MERCK & CO., INC., et al., Plaintiffs, v. ACE AMERICAN INSURANCE COMPANY, et al., Defendants.	:	CIVIL ACTION SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION Docket No.: A-001879-21 ON APPEAL FROM THE LAW DIVISION, UNION COUNTY Docket No. Below: UNN-L02682-18 Sat Below: Hon. Thomas J. Walsh, J.S.C.

BRIEF OF AMICI CURIAE: THE NEW JERSEY HOSPITAL ASSOCIATION; THE NATIONAL ASSOCIATION OF MANUFACTURERS; THE PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA; THE PRODUCT LIABILITY ADVISORY COUNCIL, INC.; AND THE RESTAURANT LAW CENTER

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AMICI IDENTITY AND STATEMENT OF INTEREST

Proposed amici curiae are associations composed of companies engaged in various businesses or industries in New Jersey and elsewhere. The amici include the following.

- Founded in 1918, the New Jersey Hospital Association ("NJHA") is a not-for-profit trade association representing and advocating the interests of more than 400 member hospitals, health systems, nursing homes, home health agencies, hospice, assisted living providers and other healthcare-related business in New Jersey. NJHA's members share a collective mission of providing quality, affordable and accessible healthcare to the people of New Jersey. In furtherance of this mission, NJHA provides leadership in advocacy, policy analysis, education, and community outreach on important issues and controversies that impact hospitals and health systems. NJHA regularly appears before all three branches of New Jersey government to provide the judiciary and elected and appointed decision makers with its expertise and industry perspective.

- The National Association of Manufacturers ("NAM") is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states, including New Jersey, and is home to approximately 7,000 manufacturing firms. Manufacturing employs more than 12.5 million men and women, contributes $2.71 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for nearly two-thirds of all private-sector research and development in the nation. The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States. The NAM regularly submits amicus briefs in cases presenting issues of importance to the manufacturing community.

- The Pharmaceutical Research and Manufacturers of America ("PhRMA") is a voluntary, nonprofit association representing the nation's leading research-based pharmaceutical and biotechnology companies, including nine with U.S. headquarters in New Jersey. PhRMA's member companies research, develop, and manufacture medicines

that allow patients to live longer, healthier, and more productive lives. Since 2000, PhRMA member companies have invested nearly $1 trillion in the search for new treatments and cures, including $91.1 billion in 2020 alone — more R&D investment than any other industry in America. PhRMA's mission is to advocate public policies that encourage the discovery of life-saving and life-enhancing medicines. PhRMA closely monitors legal issues that affect the pharmaceutical industry and frequently participates in such cases as an amicus curiae.

- The Product Liability Advisory Council, Inc. ("PLAC") is a non-profit professional association of corporate members representing a broad cross-section of American and international product manufacturers, including seven with U.S. headquarters located in New Jersey. These companies seek to contribute to the improvement and reform of law in the United States and elsewhere, with emphasis on the law governing the liability of manufacturers of products and those in the supply chain. PLAC's perspective is derived from the experiences of a corporate membership that spans a diverse range of industries in the manufacturing sector, including pharmaceuticals, transportation, electronics, informational technology, and more. Since 1983, PLAC has filed more than 1,200 briefs in both state and federal courts as amicus curiae on behalf of its members, while presenting the broad perspective of product manufacturers seeking fairness and balance in the application and development of the law as it affects product risk management.

- The Restaurant Law Center ("RLC") is the only independent public policy organization created specifically to represent the interests of the food service industry in the courts. Restaurants and other food service providers are the nation's second-largest private-sector employers. New Jersey is home to over 27,000 restaurants, providing over 300,000 jobs, or roughly 8% of the state's overall employment. The RLC provides courts with the industry's perspective on legal issues significantly impacting its members. Specifically, the RLC highlights the potential industry-wide consequences of pending cases like this one, through regular participation in amicus briefs on behalf of the industry. The RLC's amicus briefs have been cited favorably by state and federal courts.

The foregoing associations and/or their members are incorporated in, conduct substantial business operations, or represent companies that conduct substantial business in New Jersey. As a result, they rely significantly upon insurance policies to provide coverage for their various risks and they rely on New Jersey law that protects their insurance rights. Amici respectfully submit this brief to address important issues of New Jersey insurance law impacting them, other corporate and individual policyholders, the public interest, and the efficient management of coverage litigation before our courts.

This case implicates the availability of insurance to address cyber risks. According to insurers and commentators, cyber risks are among the most significant current threat to individuals and businesses of all sizes. How insurance policies are interpreted with respect to cyber risks is, therefore, of great importance to the proposed amici, which represent a cross-section of vital industries, large employers, and business leaders.

Amici also submit this brief to address matters relating to New Jersey's established standards for interpreting and applying (if at all) standard-form exclusions, which are drafted by insurers, who alone review and twiddle with every clause, every word, and every comma in their standard-form language. Rules of insurance interpretation have far-reaching impact on the many insurance products that policyholders buy to protect themselves from risks

in this and other states. It is essential that a court's contract construction under New Jersey law results in the uniform and predictable interpretation of insurance policies.

