No. 22-30371

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

James Michael Jones,
Plaintiff

v.

Certain Underwriters at Lloyds, London, subscribing to Cover Note (Unique Market Reference or UMR) B1262SM0446416, doing business as Osprey Underwriting Agency, Limited,

Intervenor Plaintiff - Appellant

v.

Cox Operating, L.L.C.,

Defendant - Appellee

On Appeal from

United States District Court for the Eastern District of Louisiana
2:20-CV-1177

PETITION FOR PANEL REHEARING

SUBMITTED BY:
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Issue Meriting Rehearing

This Court has drawn a line between a P&I Policy's coverage for crewmembers' maintenance-and-cure liability, holding it is separate and apart from, and broader than, a P&I Policy's coverage for liability claims. That line is unsupported by the policy; unsupported by case law; and it will create significant challenges in the marine insurance industry for both underwriters and assureds. P&I Underwriters urge this Court not to draw that line.

Argument

This Court's opinion draws a line in P&I policy coverage: distinguishing *Naquin v. Elevating Boats, LLC*, 817 F.3d 235 (5th Cir. 2016), this Court's opinion provides that a P&I Policy covers both Jones Act and third-party liability when the vessel is, in effect, the situs of, and causally involved in, the accident. When an incident occurs off a vessel, a different result follows. Then, the P&I policy is not implicated for liability purposes, but it is still responsible for maintenance and cure.

The case law establishes that a maritime employer owes maintenance and cure when a Jones Act seaman is injured off his vessel. *Warren v. United States*, 340 U.S. 523 (1951); *Noble Drilling Corp. v. Smith*, 412 F.2d 952, 958 (5th Cir. 1969). P&I Underwriters cannot, and would not, contest that. But there is no line in the P&I policy between liability exposure and maintenance-and-cure exposure, and this Court should not create such a line. First, it is contrary to the language and structure

of the policy; second it is contrary to settled case law; and third, there is already an insurance policy to cover this very risk: Maritime Employers' Liability coverage.

1. *This Court's holding is not consistent with the P&I policy language.*

The commonest P&I policy language is the SP-23 form. It provides that "[t]he Assurer hereby undertakes to make good to the Assured [. . .] all such loss and/or damage and/or expense as the Assured shall **as owners of the vessel named herein** become liable to pay and shall pay. ROA.1941 (emphasis added).

This is one of two provisions in the policy outlining the scope of coverage. Just before this language, the policy provides that the insurance applies "against the liabilities of the Assured as hereinafter described, and subject to the terms and conditions hereinafter set forth, **in respect of the vessel** called the [. . .]" ROA.1941 (emphasis added). See generally *Badeaux v. Eymard Bros. Towing Co., Inc.*, 568 F.Supp.3d 645, 657 (E.D. La. 2021). These limitations apply to the entire P&I policy.

The policy then provides what it covers. First, it covers "liability for loss of life of, or personal injury to, or illness of, any person." Second, it covers "liability for hospital, medical, or other expenses necessarily and reasonably incurred in respect of loss of life of, personal injury to, or illness of any member of the crew of the vessel named herein or any other person." ROA.1941. Crucially – and dispositive here – both these coverages are within the twin limitations stated at the outset of the

policy: the liability must be incurred as owner of the vessel, and in respect of the vessel. There is no dividing line such that liability payments are subject to one standard, and maintenance and cure is subject to another standard. There is no case before this one holding that maintenance-and-cure liability is different from tort liability under a P&I policy.

Furthermore, the policy's second provision (liability for medical payments) plainly contradicts any effort to establish that maintenance and cure are separate and apart, subject to a different standard: the policy covers liabilities for hospital and medical expenses not just for crewmembers, but for "any other person." ROA.1941. The P&I policy does not, under its plain language, provide broader coverage for maintenance and cure than for any other liability.

