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THE ABANDONED SHIPWRECK ACT OF 1987 IN THE NEW MILLENNIUM: INCENTIVES TO HIGH TECH PIRACY?

Russell G. Murphy *

I. INTRODUCTION

An estimated fifty thousand shipwrecks lie in the territorial waters of the United States.¹ Five to ten percent of these wrecks are believed to have historical significance.² An extraordinarily high percentage of these wreck sites are located within state boundaries.³ The Abandoned Shipwreck Act⁴ of 1987 (hereinafter ASA) controls the search for and exploration of these historic wrecks and sets the legal and practical parameters for contemporary "treasure hunting" in the United States.⁵ Recent decisions⁶ interpret-

* Professor of Law, Suffolk University Law School. B.A. 1966, University of Massachusetts at Amherst; J.D. 1973, Suffolk University Law School.

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1. H.R. REP. NO. 514(1), 100th Cong. (2d Sess. 1988), *reprinted in* 1988 U.S.C.C.A.N. (4 Stat.) 365-83.

2. *See generally* Eugene Lyon, *The Trouble with Treasure*, 149 NAT'L GEOG. 787 (1976) (discussing historical significance of large numbers of shipwrecks in United States waters).

3. Anne G. Giesecke, *Shipwrecks: The Past in the Present*, 15 COAST. MGMT. 179, 181, 189 (1987).

4. 4 U.S.C. §§ 2101-06 (1988); *See generally* McLaughlin *infra* note 5, at 181 n.187 (listing bills competing to become ASA).

5. *See generally* Sabrina McLaughlin, *Roots Relics and Recovery: What Went Wrong With the Abandoned Shipwreck Act of 1987*, 19 COLUM. – VLA J.L. & ARTS 149 (1995)

ing or relating to the ASA confirm the longstanding criticism⁷ of the Act that it is poorly designed to achieve one of its primary goals: to promote archeologically and environmentally sensitive historic shipwreck exploration.⁸ An examination of these cases suggests that current law regulating historic shipwrecks not only discourages lawful search and recovery but actually encourages covert, unauthorized and illegal salvage operations.⁹ Such decisions seem destined to lead to the emergence of a new breed of technologically sophisticated “pirates.” This article explores some of the problems created by the ASA as judicially interpreted by presenting three “models” of shipwreck exploration pursuant to the Act: The “Compliance” Model,¹⁰ “Negotiation” Model¹¹ and “Pirates” Model.¹² It addresses a basic question facing modern treasure hunters—will successful shipwreck search, discovery, exploration and recovery be fairly rewarded—and proposes some modest revisions¹³ of the ASA to help answer that question in the affirmative.

I. THE ABANDONED SHIPWRECK ACT OF 1987

The Abandoned Shipwreck Act¹⁴ of 1987 asserts federal governmental sovereignty over historic abandoned shipwrecks located within state

(discussing legislative purpose and subsequent effects of ASA on search and exploration for historic shipwrecks in state waters).

6. *See, e.g.,* Sea Hunt, Inc. v. Unidentified Shipwrecked Vessel or Vessels, 221 F.3d 634 (4th Cir. 2000); Fairport International Exploration, Inc. v. Shipwrecked Vessel Known as the Captain Lawrence, 177 F.3d 491 (6th Cir. 1999); The People ex rel. Illinois Historic Preservation Agency v. Zych, 687 N.E.2d 141 (Ill. App. Ct. 1997).

7. *See, e.g.,* McLaughlin, *supra* note 5 and accompanying text, at 151, 192–93 (criticizing ASA as ignoring fundamental lessons of admiralty law, undermining base of national maritime law and creating ineffective administrative regime for shipwreck management).

8. H.R. Rep. No. 514(II), *supra* note 1, at 8 (stating primary purpose of ASA to foster exploration and effective management of archeologically and historically significant shipwrecks).

9. *See e.g., infra* note 103 and accompanying text (discussing authorities noting that ASA gives incentive to covert and unlawful salvage operation by discouraging lawful recovery efforts).

10. *See infra* notes 117–217 and accompanying text (detailing “Compliance” Model of shipwreck exploration).

11. *See infra* notes 218–48 and accompanying text (discussing “Negotiation” Model of shipwreck exploration).

12. *See infra* notes 249–92 and accompanying text (presenting “Pirates” Model resulting from disincentives for lawful shipwreck exploration created by ASA).

13. *See infra* notes 299–312 and accompanying text (suggesting statutory reforms to alleviate negative effects of ASA).

14. 43 U.S.C. §§ 2101–2106 (1988).

borders¹⁵ or state territorial waters.¹⁶ United States title is claimed to any wreck “(1) embedded in submerged lands of a state; (2) embedded in coralline formations protected by a state on submerged lands of a state; or (3) on submerged lands of a state and (the wreck) is included in or determined eligible for inclusion in the National Register (of Historic Places).”¹⁷ Exempted from operation of the Act are shipwrecks located outside the three geographic [or, in a few cases, nine nautical] mile limit of state territorial¹⁸ waters, on public lands of the United States or on Indian tribal lands.¹⁹ Also excluded are wrecks that are not “embedded” in state lands nor eligible for inclusion in the National Register,²⁰ as well as all sovereign ships of the United States regardless of location.²¹ After asserting title to these wrecks, the Act automatically transfers title to “the state in or on whose submerged lands the shipwreck is located.”²² States are vested with full administrative and management authority for shipwreck exploration and site control²³ subject to non-binding guidelines promulgated by the Secretary of the Interior through the National Park Service.²⁴ The authority of the states extends expressly to “abandoned shipwrecks, which have been deserted and to which the owner has relinquished ownership rights with no retention.”²⁵

In a most controversial provision,²⁶ the ASA effectively removes federal court jurisdiction over claims to shipwrecks covered by the Act by specifically prohibiting the federal courts from applying the age-old

15. 43 U.S.C. § 2105(a) (Supp. 2002).

16. 43 U.S.C. § 1312 (Supp. 2002). Territorial waters extend out three geographical miles (or nine nautical miles for Florida, Texas and Puerto Rico) from the coast of each state. *Id.*

17. *See* 43 U.S.C. § 2105(a) (2002).

18. *Id.*

19. 43 U.S.C. § 2105(d) (2002).

20. 43 U.S.C. § 2105(a) (Supp. 2002).

21. *See generally* Sea Hunt, Inc. v. Unidentified, Shipwrecked Vessel or Vessels, 47 F. Supp. 2d 678 (E.D. Va. 1999); *aff'd in part and rev'd in part*, Sea Hunt v. The Unidentified, Shipwrecked Vessel or Vessels, 221 F.3d 634 (4th Cir. 2000); *cert denied* Sea Hunt v. Kingdom of Spain, 531 U.S. 1144 and *cert denied* Virginia v. Kingdom of Spain, 531 U.S. 1144 (discussing exclusion of certain types of wrecks from coverage under ASA).

22. 43 U.S.C. § 2105(c) (2002).

23. *Id.* at § 2101(a).

24. *Id.* at § 2104; *See also* 55 Fed. Reg. 50,116 (1990).

25. *Id.* at § 2101(b).

26. *See generally* McLaughlin *supra* note 5, at 170–71 and accompanying text (noting most controversial provision that removes federal admiralty jurisdiction over shipwrecks covered by ASA).

maritime law concepts of "salvage"²⁷ and "finds"²⁸ to ASA cases.²⁹ This means that, in essence, once it is determined that a shipwreck is covered by the ASA, all rights and claims to it are dependent on state law, must be asserted in state court, and will be evaluated without reference to the traditional body of admiralty law that has been applied by the federal courts since the enactment of the United States Constitution.³⁰

This dramatic and unusual restructuring of maritime law is supported by several specific Congressional goals. The overarching purpose of the ASA is historic shipwreck and wreck site protection.³¹ This is to be achieved by transferring title and legal control of wrecks to the individual states.³² Congress concluded that states are closest to the problems of near-shore shipwreck exploration, are best equipped to deal with them, and have the greatest interests at stake.³³ Additionally, Congress determined that state title, regulation, management and, when required, litigation would solve the "confusion"³⁴ over ownership of abandoned wrecks caused by prior federal court application of admiralty law.³⁵ This, in turn, would reduce federal court litigation.³⁶ The ASA also seeks to fill gaps in federal legal protection of shipwrecks arising under the Archaeological Resources

27. See *infra* notes 88–96 and accompanying text (explaining traditional maritime law of salvage).

28. See *infra* notes 97–100 and accompanying text (explaining law of finds in admiralty law).

29. 43 U.S.C. § 2106(a) (2002).

30. See U.S. CONST. ART. III, § 2 (extending judicial power of United States to all cases arising under admiralty and maritime law); 28 U.S.C. § 1333 (2002).

31. H.R. REP. NO. 514(II), *supra* note 1, at 8 (identifying "protection of our nation's maritime heritage" as goal of ASA).

32. 43 U.S.C. §§ 2101(a), 2104 (2002) (transferring title of shipwrecks covered by ASA to the respective states); 55 Fed. Reg. 50,116 (1990).

33. See generally David R. Owen, *The Abandoned Shipwreck Act of 1987: Good-Bye to Salvage in the Territorial Sea*, 19 J. MAR. L. & COM. 499, 500 (1988) (discussing reasoning behind ASA).

34. Timothy T. Stevens, *The Abandoned Shipwreck Act of 1987: Finding the Proper Ballast for the States*, 37 VILL. L. REV. 573, 579–88 (1992); McLaughlin *supra* note 5, at 174–98.

35. Owen, *supra* note 33 and accompanying text (explaining purposes behind ASA enactment).

36. See H.R. REP. NO. 514 *supra* note 1, pt. II, at 2–3, reprinted in 1988 U.S.C.C.A.N. at 370–72; see also, Anne G. Giesecke, *The Abandoned Shipwreck Act Through the Eyes of its Drafter*, 30 J. MAR. L. & COM. 167, 168 (and accompanying notes 5 and 6); McLaughlin, *supra* note 5, at 174 ("uneven" federal court decisions); Forrest Booth, *Who Owns Sunken Treasure? The Supreme Court, the Abandoned Shipwreck Act and the Brother Jonathan*, 11 U.S.F. MAR. L. J. 77, 85 (1998–1999) (Congress was "concerned that shipwreck and salvage litigation was tying up the [federal] courts and [such litigation] was only likely to increase.").

Protection,³⁷ Outer Continental Shelf Lands,³⁸ Submerged Lands,³⁹ Antiquities,⁴⁰ and National Marine Sanctuaries Acts.⁴¹

One final goal motivated enactment of the ASA: the elimination of private salvage of historic wrecks.⁴² This statute is premised on the view that historic shipwreck exploration and recovery should be carried out by state governments using tax revenues rather than private salvors using private risk capital.⁴³ The investor-backed private salvor⁴⁴ was, and is, regarded as a threat to wrecks and their surrounding marine environments.⁴⁵ Marine archeologists,⁴⁶ historic preservationists,⁴⁷ state natural resources officials,⁴⁸ and various organizations⁴⁹ are on record as condemning search and recovery practices⁵⁰ of private salvors. The ASA effectively

37. 16 U.S.C. §§ 470(aa)–(mm) (2002).

38. 43 U.S.C. §§ 1331–56 (2002).

39. *Id.* at §§ 1301–15 (2002)

40. 16 U.S.C. §§ 431–33 (2002).

41. *Id.* at §§ 1431–39 (2002) (banning treasure hunting in 2800 sq. mile sanctuary area).

42. *See, e.g., Protection of Historic Shipwrecks: Hearing on S.1504 Before the Subcommittee on Public Lands and Reserved Water of the Senate Comm. on Energy and Natural Resources*, 98th Cong., 1st Sess. 28 (1983) (hereinafter *Hearings on S.1504*) (testimony of Capt. Harry Allendorfer USN (ret.), Director of Maritime Preservation); *See also Abandoned Historic Shipwrecks: Hearings on H.R. 132 before the Subcommittee on Oceanography, Committee on Merchant Marine and Fisheries*, 97th Cong. (2nd Sess. 1982) [hereinafter *Hearings on H.R. 132*].

43. *See e.g., McLaughlin, supra* note 5, at 181 (original ASA bill premised on “assumption that state-controlled salvage would protect the shipwrecks and preserve the environment . . .”).

44. *See generally* Edward W. Horan, *Organizing, Manning, and Financing a Treasure Salvage Expedition*, 30 J. MAR. L. & COM. 235 (1999) (discussing financing of shipwreck exploration and incentives to engage in salvage expeditions).

