valuable shipwreck. They believed that the District Court committed an error in preventing a further inquiry in whether RMST was indeed a discoverer or at best a salvor.⁹⁴ CADG wanted the Court of Appeals to uphold the special protection the law gave to discoverers of long lost historical shipwrecks and concluded that there were also compelling reasons for including intellectual property rights within the bundle of rights for discoverers.⁹⁵ The central issue, therefore, according to CADG was whether RMST was a discoverer or a commercial salvor of the wreck. It further articulated its argument that there were such procedural irregularities in the court below that undermined confidence in the legal system. Therefore, CADG wanted the lower Court to reconsider the

⁸⁹ See *id.* at p. 10.

⁹⁰ See CADG I and CADG II at fn. 4 and 7.

⁹¹ *Amicus* Columbus-America brief p. 3.; *cf., also*, The Accomplishments of the Columbus-America Group in the New York Times bestseller *Ship of Gold in the Deep Blue Sea*. Kinder (1998).

⁹² *Amicus* Columbus-America brief p. 16.

⁹³ See *id.* at p. 5.

⁹⁴ *Id.* at p. 6.

⁹⁵ *Id.* at p. 10.

matter on a full record. In considering some of the positions taken by the Council and the underwriter archeological community, CADG believed that the profit motive in the salvage and exploration of the wreck was an entirely legitimate part of the exploration, which "*has frequently been fueled by the search for natural and mineral resources.*"⁹⁶ CADG concluded that profit motive was essential if private enterprise was to have an opportunity to participate in deep ocean exploration.

A third *amicus* appeared on the scene, The Explorers Club (Explorers), who filed an application to file a brief in support of Haver. This was opposed in another detailed exposition of the law by RMST on August 31st. This *amicus* request set the parties at further odds because RMST contended that Explorers was really a litigant, not a friend of the Court. The position of RMST was that since Explorers, or at least the officers of Explorers, were participants in the proceeding below they were now trying to get a further bite of the apple without incurring risk before the Court of Appeals and therefore should not be able to participate as an *amicus*.

Explorers then weighed in with their own memorandum in opposition to RMST's opposition, again on some more technical grounds as to whether or not they were indeed participants in the lower Court opinion. Explorers contended that they had a long standing interest in the TITANIC, which predated the interests of Haver and RMST.⁹⁷ It had co-sponsored Dr. Ballard's expedition, which discovered the TITANIC in 1985 as well as further activities in 1986. Their primary opposition was that they felt the lower Court's finding that RMST was entitled to the exclusive right to indefinitely control access to the TITANIC and prohibit exploration photography and scientific study of the TITANIC because it discovered the TITANIC was erroneous.⁹⁸ Explorers was committed to the ideal that it was vital to preserve access to historical or archeological shipwrecks for future exploration and study as evidenced by their own intense activities in the TITANIC. Apparently, a bronze plaque given to Dr. Ballard by explorers was placed on a capstan head located near the TITANIC's bow during the 1986 dive.⁹⁹ Their opposition was based upon the principle that the proposed Haver expedition to explore the TITANIC was consistent with the corporate mission of Explorers and the ideals of all of its members.

Explorers had a further opportunity to make their views known when they filed a reply brief on September 28, 1998 to RMST's supplemental brief, again a most fractious month for activities of counsel. Their primary argument seems to be that RMST was not the discoverer of the TITANIC and, therefore, should not have been awarded this exclusive injunction against all parties seeking access to the vessel. Explorers contended that the lower Court abused its discretion by failing to consider the multiple ongoing

⁹⁶ Id. at p. 15.

⁹⁷ Explorers *amicus* brief, p. 3.

⁹⁸ *See id.* at p. 3.