2. *This Court's opinion cannot be squared with Naquin.*

This Court's opinion further cannot be squared with *Naquin*, because Mr. Naquin was a Jones Act seaman and the *Naquin* court found the P&I policy did not provide coverage, full stop, with no division between maintenance and cure on the one hand, and Jones Act negligence on the other. Naquin filed suit and his Jones Act status was hotly contested. The district court held, and this Court affirmed, that he was, in fact, a Jones Act seaman. 817 F.3d at 237. EBI was held liable for Naquin's injuries under the Jones Act for failure to provide a safe place to work. *Naquin v.*

Elevating Boats, LLC, 744 F.3d 927; 932-38 (5th Cir. 2014).[1] EBI was liable under the Jones Act. In the same sense that this Court held Mr. Jones's maintenance and cure was incurred as owner of the vessel, EBI's exposure to Mr. Naquin was incurred as owner of the vessel: the Jones Act only applies to seamen who work on a vessel or fleet of vessels under common ownership or control,[2] but the *Naquin* court held that is not enough. The vessel had to be actually involved in the casualty. The P&I policy follows the vessel, not the crewmembers.

Mr. Naquin had not been paid maintenance and cure, even though he was owed maintenance and cure. He was paid under the LHWCA as his employer contested his Jones Act status. But in finding that Mr. Naquin was a Jones Act seaman but that the assured did not have coverage under the P&I policy, this Court made no distinction between maintenance and cure on the one hand, and liability on the other – nor should it have: the P&I policy language first covers liability for personal injury, then the second paragraph covers liability for hospital and medical expenses. Under the rule of orderliness, *Naquin* controls.[3]

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[1] Mr. Naquin would not be a Jones Act seaman if the case were tried today because this Court reversed course in *Sanchez v. Smart Fabricators of Texas, LLC*, 997 F.3d 564 (5th Cir. 2021) (*en banc*).

[2] See generally *Sanchez*, outlining the scope and history of Jones Act status.

[3] See also *Gryar v. Odeco*, 719 F.2d 112 (5th Cir. 1983) (holding that acts of the vessel are a prerequisite for coverage under a P&I policy); *Republic Ins. Co. v. City and County of San Francisco*, 1996 WL 655577 (N.D. Cal. Aug. 26, 1996) (same); and the cases cited in P&I Underwriters' prior briefs to this Court.

3. *The insurance market has already identified the gap for Jones Act seamen off their vessel and there is insurance to cover that risk: an MEL policy.*

Protection & Indemnity policies are creatures of history: considered young in the marine insurance world, they are nonetheless more than a century old.[4] The gap identified by this Court is known to the insurance market – both buyers and sellers – and a specific, narrow policy is sold to cover it: Maritime Employers' Liability (MEL) policies. Unlike a P&I policy, an MEL policy is not limited to the vessel. See *Roberts v. Inland Salvage*, C/A No. 14-1929 (E.D. La. Dec. 19, 2017). The operative policy language in an MEL policy is this:

> We hereby agree, [. . .] to pay all sums which You become legally obligated to pay, as employer, for compensatory damages under 46 U.S.C. § 688 (the so-called "Jones Act") or the General Maritime Law of the United States, or for transportation, unearned wages, maintenance and cure and burial expenses, because of Bodily Injury by Accident or Bodily Injury by Disease, including wrongful death at any time resulting therefrom, sustained by any of your employees arising out of and in the course of their employment by You [. . .][5]

[4] See generally Libby, GE, *Some Aspects of Protection and Indemnity Insurance*, 1952 Ins. L. J. 684 (1952).

[5] See also *Gautreaux v. Tassin Int'l, Ltd.*, C/A No. 21-2987 (E.D. La.), Rec. Doc. 14-3, where an entire MEL policy is attached. The coverage language, at p. 4, provides:

> In consideration of the payment of the premium [. . .] We hereby agree [. . .] to pay all sums which You become legally obligated to pay, as employer, for compensatory damages under 46 U.S.C. 688 (the so-called "jones Act") or the General Maritime Law of the United States, or for transportation, unearned wages, maintenance and cure and burial expenses, because of Bodily Injury by Accident [. . .]