45. *See supra* note 43 and accompanying text (noting protection and preservation of shipwrecks and surrounding environments as goals of ASA).

46. *See Abandoned Shipwreck Act of 1987: Hearings on S.858 Before the Subcommittee on Public Lands, National Parks and Forests of the Senate Comm. on Energy and Natural Resources*, 100th Cong., 1st Sess. 99 (1987) (hereinafter *Hearings on S.858*) (testimony of George Bass, Institute of Nautical Archeology).

47. *See generally* *Hearings on H.R. 132, supra* note 42, at 134–73 (extensive testimony on negative consequences of private salvor techniques).

48. *See e.g., Starr & Belleville, Florida: Diving for Dollars*, NEWSWEEK, Mar. 18, 1985, at 27 (quoting former head of Florida underwater archeology program that private salvage would lead to “the destruction of all shipwrecks in state waters.”).

49. *See e.g., Paul F. Johnston, Treasure Salvage, Archeological Ethics and Maritime Museums*, 22 INT’L J. NAUT. ARCH. 53, 54 (1993) (describing policy statement of Council of American Maritime Museums (CAMM) prohibiting its forty-eight member museums from accepting artifacts discovered by commercial salvors).

50. *See e.g., Office of Technology Assessment, U.S. Congress, Technologies for Underwater Archeology and Maritime Preservation-Background Paper*, OTA-BP-E-37, 30 tbl. 3 (1987) (summarizing various threats to marine artifacts posed by salvage techniques);

disempowers these salvors by subjecting them to unlimited, nonuniform and unreviewable state regulation,⁵¹ and by eliminating the system of incentives and rewards provided by federal admiralty courts that justified the salvor's work.⁵² The ASA does not, however, specify how the work historically performed by the private salvor will be accomplished under the Act.⁵³ A review of ASA-based state laws illustrates this problem.

A. *The States' Response*

Over thirty states⁵⁴ have enacted laws pursuant to the grant of

Stevens, *supra* note 34, at 577 (blasting, dredging, winching, and blow torching); McLaughlin, *supra* note 5, at 181 (noting primary objection to "mailboxing"); *see also*, BARRY CLIFFORD, *THE PIRATE PRINCE (DISCOVERING THE PRICELESS TREASURES OF THE SUNKEN SHIP WHYDAH)*, 90 (Simon & Shuster 1993) (describing mailboxes or propwash diverters as "huge metal elbows that slip over the propellers of a twin screw boat . . . [a]fter anchoring you start the engine, and when the propellers are engaged the mailboxes force a stream of water into the sand, blowing a pit about eight feet wide at the bottom and up to fifteen feet deep.").

51. 43 U.S.C. § 2101(a-b), 2104 (2002) (transferring title of shipwrecks covered by ASA to the respective states); 55 Fed. Reg. 50,116 (1990); McLaughlin, *supra* note 5, at 183-84 (noting that states are empowered to vest shipwreck management authority in wide range of agencies).

52. *See infra* note 103 and accompanying text (discussing disincentives for legal wrecking and salvage activities).

53. *See, e.g.*, McLaughlin, *supra* note 5, at 187 (noting "[u]nder the Act, there is no incentive for the states to survey for shipwreck locations, much less to excavate the wrecks.").

54. *See, e.g.*, Stevens, *supra* note 34, at 611 n. 186 (listing state statutes); *see also* Anne G. Giesecke, *Shipwrecks: The Past in the Present*, 15 COASTAL MGMT. 179, 184-88 (table comparing provisions of state laws) and Giesecke *supra* note 36, at 168 ("all states have evaluated their legal systems as they apply to underwater resources and where necessary have modified their laws."); *see also* ALASKA STAT. § 41.35.010 (1988); ARIZ. REV. STAT. ANN. § 41-841 (1992); COLO. REV. STAT. ANN. § 24-80-401 (West Supp. 1992); FLA. STAT. ANN. § 267.021 (West 1991 & Supp. 1992); GA. CODE ANN. § 12-3-80 (1992); HAW. REV. STAT. § 6E1-2 (1985); ILL. ANN. STAT. ch. 127, para. 133c.02-133c1 (Smith-Hurd Supp. 1992); IND. CODE ANN. § 14-3-3-3 (West 1983 & Supp. 1992); LA. REV. STAT. ANN. § 41:1601 (West 1990); ME. REV. STAT. ANN. tit.27, § 371 (West 1964); MD. CODE ANN., Nat. Res. § 2-309 (Supp. 1992); MASS. GEN. LAWS ANN. ch.6, § 180 (West 1986); MINN. STAT. ANN. § 138.51 (West 1979 & Supp. 1992); MISS. CODE ANN. § 3 9-7-3 (Supp. 1989); MO. ANN. STAT. § 253.420 (Vernon Supp. 1992); MONT. CODE ANN. § 22-3-421 (1991); N.H. REV. STAT. ANN. § 227-C:1 (1989 & Supp. 1991); N.Y. PUB. BLDGS. LAW § 60 (McKinney Supp. 1992); N.C. GEN. STAT. § 121-22 (1986); N.D. CENT. CODE § 55-10-01 to 55-10-02 (1983 & Supp. 1991); S.C. CODE ANN. § 54-7-610 (Law. Co-op 1992); TEX. NAT. RES. CODE ANN. § 191.091 (West Supp. 1992); VT. STAT. ANN. tit. 22 § 701 (1987 & Supp. 1991); VA. CODE ANN. § 10.1-2214 (Michie 1989); WASH. REV. CODE RCW. § 27.53.045 (West Supp. 1992); WIS. STAT. ANN. § 44.30 (West Supp. 1991). Guam the Northern Mariana Islands and Puerto Rico had enacted historic shipwreck protection legislation as well. *See* GUAM GOV'T CODE §13985.29-35 (Supp. 1974); N.M.I.

management responsibility provided in the ASA and guidelines⁵⁵ issued by the Department of the Interior. These shipwreck management programs differ from state to state on such crucial matters as: areas of state jurisdiction;⁵⁶ definition of resources regulated;⁵⁷ nature of claim(s) made by the state to protected resources;⁵⁸ permit requirements⁵⁹ for private search and recovery; rewards and incentives;⁶⁰ penalties for unauthorized salvage;⁶¹ and agencies charged with enforcement.⁶² The ASA has spawned extensive state bureaucracies charged with administering state laws and regulations that are often confusing and contradictory. Today, a law-abiding salvor committed to historic shipwreck exploration must make an informed guess at which state's law will apply (based on location of the wreck),⁶³ obtain authority from the state to search or recover, and rely on state law for compensation. As later sections of this article indicate,⁶⁴ even with state

COMMONWEALTH CODE tit. 2, § 4811 (1991); P.R. LAWS ANN. tit. 18 §§1501–1508 (1989).

55. 43 U.S.C. § 2104 (2002); 55 Fed. Reg. 50,116 (1990).

56. *See, e.g.*, N.Y. (underwater sites), § 14 (Consol. 2001); MONT. CODE ANN. § 22.3.421–442 (2001) (upon or beneath the earth or underwater). FLA. STAT. ANN. § 267 (West 1999) (state-owned lands or submerged lands); N.C. GEN. STAT. § 121.22–28 (2001) (bottoms of navigable waters, one marine league into the Atlantic).

57. *Cf., e.g.*, LA. STAT. ANN. R.S. § 41.1601 (Supp. 2001) (sunken or abandoned pre 20th century ships and wrecks of the sea); MASS. GEN. LAWS ch. 6 § 180 (2002) (sunken ships unclaimed for 100 years or valued at \$5,000 or more); FLA. STAT. ANN. § 267.021(3) (2001) (sunken or abandoned ships).

58. *Cf., e.g.*, N.Y. LAWS § 14 (Consol. 2001) (regulatory authority); N.C. GEN. STAT. § 121.22 (2001) (title); *but see* Giesecke Shipwrecks *supra* note 54 (vast majority of states assert title).

59. *Cf., e.g.*, OHIO REV. CODE ANN. § 1506.10 (West 2001) (no private salvage permits) and 90-093 Op. Att'y Gen. note 3 (opinion of the Ohio Attorney General); FLA. STAT. ANN. § 267 (West 1999) (contract); LA. REV. STAT. ANN. R.S. § 41.1601 (2001) (contract for scientific or educational exploration); N.C. GEN. STAT. § 121.22 (2001) (license). MASS. GEN. LAWS ANN. Ch. 6 § 180 (2001) (permit, state option to purchase).

60. *Cf., e.g.*, MASS. GEN. LAWS ANN. ch. 6 § 180 (2001) (75% of the value of artifacts recovered); FLA. STAT. ANN. § 267 (West 1999) (compensation by contract); LA. STAT. ANN. R.S. § 41.1601 (2001) (*quantum meruit*); N.C. GEN. STAT. § 121.22 (2001) (monetary fee or portion agreement).

61. *Cf., e.g.*, N.Y. LAWS § 14 (Consol. 2001) (misdemeanor at judges discretion); N.C. GEN. STAT. § 121.22 (2001) (fine or imprisonment of less than two years); S.C. CODE LAWS ANN. § 54.7.400 (2001) (fine not to exceed \$10,000 or imprisonment for two years); FLA. STAT. ANN. § 267 (West 1999) (forfeit of artifacts plus fine not to exceed \$500 or imprisonment of two years).

62. *Cf., e.g.*, CAL. PUB. RES. CODE § 6002, 63136 (1995) (State Lands Commission); N.C. GEN. STAT. § 121–23 (1944) (Department of Cultural Resources); LA. REV. STAT. ANN. § 41:1605 (West 1990) (Department of Culture, Recreation and Tourism); FLA. STAT. ANN. § 191.01 (2001) (Department of State).

63. *See* 43 U.S.C. § 2105(a); 43 U.S.C. § 1312 (defining extent of territorial waters).

64. *See, e.g., infra* notes 189–217 and accompanying text (detailing litigation resulting from twenty-six year effort to recover wreck in state waters).

permission and rewards, litigation subsequent to discovery may delay or deny the salvor's claims. This uncertainty is a major threat to the goals of the ASA.⁶⁵

B. Salvors and the Law of "Salvage" and " Finds" in the ASA System

For hundreds of years prior to enactment of the ASA, the private salvor was the central figure in shipwreck location and exploration.⁶⁶ A rich body of literature chronicles the exploits and escapades of these treasure hunters.⁶⁷ One of them, Key West's Mel Fisher,⁶⁸ began using advanced scientific technologies⁶⁹ in the 1960's to search for and salvage historic wrecks such as the *Atocha*⁷⁰ and the 1715 *Spanish Plate fleet*.⁷¹ Federal admiralty court enforcement of the salvage rights of adventurers like Fisher

65. See, e.g., McLaughlin *supra* note 5, at 192-93 (McLaughlin states "there is no cohesive, nationwide harmony in the [state] management of shipwrecks Under the current system, a salvor must consult a discouraging host of state laws, administrative codes, and uninformed agencies before salvage work can begin") *Id.* at 192-93. ("[T]he lucky salvor . . . [will gain] the reward at the end of the labyrinth") *Id.* at 197.

66. See JOHN VIELE, *THE FLORIDA KEYS VOLUME 3, THE WRECKERS*, 43-57 (Pineapple Press, Inc. 2001). In May 1928 Congress "established the Superior Court for the Southern Judicial District of the Territory of Florida," the original wreckers' court of Key West. *Id.* at 57. In 1847, two years after Florida became a state, it was replaced by the District Court of the United States for the Southern District of Florida. *Id.* The court was to be open at all times for admiralty cases. *Id.* "The Key West court was the only court in the United States authorized to license (private) wrecking captains and wrecking vessels and to revoke licenses for misconduct." *Id.*

67. See generally GARY KINDER, *SHIP OF GOLD IN THE DEEP BLUE SEA: THE HISTORY AND DISCOVERY OF AMERICA'S RICHEST SHIPWRECK* (Atlantic Monthly Press, 1998); BARRY CLIFFORD WITH PETER TURCHI, *THE PIRATE PRINCE: DISCOVERING THE PRICELESS TREASURES OF THE SUNKEN SHIP WHYDAH* (Simon & Schuster, 1993); EUGENE LYON, *SEARCH FOR THE MOTHER LODE* (Florida Classics Library, 1989); ROBERT BURGESS, *SUNKEN TREASURE: SIX WHO FOUND FORTUNES* (Florida Classics Library, 2000); ROBERT F. MARX, *SHIPWRECKS IN THE AMERICAS* (Bonanza Books, 1983).

68. EUGENE LYON, *SEARCH FOR THE MOTHER LODE* (Florida Classics Library, 1989) (describing Fisher's use of advanced science to aid in exploration).