The amici can offer a broad perspective to this Court regarding the insurance issues involved in this dispute. The amici and their members carry out business operations in healthcare, manufacturing, pharmaceuticals, food service, product development and sales, as well as many other critical fields, and maintain coverage with regard to cyber, property, liability, and various other risks. As a result, amici are well-positioned to highlight the importance to industry of dependable cyber coverage and reliable rules of insurance policy interpretation. See Neonatology Assocs. v. C.I.R., 293 F.3d 128, 132 (3d Cir. 2002) ("Even when a party is very well represented, an amicus may provide important assistance to the court," including by "explain[ing] the impact a potential holding might have on an industry or other group.") (internal citation omitted).

PRELIMINARY STATEMENT

By way of background, this case involves coverage that Merck & Co., Inc. ("Merck") sought for loss resulting from NotPetya malware installed on its systems. The parties agree that Merck had All-Risk policies (those granting coverage for "all risks" not expressly excluded) and that the policies included cyber risk coverage. Merck's insurers ("Insurers") denied coverage to Merck,

pointing to certain War Exclusions[1] that the insurance industry developed years before cyber-risks emerged.

In holding that the War Exclusions did not apply, the trial court employed established doctrines of insurance policy interpretation. It considered the parties' expectations of coverage as established by the involved policies' plain language and in accordance with relevant and important case law respecting policy construction. The trial court determined the War Exclusions were clear, unambiguous, and did not apply to Merck's claim for loss and damage resulting from NotPetya malware installed on its systems.

This appeal by insurers[2] raises unsettling questions concerning how insurance contracts and exclusions should be interpreted. By developing and employing consistent rules of interpretation, New Jersey courts have created an environment in which policyholders can conduct business in a sensible, reasonable

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[1] The International Risk Management Institute ("IRMI") defines the "War Exclusion," as "a provision found in nearly all insurance policies that excludes loss arising out of war or warlike actions…." IRMI, at https://www.irmi.com/term/insurance-definitions/war-exclusion.

[2] Defendant National Union Fire Insurance Co. of Pittsburgh, PA filed a Motion for Leave to File an Interlocutory Appeal. The following defendant insurers joined in support of such motion: Aspen Insurance UK Limited; HDI Global Insurance Co.; Houston Casualty Co.; Mapfre Global Risks Compania Internacional de Seguros y Reaseguros, S.A.; Vienna Insurance Group AG; Zurich American Insurance Company; and Lloyd's Syndicate Nos. 1183, 1200, 1955, and 4444. "Insurers" refers collectively to Merck's involved insurers.

manner. Maintaining that dynamic is critically important to amici, who rely on the New Jersey courts' construction of contracts to remain fair and predictable for both policyholders and insurers.

It appears that the Insurers paid some NotPetya claims presented by policyholders under policies containing War Exclusions, but they did not pay Merck's. Merck 1/21/2022 Br. at 5.[3] The Insurers challenge their obligations to Merck, citing Merck's alleged sophistication. The proposed amici are concerned that the Insurers' proposed interpretation and application of policies' standard-form War Exclusions, if adopted, could have far-reaching, detrimental impact on the many insurance products that policyholders buy to protect themselves from risks in this and other states.

It is critical to policyholders that their access to much-needed coverage not be delayed after suffering a loss. It is also important for them to have certainty in understanding the parameters of the coverage they purchased. The proposed amici, therefore, will address the need for uniform interpretation of standard exclusions that recur, in similar or identical form, across many types of polices issued to insureds of all kinds throughout New Jersey and across the country. If interpretation

[3] The proposed amici cite to Merck's Brief because the Appendix has been filed under seal. Per the Merck Brief, support for this statement appears in the Appendix at Da59 and Da62-66.

of a standard-form exclusion were driven by a policyholder's alleged "sophistication," then the same standard exclusion would take on different meanings for different policyholders, and whether that same exclusion bars coverage could depend on whether the policy was purchased by an individual homeowner, a municipality, a small business, or a large corporation. That would result in inconsistent interpretation and unpredictable coverage for risks in this State. It also would result in unnecessary, costly, and prolonged disputes about a policyholder's alleged sophistication, potentially requiring a factual determination before a court could narrow a coverage dispute by interpreting, as a matter of law, even a standard form insurance exclusion drafted by the insurer.

Basic principles of construction are being called into question in connection with the Insurers' invocation of traditional War Exclusions to evade their cyber coverage obligations, and are being debated even though:

- Prior to selling policies with such War Exclusion provisions, Insurers were aware of cyberattacks allegedly involving hostile actions by state-actors (*e.g.,* North Korea's cyberattack against Sony Pictures in 2014), but they chose to sell Merck All-Risk property insurance with affirmative grants of cyber coverage, and without cyber-related limitations or exclusions;

- Before selling the policies, Insurers were aware of narrow interpretations by courts of the War Exclusion as having to do with conventional war;
- Before Merck bought its policies, the insurance industry had already developed standard cyber-related exclusions, barring coverage for loss or damage arising from malicious code or a computer virus, but Merck's Insurers did not use them; and
- Since the NotPetya attack, the insurance industry has revised the common War Exclusion language to expressly apply to cyber operations – a tacit admission that the traditional War Exclusion involved here *does not* apply to cyberattacks like NotPetya, no matter how sophisticated the policyholder.