Obvious from the language of the policy, the MEL policy, unlike the P&I policy, covers an employer's Jones Act exposure regardless of whether a vessel is involved or not. As a corollary, it only covers crewmembers – unlike the P&I policy, it does not cover the vessel. The MEL policy expressly refers to Jones Act coverage. The Jones Act applies to vessels, so usually, vessels are nearby, but in an MEL policy, unlike a P&I policy, vessel operations are not a prerequisite for coverage. Ordinarily, a careful assured will carry both a P&I policy to cover its vessel-related liability and an MEL policy to fill the gap for seamen who are injured off the vessel.[6]

This Court's opinion, left unaltered, would yield a peculiar result in insurance, with part of a claim covered and part of a claim uncovered for the same accident. If a non-employee (say a dockworker, not a Jones Act seaman) is hurt through vessel operations (say her leg is crushed between the vessel and the dock), then there is coverage under the P&I policy for the entire claim. If the same dockworker is hurt is hurt with no vessel operations (say she slips on the dock and alleges someone left soap on that dock), then there is no coverage under the P&I policy under *Naquin*, but there would be under a marine general liability policy. One accident to one person in one place is covered by one policy.

[6] Often, MEL cover will be provided by endorsement on a separate policy, including a P&I policy.

If a Jones Act employee is hurt through vessel operations (say again she gets pinched between the vessel and the dock), the vessel owner is covered under the P&I policy. If the Jones Act employee is hurt *not* through vessel operations (say again she slips on the dock), something odd happens. Per *Naquin*, the vessel owner is not covered under the P&I policy for tort liability. But per this Court's opinion, the vessel owner is covered for maintenance-and-cure exposure.

The less-than-careful vessel owner will not have an MEL policy and will have uninsured exposure for the tort claim. The careful vessel owner will have an MEL policy, and the MEL policy would cover the claim, along with a portion of the P&I poilcy. In all likelihood, there would be double coverage for maintenance and cure, and the MEL policy would cover the liability claim alone.

Even though the assured is covered in full for the claim, that claim is, at the real risk of understatement, a challenge. The insured pays two deductibles – one for each policy. There are three lawyers involved too: one for the assured, paid-for by one or both of the insurers. The P&I underwriter will want counsel, as will the MEL underwriter, because they only cover a portion of the claim and will want to ensure they do not overpay. Who pays the assured's lawyer is uncertain – a P&I policy covers law costs, but here it would be only law costs for the defense of maintenance and cure.

More significantly, the boundary between what the P&I and MEL underwriter owe is deeply and unresolvably uncertain. The P&I underwriter owes maintenance and cure, but so does the MEL underwriter, but only through maximum medical improvement. Then in judgment, the MEL underwriter owes medical expenses if the employer is found negligent – a Jones Act negligence claim includes past and future medicals, to the extent the employer is at fault. Any settlement will deal with difficult-to-resolve negotiations over which medicals fall under which policy and why. P&I Underwriters cannot here tell this Court how these issues will be resolved, except it will assuredly be through protracted litigation. At argument, this Court asked what decision would sow confusion in the marine insurance world. P&I Underwriters respectfully submit that there is very real risk of confusion from this Court's opinion, if it is unaltered.

The P&I policy was written and limited to liabilities incurred as owner of the vessel, and liabilities in respect of the vessel. That limitation applies to both liability for tort damages and for medical expenses. An MEL policy fills the gaps. From the perspective of both underwriters and assureds, it would be preferable for this Court to take the case *en banc* and reverse *Naquin*, holding that a P&I policy's coverage for Jones Act seamen is coextensive with the Jones Act employer's exposure under the Jones Act, as opposed to expanding P&I coverage in part. If the P&I cover were extended in full to cover all Jones Act exposure regardless of the whereabouts of the

vessel, underwriters and assureds could adjust premiums, and MEL policies may be eliminated altogether, but the result would have the salutary effect of having one policy cover one accident and avoid the confusion of partial double coverage.