69. See, e.g., Stevens *supra* note 34, at 174-98 (summarizing technological developments making shipwrecks accessible); See also Mather, *Technology and the Search for Shipwrecks*, 302 MAR. L. & COM. 175 (1999).

70. See *Treasure Salvors, Inc. v. Abandoned Sailing Vessel*, 408 F. Supp. 907 (S.D. Fla. 1976), *aff'd*, 569 F. Supp. 2d 330 (5th Cir. 1978); *Treasure Salvors, Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel*, 459 F. Supp. 507 (S.D. Fla. 1978), *aff'd sub nom.*, *State of Florida, Department of State v. Treasure Salvors, Inc.*, 621 F.2d 1340 (5th Cir. 1980), *aff'd in part and rev'd in part*, 458 U.S. 670 (1982); *revisited*, 689 F. 2d 1254 (5th Cir. 1982) (describing historical background of litigation over the Spanish vessels *Nuestra Senora de Atocha* and *Santa Margarita*).

71. See *Cobb Coin, Company, Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel*, 549 F. Supp. 540 (S.D. Fla. 1982).

led directly to the passage of the ASA and the imposition of extensive state restrictions on this type of salvage.⁷²

Modern salvage of historic shipwrecks is difficult (compared to “find[ing] an exceedingly small needle in a dauntingly large haystack”),⁷³ expensive,⁷⁴ time-consuming,⁷⁵ heavily regulated,⁷⁶ dangerous⁷⁷ and, in financial terms, potentially highly rewarding.⁷⁸ Until enactment of the ASA, the salvor’s primary, if not exclusive, incentive in undertaking the risky, uncertain and expensive task of salvage was the availability of a federal admiralty court grant of either a liberal salvage award⁷⁹ or an outright grant of title to an abandoned shipwreck and cargo.⁸⁰ The admiralty concepts of “salvage”⁸¹ and “finds,”⁸² together with exclusive federal court jurisdiction over admiralty and maritime cases,⁸³ provided the foundation for a centuries old private salvage industry. The ASA’s express

72. See *supra* note 42 and accompanying text (discussing the primary goal of ASA as elimination of private salvage of historic wrecks).

73. *Columbus-America Discovery Group v. Atlantic Mutual Insurance Company*, 56 F.3d 556, 572 (4th Cir. 1995); See *Columbus-America Discovery Group v. Unidentified, Wrecked and Abandoned Sailing Vessel*, 742 F. Supp. 1327 (E.D.Va. 1990); *Columbus-America Discovery Group v. Atlantic Mutual Insurance Co.*, 974 F.2d 450 (4th Cir. 1992), *cert. denied*, 507 U.S. 1000 (1993), *on remand* 56 F.3d 556 (4th Cir. 1995), *cert. denied*, 516 U.S. 938 (1995); *sub. appl., remand*, 203 F.3d 291 (4th Cir. 2000), *cert. denied*, 531 U.S. 918 (2000).

74. See generally Edward W. Horan, *Organizing, Planning, and Financing a Treasure Salvage Expedition*, 30 J. MAR. L. & COM. 235 (1999); Kinder, *supra* note 67; *Sea Hunt, Inc. v. Unidentified, Shipwrecked and Abandoned Vessel or Vessels*, 47 F. Supp. 2d 678 (E.D. Va 1999) (noting over one million dollars spent locating wrecked vessels involved in litigation).

75. *Deep Sea Research, Inc. v. Brother Jonathan*, 102 F. 3d 379, 382 (9th Cir. 1996) (salvors searched for wreck for over nineteen years); *California v. Deep Sea Research, Inc.*, 523 U.S. 491 (1998); see also LYON, *supra* note 67 (chronicling Mel Fisher’s quest for the *Atocha*).

76. See *supra* note 4 and accompanying text (detailing ASA restrictions on private salvage).

77. *Treasure Salvors, Inc. v. Unidentified, Wrecked & Abandoned Vessel*, 569 F.2d 330, 333 (5th Cir. 1978) (son and daughter of salvor Mel Fisher plus two others killed by accident during recovery operation); see also *The Blackwall*, 77 U.S. 1, 14 (1869) (shipwreck salvage is a “perilous . . . laborious and . . . dangerous enterprise . . .”).

78. See, e.g., *Columbus America Discovery Group v. Atlanta Mutual Insurance Co.*, 974 F.2d 450, 458 (4th Cir. 1992) (estimating overall value of cargo from the *S.S. Central America* at up to one billion dollars).

79. *Yukon Recovery, L.L.C. v. Certain Abandoned Property*, 205 F.3d 1189, 1196 (9th Cir. 2000).

80. See generally THOMAS J. SCHOENBAUM, *ADMIRALTY AND MARITIME LAW*, Chapter 14 pp. 834–64 (3d ed., West Hornbook Series, 2001).

81. See *infra* notes 88–96 and accompanying text (explaining maritime salvage law).

82. See *infra* notes 97–100 and accompanying text (explaining maritime law of finds).

83. See 28 U.S.C. § 1333 (2002).

elimination of both admiralty court jurisdiction⁸⁴ and substantive salvage law⁸⁵ seriously undermines this foundation. Without the law of salvage and finds, and a federal court armed with the power to award them, a wrecker faces a colossal disincentive to search because of the unpredictability of the ASA/state law rewards system.⁸⁶ Today, once a historic wrecksite is located, there is, in fact, a strong incentive to keep the discovery secret.⁸⁷ Under the law of salvage, a salvor's investment in wreck recovery is compensated by a court-ordered reward from the salvaged property.⁸⁸ "The consistent policy underlying admiralty's salvage awards is that salvors will be liberally rewarded. Admiralty holds out a continuing incentive to undertake the physical and financial risks entailed in salvage . . . Marine treasure salvors . . . are well-aware of this policy, and are guided by its constancy."⁸⁹ So long as a salvor makes voluntary efforts to save a vessel in marine peril on or under navigable waters, and demonstrates some degree of success in these efforts, a salvage award is made and enforced by a lien⁹⁰ on the vessel and its cargo.⁹¹ The owner of the vessel is not a necessary or indispensable party to the *in rem* action but can intervene to recover what remains after the salvage award is paid.⁹² The amount of a

84. 43 U.S.C. § 2106(a)(b) (2002).

85. *Id.*

86. See *infra* note 103 and accompanying text (describing the uncertainty created by ASA).

87. See, e.g., Christopher L. Mezell, *Being and Embeddedness: The Abandoned Shipwreck Arts' Historical Proxy is All at Sea*, 34 GA. L. REV. 1743, 1768 (2000). ("The ASA forces would-be finders and salvors to resort to secretive measures in order to retain . . ." control over discovered wrecks); *Id.* ("Because experienced divers and treasure hunters will know about the requirements of the ASA, they will be discouraged from disclosing their finds. They will work in secret to avoid governmental intervention, and will be given an incentive to perjure themselves on the stand, as they are . . . often the only persons with first-hand knowledge of the . . . wreck . . ."); see also, LYON, *supra* note 68, at 22-3 "[T]reasure hunters . . . are secretive, jealously guarding their knowledge of sunken ships . . . One Fort Pierce . . . [salvor] failed to get a salvage contract (permit) because he would never put the location of his shipwreck into writing.").

88. See 3A NORRIS, BENEDICT ON ADMIRALTY, § 16 (8th ed. 1992); *Com. v. Maritime Underwater Surveys, Inc.*, 531 N.E.2d 549, 551 (Mass. 1988) ("The law of salvage . . . was meant to encourage the rescue of imperiled or derelict marine property by providing a liberal reward to those who recover property on or in navigable waters."). *Id.*

89. *Cobb Coin Co., Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel*, 525 F. Supp. 186, 207 (S.D. Fla. 1981).

90. See Fed. R. Civ. P. Adm. Supp. Rule c(1) & c(2) (2002).

91. See generally SCHOENBAUM, *supra* note 80, at 834-39; see also *The Sabine*, 101 U.S. 384 (1879); *Jupiter Wreck Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel*, 691 F. Supp. 1377 (S.D. Fla. 1988). Note also that actions may be brought *in personam* against an owner who is subject to the courts' personal jurisdiction. SCHOENBAUM, *supra* note 80 at § 1-2.

92. *Id.*

salvage depends on the factors set forth by the United States Supreme Court in *The Blackwall*⁹³ including 1) the type of danger faced by the property; 2) the value of the saved property; 3) the risk incurred by the salvors; 4) the salvors' skill (which some courts in treasure cases have taken to mean the extent to which salvage was conducted with due regard to historical, archaeological and environmental concerns)⁹⁴ 5) the value of the salvor's equipment; and 6) time and labor costs in the salvage operation.⁹⁵ Awards amounting to or exceeding eighty percent of the value of a wreck and its cargo are not unusual.⁹⁶

In the alternative, a federal court can apply the American rule of finds.⁹⁷ A salvor who discovers a lost and abandoned wreck, and reduces the wreck or some portion thereof to possession, is granted title to it against the world.⁹⁸ Finds, a less favored remedy to that of salvage,⁹⁹ is normally available only when the vessel's owner is unknown or has abandoned ownership claims.¹⁰⁰

Procedurally, once a wreck has been found and partial recovery of goods or artifacts has been made, the salvor will file a federal court action requesting either an award of salvage or outright title to the wreck and its contents. The complaint in federal court will request the issuance of a warrant for the *in rem* "arrest" of the vessel and the appointment of the salvor as its "temporary custodian." Injunctive relief is often sought to keep competing salvors, state and federal government officials, sport divers and others from interfering with the salvor's possession and recovery efforts. A claim of finds is usually asserted in the alternative.¹⁰¹

The Abandoned Shipwreck Act abolishes this system of federal court

93. *The Blackwall*, 77 U.S.1 (1869).

94. See SCHOENBAUM, *supra* note 80, at 842 fn.1.

95. *Id.* at 842.

96. See NORRIS, *supra* note 88, § 240; see also Adam Lawrence, *State Antiquity Laws and Admiralty Salvage: Protecting Our Cultural Resources*, 32 U. MIAMI L. REV. 291, 306 (1977); see also *Columbus-America Discovery Group v. Atlanta Mutual Insurance Co.*, 974 F.2d 450(1992).

97. See generally SCHOENBAUM, *supra* note 80, § 14-7 pp. 851-54 (detailing law of finds in American admiralty jurisprudence).

98. *Commonwealth v. Maritime Underwater Surveys, Inc.*, 531 N.E.2d 549, 551 (noting law of finds grants title to first party discovering and reducing to possession things found under sea which have not been owned or are property which is long-lost or abandoned).

99. *Columbus America Discovery Group v. Atlantic Mutual Insurance Co.*, 974 F.2d 450, 460 (4th Cir. 1992) (citing *Herner v. United States*, 525 F. Supp. 350, 356 (S.D.N.Y. 1981)).

100. *Maritime Underwater Surveys*, 531 N.E.2d at 551-52.

101. See *supra* notes 91 and 92 and accompanying text (discussing court's jurisdiction, *in rem*).

jurisdiction and remedies for all historic abandoned shipwrecks covered by the Act.¹⁰² In so doing, it creates great uncertainty for the salvor and establishes a powerful deterrent to lawful wrecking.¹⁰³ This is best understood by examining a series of difficult questions that must be answered by the salvor under the ASA system.

The treasure hunter must first determine whether a potential wreck or wreck site is generally covered by the ASA.¹⁰⁴ If it is, it must then be determined whether the wreck meets the technical requirements of the Act so as to force the salvor to comply with state laws regulating shipwreck exploration. To be covered by the ASA, the wreck must be "historic," "abandoned," "embedded," (or if not embedded the wreck site must be "eligible for inclusion in the National Historic Register") and located in the "navigable waters" of the United States.¹⁰⁵ Next, the salvor must predict which specific state's law will control. This will be based on the salvor's ability to pinpoint the precise location of the wreck within a state's territorial waters.¹⁰⁶ Finally, the state's regulations must be interpreted and followed, and state law must provide an express form of compensation in order for the salvor's work to be rewarded.¹⁰⁷

Based on the best guess at answers to these questions, the salvor must make a choice. If the ASA applies, the salvor must obtain authority to search and recover under the controlling state's regulations and rely on the state's system of rewards for compensation. Litigation over the applicability of the ASA (and, therefore, the core authority of the state to regulate) and whether its requirements are satisfied is likely.¹⁰⁸

102. 43 U.S.C. § 2106(a) (2002).