⁹⁹ Id. at p. 4.

uses of the TITANIC by a variety of individuals and by failing to ensure that these individuals were properly made parties to the case and, therefore, issued an overly broad injunction.¹⁰⁰

They further contended that there was a distinction between the right to salvage as opposed to the right to permanently prohibit access to the TITANIC for any purpose, but did not interfere with the recovery of artifacts. The Court had issued an overly broad injunction.¹⁰¹ This went to the issue of access and photography sought by Haver and DOE. Explorer's position was that since RMST was not the first to photograph the TITANIC (but this was done by Dr. Ballard and others on behalf of Explorers) RMST should not be entitled to an exclusive right to control photography. Due to the depth at which the TITANIC was, it was not accessible to scuba divers and access was available only to a very limited selection due to the requirement of extremely sophisticated and expensive underwater technology of which there were only four in the world that could dive to that depth.¹⁰² One of those was the NAUTILE operated by RMST's partner. Explorers, perhaps in a sense of hyperbole, stated "*the Titanic is so inaccessible fewer people have visited the wreck than have visited outer space.*"¹⁰³ Their contention was that the injunction was a scare tactic of the court designed to play upon the ignorance of those unfamiliar with the extreme environment found in the deep ocean.¹⁰⁴ It is obvious, therefore, that this was a very hard fought battle between groups and individuals involved in this arcane and extremely technical issue of salvage and/or exploration of the deep ocean.

3. RMST RESPONSE TO HAVER'S OPENING MEMORANDUM

RMST then weighed in with its learned tomes submitted to the Court of Appeals during the time frame of September 15-25, 1998. All of this was only three months after the lower Court issued its opinion and order from which the appeal was taken. In the annals of appellate practice, this is probably one of the most vigorously and innovative expedited appeals of a substantial interest to the underwater community.

On September 15, 1998, RMST countered Haver's prior memorandum with its own main legal memorandum. This was almost a repeat of its prior arguments raised with the Court in its attempt to oppose the application of Haver for a stay pending appeal, which had been submitted to the Court on July 11th. The position of the parties had hardened somewhat after each had been exposed to the other's legal arguments and the assistance or impediments raised by the various *amici* in their briefs.

¹⁰⁰ Id. at p. 4.

¹⁰¹ Id. at p. 4.

¹⁰² Id. at p. 7.

¹⁰³ Id. at p. 8.

¹⁰⁴ Id. at p. 8.

RMST relied heavily upon the Court of Appeals' prior decision in the Columbus-America Discovery Group case.¹⁰⁵ One of RMST's basic arguments was that if the District Court had not taken the position it did, it would only be a matter of time before a foreign expedition was launched and there would be no control by any District Court over the salvage of the TITANIC. *"By assuming jurisdiction over the wreck site, the District Court has created the opportunity for significant research and recovery efforts to take place in a historically and archeologically responsible manner."*¹⁰⁶ Their argument was that this was the only method of dealing with the wreck because RMST was not going to sell any of the artifacts, but attempted to recoup its investment by placing the artifacts in museum exhibits and receiving payments from museum patrons and licensing agreements for videos. This they contended was evidence of their long term commitment to the wreck and to an appropriate salvage of it.

They also addressed other legal issues, which were of a more technical matter, *viz.*, the concept of freedom of navigation, issues of *in rem* jurisdiction and various statutes pertaining to the Titanic Maritime Memorial Act and the Abandoned Shipwreck Act. This was followed shortly by an additional supplemental brief on September 23, 1998, again consistent with their prior arguments. They also responded to Explorers and other *amici* arguments, which they contended *"create out of the whole cloth, a theory of salvage law that has no legal basis."*¹⁰⁷ RMST suggested the issue of Haver as the first finder, and whether RMST was first discoverer, as opposed to salvor, was not the issue because whether RMST were discoverer or salvor it obtained no rights in the vessel until it committed its time, energy and resources to salvage it. The argument got a little more personal, in that the RMST was contending that the Haver *amici* arguments ultimate result was to *"open the Titanic wreck site up to a free-for-all on the high seas by anyone from any nation. The potential for plunder and inappropriate salvage (not protecting the vessel's historic and archeologic integrity) is the obvious result of the argument promulgated by the amici."*¹⁰⁸

The Court of Appeals was probably delighted to note that the last brief that they thought they were going to be subjected to was that by Haver in their reply brief of September 25, 1998. In a period of three months from the time of the filed lower Court's opinion until the final brief was submitted to the Court of Appeals, there were an inordinate amount of documents and legal memoranda submitted to the Court of Appeals for their analysis. In the Summer of 1998, however, RMST continued on its expedition and indeed was successful in some of its activities, particularly the Discovery Channel video presentation. The author of this paper remembers vividly watching with considerable awe the activities of the French submersible of

¹⁰⁵ 974 F.2d 450, 460-61 (CADG I) (4th Cir. 1992).