4. Conclusion

Because the P&I policy does not draw a line between maintenance and cure liability on the one hand, and tort liability on the other, the natural conclusion is that P&I Underwriters' paid maintenance and cure that is not owed; P&I Underwriters' limitation in their policy is effective; and P&I Underwriters can recover from Cox for the maintenance and cure paid. But however this Court rules with regard to P&I Underwriters' right to recover the maintenance and cure paid to Mr. Jones, P&I Underwriters respectfully urge this Court not to expand P&I coverage past the limits written in the language of the policy. That policy language draws no line between tort liability and maintenance-and-cure exposure, and this Court should not create a line that is uncalled-for in the policy or in the case law, and may well prove unworkable in practice.

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CERTIFICATE OF SERVICE

This is to certify that on October 26, 2023, the foregoing document was served, via the Court's CM/ECF Document Filing System, in compliance with Rule 25(b) and (c) of the Federal Rules of Appellate Procedure upon all counsel of record, and has been transmitted to the Clerk of Court.

S/Harry E. Morse

CERTIFICATE OF COMPLIANCE

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2. This document complies with the typeface requirements of FED. R. APP. P. 32(a)(5), and 5th CIR. R. 32.1 and the type-style requirements of FED. R. APP. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word 2019 in Times New Roman 14.

S/Harry E. Morse

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
October 13, 2023
Lyle W. Cayce
Clerk

No. 22-30371

CERTAIN UNDERWRITERS AT LLOYDS, LONDON

Plaintiff—Appellant,

versus

COX OPERATING,

Defendant— Appellee.

Appeal from the United States District Court
For the Eastern District of Louisiana
USDC No. 2:20-CV-1177

Before STEWART, DENNIS, and SOUTHWICK,[*] *Circuit Judges*.

PER CURIAM:

Certain Underwriters at Lloyds, London ("Lloyds") brought an intervenor complaint against Cox Operating LLC ("Cox") seeking to recover maintenance and cure benefits Lloyds paid to an injured seaman. Cox filed a motion for summary judgment, arguing that Lloyds bears responsibility for the payments under a protection and indemnity ("P & I") policy under which Cox is an assured. The district court agreed and granted

[*] JUDGE SOUTHWICK concurs in the judgment.

the motion. Lloyds timely appealed. Because the district court properly found that Lloyds is obligated to pay the maintenance and cure under the P & I policy, we AFFIRM.

I. Factual and Procedural Background

This intervenor suit arises from an underlying case whereby an injured seaman, James Michael Jones, sued Cox and his employer, nonparty Select Oilfield Services, LLC ("Select"). Jones brought claims of negligence and unseaworthiness based on injuries he sustained while employed by Select on a lift boat, the M/V SELECT 102, that Select time chartered to Cox. Jones, who was the captain of the M/V SELECT 102, sustained serious head injuries when he slipped and fell on a fixed saltwater platform owned by Cox. Select provided Jones's services as part of a Master Services Agreement ("MSA"), under which Select agreed to supply Cox with equipment, goods, and services to aid in the production of natural gas and oil.

Pursuant to the MSA, Select agreed to provide Cox with the M/V SELECT 102 lift boat, as well as a captain and crew to assist with Cox's oil and gas production in the Eloi Bay Field in St. Bernard Parish, Louisiana.[1] As relevant to this intervenor suit, Select also agreed to defend and indemnify Cox for "all [l]osses of every kind and character arising out of bodily injury, illness, death, property damage of [Select], arising out of, in connection with, incident to or resulting directly or indirectly from this Agreement or the provision of any Services, Goods, or Equipment provided under" the MSA, regardless of fault. To cover these indemnity obligations, Select agreed to procure insurance policies that included Cox as an additional assured and

[1] On its website, Cox describes the Eloi Bay Field as being "[l]ocated in state waters of L[ousiana]." COX, ELOI BAY, https://coxoperating.com/footprint/eloi-bay/ (last visited October 12, 2023).

contained waivers of subrogation in Cox's favor. To that end, Select obtained a general liability policy with U.S. Specialty Insurance Company ("USSIC"), and, as relevant to this appeal, a maritime P & I policy with Lloyds.