103. See, e.g., *Yukon Recovery, L.L.C. v. Certain Abandoned Property*, 205 F.3d 1189, 1196 (noting "[t]he ASA creates uncertainty when a salvor cannot determine in advance whether a wreck is 'abandoned' or 'embedded' [on state lands] and therefore subject to the ASA A salvor could expend immense resources to locate, survey and salvage a wreck only to have a court later rule that the salvor is entitled to nothing" (emphasis added); see also statement of Rep. Norman D. Shumway (R-Cal.), H.R. REP. NO. 514(II), 100th Cong., 2d Sess. 1 (1988), reprinted in 1988 U.S.C.C.A.N. 365, 370, ("the likely result (of the ASA) will be laws which create major disincentives to private efforts to discover shipwrecks.").

104. 43 U.S.C. § 2105; *infra* note 118 and accompanying text (discussing Sea Hunt litigation).

105. 43 U.S.C. § 2105.

106. *Id.*

107. See *supra* notes 56-63 and accompanying text (detailing state statutory provisions regulating salvage).

108. See, e.g., *Zych v. Unidentified, Wrecked and Abandoned Vessel*, 746 F. Supp. 1334 (N.D. Ill. 1990); 755 F. Supp. 213 (N.D. Ill. 1991); *Deep Sea Research, Inc. v. Brother Jonathan*, 883 F. Supp. 1343, 1398 (N.D. Ca. 1995) ("the exact location of the Brother Jonathan [was] . . . stipulated . . . [to be] within California's territorial sea even though it appeared that the wreck was not more than four and one half miles off shore.").

If the salvor concludes that the ASA does not control, a traditional federal court salvage and finds action may be filed in federal court.¹⁰⁹ Litigation in that court over ASA issues similar to those presented at the state level is again likely.¹¹⁰ If a federal court decides that a wreck is governed by the ASA, the salvor must again look to the state and seek state authority to search and recover. Because prior wreck identification and exploration will have occurred without state permission, the state may simply deny any prospective authority on procedural grounds.¹¹¹

The private salvor has one final option. A salvor may conclude that good-faith efforts to follow federal and/or state law cannot promise a fair reward with sufficient certainty and timeliness. In that case, the salvor may choose to work outside the law by taking the treasures of lost shipwrecks secretly and without legal authority.¹¹² That is, to become a modern-day pirate. Ironically, the ASA provides a powerful incentive to following this option.

II. THREE "MODELS" OF SHIPWRECK EXPLORATION IN THE POST—ASA ERA

Very few professional treasure hunters (and organizations) possess the funding, technical skills, vessels and equipment, and commitment to engage in sophisticated historic shipwreck exploration.¹¹³ Salvage is not, however, limited to professionals. The ASA restricts the salvage activities of professionals and amateurs alike. The absence of rewards and incentives in this statute is a deterrent to all private shipwreck exploration. When privately funded salvors stop exploration because ASA-based salvage is not worth the investment, states are not likely to spend public monies on government sponsored "treasure hunts"¹¹⁴ or pursue exploration with the same skill and dedication exhibited by private salvors.¹¹⁵ Shipwreck

109. See *infra* notes 189–216 and accompanying text (detailing litigation in which ASA did not apply).

110. See 43 U.S.C. § 2105; *supra* notes 104 and 108 and accompanying text (presenting examples of cases moving between state and federal courts).

111. See *supra* notes 56–63 and accompanying text (noting complex requirements of applicable state statutes regulating private salvage pursuant to ASA).

112. See, e.g., *supra* note 87 (discussing situations in which a would-be salvor has incentive to act outside the law).

113. See Horan, *supra* note 74.

114. See, e.g., McLaughlin, *supra* note 5, at 184 ("The ASA gives the power of shipwreck management to state agencies whose finances often preclude efforts to survey, salvage, or preserve . . . wrecks").

115. See Giesecke, *supra* note 36, at 167–68 (noting drafter of the ASA provided list of positive consequences of the Act that made no mention of state-sponsored historic

exploration may simply stop and there will be no newly discovered historic vessels to preserve and protect. Hundreds, if not thousands, of historically important wrecks will remain undiscovered or be secretly salvaged.¹¹⁶

Recent shipwreck decisions illustrate the many obstacles faced by a law-abiding salvor in the post-ASA world. These obstacles force the new-Millennium salvor to choose whether to comply with ASA-based state regulations, negotiate a private search and recovery arrangement with a state, or become a pirate who salvages secretly and outside the law. This article presents these options as three models for ASA shipwrecking: the "Compliance" Model, "Negotiation" Model and "Pirates" Model.

A. The Compliance Model—Poor Harry Zych!

The obvious choice for the private salvor is compliance with applicable state law from the beginning of an exploration. Thus far, the ASA has withstood constitutional and substantive admiralty law challenges.¹¹⁷ As valid controlling federal legislation, the ASA treats the wrecking and salvage business no differently than federal law treats other heavily regulated industries. As such, salvors are legally obligated to follow state regulations from the outset. However, as the following case studies demonstrate, full compliance with state law is no guarantee that a law-abiding salvor will be financially rewarded (or historically recognized) for the discovery of an historic shipwreck.

A recent illustration of the "Compliance" explorational model is *Sea Hunt Inc. v. Unidentified Shipwrecked Vessel or Vessels*.¹¹⁸ In the late 1990's, Sea Hunt discovered what it believed to be the remains of two Spanish military frigates, *La Galga de Andalucia* (LA GALGA) and the JUNO.¹¹⁹ The JUNO was lost in a hurricane in 1802¹²⁰ and was thought to

shipwreck discovery or salvage).

116. See *McLaughlin*, *supra* note 5, at 193 (reasoning "[L]imited budgets of most state agencies assure that shipwrecks [will] remain undiscovered and unsalvaged").

117. See, e.g., *Zych v. Unidentified, Wrecked and Abandoned Vessel*, 796 F. Supp. 1334–35 (N.D. Ill. 1990) (reasoning ASA does not violate "uniformity principle" of Article III (legislative enactments on maritime and admiralty matters must "be co-extensive with and operate uniformly in the whole of the United States")); see also *Panama R.R. Co. v. Johnson*, 264 U.S. 375, 386–87 (1924) (declining to decide whether ASA unconstitutionally removed federal court jurisdiction over "cases of admiralty and maritime jurisdiction" mandated by Article III, § 2).

118. 47 F. Supp. 2d 678 (E.D. Va. 1999); *aff'd in part and rev'd in part*, *Sea Hunt v. The Unidentified Shipwrecked Vessel or Vessels*, 221 F.3d 634 (4th Cir. 2000), *cert. denied* 531 U.S. 1144 (2001).

119. See *id.*

120. *Id.*

be carrying a cargo of Spanish gold coins.¹²¹ The LA GALGA and a small fleet of merchant ships it was guarding sank in a 1750 hurricane off the coast of the Maryland/Virginia border.¹²² The LA GALGA fleet was transporting “gold and silver bullion and other valuable New World products.”¹²³ Both vessels’ remains were located within three miles of Virginia’s Assateague Island National Seashore.¹²⁴ They thus appeared to Sea Hunt and Virginia to fall within the ASA and be subject to ownership and regulation by the state.¹²⁵

Sea Hunt Inc., applied to Virginia’s Marine Resources Commission for a permit¹²⁶ to begin recovery of items from the wreck sites.¹²⁷ On June 10, 1997, a permit was granted providing exclusive salvage rights to these shipwrecks within two separate six-square mile zones off the Virginia coast.¹²⁸ The permit specified the search and recovery methods to be used required documentation of artifacts and proper storage mandated the on-site presence of a state-approved archaeologist at all times and provided compensation to Sea Hunt of seventy-five percent of the value of all goods salvaged with title to all historic artifacts reserved exclusively to the state.¹²⁹

In order to comply with Virginia law, Sea Hunt’s application required the review or approval of the Virginia Marine Resources Commission, Virginia Department of Historic Resources (DHR), Virginia Institute of Marine Science, Virginia Department of Environmental Quality and the U.S. Army Corps of Engineers.¹³⁰ General supervisory authority over the recovery process was vested in the DHR.¹³¹ The DHR was also charged with the responsibility of payment to permittees such as Sea Hunt, Inc., of a “reasonable” percentage of the value of the recovery.¹³²

121. See Victoria Benning, *Spain to Split Sunken Ships: Federal Decision Based on Treaty*, WASHINGTON POST, May 3, 1999 at A6.

122. See *Sea Hunt*, 221 F.3d at 639.

123. See Dennis B. Blanton & Samuel G. Margolin, *An Assessment of Virginia’s Underwater Cultural Resources: Virginia Department of Historic Resources Survey and Planning Reprint Series No. 3*, 23 (1994).

124. See Clarissa A. Kang, *Charting Through Protection for Historic Shipwrecks Found in U.S. Territorial Waters: Sea Hunt v. Unidentified, Shipwrecked Vessel or Vessels*, 19 VA. ENVTL. L. J. 87, 88 (2000).

125. See *Sea Hunt*, 221 F.3d at 639.

126. See VA. CODE ANN. § 10.1-2214(B) (Michie 1998).

127. See *Sea Hunt*, 221 F.3d at 639.

128. Kang, *supra* note 124, at 91.

129. *Id.*

130. *Id.* at 107.

131. *Id.* at 108.

132. VA. CODE ANN. § 10.1-2214 C (Michie Supp. 1999).

Within a year of having been granted the permit, and after searching for more than three years and expending more than one million dollars, Sea Hunt filed a federal court *in rem* salvage action against the JUNO and the LA GALGA.¹³³ It did so because, apparently, Sea Hunt was concerned that claims by the Government of Spain and other salvors would jeopardize its recovery and compensation under the Virginia permit.¹³⁴ Sea Hunt sought a declaratory judgement that Spain had abandoned the two vessels.¹³⁵

This admiralty court action was exactly the kind of litigation the ASA was intended to remove from the federal courts.¹³⁶ Sea Hunt (and Virginia by intervention) invoked the ASA at the federal level to establish Virginia's title to the JUNO and LA GALGA and validate Sea Hunt's exclusive permit.¹³⁷ The government of Spain filed a verified claim to the shipwrecks.¹³⁸ Spain, with the support of the United States, argued that under international law, national governments must expressly abandon sovereign vessels and, Spain asserted, it had never done so.¹³⁹ Without abandonment, the ASA would not apply, Sea Hunt's permit would confer no legal rights, and Spain would be authorized to exclude all parties from the wreck sites. At best, Sea Hunt might be eligible for a federal court salvage award.¹⁴⁰

After three years of litigation, Sea Hunt learned the consequences of good-faith compliance with ASA-based state regulation. On July 21, 2000, the United States Court of Appeals for the Fourth Circuit ruled that the 1902 Treaty of Friendship and General Relations between the United States and Spain¹⁴¹ required express abandonment of Spain's claims to the JUNO and LA GALGA.¹⁴² The court determined that neither Article XX of the 1763 Definitive Treaty between France, Great Britain and Spain¹⁴³ nor the 1819 Treaty ending the War of 1812 between the United States and

133. See *Sea Hunt*, 221 F.3d at 639.

134. *Id.*

135. *Id.*

136. See Booth, *supra* note 36 and accompanying text (noting one purpose of ASA to reduce litigation in this area).

137. See *Sea Hunt*, 221 F.3d at 640.

138. *Id.* at 639-40.

139. *Id.* at 640.

140. *Id.* at 639 (discussing Sea Hunt admiralty complaint that sought a salvage award as an alternative remedy to a grant of title); see generally *supra* notes 88-96 and accompanying text (discussing maritime law of salvage).

141. See Treaty of Friendship and General Relations, July 3, 1902, U.S. - Spain, art. X, 33 Stat. 2105.

142. See *Sea Hunt*, 221 F.3d at 642.

143. *Id.* at 643-46.

Spain,¹⁴⁴ contained such express abandonment of these vessels.¹⁴⁵ The court held that “[t]he mere passage of time since a shipwreck is not enough to constitute abandonment.”¹⁴⁶ Without abandonment, *Sea Hunt* was entitled to no legal protection from the ASA.