The proposed amici curiae have a significant interest in this case. Their coverage rights are implicated by the issues involved, and their insurance rights would be detrimentally impacted if New Jersey's well-established insurance coverage jurisprudence were distorted in the ways Insurers advocate in this appeal. The proposed amici curiae respectfully submit that this Court should take into account these circumstances and the need for predictable and uniform insurance coverage.

ARGUMENT

I. The Trial Court Correctly Applied Well-Established Principles of New Jersey Insurance Law.

The trial court's holding that Merck's War Exclusion does not apply to its cyber losses is firmly supported by New Jersey maxims of insurance policy interpretation. Those well-established principles –– including the rules that policy provisions are construed according to their plain meaning, with exclusionary terms interpreted narrowly and in conformity with insureds' reasonable expectations of coverage –– provide clarity and predictability to courts and litigants alike.

Merck paid a substantial premium to purchase "All Risk" property insurance with $1.75 billion in limits. Opinion at 1. This Court has long recognized the significant and important protections offered by an "All Risk" policy (as opposed to a "Named" or "Specific peril" policy). E.g., Victory Peach Grp. v. Greater N.Y. Mut. Ins. Co., 310 N.J. Super. 82, 87 (App. Div. 1998). It is well recognized that an All-Risk policy provides coverage "for all losses arising from all fortuitous causes except those that are specifically and expressly excluded by the insurance contract." 1 NEW APPLEMAN INS. LAW PRAC. GUIDE § 1.13 (2022). In contrast, "'named perils' insurance policies cover only losses arising out of causes that are expressly encompassed by a policy's insuring agreement." Id.

Merck's All-Risk policies provide affirmative grants of cyber coverage and do not contain any cyber-related exclusions or limitations. Merck 1/21/2022 Br. at 3-4, 10, 20.[4] As such, an insured in Merck's position reasonably expected coverage for losses sustained in 2017 when its computer systems were infected by NotPetya, a malware that infected more than 40,000 Merck computers, resulting in approximately $1.4 billion in losses. Merck's Insurers, however, denied the claim, arguing their War Exclusions barred coverage.[5] These exclusions, which commonly are used by insurers across many lines of coverage, were drafted by the insurance industry.

The trial court interpreted the relevant insurance policies as a matter of law. Given that it did so consistent with New Jersey's established interpretative rules, there is no good reason

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[4] The proposed amici cite to Merck's Brief because the Appendix has been filed under seal. Per the Merck Brief, support for this statement appears in the Appendix at Da10-11, Da46 and Da52-53.

[5] The exclusions state:

> This policy does not insure the following:
>
> A. 1) Loss or damage caused by hostile or warlike action in time of peace or war, including action in hindering, combating, or defending against an actual, impending, or expected attack:
>
> a) by any government or sovereign power (de jure or de facto) or by any authority maintaining or using military, naval, or air forces;
>
> b) or by military, naval, or air forces;
>
> c) or by an agent of such government, power, authority, or forces;

Opinion at 2.

to disturb the court's ruling and, in fact, much detriment to unsettling the law in this area.

New Jersey law is clear on all the general interpretative tools guiding the court in this matter of insurance contract construction. The burden of proof is on the insurer to show that a policy exclusion applies so that it may properly deny coverage. Princeton Ins. Co. v. Chunmuang, 151 N.J. 80, 95 (1997). "In general, insurance policy exclusions must be narrowly construed," and enforced only when "specific, plain, clear, prominent, and not contrary to public policy." Flomerfelt v. Cardiello, 202 N.J. 432, 441-42 (2010) (citations and alteration omitted). When interpreting an insurance policy, courts give the words used their "plain and ordinary meaning." Id. at 441. Further, when an insurer does not define a term in a policy, courts consider dictionary definitions and apply common understanding of terms. See Priest v. Roncone, 370 N.J. Super. 537, 544 (App. Div. 2004) (considering dictionary's definition of an undefined term in an insurance policy to determine its plain and ordinary meaning).

The trial court adhered to those basic principles. It noted the insurer bears the burden of showing a policy exclusion applies, and exclusions are narrowly construed against the insurer. Opinion at 5-6. The court considered the "ordinary meaning" of words used in the War Exclusions, referring to the Oxford English Dictionary definitions of "warlike" (or "like war") and "hostile" (or "of,

pertaining to, or characteristic of an enemy; pertaining to or engaged in actual hostilities"). Opinion at 7.