The P & I policy provided coverage for "all such loss and/or damage and/or expense as the [a]ssured shall as owners of the vessel named herein have become liable to pay," including "hospital, medical, or other expenses necessarily and reasonably incurred in respect of loss of life of, personal injury to, or illness of any member of the crew of the vessel." Select had the ability to add additional assureds and release from liability "others for whom the [a]ssured is performing operations," and added Cox as an additional assured under the policy. Lloyds, in turn, agreed to "waive all rights of subrogation against any parties so released." However, Lloyds also limited this waiver of subrogation by including a provision stating that "no party shall be deemed an [a]dditional [a]ssured or favoured with a waiver of subrogation on any vessel insured hereunder which is not actually engaged or involved in the intended operations at the time of loss[.]"

After Lloyds paid maintenance and cure to Jones under the P & I policy, Lloyds filed an intervenor complaint seeking to recoup those costs from Cox as the party at fault for Jones's injuries. Cox filed a motion for summary judgment, arguing that Lloyds's intervenor complaint should be dismissed because Lloyds had waived its subrogation rights under the P & I policy. The district court granted summary judgment in favor of Cox, determining that "[b]ecause Cox was named as an additional insured under the P&I policy and because Select released Cox from liability for Jones's injury, Lloyds has no right to recover from Cox through subrogation." The district court rejected Lloyds's argument that the limitation clause in the waiver of subrogation provision applied, finding that the M/V SELECT 102 was in fact "involved in the intended operations of the parties at the time

Jones was injured" since it was at the Eloi Bay Field to assist with Cox's operations, including the service platform, and "the M/V Select 102 was actually servicing the oil and gas production facility" on that day.

Lloyds now appeals the dismissal of its intervenor complaint, arguing that the district court erred in ruling in Cox's favor because the injury did not occur on the M/V SELECT 102 and thus was not covered by the P & I policy, or alternatively, falls within the clause limiting Lloyds's waiver of subrogation rights.

II. Standard of Review

We review a district court's grant of summary judgment de novo. *Tiblier v. Dlabal*, 743 F.3d 1004, 1007 (5th Cir. 2014). Summary judgment is proper "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). "[T]his court construes 'all facts and inferences in the light most favorable to the nonmoving party.'" *McFaul v. Valenzuela*, 684 F.3d 564, 571 (5th Cir. 2012) (quoting *Dillon v. Rogers*, 596 F.3d 260, 266 (5th Cir. 2010)). The summary judgment movant bears the burden of proving that no genuine issue of material fact exists. *Latimer v. SmithKline & French Labs.*, 919 F.2d 301, 303 (5th Cir. 1990).

III. Discussion

A. The P & I policy covers Jones's maintenance and cure

The parties dispute whether the maintenance and cure Lloyds paid to Jones was covered by the P & I policy because Jones's injury did not take place on the M/V SELECT 102. Though the district court found that it was "undisputed" that Jones's maintenance and cure fell within the P & I policy, Lloyds vigorously denied before the district court, and maintains on appeal,

that Jones's maintenance and cure was not properly covered under the P & I policy.

Lloyds contends that the district court erred in finding Jones's injury to be covered under the P & I policy because the policy covered "only liabilities related to vessels that are scheduled under the policy" since the policy states that it provides coverage for "all such loss and/or damage and/or expense as the [a]ssured shall *as owners* of the vessel named herein have become liable to pay." The P & I policy includes coverage for claims asserted by Jones for "loss of life, injury, and illness," Lloyds's argument goes, and under Louisiana law[2] we must read this language in conjunction with the preceding paragraph that limits coverage to losses the assured acquires "as owner"[3] of the M/V SELECT 102. *Naquin*, 817 F.3d at 239 (under Louisiana law insurance contracts "must be interpreted in light of the other provisions so that each is given the meaning suggested by the contract as a whole").