An additional blow to *Sea Hunt*'s expectations was delivered in a footnote to the Appeals Court decision. *Sea Hunt*'s *in rem* complaint asserted a salvage claim against Spain as an alternative to the ASA claim.¹⁴⁷ “Because *Sea Hunt* had prior knowledge [before filing its federal court law suit] of Spain's ownership interests and had reason to expect Spain's . . . refusal to agree to salvage activity. . . ,”¹⁴⁸ *Sea Hunt* was not entitled to a salvage award.¹⁴⁹ The United States Supreme Court denied *certiorari*.¹⁵⁰

Other cases highlight the importance of the term “abandonment”¹⁵¹ to a salvor's attempts to comply with federal and state salvage law. For example, in *Fairport International Exploration, Inc. v. Shipwrecked Vessel, Known as the Captain Lawrence*,¹⁵² *Fairport International* and its president, Steven Libert, began searching for the location of the wreck of the *Captain Lawrence* in 1984. Library and archival research led Libert to conclude that the owner of the *Captain Lawrence*, Wilfred H. Behrens, had discovered a cache of gold lost in northern Lake Michigan during the Civil War. Libert believed that Behrens' logbook and, perhaps, a chest of gold, were on the *Captain Lawrence* when the ship sank on August 26, 1933, adjacent to the shore of Lake Michigan's Poverty Island.¹⁵³

Libert found the wreck in 1993 and confirmed that artifacts previously discovered at the location of the wreck were from the *Captain Lawrence*.¹⁵⁴ As in *Sea Hunt*, Libert applied to the state for a permit to “dredge an area of the lake bed in which he believed the *Captain Lawrence* [was] embedded.”¹⁵⁵ Michigan denied the application. Libert then obtained a “Salvage Bill of Sale” to the vessel from Behrens' heirs that assigned to *Fairport* the

144. See *Sea Hunt*, 47 F. Supp. at 690–91.

145. See *Sea Hunt*, 221 F.3d at 643 n.1.

146. *Id.* at 647.

147. *Id.* at 639; see *supra* note 140 and accompanying text (describing complaint seeking salvage award as alternative to grant of title to *res*).

148. *Sea Hunt*, 221 F.3d at 647–48 n.2.

149. *Id.*

150. *Sea Hunt, Inc. v. Kingdom of Spain*, 531 U.S. 1144 (2001).

151. See generally McLaughlin, *supra* note 5, at 164–67 (analyzing doctrine and authorities on abandonment of shipwrecks).

152. *Fairport International Exploration, Inc. v. Shipwrecked Vessel, Known as the Captain Lawrence*, 177 F.3d 491 (6th Cir. 1999).

153. *Id.* at 494.

154. See *id.* at 494 n.2.

155. *Id.* at 494.

exclusive right to salvage the *Captain Lawrence*.¹⁵⁶ In June of 1994, Fairport filed an admiralty complaint in the U.S. District Court for the Western District of Michigan requesting an arrest of the vessel, a declaration that Fairport was its sole owner, a salvage award, and an injunction against salvage by any other parties.¹⁵⁷ The Court granted the State of Michigan's motion to intervene. In June of 1995, Michigan's motion to dismiss for lack of jurisdiction was granted.¹⁵⁸ The *Fairport International Exploration, Inc.*, litigation was thus born. More than five years of court battles¹⁵⁹ followed during which the *Captain Lawrence* lay unexplored and unsalvaged, and Fairport remained uncompensated.

Fairport's initial legal difficulties were caused by the interplay between the ASA and the Eleventh Amendment to the United States Constitution.¹⁶⁰ The original trial court found in 1995 that Michigan had established abandonment of the *Captain Lawrence* by its owner, Behrens, by a preponderance of the evidence.¹⁶¹ Abandonment under the ASA established a "colorable claim" to the vessel by the state.¹⁶² Thus, as several other courts had determined, a suit by a claimant such as Fairport was a suit in the federal courts by a citizen directly against the state and was prohibited by the Eleventh Amendment.¹⁶³ In 1997, the Sixth Circuit affirmed the trial court's dismissal for lack of jurisdiction¹⁶⁴ but that decision was vacated by the United States Supreme Court in 1998.¹⁶⁵ In *California v. Deep Sea Research, Inc.*,¹⁶⁶ the Supreme Court limited the application of the Eleventh Amendment to cases involving ASA claims to vessels in the state's actual "possession"¹⁶⁷ and required trial courts to find abandonment by clear and convincing evidence of the type of "abandonment" defined and recognized by traditional admiralty and maritime law principles.¹⁶⁸

156. *Id.*

157. *Id.*

158. *Fairport*, 177 F.3d at 494.

159. *See Fairport*, 913 F. Supp. 552 (W.D. Mich. 1995), *aff'd*, 105 F.3d 1078 (6th Cir. 1997), *vacated by*, 523 U.S. 1091 (1998).

160. *See* U.S. CONST. amend. XI ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another state, or by Citizens or Subjects of any Foreign State.").

161. *See Fairport*, 913 F. Supp. at 558-59.

162. *Id.* at 559.

163. *Id.*

164. *See Fairport*, 105 F.3d at 1083.

165. *Fairport*, 523 U.S. at 1091.

166. *California v. Deep Sea Research, Inc.*, 523 U.S. 491 (1998).

167. *Id.* at 507-08.

168. *Id.* at 501-08.

Based on this decision by the Supreme Court, *Fairport* was remanded to the Sixth Circuit.¹⁶⁹ In 1999, that Court remanded in turn to the District Court with instructions to review the 1995 trial evidence for proof of abandonment by Behrens.¹⁷⁰ Without a hearing and based on the original trial record, the Court found abandonment and dismissed *Fairport's* admiralty *in rem* action.¹⁷¹ Subsequent appeals were unsuccessful.¹⁷²

Fairport's attempts to comply with the law left it with extremely limited options. A federal court salvage award was barred by the ASA.¹⁷³ Michigan was free to explore and salvage based on *Fairport's* work. *Fairport's* only hope of compensation was a resort to Michigan's system for shipwreck exploration.¹⁷⁴ That same system had barred *Fairport's* search efforts in 1994¹⁷⁵ and would be unlikely to sanction or reward exploration *post facto*.

*Sunken Treasure, Inc. v. Unidentified, Wrecked and Abandoned Vessel*¹⁷⁶ is another example of the effects of attempted ASA compliance on a salvor's business operations. *Sunken Treasure Inc. (STI)* found the "remains of a vessel from the era of Christopher Columbus"¹⁷⁷ on the Estate Salt River in the Virgin Islands. The submerged lands in which the vessel was embedded were in the territorial waters of the Virgin Islands.¹⁷⁸ The wreck was also located in an area designated by Congress¹⁷⁹ as a National Historic Park and Ecological Preserve.¹⁸⁰

STI sought authority from the Virgin Islands government to dredge in the area of the Salt River in which an anchor from the vessel was believed to be located.¹⁸¹ STI was told that local and federal permits would be

169. *Fairport*, 523 U.S. at 1091.

170. *Fairport Int'l Exploration, Inc. v. Shipwrecked Vessel, Known as the Captain Lawrence*, 177 F.3d 491, 501(6th Cir. 1999).

171. *Fairport Int'l Exploration, Inc. v. Shipwrecked Vessel, Known as the Captain Lawrence*, 72 F. Supp. 2d 795 (W.D. Mich. 1999), *aff'd* 245 F.3d 857 (6th Cir. 2001), *cert. denied* 534 U.S. 1019 (2001).

172. *Id.*

173. See 43 U.S.C. § 2106 (a) (2002) (ASA removes federal court jurisdiction to award salvage or finds).

174. Michigan had no statute relating to the management of abandoned shipwrecks within its waters. This absence of regulation is a prime example of the uncertainty created by the ASA.

175. See generally *Fairport*, 177 F.3d 491 (6th Cir. 1999).

176. *Sunken Treasure, Inc. v. Unidentified, Wrecked and Abandoned Vessel*, 857 F. Supp. 1129 (D. V. I. 1994).

177. *Id.* at 1130.

178. *Id.*

179. 48 U.S.C. § 1705.

180. *Sunken Treasure*, 857 F. Supp. at 1130–1131.

181. *Id.* at 1131.

required.¹⁸² However, no formal licensing procedure existed in the Virgin Islands.¹⁸³ STI then attempted to gain authorization through an Act of the Virgin Island Legislature but, after many delays, it lost "patience with . . . legislative channels"¹⁸⁴ and prepared to "commence operations despite lack of formal authorization."¹⁸⁵ This open declaration of piracy was met by an order from the Virgin Islands Department of Planning and Natural Resources prohibiting STI from removing anything from the Salt River. STI complied but filed an *in rem* admiralty action seeking salvage or finds in the local federal District Court on September 18, 1991. The United States intervened as a defendant and the Government of the Virgin Islands entered as a plaintiff.¹⁸⁶

On July 14, 1994, almost three years later, the District Court upheld the Virgin Islands ASA claim of ownership to the wreck based on a finding that the Act was constitutional.¹⁸⁷ Consequently, the federal admiralty court lacked jurisdiction and was barred from awarding a salvage fee to STI. STI's case was dismissed with recourse available only in the Virgin Islands territorial courts.¹⁸⁸ STI abandoned its public recovery efforts.

Not every ASA case leaves the private salvor empty-handed. The litigation between Harry Zych and the State of Illinois¹⁸⁹ over the wreck of the *Lady Elgin* demonstrated that a private treasure hunter could ultimately prevail on a claim to an historic shipwreck. However, the question raised by this case for salvors in the new Millennium is whether any treasure hunter is prepared to spend the time (almost ten years and five federal and state decisions)¹⁹⁰ and money (many tens of thousands of dollars in

182. *Id.*

183. *Id.* at 1131 n.1.

184. *Id.*

185. *Id.*

186. *Sunken Treasure*, 857 F. Supp. at 1137.

187. *Id.* at 1137.

188. *Id.*

189. *Zych v. Unidentified, Wrecked and Abandoned Vessel*, believed to be the SB "Lady Elgin," 746 F. Supp. 1334 (N.D. Ill. 1990); *Zych v. Unidentified, Wrecked and Abandoned Vessel*, believed to be the SB "Lady Elgin," 755 F. Supp. 213 (N.D. Ill. 1990), *as amended* by 1991 AMC 1261 (N.D. Ill. 1991); *Zych v. Unidentified, Wrecked and Abandoned Vessel*, believed to be the SB "Lady Elgin," 960 F.2d 665 (7th Cir. 1992), *cert. denied*, 506 U.S. 985 (1992); *People ex rel. Ill. Historic Preservation Agency v. Zych*, 687 N.E. 2d 141 (Ill. App. Ct. 1997); *People ex re. Ill. Historic Preservation Agency v. Zych*, 690 N.E. 2d 1387 (Ill. 1998); *People ex re. Ill. Historic Preservation Agency v. Zych*, 710 N.E. 2d 820 (Ill. 1990); (The "Lady Elgin" litigation was so protracted that the Illinois state trial judge originally assigned to the case in 1992 retired before the litigation was completed, *see infra* note 191).

190. *See supra* note 189 and accompanying text (detailing length and extent of *Zych* litigation).

attorney's fees) required of Zych to litigate to a favorable decision on his claim to the *Lady Elgin*.¹⁹¹

After searching for some sixteen years, Harry Zych found the *Lady Elgin* in 1989 on the shores of Lake Michigan.¹⁹² Regarded as one of the most notorious shipwrecks in the history of the Great Lakes, the *Lady Elgin* was carrying 450 passengers from a Democratic Party rally in Chicago towards Milwaukee, Wisconsin, when, in 1860, it collided with another vessel and sank.¹⁹³ Shortly after the discovery, Zych filed an *in rem* admiralty action in an Illinois federal court. The Illinois Historic Preservation Society (IHPA) and Illinois Department of Transportation intervened, challenged the suit on Eleventh Amendment grounds, and eventually claimed ownership of the wreck under the Abandoned Shipwreck Act. The Lady Elgin Foundation (LEF), established in 1989 or 1990 by Zych and CIGNA insurance (the successor-in-interest to the original insurer of the *Lady Elgin*) to fund the *Lady Elgin* recovery project, intervened. By agreement, CIGNA eventually transferred its interest in the wreck to LEF in exchange for twenty percent of the gross proceeds from the sale of property or artifacts from the wreck site.¹⁹⁴

At the federal level, three years of court proceedings and three separate opinions ultimately resulted in a dismissal of Zych and LEF's claims to the *Lady Elgin*. District Court decisions refusing to bar the case on Eleventh Amendment grounds and rejecting the state's ASA assertions of abandonment were eventually reversed by the Seventh Circuit.¹⁹⁵ It held that even the mere existence of a state claim to the *Lady Elgin* triggered an Eleventh Amendment ban on federal jurisdiction.¹⁹⁶ Zych was thus relegated to state procedures and remedies that would add five more years of frustration to his efforts.

