

CLIENT ADVISORY

Current Issues Regarding Punitive Damages Under P&I and MEL Policies

The issue of punitive damages has become significant for maritime employers with employees working on maritime vessels since the June 2009 United States Supreme Court ruling in *Atlantic Sounding Co. v. Townsend* that made punitive damages allowable under Maintenance & Cure. In late 2010, a \$25,000,000 verdict was issued in *Doe v. Maersk Line Ltd.*, a case involving punitive damages. As one of the largest verdicts in the United States last year, it points to stormy times for maritime employers. Seemingly small mistakes in handling vessel crew injury claims can now lead to extremely costly punitive damages to your client. A punitive damage verdict could put your client out of business in a short period of time. Care must be taken to advise your clients of these developments as punitive damages typically are not covered under Protection and Indemnity (P&I) or Maritime Employers Liability (MEL) policies.

MEL for crew injuries can be covered under a P&I policy written for a maritime vessel or on a mono-line basis under a MEL policy. MEL insurance is the most comprehensive on-the-job injury coverage available in the U.S. Unlike other forms of workers' compensation, MEL allows injured seamen to sue their employer for their injuries, with no limit on amounts recoverable. Claims are either settled through agreement or in court, and the courts generally favor the seaman. There are five key remedies under general maritime law that a MEL policy covers. Maintenance & Cure is the first of these remedies to be used when a crew injury occurs and where punitive damages come into play.

Maintenance & Cure is an ancient right of a seaman. Found in use over 1,000 years ago, it was codified into U.S. general maritime law in 1823. Maintenance & Cure pays for transportation back to home, wages, medical bills and a daily stipend to injured crewmembers in the service of a maritime vessel. The above cited *Doe v. Maersk Line Ltd.* case has very peculiar circumstances and reportedly no witnesses. It involved a seaman who reportedly became intoxicated and was injured while on shore leave. Authorities brought the drunk seaman back to the vessel and took him to the captain, who sent the seaman to his bunk to sleep it off. The injured seaman claims to have asked for medical attention and was turned down by the captain. Not providing medical attention for the injured seaman resulted in the \$25,000,000 verdict.

To make matters worse, the BP Macondo well blowout in April 2010 has resulted in a number of injury/death cases suing for punitive damages under some of the other four key remedies covered under the Maritime Employers Liability policy. These are:

- **Jones Act:** Allows an injured crewmember to sue the maritime employer for negligence.
- **Un-seaworthiness:** Allows the injured crew member to sue for unsafe working conditions.
- **Death on the High Seas Act:** Coverage for death claims occurring outside of state waters.
- **Wrongful Death:** Coverage for death claims occurring within state waters.

The Spill Act (H.R. 5503), a bill that has passed the House of Representatives and, as of the publication of this article, is currently in the Senate, is another piece of legislation that could add to the potential exposures for maritime employers as it specifically calls for punitive damages to be payable under the Death on the High Seas Act and the Jones Act.

We are not aware of any U.S. P&I or MEL insurance products that do not have an exclusion for punitive damages. Your clients need to be made aware that this is a significant exposure for them.

While we are working on insurance solutions for this issue, we recommend the following to help your maritime employer clients avoid punitive damages under Maintenance & Cure:

- Provide a MEL policy that does not have a deductible and the insurance company "pays on behalf of" the maritime employer, removing the maritime employer from the process.
- Have your client employ an experienced, professional maritime claims adjuster and manage the claims process from first dollar up to the deductible under the MEL policy.

Your maritime employer clients will benefit from being removed from the claims process. Maintenance & Cure claims typically go wrong in the first thousand dollars of expenses if not handled properly, and this is where punitive damages will be an issue for your clients.

AmWINS' Energy Practice has a special focus on marine issues and can be contacted with questions regarding MEL policies.

This article was prepared by Pascal Ray and the AmWINS Energy Practice.

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