Lloyds cites *Naquin* for the proposition that where an "as owner" clause to a P & I policy remains intact, coverage under the P & I policy only extends so far as there is a "causal operational relation between the vessel

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[2] Given that there is no federal maritime rule governing the issues of whether Jones's maintenance and cure benefits are covered by the P & I policy or whether the limitation to the subrogation waiver applies here, this court applies Louisiana law as the state with the most substantial interest in the application of its state's laws to the interpretation of the P & I policy. *Naquin v. Elevating Boats, L.L.C.*, 817 F.3d 235, 238 (5th Cir. 2016) ("In the absence of a specific and controlling federal maritime rule over this [marine insurance] dispute, we interpret this maritime insurance contract under Louisiana state law."). Select, the co-signatory of the P & I policy, is a Louisiana-based company, and the policy was executed to insure for risks associated with the provision of services on coastal waters of Louisiana, which is where Jones was injured.

[3] While the "as owner" clause was deemed deleted with respect to any additional assureds under the P & I policy, additional assureds are nonetheless "not entitled to a broader scope of coverage than would be the owner."

and the resulting injury." *Id.* at 240 (quoting *Lanasse v. Travelers Ins. Co.*, 450 F.2d 580, 584 (5th Cir. 1971)). Cox responds that *Naquin* is inapplicable because it only addressed liability coverage under a P & I policy, not an insurer's attempts to recoup maintenance and cure through subrogation. Indeed, *Naquin* involved a third-party complaint by a Jones Act employer against its insurers challenging the denial of liability coverage for a land-based incident. 817 F.3d at 237–8. There, the court determined that the P & I insurer properly denied liability coverage because the employer was not liable, as owner of the covered vessel, for the land–based incident that caused the seaman's injury. *Id.* at 240. Here, in contrast, Lloyds did not provide liability coverage under the P & I policy, and the issue instead is whether Jones became due maintenance and cure under the policy.

The court in *Naquin* relied on *Lanasse*, which called for "some causal operational connection between the vessel and the resulting injury" for the provision of maintenance and cure under a P & I policy to fall within a time charters' indemnity provision. 450 F.2d 580. Notably, the indemnity provision in the time charter in *Lanasse* only applied to damages "directly or indirectly connected with the possession, navigation, management, and operation of the vessel." *Id.* at 582 n.4.[4] Here, in contrast, the MSA's indemnity provision contained no such limitations, and explicitly applied to losses beyond the mere operation of the vessel to cover "all [l]osses of every kind and character arising out of bodily injury, illness, death, property damage" in connection with Select's services.

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[4] Judge Brown also cautioned that had the suit, which was between parties to a time charter, been a subrogation action brought by an insurer a "serious question" would arise as to whether the action would be barred by the anti-subrogation rule, under which "an underwriter cannot recover by way of subrogation against its own assured" where the policy includes an "explicit policy provision waiving subrogation." *Id.* at 585.

Select bore the obligation to pay maintenance and cure to Jones as a shipowner whose seaman was injured while "in service of the vessel." Select thus became liable to pay Jones maintenance and cure precisely as the "owner" of the M/V SELECT 102. *Bertram v. Freeport McMoran*, Inc., 35 F.3d 1008, 1013 (5th Cir. 1994) ("shipowner must pay maintenance and cure"); *Hernandez v. Bunge Corp.*, 01-1201 (La. App. 5 Cir. 4/10/02), 814 So. 2d 783, 791, *writ denied*, 2002-1551 (La. 9/30/02), 825 So. 2d 1193 ("Maintenance and cure is an obligation imposed upon a shipowner."); THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW, § 6–28 (6th ed. 2022) (maintenance and cure is the "obligation of a shipowner who employs seamen to care for them if they are injured or become ill.").