In September, 1992, while Zych's original admiralty case was pending, Illinois and the IHPA sued Zych, CIGNA and LEF in the Cook County Circuit Court.¹⁹⁷ Between 1992 and a bench trial decision in May, 1996, Zych struggled to protect his interests. He first attempted to get the state

191. See generally Paul Keller, *Salvor-Sovereign Relations: How the State of Illinois Destroyed the Lady Elgin*, 30 J. MAR. L. & COM. 245 (1999).

192. See Zych, 746 F.Supp. at 1336.

193. *Id.* (noting loss of 300 passengers, most of them Democrats, caused a dramatic shift in the balance of political power in Milwaukee from the Irish to the Germans).

194. *Id.* at 1337-38.

195. Zych v. Unidentified, Wrecked and Abandoned Vessel, 755 F. Supp. at 216, as amended by 1991 AMC 1261 (N.D. Ill. 1991); Zych v. Unidentified, Wrecked and Abandoned Vessel, believed to be the SB "Lady Elgin," 960 F.2d 665 (7th Cir. 1992) (discussing elements and evidentiary standards of abandonment).

196. Zych v. Unidentified, Wrecked and Abandoned Vessel, 960 F.2d at 670.

197. Keller, *supra* note 191, at 247.

to comply with the preliminary injunction issued by the Illinois federal court¹⁹⁸ subsequent to the Seventh Circuit decision. The injunction prohibited any disturbance of the wreck site "other than (by) plaintiff Harry Zych, those persons expressly authorized by him, and . . . persons authorized as agents of the State of Illinois."¹⁹⁹ A state official, William L. Wheeler, Associate Director and Counsel of the IHPA, disclosed the LORAN numbers locating the wreck site (shared with him by Zych in confidence) to a private diving club and designated them authorized agents of the state.²⁰⁰ This immunized the club from operation of the injunction. "Within months, all of the smaller and most valuable artifacts had disappeared from the site."²⁰¹

In 1993, a consent decree was entered in the Cook County Circuit Court under which Illinois would gain title to the wreck and all artifacts in Zych's possession, and Zych and LEF would be credited with the discovery, receive exclusive media and publication rights, and obtain all photos, films and videos held by State agents or officials.²⁰² The decree was violated by Illinois almost immediately²⁰³ and, in 1994, the consent decree was vacated on Zych's motion based on a finding that Illinois had not acted in good faith.²⁰⁴

The state continued to fight Zych by applying in 1994 to have the Lady Elgin listed on the National Register of Historic sites.²⁰⁵ This would, of course, place it within the ASA²⁰⁶ and bolster Illinois' claim of ownership. Based on a "misrepresentation" of the "fact" of ownership, this listing was approved in 1995.²⁰⁷

A full trial of the state's 1992 lawsuit resulted in a May 1996 unpublished opinion finding that CIGNA had not abandoned the title to the wreck it had acquired as successor-in-interest insurer.²⁰⁸ The following year the Illinois Appeals Court reversed in a two-to-one decision that held that ATENA had abandoned the *Lady Elgin* by not searching for the wreck.²⁰⁹

198. See *Zych v. Unidentified, Wrecked and Abandoned Vessel*, believed to be the SB "Lady Elgin," No. 89 C 6501, at 2 (N.D. Ill. filed July 22, 1992).

199. *Id.*

200. Keller, *supra* note 191, at 248-49.

201. *Id.* at 249.

202. Keller, *supra* note 191, at 249.

203. *Id.*

204. *Id.* at 250.

205. *Id.*

206. 43 U.S.C. § 2105(a) (2002).

207. Keller, *supra* note 191, at 250.

208. *Id.*

209. *People ex rel. Illinois Historic Preservation Agency v. Zych*, 687 N.E.2d 141, 150 (Ill. App. Ct. 1997). ("[A] 129 year period of time lapsed between the wreck . . . and the

The saga of Harry Zych's twenty six year effort to claim discovery and ownership of the *Lady Elgin* ended in 1999 when the Illinois Supreme Court reversed the Appeals Court²¹⁰ and reinstated the trial judge's conclusions that: (1) CIGNA had acquired the original insurer's (AETNA) title arising from its payment of insurance to the *Lady Elgin's* owner; and (2) its failure to actively search for the wreck until Zych's discovery in 1989 did not constitute abandonment of title or ownership.²¹¹ In support of these conclusions the court noted that: (1) for over a century AETNA and CIGNA had preserved six letters evidencing Aetna's coverage and ownership;²¹² (2) CIGNA officials testified that other documentation "most likely" existed but was lost in a Chicago fire;²¹³ (3) although abandonment can be expressed or inferred, failure to search is not conclusive of abandonment when lack of technology made discovery impractical if not impossible, search could not occur until at least the late 1970's;²¹⁴ (4) CIGNA asserted its rights as soon as it learned of Zych's discovery by entering into the agreement with LEF;²¹⁵ and (5) the trial court applied the correct standard for abandonment which is *not* limited to express renunciation of ownership and considers circumstantial evidence.²¹⁶ Accordingly, the ASA did not apply, Illinois had no lawful claim to the *Lady Elgin* and Harry Zych had finally won.

From a formalistic standpoint, compliance or noncompliance with the ASA is not an option for today's treasure hunter. The cases in this section emphasize, however, that compliance (obedience of the law) can force the salvor into a world of contentious and protracted litigation at state and federal levels. The preliminary conclusion that the ASA does or does not apply to a specific wreck is challengeable. Even if a salvor is correct that a particular state's law must be followed, attempted compliance with state requirements often triggers an adversarial relationship with the state. "[S]alvors are at the mercy of [state] government officials. When these bureaucrats are reasonable, knowledgeable and sincere, good things can happen. But when they have their own agendas, bad results are

discovery [T]echnological developments . . . made it . . . easier to locate shipwrecks in the late 1960's and early 1970's [The insurer] made no efforts to salvage . . . for about 20 years.").

210. *People ex rel. Illinois Historic Preservation Agency v. Zych*, 710 N.E.2d 820 (Ill. 1999).

211. *Id.* at 826.

212. *Id.*

213. *Id.*

214. *Id.*

215. *Id.*

216. *Illinois Historic Preservation Agency v. Zych* 710 N.E.2d at 826; *cf Columbus America Discovery Group v. Atlantic Mut. Ins. Co.*, 974 F.2d at 472 (4th Cir. 1992).

inevitable.”²¹⁷ Those “bad results” may ultimately be undone or ameliorated by the courts. However, cases like *Sea Hunt*, *Fairport*, *Sunken Treasure* and, even, *Zych* effectively force the treasure hunter to ask whether other options exist to formal ASA compliance. A system in which finding gold is easier than being rewarded and recognized has inevitably led to non-traditional alternatives to compliance. One such option is the “Negotiation Model.”

B. *The Negotiation Model—David Paul Horan*

The “Compliance Model” could justifiably be termed the “litigation” model. Lengthy, costly and, at times, inconclusive lawsuits often result from competing claims to shipwrecks covered by the ASA. The United States Supreme Court’s 1998 opinion in *California v. Deep Sea Research Inc.*,²¹⁸ joined with a strategy developed by Florida admiralty attorney David Paul Horan,²¹⁹ provide an alternative model for post-Millennium treasure hunting.

The *Brother Jonathan*, a 220 foot steamship, sank in 1865 when it hit a submerged rock off the coast of Crescent Heights, California. Its cargo included an estimated \$2 million in gold and an Army payroll of \$250,000, both at 1865 values.²²⁰ For over nineteen years, Deep Sea Research (DSR) researched and explored for the *Brother Jonathan*.²²¹ In 1991 DSR found a wreck it believed to be the *Jonathan* and filed an *in rem* admiralty action in the federal court for the Northern District of California. The State of California intervened and asserted a claim to the wreck under the ASA. The case was initially dismissed without prejudice on DSR’s motion but was reinstated in 1994 when DSR conclusively identified a different wreck located four and one-half miles off the California Coast as the *Brother Jonathan*.²²²

From the outset, the *Brother Jonathan* litigation was structured as an Eleventh Amendment sovereign immunity²²³ case. DSR stipulated that the

217. Keller, *supra* note 191, at 245.

218. See 523 U.S. 491 (1998); see generally Forrest Booth, *Who owns Sunken Treasure? The Supreme Court, the Abandoned Shipwreck Act and the Brother Jonathan*, 11 U.S.F. MAR. L. J. 77 (1999).

219. See *infra* notes 240–45 and accompanying text (discussing Attorney Horan’s model for treasure hunting).

220. *Deep Sea Research*, 523 U.S. at 495.

221. See *Deep Sea Research, Inc. v. Brother Jonathan*, 102 F.3d 379, 382 (9th Cir. 1996).

222. *Deep Sea Research*, 523 U.S. at 496.

223. See *supra* note 160 and accompanying text (describing constitutionally protected sovereign immunity).

wreck was "located upon submerged lands belonging to California"²²⁴ even though its location appeared to place it beyond the three mile territorial waters limitation of the ASA.²²⁵ With this stipulation, California could claim title under the ASA and a California Law²²⁶ vesting title in the state of "all abandoned shipwrecks . . . on or in the tide and submerged lands of California."²²⁷ In so doing, the state could assert that DSR's admiralty complaint against the *Brother Jonathan* was "an action against the state in violation of the Eleventh Amendment"²²⁸ and move to dismiss the complaint for lack of subject matter jurisdiction.

Both the California District Court and the Ninth Circuit Court of Appeals rejected California's position, held that the ASA preempted California laws regarding title to shipwrecks, and concluded that the *Brother Jonathan* was not abandoned for ASA purposes.²²⁹ On review by the United States Supreme Court, Justice O'Connor revisited and distinguished the Court's Eleventh Amendment plurality ruling in *Florida Dept. of State v. Treasure Salvors, Inc.*²³⁰ that federal court *in rem* actions involving state claims were barred by the Amendment only in cases of lawful state possession of a vessel. The Court held that the Eleventh Amendment did not prohibit an *in rem* admiralty action against a vessel such as the *Brother Jonathan* that was not in the actual physical possession of the state.²³¹ The Court declined to resolve the issues of ASA preemption raised in the appeal.²³² The case was remanded with instructions to reconsider the Abandoned Shipwreck Act issues without reference to the Eleventh Amendment.²³³

Now facing further proceedings on the remand, DSR and California decided that four years of litigation was enough. A settlement agreement was entered into under which DSR was granted a salvage permit in exchange for California's receipt of twenty percent of gold coins recovered from the *Brother Jonathan* and title to all historic artifacts from the wreck.²³⁴ In essence, the state waived any ASA claims it had to the *Brother*

224. *Deep Sea Research*, 523 U.S. at 497.

225. *Id.* at 496-98.

226. CAL. PUB. RES. CODE § 6313 (West 1998).

227. *Id.*

228. *See Deep Sea Research*, 523 U.S. at 496-97.

229. *Deep Sea Divers, Inc. v. Brother Jonathan*, 883 F. Supp. 1343 (N.D. Col. 1995); *Deep Sea Divers, Inc. v. Brother Jonathan*, 102 F.3d 379 (9th Cir. 1996).

230. *See* 458 U.S. 670, 697 (1982).

231. *Deep Sea Research*, 523 U.S. at 506-507.

232. *Id.* at 508-509.

233. *See id.*

234. *See* Christopher L. Meazell, *Being and Embeddedness: The Abandoned Shipwreck Act's Historical Proxy Is All at Sea*, 34 GA. L. REV. 1743, 1759 n.99 (2000).

Jonathan, leaving DSR with authority to salvage. This in turn, allowed the original 1994 *in rem* admiralty action²³⁵ to proceed and enabled DSR to be rewarded by the traditional maritime remedies of injunction and, most importantly, salvage.²³⁶

Attorney David Paul Horan of Key West, Florida, is one of this country's most prominent salvage lawyers. Attorney Horan foresaw the problems of protracted litigation symbolized by *Deep Sea Research*, *Sea Hunt* and *Zych* many years before the cases were brought. Mr. Horan represented Mel Fisher and Treasure Salvors, Inc., through the United States Supreme Court's decision²³⁷ in their favor, prevailed against the State of Florida in *Cobb Coin*,²³⁸ and, later, went on record against the ASA based upon federal constitutional principles.²³⁹ Attorney Horan's experience led him to employ a "negotiation" model for ASA salvaging as early as the 1980's.