¹⁰⁶ RMST main brief, p. 48.

¹⁰⁷ RMST supplemental main brief, p. 3.

¹⁰⁸ *See id.* at p. 5.

RMST at the bottom of the Atlantic Ocean picking up pieces from the TITANIC and the ultimate recovery of a large section of the TITANIC's hull, which was embedded in the ocean bottom in the debris field. All of this was shown live at the site by the Discovery Channel, which made for a fascinating historical record. Since that activity was concluded during the operational window, the emergency for the time frame for the Court of Appeals to render to its decision was therefore rendered moot, that is, it did not have to make the decision within the window of opportunity and, hence, thus produced the substantial legal briefs filed by the various parties.

The Haver reply brief was again directed to a substantial number of technical issues which are not overly interesting to a layman, but did emphasize once again their claim of the invalidity of the lower Court's giving an exclusive right to photograph to the RMST.¹⁰⁹ Haver reiterated again his arguments of harm to himself by referring to the comments of RMST's counsel as a result of his own dive to the TITANIC "*the irreplaceable once in a lifetime experience that the District Court has denied to Haver and other explorers, scientists and marine archeologists.*"¹¹⁰ It urges the necessity for Haver to photograph the TITANIC (it seems to have been lost somehow in the argument that Haver was at best a passenger on a submersible that was going to take them to the wreck and photograph it for his own personal benefit). However, he consistently argued that there was a public interest in protecting historically significant artifacts and the dives would further this public policy by "*facilitating further research on, and capturing on film a historical shipwreck that everyone agrees is deteriorating at a rapid rate.*"¹¹¹ One may well argue what the status Haver played in this fascinating dialogue when there were other archeologists on RMST staff that were indeed looking at this very issue.

9. THE ULTIMATE DECISION

The Fourth Circuit Court of Appeals was assembled to hear the arguments on October 29, 1998 by a three judge panel. It was not until March 24, 1999, that the Court issued its detailed and extraordinarily interesting opinion, which we suggest is not the last we have heard on this fascinating issue.¹¹²

The Court affirmed the lower Court's injunctions, insofar as they enjoined parties and persons in privity with them from conducting salvage operations on the wreck and interfering with the operation of RMST. However, they reversed the lower Court's injunction, insofar as they purported to prohibit the visiting, viewing, searching, surveying, photographing and obtaining images of the wreck or the site as long as these activities did not constitute any salvage effort or interfere with RMST salvage rights.

¹⁰⁹ Haver Reply Brief, p. 14.

¹¹⁰ See *id.* at p. 17 fn. 24.

¹¹¹ *Id.* at p. 18.

¹¹² 171 F.3d 943 (4th Cir. 1999).

Let us now consider the particular rationale as to how the Court arrived at their decision. A substantial part of the opinion was taken up with the lengthy erudite and, at times, convoluted discussion of issues. The Court discussed what we have characterized as technical legal issues, not necessarily going to the more interesting merits of the arguments about the parties' activities relevant to the TITANIC salvage.

It was not until the 18th page of the Circuit Court's decision that they essentially got to the issue of Haver's claim that the lower Court could not have exercised jurisdiction over the wreck because it lay in international waters and other similar arguments.¹¹³ The Court analyzed the well developed "*venerable law of the sea*" which arose from the custom among seafaring men.¹¹⁴ The discussion included a fascinating commentary on the historical precepts of admiralty law, going back to some 3,000 years or more from ancient Rhodes of 900 B.C. to the present date, which we commend to the legal historian among us.

The opinion then embarked upon an equally interesting discussion of the distinction between the law of finds and the law of salvage referring again to their prior opinion in Columbus-America Discovery.¹¹⁵ The law of salvage has existed as an important part of the general maritime law of nations as long as there has been navigation, including the 3,000 year old Rhodian Code.¹¹⁶ A further discussion ensued about the issue of salvage services, obtaining a lien and exclusive possession by the salvor as well as the obligations of the salvor of good faith, honesty and diligence in protecting the property.¹¹⁷ There was an interesting discussion of *in rem* jurisdiction and the extension of jurisdiction on the high seas and the effective limits of sovereignty itself with further discussion of the U.N. Convention on the Law of the Sea.¹¹⁸ It was only after approximately 27 pages of this historical background and involved legal analysis on the issues we just discussed that the Court actually addressed the more substantive issues that the reader of this article may like to know.