More specifically, the court also appropriately considered the body of relevant case law concerning the War Exclusion language. Id. at 7-9. See, e.g., Stanbery v. Aetna Life Ins. Co., 26 N.J. Super. 498, 505 (Law Div. 1953) ("The word 'war' when used in a private contract or document should not be construed on a public or political basis, in a legalistic or technical sense, but should be given its ordinary, usual and realistic meaning, viz., actual hostilities between the armed forces of two or more nations or states de facto or de jure."); Pan Am. World Airways, Inc. v. Aetna Cas. & Sur. Co., 368 F. Supp. 1098, 1131 (S.D.N.Y. 1973) (rejecting insurer's claim that war exclusion applied to situation involving plane hijacked and then destroyed by members of a terrorist organization after holding "reasonable insurers and insured cannot be deemed to have imagined such things when they used the terms 'war' and 'warlike operations.'"); Int'l Dairy Eng. Co. of Asia, Inc. v. Am. Home Assur. Co., 352 F. Supp. 827, 831 (N.D. Cal. 1970) (war exclusion applied where policyholder's warehouse, which was located in an active war zone, was destroyed by a flare dropped as part of combat operations).

In view of both the ordinary meaning of the words in the exclusion, and relevant case law interpreting such language, the trial court appropriately interpreted the War Exclusions as

involving the use of armed forces. Opinion at 7. That circumstance did not present here; rather Merck's losses resulted from a hacker's malware (as the Insurers admit). Accordingly, the trial court, employing New Jersey's settled rules of policy interpretation, determined the exclusion did not bar coverage for Merck's claim. Id. at 10.

The court's interpretation of the involved War Exclusion also, and appropriately, was consistent with case law addressing considerations of expectations of coverage. The "fundamental principle of insurance law is to fulfill the objectively reasonable expectations of the parties." Werner Indus. v. First State Ins. Co., 112 N.J. 30, 35 (1988). If a policy's language is clear, the policy should be enforced as written to fulfill the reasonable expectations of the parties. Passaic Valley Sewerage Comm'rs v. St. Paul Fire & Marine Ins. Co., 206 N.J. 596, 608 (2011). As such, it was entirely appropriate for the trial court to refer to Merck's expectations regarding coverage.

As the Supreme Court of New Jersey explained over fifty years ago:

> When members of the public purchase policies of insurance they are entitled to the broad measure of protection necessary to fulfill their reasonable expectations. They should not be subjected to technical encumbrances or to hidden pitfalls and their policies should be construed liberally in their favor to the end that coverage is afforded "to the full extent that any fair interpretation will allow."

Kievit v. Loyal Protective Life Ins. Co., 34 N.J. 475, 482 (1961) (citation omitted).

Because the trial court found that the War Exclusion unambiguously did not apply to Merck's cyber-related losses, the court did not resort to the doctrine of *contra proferentem*, under which courts construe ambiguities against insurers. Benjamin Moore & Co. v. Aetna Cas. & Sur. Co., 179 N.J. 87, 102 (2004). The trial court's careful approach accords with Benjamin Moore, where the New Jersey Supreme Court declined to rely on *contra proferentem* because the policy language "clear[ly]" favored the policyholder, while expressly leaving "open" the possibility that in a future case even "a large national commercial venture" could "have the benefit of the doctrine of *contra proferentem*" where there is "doubt" in standard-form policy language. Id. at 102-03.

II. New Jersey's Long-Standing Rules of Insurance Policy Interpretation Apply Uniformly No Matter The Identity Or Alleged Sophistication Of The Insured.

The longstanding principles of insurance law described above "apply to commercial entities as well as individual insureds, so long as the insured did not participate in drafting the insurance provision at issue." Wakefern Food Corp. v. Liberty Mut. Fire Ins. Co., 406 N.J. Super. 524, 540 (App Div. 2009), cert. denied, 200 N.J. 209 (2009). And for good reason. By reading standard-form language with the same interpretive rules irrespective of the

identity of the insured, New Jersey courts incentivize clear drafting across the board and ensure that identical language is construed consistently and predictably.

At issue, here, are War Exclusions that date back to a time long before cyber-risks. Yet, the Insurers are seeking to apply such exclusions as if they are akin to the cyber-risk exclusions that the industry has developed, but which Insurers did not include in their policies. The Insurers seek to excuse their failure to specifically include the updated cyber-risk excluding provision, claiming that their modernized spin on traditional exclusions is appropriate because Merck is "sophisticated." This, however, is no justification for their sought-after relief because:

- The traditional War Exclusions at issue were drafted by insurers years ago, without the input or assistance of Merck;
- The Insurers had the option of including cyber exclusions in policies issued to Merck but did not, and instead they offered policies with affirmative cyber-coverage grants;
- The trial court found the traditional War Exclusions clear and interpreted their meaning and application based on reasonable, plain language interpretations;

- The involved exclusions should be interpreted uniformly, based on the words the insurance industry selected when drafting them;
- The meaning and application of these War Exclusions impacts not only Merck but potentially any policyholder similarly harmed because insurers will likely seek to apply the precedent developed here; and,
- Consistency in the interpretation of the meaning of standard-form policy exclusions as applied to all policyholders will lead to efficient resolution of insurance claims, reduce the need for litigation, and conserve judicial resources.