Mr. Horan recognized that regardless of the eventual outcome of a case, both winner and loser would spend extraordinary sums on attorney's fees and litigation expenses. Years of recovery and preservation would be lost. Neither the state nor the treasure hunter could be certain of the strength of a claim to a wreck. This would be a clear deterrent to any kind of planned or controlled exploration. He therefore adopted a negotiation strategy that would, in essence, result in a settlement of potential competing claims prior to the initiation of any formal litigation.²⁴⁰

To this day, Attorney Horan uses the Negotiation Model to free his clients from the constraints of the ASA. "Awards of eighty percent of salvaged items, with cross-sectional and unique items passed to the state," have been reached by contract with the state of Florida.²⁴¹ Mr. Horan can succeed in this way for several reasons. He has a reputation for professionalism, skill, toughness, technical expertise, tenacity, and most importantly, success. He represents treasure hunters and investors with similar reputations. Mr. Horan is politically sophisticated and well-connected. His track record dates back to Mel Fisher's early 1970s discovery of the wreck

235. *Deep Sea Research, Inc. v. The Brother Jonathon*, 883 F. Supp. at 1343.

236. See *supra* notes 88-96 and accompanying text (examining maritime law of salvage).

237. *Treasure Salvors, Inc.*, 458 U.S. 670, 700 (1982).

238. *Cobb Coin Company, Inc., v. The Unidentified, Wrecked and Abandoned Sailing Vessel*, 549 F. Supp. 540, 561 (S.D. Fla. 1982).

239. See David Paul Horan, *Historic Shipwreck Recovery, Past, Present and Future: An Argument in Favor of Federal Admiralty Law*, (Remarks at North Carolina Bar Foundation C.L.E. Seminar, Wrightsville Beach, N.C. VIII-7, April 22-23, 1988) (transcript at UNC Law Library).

240. Interview with David Paul Horan, Esq., at the offices of Horan & Horan, Attorneys at Law, Key West, FL (April 25, 2001). On file with author.

241. McLaughlin, *supra* note 5, at 197 n. 285.

site of the 1622 Spanish galleon the *Atocha*²⁴² and the federal courts' adoption of many of his arguments regarding the archeological, environmental and legal implications of shipwreck exploration.²⁴³

The Negotiation Model allows attorneys with standing comparable to David Paul Horan's to approach appropriate state officials on behalf of qualified salvors. That official may be a Cabinet member (Secretary of State, Attorney General), legislator (Chair of the House or Senate Finance Committee), person charged with oversight of the state's historic shipwreck management program, or a member of the state's congressional delegation.²⁴⁴ The goal of such contact is the negotiation of a workable arrangement between the treasure hunter's lawyer on behalf of specified salvor(s) and the state.

The agreement can be as simple or as complex as the parties want, but the essentials are very straightforward. The contract must authorize search and recovery operations by the represented treasure hunter(s) for a designated period (e.g. one to five years) and either result in the issuance of a salvage permit or exempt the salvor(s) from applicable licensing or permit requirements under state law. The state must expressly waive, in advance, any potential ASA claims it might have during the contract period and must commit to not filing ASA cases or intervening in federal admiralty court litigation in which the contracting salvors are parties. In exchange, the salvor(s) must share with or donate to the state a specified percentage (normally in the twenty percent to thirty percent range) of the actual value of items recovered from the wreck. The contract must stipulate which items of historical significance will be claimed and/or donated to the state. In some cases, the value of donations must be made available as tax deductions for the donors (usually investors or financial backers of the salvor). Other matters that may be contractually addressed include authorized and prohibited search and recovery techniques; artifact preservation; role(s) of state officials, if any; exclusions, in terms of navigable areas not to be searched, existing sites, or pending claims; and methods for accounting, reporting and verification.²⁴⁵

The benefits of the a negotiated approach are many. The state and salvor avoid the financial burdens of protracted litigation, save the costs of state-funded exploration, assure the quality of search and recovery operations, guarantee that successful discoveries will generate archaeologi-

242. See *supra* note 71 and accompanying text.

243. See *supra* notes 71-73 and accompanying text.

244. This strategy applies with equal force to claims made by the United States government to sovereign vessels of the U.S. or wrecks found on federal lands.

245. See *supra* note 240.

cal and historical displays by the state, and protect the public interest in having historic items brought within state ownership. The salvor avoids the costs and delays of state permitting, and is assured that the state will not interfere with his projects through ASA lawsuits or other forms of litigation.²⁴⁶ Most importantly, the Negotiation Model restores the primary incentive for historic ship exploration – the guaranteed financial reward that was eliminated by the ASA.²⁴⁷

The Negotiation Model may prove unworkable where the state refuses to surrender its ASA rights. This usually occurs because the negotiation attorney lacks the standing necessary to earn the state's trust or other political obstacles prevent negotiation.²⁴⁸ There is, of course, no way to monitor the frequency or success of this approach to shipwreck exploration. For these reasons, a third and final approach is available to the modern treasure hunter. The burdens and uncertainties of the Compliance Model, and the practical limitations of the Negotiation Model, may force the salvor to resort to the ancient art of piracy.

C. The Pirates Model—“I am a free prince . . .”²⁴⁹

“Piracy. [A]n act of depredation with the intent of stealing committed on the . . . seas . . . [or] an act or practice of violence or depredation that would be felonious if done ashore committed . . . by one not acting under the authority of a politically organized community.

“Depredation. [A]n act of plundering, despoiling . . . or pillage . . .”

“Pirate. [O]ne who commits or practices piracy . . .”²⁵⁰

Just below the surface of the court opinions, law review articles, and personal observations regarding historic shipwreck salvage examined in this Article, is a stark reality. Shipwreck exploration is private, secretive, isolated and in many cases, unobservable. As a result, strong and sometimes irresistible temptations exist to simply ignore the law when searching for wrecks and salvaging their riches. Some post-Millennium explorers will succumb to these temptations and use new technologies to

246. *Id.*

247. See *supra* note 103 and accompanying text (discussing ASA's elimination of incentives for private salvors to engage in salvage operations on historic shipwrecks in state waters).

248. See *supra* note 240.

249. Clifford, *supra* note 67, at 25.

250. Webster's New International Dictionary 874 (3d. ed. 1986).

engage in modern-day piracy.

The Columbia-America Discovery Group (CADG) litigation²⁵¹ over the rights to the S.S. CENTRAL AMERICA (Central America), while not a case of piracy, suggests why the temptation to pirate may be so great.

The Fourth Circuit Court of Appeals opinion in *Columbus-America Discovery Group v. Atlantic Mutual Insurance Co.*,²⁵² sets forth the facts of a case of “legal brawls involving self-styled ‘finders’ from Ohio, British and American insurance underwriters, an heir to the Miller Brewing fortune, a Texas Oil millionaire, an Ivy League University, and an Order of Catholic monks . . . [T]he prize . . . was up to one billion dollars in gold.”²⁵³

The SS Central America was lost in a hurricane in 1857 approximately 160 miles off the coast of South Carolina.²⁵⁴ At the time, Central America was transporting \$1,219,189 (1857 value) in gold from California to New York.²⁵⁵ The gold was en route to New York banks to soften the effects of the financial crisis termed the “Panic of 1857.”²⁵⁶ Also on board were “several hundred thousand dollars worth . . .”²⁵⁷ (1857 value) of passenger gold or cash coming out of the California gold rush.²⁵⁸

Because this treasure lay on the ocean floor over 8,000 feet below the surface, attempts at finding the site and salvaging the gold were unsuccessful until CADG found the Central America in late 1988.²⁵⁹ CADG, and its president Tommy Thompson, had discovered a wreck in 1987 and retained Attorney David Horan²⁶⁰ to file a non-ASA federal court *in rem* action against this wreck in the Eastern District of Virginia.²⁶¹ After two years of salvage efforts, CADG realized it had been working “the wrong ship”²⁶² Salvage ceased and the search for the Central America was resumed. When it was ultimately found, CADG reactivated the Eastern District of Virginia case and, in 1989, persuaded the judge to issue a permanent injunction giving CADG exclusive control of the Central America wreck site.²⁶³ In August, 1990, the same Court awarded ownership of the Central America

251. See *supra* note 73 (detailing procedural history of *Columbus-America* lawsuits).

252. *Columbus-America*, 974 F.2d at 454.

253. *Id.* at 454.

254. *Id.* at 455.

255. *Id.* at 456.

256. *Id.* at 455.

257. *Columbus-America*, 974 F.2d at 456.

258. *Id.*

259. *Id.* at 455.

260. See *supra* notes 240–45 (describing a Negotiation Model for shipwreck exploration).

261. *Columbus-America*, 974 F.2d at 458.

262. *Id.*

263. *Id.*

to CADG²⁶⁴ pursuant to the maritime law of “finds.”²⁶⁵ On appeal, the Fourth Circuit reversed the trial court’s decision that the ship and passenger gold had been abandoned and thus belonged to CADG.²⁶⁶ The Court rejected the trial judge’s conclusion that insurance companies that had paid claims on the lost gold had abandoned their interests. Of particular legal significance were the facts that (1) technology to search for this wreck was not available until the late 1970’s, (2) the insurance underwriters never purposely destroyed or abandoned original insurance contracts or documents,²⁶⁷ and (3) as soon as the technology became available these companies worked with numerous salvors (including the award of some salvage contracts) in efforts to find the Central America.²⁶⁸ The Court remanded for various further proceedings and mandated application of the law of salvage to determine a “proper salvage award”²⁶⁹ for CADG’s discovery of the insurance companies’ gold. It was observed that “Columbus-America should . . . receive by far the largest share of the Treasure.”²⁷⁰ The Court suggested “an award *in specie*” defined as “a percentage of the total recovery, rather than . . . a set monetary amount” because “salvaging efforts have not been completed.”²⁷¹ At the time of this decision, CADG had recovered “several hundred million dollars worth (present value) of gold coins, ingots, and bars.”²⁷² from the Central America. The overall value of the cargo was still estimated to be “up to one billion dollars.”²⁷³ leaving vast amounts of gold to be brought up.

The CADG litigation traveled through the federal courts system for a decade. Ultimately, CADG was awarded a salvage fee equal to ninety percent of the value of the gold, recovered and unrecovered.²⁷⁴ A complicated (and confidential) marketing program for the phased sale of the gold was put in place.²⁷⁵ The United States Supreme Court denied

264. *Id.* at 459.

265. *See supra* notes 97–100 and accompanying text (explaining maritime law of finds).

266. *Columbus-America*, 974 F.2d at 468.

267. *Id.* at 466.

268. *Id.* at 466–67 (“[I]n at least one instance all the documents in an insurer’s file on the CENTRAL AMERICA were stolen by a would-be salvor). *Id.*

269. *Id.* at 468.

270. *Id.*

271. *Id.* at 469.

272. *Columbus-America*, 974 F.2d at 468.

273. *Id.*

274. *Columbus-America Discovery Group v. Atlantic Mutual Insurance Co.*, 203 F.3d 291, 296, 303 (4th Cir. 2000).

275. *Id.* at 296, 303.

certiorari three times before this process ended.²⁷⁶ Three judges died during the litigation.²⁷⁷

A settlement finally terminated this case. In it, the insurance underwriters relinquished their claims to ten percent of the total cargo of gold by taking an *in specie* ten percent share of the recovered items.²⁷⁸ As against the insurance companies, CADG became the sole owner of future treasure salvaged from the Central.²⁷⁹ CADG received a ninety percent share of recovered items *in specie*.²⁸⁰ The District Court retained jurisdiction over CADG's *in rem* case.²⁸¹

Tommy Thompson and CADG had prevailed. But, they had done so only "after much effort and expense."²⁸² CADG started its quest to find the Central America in the early to mid-1980's. Vast sums of money were spent. CADG broke new ground using sophisticated technologies²⁸³ to find an historic shipwreck in deep ocean water. CADG was willing to bear the costs of lengthy litigation and endure extended delays in being rewarded for its work.

The CADG experience inevitably raises this question for the future: if the modern-day salvor can find and recover treasure on wreck sites like the Central America, or the JUNO and LA GALGA, without anyone else's knowledge, is compliance with the law, literally or through negotiation, in order to salvage that treasure really worth it?

The Pirates Model's answer is "no"! There has always been a segment of the treasure hunting fraternity that has operated on the edge of the law. The ASA was enacted partially in response to this.²⁸⁴ When the stakes are as high as they are in cases like *Columbus-America* or *Sea Hunt*, and the law as convoluted as it is in both ASA and traditional admiralty cases, a

276. See *Columbus America*, 974 F.2d 450 (4th Cir. 1992); *Columbus America Discovery Group*, 56 F.3d at 576; (showing tortured procedural history of *Columbus-America*); *Columbus-America Discovery Group v. Unidentified Wrecked and Abandoned Salvaging Vessel*, 742 F.Supp 1327 (E.D. Va. 1990).

277. *Columbus-America Discovery Group*, 203 F.3d at 296.