In a somewhat obvious understatement, the Court stated that in applying these principles (those discussed in the previous 27 pages) to a wreck lying in international waters, "*obvious complexities emerge*."¹¹⁹ The Court found against Haver on the issue of the District Court's finding that RMST and its

¹¹³ See *id.* at 959.

¹¹⁴ *Id.* at 960.

¹¹⁵ 974 F.2d at 464 (CADG I).

¹¹⁶ 171 F.3d 943 at 962.

¹¹⁷ See *id.* at 963.

¹¹⁸ *Id.* at 964-65.

¹¹⁹ *Id.* at 965.

predecessors represented the first party to successfully salvage the TITANIC. The Court stated that as the first successful salvor, RMST obtained a lien as a matter of law on the wreck as well as on the artifacts to enforce its claim for compensation and reward. It also obtained the right to exclusive possession, not only of the artifacts removed from the wreck, but also the wreck itself "*so that no other person is entitled to lawfully to intrude as long as salvage operations continue.*"

In concluding that there was a need for admiralty courts to apply the law similarly in whatever country such an activity would have been brought to ensure enforcement and harmony, which shared maritime principles, the Court was satisfied that to the extent the District Court applied these principles, that is, the national law of salvage, then it had acted in accordance with the *jus gentium* in awarding RMST exclusive salvage rights.¹²⁰

However, having concluded that the District Court correctly applied these principles, the question remained how could an admiralty court enforce salvage rights with respect to property that did not physically lie within its jurisdiction. The Court then went into another technical discussion of the issue of *in rem* jurisdiction, the provisions of the U.N. Convention on the Law of the Sea as well as the Titanic Maritime Memorial Act. They then rejected Haver's argument that these statutes and convention precluded the courts from exercising jurisdiction. In a very important ruling, the Court found that the District Court had constructive *in rem* jurisdiction over the wreck by having a portion of it within its jurisdiction and this constructive *in rem* jurisdiction continues as long as the salvage operation continues.¹²¹ The Court reiterated the well known comment that "*no nation had sovereignty over the high seas*", but this did not leave the high seas without enforceable law, which the Court indicated would be the law of salvage as shared by nations.¹²² The Court was satisfied that applying the law of salvage would do no violence to the relationship among nations to enforce these universal rights to the extent generally recognized on a non-exclusive basis. They concluded therefore that the lower Court was correct in declaring that RMST had salvage rights to the wreck and these included the right exclusively to possess the wreck for purposes of enforcing the maritime lien it obtained as a matter of law. It found the lower Court acted properly in entering an injunction over the persons prohibited from interfering with those rights.¹²³

The Court then discussed the issue of shared sovereignty of the high seas, which did not preclude "*all nations from enforcing the internationally recognized law of salvage in courts with respect to persons and property within their jurisdiction, nor even from exercising this form of shared*

¹²⁰ Id. at 966-67.

¹²¹ Id. at 968.

¹²² Id. at 968.

¹²³ Id. at 968.

*sovereignty for matters on the high seas.*¹²⁴ The Court then directed its attention to the terms of the injunction and the geographical area of same. They reversed the lower Court's expansion of salvage rights, which included the exclusive right to photograph or otherwise record images of the wreck. In the absence of any prior decision that expanded these salvage rights to include this, they felt that to award exclusive right to photograph would convert what was designed as a salvage operation into an operation serving the salvors and they would be less inclined to save the property because they might be able to obtain more compensation by leaving in place than selling photographic images of it.¹²⁵