The strict construction of exclusionary language against insurers is especially important to guard against insurers evading coverage at the point of claim, based on novel interpretations of policy language. Insurance contracts are aleatory, no matter who buys them; they are contracts in which the insurer receives a premium for its agreement to compensate the insured if certain risks occur. Paul Revere Life Ins. Co. v. Haas, 137 N.J. 190, 207 (1994). The insurer gets paid that premium, today, for its promise to make future payment if and when its insured suffers covered loss as a result of a fortuitous, future event.[6] This lag between

[6] Insurers receive billions of dollars of premium income. *Top 200 U.S. Property/Casualty Writers*, AM BEST'S REV. (July 2020), at

the payment of premium and the performance promised by an insurer creates an incentive for mischief by insurers if interpretive rules are not applied or are applied loosely as to certain types of insureds. "By the time the policyholder makes a claim, not only has the insurance company already received the benefit of the bargain, but also the policyholder has nowhere else to go." Thomas Baker, INSURANCE LAW & POLICY, 91-92 (2d ed. 2008); see also E.I. DuPont de Nemours & Co. v. Pressman, 679 A.2d 436, 447 (Del. 1996) ("Unlike other contracts, the insured has no ability to 'cover' if the insurer refuses without justification to pay a claim.").

Further, by urging courts to consider the degree of the insured's sophistication before applying longstanding policy interpretation rules to standard-form language, the insurance industry vastly overcomplicates the coverage analysis. As commentators have observed, a sophisticated insured exception "may cause more problems than it solves by leading to inconsistent interpretations of the same language, depending on the identity of the insured, and diverting limited judicial resources to gauging the insured's size, information resources, and supposed sophistication." Barbara O'Donnell, *Application of contra*

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http://www.ambest.com/review/displaychart.aspx?Record_Code=274586&src=43&_ga=2.171650912.1123988532.161273917273892297.1612560642.

proferentem to the sophisticated insured, 1 LAW & PRAC. OF INS. COV. LITIG. § 1:12 (July 2021).

And, of course, the question arises how sophistication should be assessed. Id. Should courts look at the insured's size (and if so, by annual revenues, annual profit, market capitalization, number of employees, or some other measure)? Does it matter whether the insured has a full-time risk manager or uses a broker and, if so, what level of experience or skill of the risk manager or broker makes the insured "sophisticated"? Relevant here, amici include businesses that are "sophisticated" in their respective fields -- e.g., healthcare, manufacturing, pharmaceuticals, product development, and foodservice -- but they are not as "sophisticated" in the realm of insurance like their insurers. See Eugene R. Anderson & James J. Fournier, *Why Courts Enforce Insurance Policyholders' Objective Reasonable Expectations of Insurance Coverage*, 5 CONN. INS. L.J. 335, 373 (Fall 1998) ("Insurance companies simply have no reason to believe that policyholders sophisticated in building automobiles, manufacturing chemicals or flying airplanes are equally sophisticated about insurance.").

Also of note, this Court recently reiterated that "the [reasonable expectations] doctrine has been applied to commercial lines, as well." Abboud v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa., 450 N.J. Super. 400, 409 (App. Div. 2017). The Insurers'

"sophisticated insured" argument in this matter is contradicted directly by precedent.[7]

Thus, even if Merck is regarded as "sophisticated" simply because it is a large corporation with substantial financial means, such a finding would be irrelevant to the court's proper interpretation of this standard-form exclusion. Indeed, in Diamond Shamrock Chemicals Co. v. Aetna Cas. & Sur. Co., 258 N.J. Super. 167, 209 (App. Div. 1992), this Court noted:

> Despite Diamond's sophistication, the critical fact remains that the policy in question was a standard form policy prepared by Aetna's experts, with language selected by the insurer. **The specific language contained in the exclusion was not negotiated. It appears in policies issued to big and small businesses throughout the country**. The use of standard policy provisions is founded upon the premise that collaboration among casualty insurers is necessary to calculate and maintain reasonable rates. . . . **It would seem that the benefits of this standardization would be lost if standard form language were given different meanings for different insureds based upon**

[7] Also, an insurance treatise authored by certain insurers' counsel provides as follows: "The doctrine of reasonable expectations applies to sophisticated insureds." William D. Wilson & Frank J. DeAngelis, NJ INS. COV. LITIG., A PRACTITIONER'S GUIDE § 5 (2017 ed.) (citing G-I Holdings, Inc. v. Reliance Ins. Co., 586 F.3d 247, 254 n.10 (3d Cir. 2009) ("This 'reasonable expectations' approach to interpreting insurance contracts applies even where, as here, the insured is a sophisticated actor.")). The treatise notes that, in applying the doctrine of reasonable expectations to a sophisticated insured, courts take into consideration whether it was "objectively reasonable" for the insured to expect that coverage should be provided. Id. (citing G-I Holdings, Inc., 586 F.3d at 257 ("We may take [the insured's] sophistication into account in deciding what was objectively reasonable for it to expect from its insurers")).

> **individual degrees of sophistication and bargaining power**.
>
> In the context of standard form provisions, the 'highly sophisticated' insured exception . . . tends to produce anomalous results. Invariably, the 'highly sophisticated' insured is found to have negotiated an insurance contract providing protection inferior to that of his less urbane counterpart, although the language of the two policies is identical. . . . **[I]t seems incongruous to hold Diamond to a stricter standard and less protection merely because it is a "sophisticated" insured**.