278. See, e.g., *id.* at 301.

279. *Id.* at 302.

280. *Id.* at 296-97.

281. *Id.* at 301.

282. *Columbus-America*, 974 F.2d at 458.

283. *Columbus-America*, 742 F. Supp. at 1330 ("A specially equipped ship was obtained . . . Among the equipment was a side-scan sonar, satellite navigation, tele-operated deep-sea equipment submersible with stereo camera and robotic arms and computer modeling software.").

284. See *supra* notes 43-50 and accompanying text (discussing ASA as statutory response to perceived unlawful behavior by private salvors).

certain small number of treasure explorers will choose to become modern day pirates.

No legitimate salvor will openly acknowledge pirate activity. However, circumstantial, anecdotal and off-the-record evidence exists to substantiate the existence of unauthorized search and salvage operations now and to predict increased private activity in the near future.²⁸⁵ A recognized world-wide "black market" exists for trading in historic shipwreck items of all kinds.²⁸⁶ A few treasure hunters have acquired reputations for conducting unsanctioned salvage; some are already banned from shipwreck exploration in certain countries.²⁸⁷ Others talk openly, if privately, of planned pirate expeditions.²⁸⁸ And, most importantly, new technologies and equipment exist to make it practically feasible to "go the pirate's way."

The emergence of new Millennium pirates is greatly facilitated by the availability of private submarines. Several submarine manufacturers now offer high-tech vessels that are ideal for secret and unauthorized shipwreck exploration.

At the lower end, Nautilus Underwater Systems of Ft. Lauderdale, Florida, sells a twenty-four foot, five-man electric submarine that is yacht-based. This million dollar vessel will descend to 525 feet for up to ten hours. At the top end, for \$78 million, U. S. Submarine of Shelton, Washington, will build a 213-foot vessel, the Phoenix 1000, that has 5,000 square feet of interior space, portholes up to seven feet, and, for the wrecker, a fully operational docking mini-sub. The most flexible boat may be the \$15 million Olympic 105 built by Olympic Submarine Technologies, also of Shelton, Washington. This 105-foot sub accommodates up to ten people for ten days and can be outfitted with a diver lockout chamber.²⁸⁹ When combined with more traditional search and salvage methods²⁹⁰ these

285. In the course of researching this Article the author interviewed Florida-based "treasure hunters" (self-described) and historic artifact buyers who readily acknowledged the existence of modern day pirates. The author personally observed some of these artifacts and was briefed on their apparently illegal importation into the United States. Notes on file with author.

286. *Id.*

287. *See supra* note 240.

288. *See supra* note 285.

289. Kent Steinriede, *Underwater Indulgences*, THE AMERICAN WAY, 84-7 (May 15, 2001).

290. *See supra* notes 69 and 283 (showing traditional methods of salvage activity).

private submarines²⁹¹ will encourage some salvors to resort to clandestine exploration and recovery.²⁹²

The Pirates Model is an ironic consequence of the elaborate formalistic system of historic shipwreck exploration and preservation established by the ASA. "The Law" has always fostered "the Outlaw." The question is, however, whether any reform short of outright repeal of the ASA, and a return to the pre-ASA system of federal court admiralty jurisdiction over finds and salvage cases, will prevent high-tech piracy.²⁹³

IV. REFORMS: MANDATED OR GUARANTEED REWARDS

Mel Fisher once observed that abandoned shipwrecks "have no social or cultural value as long as they remain in the seabed. They are simply abandoned."²⁹⁴ He could also have added that such wrecks lack monetary or historic value until they are located and salvaged.

Critics of the ASA have pointed out that the Act provides very little or no incentive for states to conduct their own search and recovery efforts and provides powerful disincentives for private salvage of historic shipwrecks.²⁹⁵ Both have been examined in this Article. Accordingly, any reform of the ASA must focus on guaranteeing an appropriate reward for private discovery of historic shipwrecks and recovery of items therefrom by methods sensitive to archeological and environmental concerns. This approach offers two immediate benefits. First, it restores the positive incentive to private treasure hunting lost by the Act's removal of federal court salvage and finds jurisdiction. Second, it may discourage the kinds of illegal, covert and unauthorized treasure hunting referred to in the Pirates

291. See *supra* note 285 (one wrecker confided to the author that his submarine was almost finished and that he expected to be on a clandestine search and recovery expedition within months).

292. It is unclear whether the private submarine will replace the traditional "mother ship" in the search process. If a sub can be equipped with side-scanning sonar and sub-bottom profilers, or can pull a state-of-the-art magnetometer sensor, a great deal of underwater exploration will become undetectable. See, CLIFFORD, *supra* note 67, at 88-9.

293. A simple, straight forward and effective solution to the problem created by the ASA system analyzed in this Article is legislative repeal of the Act. Practically speaking, it is highly unlikely that Congress will either regard this matter as a priority issue in the post-September 11 world or accept the Act's alleged short comings as a sufficient legal and factual basis to repeal it. For these reasons, this Article proposes only narrow and limited adjustments to the Act and the ASA system.

294. Melvin A. Fisher, *The Abandoned Shipwreck Act: The Role of Private Enterprise*, 12 COLUM. VLA J.L. & ARTS 373, 376 (1988).

295. See *supra* notes 5, 87, 114 and accompanying text; See also Meazell, *supra* note 234, at 1771 ("There are perverse incentives [under the ASA] for shipwreck finders to keep the wreck's location a secret.").

Model section of this article.

Under current law, states are not required to offer rewards for successful shipwreck discovery or salvage.²⁹⁶ There is significant lack of uniformity in state shipwreck permitting and management programs.²⁹⁷ Bureaucratic, political and, even, psychological obstacles can prevent compliance with state law or a negotiated reward.²⁹⁸ Therefore, the law regulating historic shipwreck exploration would be significantly strengthened by Congressional amendment of the ASA to provide any of the following reforms.

*A. Require the ASA Guidelines to Recognize the Importance
of Guaranteed Rewards as Incentives
to Responsible Historic Shipwreck Exploration*

Current ASA guidelines issued by the National Park Service in 1990 are openly hostile to the private salvor. The guidelines recommend that states: "protect . . . state-owned shipwrecks from commercial salvage, treasure hunting and private collecting activities"²⁹⁹ by, basically, prohibiting such work.³⁰⁰ In this spirit, the guidelines impose no requirement that states offer specified financial rewards for either discoveries made pursuant to state permits or brought to the states attention by conscientious treasure hunters who are aware of the ASA's vesting of ownership in the states. Congress could amend sections 2104(a) and (b)³⁰¹ of the ASA to require a new guideline issued by the Park Service providing that state management plans should "(5) provide state-guaranteed financial rewards for historic shipwreck discoveries reported to the state or identified, salvaged or explored pursuant to state authority."

Issuance of such a guideline would impose no enforceable obligation on the state to put reward/incentive programs in place. The guidelines are advisory and non-binding.³⁰² However, the addition of the proposed guideline (5) would at least highlight the problems caused by the absence of state rewards and, perhaps, force the states to examine existing reward programs, if any.

296. Abandoned Shipwreck Act Guidelines, 55 Fed. Reg. 50,116 (1990) (Guidelines are nonbinding).

297. See *supra* note 54-62 and accompanying text (noting lack of uniformity among State statutes).

298. See Keller, *supra* note 191.

299. 55 Fed. Reg. 50,116, 50,134 (1990).

300. *Id.*

301. Abandoned Shipwrecks, 43 U.S.C. §§ 2104(a)(b) (2002).

302. See ASA Guidelines, 55 Fed. Reg 50,134 (1990).

B. Make the Guidelines Mandatory

In addition to specifying a requirement of state rewards, Congress could amend section 2104(a) of the ASA to provide that "such guidelines shall be binding on the states and appropriate federal agencies in developing legislation and regulations to carry out their responsibilities under . . . " the Act.

C. Condition Receipt of Federal Funds on Adoption of State Reward Programs

The optional character of the guidelines is the result of National Park Service commentary in the Introduction section to the guidelines indicating that the drafters rejected compulsory standards.³⁰³ Congress could amend sections 2104(a) and (b) to make state adoption of the guidelines (as modified above) a prerequisite for federal funding of state historic preservation programs authorized by the National Historic Preservation Act³⁰⁴ and supported by Historic Preservation Fund grant awards. Although this approach would not compel state adoption of salvage reward programs, for the first time states would have concrete incentives to do so.³⁰⁵ This approach could also be implemented by conditioning receipt of federal funds under any marine or environmentally-related federal legislation on state adoption of reward systems.

D. Fund State Rewards by Direct Congressional Appropriation

Congress could require the Department of the Interior to include in its annual budget a request for appropriation of funds for a program of state financial incentives. Grants based on state proposals or direct distributions to each state adopting a guaranteed reward program could be made based on a formula weighted to reflect the level of wrecking activity in each state over a period of time as recorded by the state.

Regardless of the financial incentives mechanism employed, the goal of legislative reform³⁰⁶ must be to encourage careful private historic

303. *Id.*

304. Historic Preservation Program, 16 U.S.C. § 470 (2002).

305. ASA Guidelines, 55 Fed. Reg. 50,117 (1990). (The drafters of the Guidelines expressly noted "concerns that the National Park Service may make the guidelines a requirement for State historic preservation programs." The Park Service should now do so to give meaning to the policies reflected in the ASA and the Guidelines).

306. The reforms outlined in this section are preliminary proposals that will be more fully developed in a subsequent Article on the topic. Author's note.

shipwreck exploration while preserving state and public interests and minimizing the temptations to search and salvage outside the law.

A particular advantage of formalized rewards programs is the opportunity to regulate the exploration process by limiting and controlling rewarded activity. Judicial standards for making state financial awards routinely include matters not covered by the original *Blackwall* factors³⁰⁷ traditionally considered by admiralty courts in salvage cases. For example, the court in *Columbus-America* added to *Blackwall* consideration of "the degree to which the salvors have worked to protect the historical and archeological value of the wreck and the items salvaged."³⁰⁸ One author has suggested awards limited to "disclosure of *information* pertaining to a shipwreck—such as its location, a detailed descriptions or reports of vandalism."³⁰⁹ It was noted that "a standard policy to reward 'honest and expeditious reporting of pertinent information . . .' would reduce the inclination for a finder . . . to pilfer the site . . ."³¹⁰ of an historic wreck. Reward programs would allow each state to implement broad shipwrecking goals and policies through the amount and availability of awards for specified exploration activities.

One final benefit would flow from reforms of this kind. At present, a treasure hunter's chances for financial gain from historic shipwreck discovery depend on the fortuity of location. If a wreck is found within the three (or nine) mile limit of state territorial waters the ASA applies, the state has title, and the wrecker's reward (if any) is controlled by state law.³¹¹ A discovery outside these waters triggers application of the maritime law of salvage and finds and offers a far more predictable reward.³¹² Amending the ASA and the guidelines to more strongly encourage or mandate state reward programs will eliminate the existing inconsistency in rights based solely on the accident of geography. A treasure hunter who knows that successful exploration will be properly rewarded by government is less likely to choose the pirates way.

307. *The Blackwall*, 77 U.S. 1 (1869) (discussing the *Blackwall* factors and subsequent ramifications).

308. *Columbus-America*, 974 F.2d at 468.

309. Stevens, *supra* note 34, at 615.

310. *Id.* at 615–16.

311. See *supra* notes 17, 18 and accompanying text (describing United States' claim to title, and specific exemptions therefrom).

312. See *supra* notes 87–98 and accompanying text (discussing maritime law of salvage and finds).

V. CONCLUSION

The SECOND NEWPORT SYMPOSIUM on "Sunken Treasure: Law, Technology, and Ethics" identified "a number of commendable accomplishments" of the Abandoned Shipwreck Act of 1987.³¹³ It was noted that, as a result of the ASA, "most states would not allow . . . [private] salvor activity . . . Even in Florida, where salvor activity has a long history, few wrecks have been released to salvors since the passage of the ASA."³¹⁴

This Article has examined the operation of the ASA through three models of treasure hunting: the Compliance, Negotiation and Pirates Models. Each model suggests that legislative destruction of the private salvage industry is not the positive achievement some commentators believe it to be. The Article calls for Congressional recognition of the fact that post-Millennium treasure hunters armed with high-tech equipment have the capacity to explore and salvage outside the law. The time has come to reexamine the ASA to determine whether creation of a new breed of modern day pirates is a tolerable consequence of the Act. This Article offers reasons to those concerned about the treasures of the sea supporting the conclusion that it is not.

313. See Giesecke, *supra* note 36, at 167.

314. *Id.* at 172.