The Court reversed the lower Court's injunction on this issue concluding that it erred in extending the law of salvage to vest in RMST exclusive rights to visit, view and photograph the wreck of the TITANIC in international waters.¹²⁶ The Court also reversed that part of the injunction which prohibited anyone from entering a ten mile radius of the wreck site to search, survey or obtain any image of the wreck. They reversed this aspect of the lower Court's order for the same reason they gave in denying exclusive viewing and photographing rights, namely that to do so "*would alarmingly expand salvage law and interfere with the right of free navigation.*"¹²⁷ The Court made this distinction, *i.e.*, it did not mean that a court may not enforce salvage rights by prohibiting a party over whom it had personal jurisdiction from conducting salvage operations or interfering with the first salvor's exclusive possession of the wreck for purposes of salvaging it.¹²⁸

An excellent commentary with regard to the issue of photographing or recording images of the wreck is also addressed in the comments in the Tulane Maritime Law Journal previously discussed.¹²⁹ The author of that article concluded that the Fourth Circuit limited its discussion to the breadth of salvage law, but excluded any possible extension into intellectual property rights. The author felt that the unique circumstance of the TITANIC was a rare case and that the lower Court decision may be a sign of things to come in the next century, namely an extension of salvage rights into common law and federal intellectual property rights. However, the author felt that such rights as articulated must be narrowly construed, and indeed were narrowly construed by the Fourth Circuit. The author felt that the Fourth Circuit's reversal "*said nothing about the possibility of a future grant of explicit intellectual property rights. It merely disapproved of the District Court's sweeping characterization of salvage rights as tending to*

¹²⁴ *Id.* at 968.

¹²⁵ *Id.* at 969-70.

¹²⁶ *Id.* at 970.

¹²⁷ *Id.* at 970.

¹²⁸ *Id.* at 970.

¹²⁹ Lin, *supra* at fn. 39.

'convert what was designed as a salvage operation on behalf of the owners into an operation serving the salvors'. It appeared, therefore that the scope of salvage rights would not be extended that far. However, the question of whether such rights can still be granted under an intellectual property theory remains to be answered."¹³⁰ The author felt that although the Fourth Circuit Court's reversal was limited to salvage rights, arguably a future court could grant the same rights as was granted by the District Court in the name of intellectual property without running afoul of the Haver Court's ruling. In opining as to whether the Supreme Court would address the issues, the author felt that the ruling could determine whether the case "will forever be remembered as a bizarre ruling tailored to fit the unique circumstances of a truly unusual ship, or the first in a new trend of broadening admiralty rights governing salvage of shipwrecks."¹³¹

10. CONCLUSION

The world's intense interest in all things relating to TITANIC has not abated. The legal decisions relating to this issue, particularly the activities of salvors, discoverers and potential interlopers has given those in the business of deep ocean salvage and archeological enterprise a more definitive model and guidelines for their future activities. The intensity of the activities in the Federal Court in Virginia from the moment the lower Court issued its order of June 23, 1998, until the argument before the Fourth Circuit on October 29, 1998 (which was ultimately decided on March 24, 1999)¹³² has provided not only the legal profession, but others with a fascinating analysis of international law, the historic beginnings of maritime and admiralty law and the law of salvage as well as insight into the political atmosphere surrounding the troubling issue of deep sea salvage and exploration of ancient wrecks and those that have achieved some sense of notoriety, such as the TITANIC.

Although the novice in this field of history and law may have felt that the Fourth Circuit's opinion was the final ruling on the TITANIC, there was still a vestige of that case that has crept its way into the legal history, particularly into the courts in New York.¹³³ This was an application by Lindsay who had filmed and directed for British television a documentary on the TITANIC concerning the third salvage expedition to the vessel. In his project he discussed his idea for filming the TITANIC with the defendant RMST President, George Tulloch. There ensued the usual negotiations as to whether or not such a project would be viable. In 1996, Tulloch began paying the plaintiff a monthly stipend for approximately 12 months. Apparently, things did not work out and, therefore, the inevitable lawsuit was commenced against RMST

¹³⁰ Lin, *supra* at 506.

¹³¹ Lin, *supra* at 506.

¹³² 171 F.3d 943 (4th Cir. 1999).

¹³³ Alexander Lindsay v. The Wrecked and Abandoned Vessel RMS TITANIC, et al., RMS TITANIC Inc., et al., 1999 AMC 69 (S.D.N.Y. 1998).

and Tulloch, et al., in which Lindsay claimed the defendants were currently profiting from the film, video and still photographs taken by him during a 1996 salvage operation. Predictably, RMST sought to have the case transferred to its more proper venue in Virginia where all of the ensuing litigation had previously taken place, but this was rejected by the New York court.