Similarly, in CPS Chemical Co. v. Continental Insurance Co., 222 N.J. Super. 175, 189 (App. Div. 1988), this Court noted that insurance policies "are prepared by the company's experts, [people] learned in the law of insurance, . . . and therefore it is not unfair that the insurer bear the burden of any resulting confusion." (Internal citations and quotation marks omitted). As such, New Jersey courts have "adopted the principle giving effect to the 'objectively reasonable expectations' of the insured for the purpose of rendering a 'fair interpretation' of the boundaries of insurance coverage." Id. (listing cases). Importantly, as this Court has previously explained:

> **[t]hese principles are no less applicable merely because the insured is itself a corporate giant.** The critical fact remains that the ambiguity was caused by language selected by the insurer.

Id. at 189-90.

Likewise, the Supreme Court of New Jersey has addressed the reasonable expectations of policyholders (regardless of level of

sophistication) when interpreting exclusions drafted solely by insurers. In Nav-Its, Inc. v. Selective Insurance Co., 183 N.J. 110 (2005), the insurer argued the pollution exclusion broadly barred coverage for a non-traditional environmental pollution claim (i.e., an underlying personal injury action against a construction contractor in which the claimant alleged he was exposed to toxic fumes). In rejecting the insurer's position, the trial court noted that the "reasonable expectations" doctrine has been applied to "all forms of insurance contracts." Id. at 119. The Court also determined that if the insurer's interpretation were accepted, the policy would exclude essentially all pollution hazards, even though the evidence suggested its purpose was to exclude only traditional environmentally-related damages. Id. The Court, therefore, held that the insurer's interpretation was "overly broad, unfair, and contrary to the objectively reasonable expectations of the New Jersey and state regulatory authorities that were presented with an opportunity to disapprove the clause[,]" and that the same reasonable expectations were imputed to insureds who purchased the policies. Id. at 121, 123-24.

In sum, under well-established principles of New Jersey insurance law, because the War Exclusion employs standard form language prepared by insurers and commonly incorporated into policies, the Insurers' characterization of Merck as "sophisticated" should be regarded as entirely irrelevant to a

court's interpretation. This Court should not negate the reasonable expectations of all policyholders that the War Exclusion would have limited application and would *not* wipe out the affirmative grants of cyber coverage the policyholder purchased for a substantial premium, whether such policyholder is a mom-and-pop shop or publicly-traded corporation.

III. Narrow Interpretation Of The War Exclusion Is Supported By The Insurers' Refusal To Include Language Clearly Barring Coverage For Cyber Events Like NotPetya.

It bears noting that when evaluating an insurer's claim concerning policy language, New Jersey courts may consider "whether alternative or more precise language, if used, would have put the matter beyond reasonable question[.]" Mazzilli v. Acc. & Cas. Ins. Co. of Winterthur, Switzerland, 35 N.J. 1, 7 (1961).

In CPS Chemical, the Court found "[i]f the insurers had desired to so radically constrict the coverage provided by their standard-form policies, they could easily have accomplished their intent by employing clear and unequivocal language." 222 N.J. Super. at 190. In that case, because the insurer could have (but did not) make their intention to limit coverage clear, the ambiguity –- found to exist there –- was created by the insurers and was resolved against them. Id.

Such precedent generally applies with equal force here. Insurance professionals have long been on notice of the realities of insuring cyber risks, including the potential involvement of

state-actors. For example, in 2014, hackers released confidential data from the film studio Sony Pictures and employed malware to erase Sony's computer infrastructure. United States intelligence officials alleged the attack was sponsored by the government of North Korea, which denied all responsibility.[8] Sony Pictures CEO reported that the cyberattack would be completely covered by insurance.[9]

Several years after the Sony hack, the Insurers here chose to sell to Merck (and collect substantial premium for) "All Risk" property policies, which had **affirmative grants of cyber coverage**, and which did not have cyber-specific limitations or exclusions. Although the policies had the standard "War Exclusion" language, the Insurers were well-aware of the limited interpretation, described supra, that courts gave such language over the last several decades). Despite that knowledge, the Insurers failed to amend their War Exclusion or add a new exclusion that would clearly convey their alleged intention to exclude coverage for cyber events unconnected to the use of armed force.

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[8] David E. Sanger & Nicole Perlroth, *U.S. Said To Find North Korea Ordered Cyberattack On Sony*, N.Y. TIMES (Dec. 17, 2014), at https://www.nytimes.com/2014/12/18/world/asia/us-links-north-korea-to-sony-hacking.html

[9] *Here's How Insurance Will Respond To The Sony Cyber Hack*, INS. BUS. AM. (Jan. 14, 2015), at https://www.insurancebusinessmag.com/us/news/breaking-news/heres-how-insurance-will-respond-to-the-sony-cyber-hack-20888.aspx.