Select's duty to provide Jones with maintenance and cure exists regardless of fault because Jones' injuries were sustained while he was in "service of his ship," and Select waived its right to recover any such costs from Cox under the indemnity provision of the MSA. *Warren v. United States*, 340 U.S. 523 (1951) (seaman entitled to maintenance and cure benefits when injured while on shore leave); *Noble Drilling Corp. v. Smith*, 412 F.2d 952, 958 (5th Cir. 1969) ("it would be unreasonable to say that a seaman working out from our shores in the Gulf of Mexico on a drilling platform, which his vessel has the function of servicing, is not also in the service of his ship"); *Cent. Gulf S. S. Corp. v. Sambula*, 405 F.2d 291, 296 (5th Cir. 1968) ("the vessel and her owners are liable, in case a seaman falls sick, or is wounded, in the service of the ship, to the extent of his maintenance and cure"); *Bertram*, 35 F.3d at 1013 (maintenance and cure "in no sense is predicated on the fault or negligence of the shipowner"). Given that Select has no right to seek reimbursement of Jones's maintenance and cure from Cox, Lloyds as a subrogated insurer, can have no greater rights as to Cox than Select as the subrogor. *Travelers Ins. Co. v. Impastato*, 607 So. 2d 722, 724 (La. App. 4th Cir. 1992) ("Under Louisiana law, a subrogated insurer acquires no

greater rights than those possessed by its subrogor and is subject to all limitations applicable to the original claim of the subrogor.").

Because Select was liable to pay Jones maintenance and cure as "owner" of the M/V SELECT 102, such benefits were covered by the P & I policy.

B. The limitation on Lloyds's waiver of subrogation does not apply

Having found that the P & I policy covered Jones's maintenance and cure, we next turn to the status of Lloyds's right to bring this subrogation action considering the waiver of subrogation rights provision[5] in the P & I policy.[6] The district court found that the M/V SELECT 102 was "engaged or involved in the intended operations" at the time of Jones's accident because "the M/V Select 102 and its crew were at the Eloi Bay Field to assist with Cox's operations there, including the service platform, and the M/V

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[5] The "Blanket Additional Assureds and Waivers of Subrogation" provision in the P & I policy allowed Select to "name others for whom [Select] is performing work as [a]dditional [a]ssureds on this [p]olicy," release any additional assureds from liability, and required Lloyds to "waive all rights of subrogation against any parties so released [from liability by Select]." The provision also contained a limitation clause stating that "[n]otwithstanding the preceding provision, no party shall be deemed an [a]dditional [a]ssured or favoured with a waiver of subrogation on any vessel insured hereunder which is not actually engaged or involved in the intended operations at the time of loss[.]"

[6] The parties argue at length over whether Select's release of Cox in the MSA served to also waive Lloyds's subrogation rights as to Cox. Under Texas law, the law applicable to the MSA, "[s]ubrogation rights belong to the subrogated party and are waivable only by the insurer," so Select could not have waived Lloyds's subrogation rights through the MSA. *Halliburton Energy v. Ironshore Specialty Ins.*, 921 F.3d 522, 532 (5th Cir. 2019). Despite Select's agreement in the MSA to procure insurance that included a waiver of subrogation in Cox's favor, nowhere in the MSA does Select purport to waive subrogation rights on behalf of its insurer. Rather, Select agreed to support its indemnity obligations to Cox through an insurance policy in which Cox "is listed as an additional insured on and provided a written waiver of subrogation in [Cox's] favor."

Select 102 was actually servicing the oil and gas production facility on" the day Jones was injured.

Lloyds argues that the district court erred in finding that the vessel was engaged in its "intended operations" at the time of the Jones's incident because the "P & I Policy makes waiver of subrogation coextensive with coverage." Yet, having found that Jones's maintenance and cure was covered by the P & I policy, the waiver of subrogation clause also covers Cox as an additional assured under the policy. Lloyds insists that the district court's reasoning ignored the plain meaning of the limitation restricting coverage and the waiver of subrogation to "vessel operations," yet nowhere does the policy explicitly limit either coverage or the waiver of subrogation to "vessel operations." Instead, coverage extends to "all such loss and/or damage and/or expense as the [a]ssured shall as owners of the vessel named herein have become liable to pay," including "hospital, medical, or other expenses necessarily and reasonably incurred in respect of loss of life of, personal injury to, or illness of any member of the crew of the vessel." The P & I policy limits the waiver of subrogation where a vessel is "not actually engaged or involved in the *intended* operations at the time of loss." The policy thus limits the waiver of subrogation only where the vessel is not engaged in operations intended by the parties to the MSA at the time of the loss. *Doerr v. Mobil Oil Corp.*, 774 So.2d 119, 124 (La. 2000) (when the words of the insurance contract "are unambiguous and the parties' intent is clear, the insurance contract will be enforced as written.") (citing La. Civ. Code Ann. art. 2046 (1985)).

