Choice of law matters: By arguing state law rather than federal maritime law, marina avoids liability for sinking of houseboat caused by "unsafe" berth

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Red Shield Insurance Co. v. Barnhill Marina & Boatyard Inc., 2009 Westlaw 1458022 (U.S. Dist. Ct., ND CA May 21, 2009).

Choosing the "wrong" law can have serious case-deciding consequences. Generally, federal maritime law applies to all maritime torts (i.e. property damage or personal injuries) occurring on navigable waters. Many judges, however, feel more comfortable with the law of the state where they sit, and often strain to apply state law when federal maritime law should rightly govern the action. Because maritime law has been developed to facilitate maritime commerce, it often differs substantially from ordinary state legal principles. As a result, a party who should lose under maritime law standards can avoid liability when state law is applied. This is apparently what happened recently in *Red Shield Insurance Co. v. Barnhill Marina and Boatyard Inc,* where defendant marina escaped what probably would have been a $160,000 judgment.

Plaintiff Insurer provided "floating home" property insurance on a houseboat, which sank at its leased berth at a marina in San Francisco Bay. A large accumulation of silt and mud under the houseboat had caused it to list and founder. The insurer paid the vessel owner $160,000 under the policy, then brought a subrogation action against the Marina. In competing summary judgment motions before the federal court, both parties argued that California's Floating Home Residency Law ("FHRL") Civil Code sec. 800 *et seq* governed the dispute. That statute requires a marina owner to "maintain the physical improvements of the common areas in good condition" for the benefit of all houseboat lessees. The Court acknowledged that this was a case of admiralty jurisdiction, and that federal admiralty law would displace the California statute if that statute squarely contravened settled maritime law principles. Finding no federal law on the issue, the court held that the subsoil below the insured's houseboat was not a part of the Marina's common areas. Accordingly, under California law, although the berth was known to be subject to silting, the Marina had no obligation to dredge or otherwise maintain it.

To the extent the Court's opinion rests on California law, its reasoning seems sound. However, the Court failed to consider the existence of federal maritime case law, which arguably contradicts and conflicts with California's FHRL. Under federal maritime law, specific duties of care are imposed upon the owners of wharfs and marinas. While a marina owner does not guarantee the safety of a boat at its dock, it is "under a duty to exercise reasonable diligence to furnish a safe berth and to avoid damage to the vessel. This includes the duty to ascertain the condition of the berth, to make it safe or warn the ship of any hidden hazard or deficiency known to the wharfinger or which, in the exercise of reasonable care and inspection, should be known to him and not reasonably known to the shipowner." *Trade Banner Line Inc. v. Caribbean Steamship Co*. 521 F 2d 229, 230 (5th Cir 1975). Where a wharf owner knows the draft of a vessel on its premises, and knows that tidal changes may make the berth unsafe for a vessel of that draft, the wharf owner must "use reasonable diligence to determine whether the dockage spaces were reasonably safe" for the yachts which were going to use them. *"J. Frank Doubleday v. Corinthian Yacht Club* 1979 AMC 2578 (D MD 1973). Here, the Marina had dredged the berth in the past because of silt accumulations, and was presumably aware that the houseboat could be negatively impacted by the accumulation of silt and debris. It is unclear

whether the Marina had ever warned the houseboat owner of the silting problem. Had federal law been applied to this action, the court could well have reached another conclusion.

Most current marina leases contain exculpatory clauses which may insulate a marina from liability arising from negligent berth maintenance. Depending on the specific wording of the clause, and the jurisdiction involved, such clauses are often found to be valid. See, for example, *Sander v. Alexander Richardson Investments* 334 F3d 712 (8th Cir 2003) and *Markel American Ins. Co. v. Dagmar's Marina LLC* 2007 AMC 2259 (Wash App 2007), which held that an "own negligence" exculpatory clause is valid if it is "sufficiently clear," versus *Pelletier v. Alameda Yacht Harbor* 188 Cal App 3d 1551 (1986), which found a Marina's contractual exculpation for its own negligence to be void as against public policy. The lesson to be drawn from this case that an early and thorough examination of choice of law issues can have a significant impact on the outcome of a case.