In fact, these Insurers had the opportunity to add any number of cyber-related exclusions to the All-Risk policies that they issued to Merck, but they elected against doing so. For example, the Insurers could have addressed the intersection of cyber coverage and hostile/warlike action by adding the industry-known "Institute Cyber Attack Exclusion Clause," abbreviated CL380, which states that "in no case" shall insurance incorporating this clause cover loss or damage "directly or indirectly caused by or contributed to by or arising from the use or operation, as a means of inflicting harm of any computer, computer system, computer software programme, malicious code, computer virus or process or any other electronic system." CL380 was available to the Insurers as a standard exclusion since 2003, but none of the Insurers opted to include it in the property policies they issued to Merck.[10]

Moreover, since the NotPetya cyberattack, insurers have utilized exclusions targeting cyber risks when writing "All Risk" coverage. In November 2021, the Lloyd's Market Association Bulletin published four exclusionary clauses concerning "War, Cyber War and Cyber Operation." In each of the four clauses, "War" and "Cyber Operation" are separately and specifically defined as follows:

[10] Data Polis Database, at https://datapolis.id/database/institute-cyber-attack-exclusion-clause-10-11-03-cl-380/.

> **Cyber operation** means the use of a **computer system** by or on behalf of a **state** to disrupt, deny, degrade, manipulate or destroy information in a **computer system** of or in another **state**.
>
> **War** means:
> 1. The use of physical force by a **state** against another **state** or as part of a civil war, rebellion, revolution, insurrection, and/or
> 2. Military or usurped power or confiscation or nationalization or requisition or destruction of or damage to property by or under the order of any government or public or local authority.
>
> Whether war be declared or not.

There is a plain delineation between "War" (as understood in the traditional sense – *e.g.*, military boots on the ground, physical force including heavy artillery) and a "Cyber Operation" conducted by or on behalf of a sovereign state.

All four exclusionary clauses referenced above attend to the "attribution problem" that insurers face when attempting to apply the traditional "War Exclusion" to cyber incidents. By way of background, the traditional War Exclusion requires **the insurer** (who bears the burden of proof) to attribute the hostile or warlike action to a government or sovereign power (or an agent of the same). For example, the War Exclusion in Merck's policies purports to exclude "Loss or damage caused by hostile or warlike action in time of peace or war . . . :"

> a) By any government or sovereign power (de jure or de facto) or by any authority maintaining or using military, naval or air forces;
> b) Or by military, naval, or air forces;
> c) Or by an agent of such government, power, authority or forces; . . .

In the traditional sense, attributing hostile or warlike action to a specific government or sovereign power usually is possible; military personnel can be identified. In contrast, attribution may be difficult, if not impossible, with cyberattacks.

Although United States intelligence officials might assert that a cyberattack was conducted from a particular location, the general public (including insurance companies) is not privy to and cannot evaluate or cross-examine any supporting evidence. Even if an attack could be attributed to a particular geographic region, that does not answer whether such attack was the work of a rogue actor (*i.e.*, covered) or an "agent" of a sovereign power (*i.e.*, potentially excluded). Foreign governments could be expected to deny being involved, so there may well be no evidence on which an insurer could rely. And, in instances involving cybercrime, there might be a double-attribution problem if the hackers were hacked themselves.[11] All those examples and surmised situations underscore that in the new world of cyber, it may be difficult (if not impossible) for an insurer to meet its proofs under the War Exclusion, and a new approach was needed.[12]

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[11] Zack Whittaker, *Hackers are targeting other hackers by infecting their tools with malware*, TechCrunch (Mar. 9, 2020), at https://techcrunch.com/2020/03/09/hacking-the-hackers/.

[12] Several reinsurance professionals from Capsicum Reinsurance Brokers LLP described the challenge in characterizing war exclusions as barring coverage for loses from events like NotPetya:

> The main issue of war in the context of cyber stems from an attribution problem: the lack of either a credible or

All four of these Lloyd's Market exclusionary clauses appear to attempt to resolve this "attribution problem" by including the following language:

> The primary but not exclusive factor in determining attribution of a **cyber operation** shall be whether the government of the **state** (including its intelligence and security services) in which the **computer system** affected by the **cyber operation** is physically located attributes the **cyber operation** to another **state** or those acting on its behalf.[13]

Under this provision, if (for example) China installs malware on systems in Hong Kong, and the malware spreads to an American

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> traditional identifiable party claiming responsibility for a cyber-attack, or the inability to determine the proximate cause of an event and/or a loss. By their nature, it is almost impossible to determine the motivations and origins of the vast majority of cyber-attacks. The implication? The (re)insurance market cannot rely on traditional reference points such as time, location and attributable person(s) responsible. This challenge becomes all the more contentious when cyber-attacks are suspected destabilisation plots orchestrated by state actors. As a consequence of this challenge it is the contention of this paper that the cyber peril has not only transcended traditional lines of business, but also that it challenges the very concept of war as the (re)insurance market historically has understood it, arguably rendering current war exclusionary language unfit for purpose.

Capsicum Re, *Cry Cyber and Let Slip the Dogs of War* (July 2019), at https://www.ajg.com/gallagherre/news-and-insights/2020/aug/whitepaper-cyber-and-acts-of-war/.