The M/V SELECT 102 was involved in the operations intended by Select and Cox at the time of the incident—even if the vessel wasn't directly

involved in the incident.[7] Under the MSA, Select and Cox agreed that the intended operations of the vessel included "all services, labor and work performed by [Select] for the benefit of [Cox] or pursuant to [the MSA] or otherwise performed in connection with or without any Goods or Equipment, including delivery thereof," and it is undisputed that the MSA generally required Select to "assist with Cox's operations in the Eloi Bay Field." At the time of Jones's injury, the M/V SELECT 102 was engaged in its "intended operations" in the Eloi Bay as defined under the MSA, and Jones was serving Cox in his capacity as captain of the vessel. Even if there were ambiguity as to the term "intended operations," as included in the limitation on the waiver of subrogation, any such ambiguity is to be resolved "in favor of coverage." *Bonin v. Westport Ins. Corp.*, 2005-0886 (La. 5/17/06), 930 So. 2d 906, 911 (citations omitted); *Louisiana Ins. Guar. Ass'n v. Interstate Fire & Cas. Co.*, 630 So. 2d 759, 764 (La. 1994) ("ambiguous contractual provision is to be construed against the drafter, or, as originating in the insurance context, in favor of the insured.")

Because the M/V SELECT 102 was engaged in its "intended operations" at the time of Jones's injury and the limitation on the waiver of

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[7] Lloyds filed a 28(j) letter, arguing that cases applying the "active control duty" theory to negligence claims against vessel owners somehow means that the M/V SELECT 102 was not "actually engaged or involved in the intended operations at the time of the loss" as understood under the P & I policy. Under the "active control" doctrine, vessel owners have a "a duty to exercise reasonable care to prevent injuries to longshoreman working in areas remaining under the 'active control of the vessel' or when the vessel owner 'actively involves' itself in the cargo operations[.]" *Fontenot v. United States*, 89 F. 3d 205, 206 (5th Cir. 1996); *see also Scindia Steam Navigation Co. v De Los Santos*, 451 U.S. 156, 164 (1981) ("vessel [owner] may be liable if it actively involves itself in the cargo operations and negligently injures a longshoreman[.]) While negligence claims are subject to the "active control duty," *Manson Gulf, L.L.C v. Mod. Am. Recycling Serv., Inc.*, 878 F.3d 130, 134 (5th Cir. 2017) (noting that "the Supreme Court clarified in *Scindia* that vessel owner liability sounds only in negligence"), maintenance and cure is "in no sense [] predicated on the fault or negligence of the shipowner." *Bertram*, 35 F.3d at 1013 (internal citation removed).

subrogation does not apply, Lloyds waived its subrogation rights as to Cox.[8] The district court properly dismissed Lloyds's intervenor complaint.

IV. Conclusion

For the reasons set forth, we AFFIRM the district court's dismissal of Lloyds's intervenor complaint.

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[8] Lloyds's claim is also barred by the anti–subrogation rule, under which "[a]n insurer cannot by way of subrogation recover against its insured *or an additional assured* any part of its payment for a risk covered by the policy." *Lloyd's Syndicate 457 v. FloaTEC, L.L.C.*, 921 F.3d 508, 521 (5th Cir. 2019) (emphasis in original). It is undisputed that Cox was an additional assured under the P & I policy, and as discussed above, Jones's maintenance and cure was covered under the P & I policy. Lloyds attempts to evade the application of the anti-subrogation rule by pointing to cases that have found the rule to bar only subrogation suits that involved waivers of subrogation that did not contain the limitation contained in the P & I policy at issue here. However, the limitation on Lloyds's waiver of subrogation does not apply here because Jones's injuries arose while the vessel was engaged in the operations intended by the parties to the MSA.