

# MARPOL DETENTION COSTS INSURANCE (MDCI)

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Replacement shipowner's insurance cover when facing allegations of MARPOL violations in the US



**SHORELINE**

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## Introduction

The United States has long pursued a policy of deterrence in combating violations of the International Convention for the Prevention of Pollution from Ships (MARPOL). In addition to traditional enforcement methods, the US administration has implemented a whistleblower reward program to incentivize individual seafarers with insider knowledge to report suspected environmental misconduct.

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## Legislative Framework in the US

US Port State Control (PSC) inspections focus on record keeping requirements and regulatory compliance with, *inter alia*, the International Convention for the Prevention of Pollution from Ships (MARPOL), the US implementing legislation: the Act to Prevent Pollution from Ships (APPS) and the Ports and the Waterways Safety Act (PWSA). With stringent regulations and a whistleblower reward program in place, even the most vigilant owners and well-operated ships can face substantial legal fees and expenses for the detention of their vessel's crew following the suspicion of a violation.

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## Case History

In the last 20+ years, Shoreline has researched close to 100 such cases, many of which have resulted in substantial fines and penalties and equally high whistleblower rewards which can be up to 50% of the amount of the fine or penalty paid by the vessel owner, operator and /or manager.

Putting this in perspective, a major cruise line paid a fine in the amount of USD 40 million whilst a major Far East based container ship company faced a fine of USD 25 million.

These cases highlight the importance which the US regulatory authorities place upon the enforcement of MARPOL regulations and their policy of holding corporations vicariously accountable for unauthorized, unwanted and impermissible (mis)conduct of their crew.

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## Legal Implications

As maritime trade and pollution concerns grew, so did the US administration's emphasis on deterrence. The USCG, working in collaboration with other enforcement agencies, established specialized units dedicated to the investigation and enforcement of suspected violations, which often include unknown, unwanted and strictly prohibited conduct occurring onboard a vessel on the high seas. These units focused on monitoring vessel compliance, shipboard record keeping, conducting inspections and gathering evidence to build strong cases against offenders.

Through the enhanced PSC inspection regime that followed, the USCG now routinely inspects a ship's deck and engine logs, oil record book, sounding logs, alarms and other electronically stored data during US port calls. If irregularities are discovered in the ship's onboard record keeping, regardless of the geographical location of the specific log entry under inspection, the shipowner, manager and certain individuals will stand accused of having false documentation while in US waters and obstruction of USCG agency proceedings (either by way of omission or commission), and the US government will commence legal proceedings.

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## The Whistleblower Reward Program

To enhance its enforcement efforts, the US administration introduced a whistleblower reward program as part of its deterrence policy. The program aimed to encourage individuals with knowledge of suspected violations to come forward.

The whistleblower reward program has proven to be a valuable tool in augmenting the effectiveness of the US administration's deterrence policy. By incentivizing seafarers to expose violations, the program broadens the scope of detection and enables authorities to pursue enforcement actions that might otherwise go unnoticed.

However, this policy also has unintended consequences which may be detrimental to the interests of the innocent shipowner and manager. The presence of significant financial incentives has encouraged some seafarers to fabricate and exaggerate claims of MARPOL violations for personal gain.

Anecdotally, we understand that many of the so-called magic pipe and oil record book cases find their genesis in HR issues. Many of these cases arise from reports made to the USCG by disgruntled employees who take exception to the way they have been treated onboard the vessel and or by their shoreside management.

Whilst great strides have been made by many companies to improve their environmental regulatory compliance, these human factors are hard to legislate for especially when such large financial rewards are on hand for those that step forward.

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### The Impact on P&I Cover

The primary objective of the International Group P&I Clubs is to provide insurance coverage to their members for various risks, including liability arising from accidental or other pollution incidents arising from the barratry of their crew. P&I Clubs do not provide coverage for the costs, fees and expenses incurred when investigating and/or defending a suspected MARPOL violation. Consequently, ship owners and managers facing an expanded MARPOL examination in the US are well advised to seek specialized legal counsel with experience and expertise in the subject matter. They should prepare to address the legal proceedings, potential penalties, and defense strategies independently, as P&I insurance does not provide support.

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### The Human Cost

Unfortunately, it is the innocent seafarers who are subsequently ordered ashore by the USCG and required to stay under strict conditions set by the Custom and Border Protection (CBP) Agency, detained ashore for an unknown and potentially lengthy functional detention through no fault of their own.

As innocent bystanders and potential witnesses to the alleged conduct, seafarers can be detained against their will for an indeterminable period, until the US authorities are satisfied, they have no further use.

The legal justification for their detention has no official legal precedent of which we are aware, instead, it relies upon the authority of the CBP, acting at the request of the USCG, to revoke and withhold a vessel's departure clearance until the vessel's owner and operator agree to house, feed, pay, insure and maintain certain members of the ship's crew for their later participation in a civil or criminal proceeding.

Deemed by the courts to be a flight risk, the seafarer witnesses will be relieved of their passports and ordered to remain under quasi house arrest until released; all of which being at the owner/manager's expense.

Legal commentators in the US have long argued that the Dept of Justice's practice of detaining seafarers against their will, constitutes a violation of their human rights.

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### Environmental and Social Governance

New ESG regulations can require shipowners and operators to integrate human rights considerations into their policies, procedures, and decision-making processes. This can include conducting human rights due diligence audits to identify and mitigate risks, ensuring that their operations and supply chains do not contribute to human rights abuses, and seek to promote responsible business conduct.

In recognizing that not all errors and omissions are preventable with policies, procedures, and training, it could be argued that a shipowner/manager with knowledge of the risks posed to their employees by MARPOL violation cases in the US, should ensure sufficient financial security is in place by way of adequate insurance, tailored to safeguard the interests, human rights and liberty of their seafarer employees.

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### MARPOL Detentions Costs Insurance

In recognizing this gap in a ship owner's P&I cover, Shoreline has developed a new insurance product to provide replacement cover when most needed. This new cover safeguards the company's interests as well as the interests of their crew; by ensuring the crew are provided with expert legal counsel, this will expedite the legal proceedings, which is to the company's advantage. This new insurance will also cover the costs incurred to protect the rights and liberties of their crew; all of which would previously have constituted an unbudgeted and significant expense.

With the innovation of this new insurance product the interests of those seafarers detained in the US legal system by the mere dint of their contract of employment can now be properly protected.

Additional details of this new cover can be found by accessing our MARPOL product information sheet and MARPOL product Q&A via our website: [www.shoreline.bm](http://www.shoreline.bm)

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