Another exposition on the law of salvage was then put before the parties by the Court in its attempt to determine which of the claimants and defendants may have had some arguable claim for salvage and compensation. The Court once again added the important policy consideration in the law of salvage, namely the preservation of historic shipwrecks.¹³⁴ In denying the motion of defendants to dismiss the *in rem* claim against the vessel, the Court stated: "*today, as we stand on the threshold of the next millennium, technological advances permit a level of video and photographic documentation of wreck sites unprecedented in maritime history. Such efforts should be encouraged . . . not chilled.*"¹³⁵ The Court rejected the majority of other defenses raised and maintained the status of the case in the New York court and would not transfer it to Virginia indicating that Lindsay simply sought a salvage award for services allegedly provided to the TITANIC. This case is still pending before the court without any final resolution.

I believe my ultimate conclusion and yours as to who owns the ocean deep is the rather simplistic answer -- who knows? Given the wide variety of arguments and issues raised in the TITANIC matter, particularly the problems created by the court in Virginia in imposing an injunction over a ten mile square area of ocean, in international waters available to free navigation and passage through all, the answer to the riddle is still uncertain. What is, however, more certain now than it was a year ago is that the courts, insofar as deep sea salvage wrecks are concerned, are much more conscious of the conflict of issues that arise between those attempting salvage of deep sea wrecks with present technology and those who either wish to photograph, inspect, or be participants in a sightseeing trip, etc. This question then is who has the better or prior right to attempt to exclude those from a spot not only in the ocean but on the ocean floor. As you are aware, Dr. Ballard has just located some Phoenician wrecks in the Mediterranean at a depth of over 2,000 feet. There is no present attempt yet to retrieve any of those objects from the ocean bottom, but when that is commenced (if ever) the same issues and same question will arise, namely, who owns the ocean deep? It is submitted that the analysis we have considered here would be equally applicable to those important archeological finds.

I believe that my views as stated in my prior article¹³⁶ are still as valid today as they were when written over a year ago.

¹³⁴ See *id.* at p. 73.

¹³⁵ *Id.* at p. 73.

¹³⁶ McCormack: Finders Keepers-Losers Weepers: Underwriters Problems with Deep Sea and Other Salvage Operations, 49 FICC Quarterly 87 (1998), p. 102.

Today, the American lawyer dealing with the salvage claims as well as competing claims from underwriters has to contend with many issues that have recently been developed in the law, particularly those relating to sunken wrecks. The advent of advanced technology that permits robot submarines to roam the deep ocean in search of lost treasures and shipwrecks has had a substantial impact on the business of salvage. Salvors have to contend with fractious state and Federal bureaucrats relating to issues of preservation of the wreck sites, ecological issues, historical preservation societies, predatory would-be salvors and, at times, the familiar maxim of "finders keepers — losers weepers." Added to this are the claims of underwriters, and those claiming privity with them by merger and the like, who seek subrogated recoveries of long ago payments.

The days of the swashbuckling salvors coming to the rescue of wallowing tankers have given way to scientific analysis of ocean beds, review of meteorological phenomena of 200 years ago, and robotics which permit exploration and salvage at depths and pressures never before considered feasible for salvage. The increasing sophistication of hull and cargo underwriters on these issues has made them formidable opponents in these cases.

Today, salvors must be part scientist, conservationist, lobbyist and sailor. Of course, sailors must be familiar with the law in relying on the ancient precepts of salvage, but imbued with twentieth century scientific expansion of the scope and breadth of salvage in areas that have heretofore been considered the great abyss. I commend the historian among us to review the most recent legal decisions on these issues for a whole new look at the arcane world of deep-sea salvage.

I commend to all of you who are interested in this fascinating historical issue of deep ocean salvage, to continue to be aware of the ongoing activities in this area. As we approach this millennium, there is a whole new world of potential for deep ocean salvage. It may well be, as the millennium continues, we may ultimately find the answer to the crucial question -- who owns the ocean deep.

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