[13] In addition to this language, the Lloyd's Market clauses expressly permit the insurer to "rely upon an inference which is objectively reasonable as to attribution of the cyber operation to another state or those acting on its behalf." And, if the government of the state in which the affected computer system is located takes too long to, does not, or is unable to attribute the cyber operation to another state, the insurer is allowed to prove attribution by reference to other evidence.

insured's system, the insurer may point to any statement of a United States intelligence official attributing the cyberattack to the Chinese government and, if admissible, use it to support its denial of coverage.

The insurance industry's development of new exclusions is a tacit admission, if not an acknowledgment, that the traditional War Exclusion does not bar coverage for the modern, and here experienced, cyber events. The Insurers could have added a clear exclusion advising Merck that its policies would not cover losses such as those resulting from a cyberattack like NotPetya. Industry-known language was available for use, but it was not incorporated in the policies in issue. This Court should consider the Insurers' failure to do so fatal when narrowly and properly interpreting the plain language of the War Exclusions. Mazzilli, 35 N.J. at 7; CPS Chem., 222 N.J. Super. at 190. Amici urge this court not to upend settled principles of insurance law interpretation and approach to coverage to justify the Insurers' desire to dishonor the plain language of their insurance promise to Merck and other similarly-situated policyholders, who seek conformity with their reasonable expectations of the insurers' promises.

IV. Insurance-Industry Public Statements Show The War Exclusion Does Not Apply Here.

Insurance-industry public statements in the aftermath of NotPetya show that war exclusions do not bar coverage for losses resulting from cyber events like NotPetya.

New Jersey courts have considered insurance industry statements and custom and practice in resolving coverage disputes. DEB Assocs. v. Greater New York Mut. Ins. Co., 407 N.J. Super. 287, 301 n.5 (App. Div. 2009); Cypress Point Condo. Ass'n, Inc. v. Adria Towers, L.L.C., 226 N.J. 403, 430–31 (2016). Courts have considered insurers' admissions that there are "gray areas" in the coverage,[14] public expressions about the scope of coverage,[15] insurance industry publications,[16] and public statements and testimony regarding the development of policy language.[17]

In the aftermath of NotPetya, the insurance industry faced numerous questions as to whether losses stemming from events like NotPetya would be limited by the War Exclusion. Various brokers, insurers, and reinsurers repeatedly commented that war exclusions mirroring those in the Merck policies do not express clearly the intent to reach cyber events.

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[14] See, e.g., DEB Assocs., 407 N.J. Super. at 301 n.5.
[15] See, e.g., Diamond Shamrock Chems. Co., 258 N.J. Super. at 210.
[16] See, e.g., Cypress Point Condo. Ass'n, 226 N.J. at 430–31.
[17] See e.g., Morton Int'l, Inc. v. Gen. Acc. Ins. Co. of Am., 134 N.J. 1, 77 (1993); Nav-Its, 869 A.2d at 936.

The industry's custom and practice has long been to pay cyber claims purported to have been caused by a nation-state. Robert Parisi, managing director and cyber product leader at Marsh, noted that insurers had a long history of paying claims for "events alleged or imputed to have been caused by a nation-state" and disputed the assertion that war exclusions could bar coverage for events like NotPetya: "Our view is that cyber war is a very specific thing that involves sovereign nations, military actions and physical force[.] . . . The cyber insurance market has a long history-dating back to the first policy- of covering events alleged or imputed to have been caused by a nation-state."[18]

Senior insurance industry executives and brokers also have acknowledged the ambiguity of war exclusions as they relate to cyber-related losses including:

- Tim Zeilman, vice president for strategic products at The Hartford Steam Boiler Inspection and Insurance Co. ("HSB"), noted that the applicability of war exclusions is a "gray area for insurers and policyholders." Mr. Zeilman stated: "I don't think there's one correct answer, and if there is it is untested[.] . . . What might qualify as an act of war is a bit of an unknown."

[18] Russ Banham, *Cyber Coverage Confusion*, RISK MANAGEMENT (Oct. 2019), at https://www.rmmagazine.com/articles/article/2019/10/01/-Cyber-Coverage-Confusion-.

Interestingly, even though HSB includes war exclusions in all its cyber policies, "[t]here hasn't been a case in which a[n insured] company was denied coverage due to these exclusions."[19]

- Marsh, the nation's largest insurance broker, noted that war exclusions were not intended to reach events like NotPetya. Marsh explained in a bulletin why it is improper to conflate the war exclusion with a non-physical cyber event like NotPetya. The bulletin states "[f]or a cyber-attack to fall within the scope of the war exclusion, there should be a comparable outcome, tantamount to a military use of force." Marsh concludes that "[t]he debate over whether the war exclusion could have applied to NotPetya demonstrates that if insurers are going to continue including the war exclusion on cyber insurance policies, the wording should be reformed to make clear the circumstances required to trigger it."[20]

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[19] Adam Janofsky, *An "Act of War" Throws a Wrench Into Cyber Insurance Policies*, WSJ PRO CYBERSECURITY (July 9, 2018), at https://www.wsj.com/articles/an-act-of-war-throws-a-wrench-into-cyber-insurance-policies-1531173326.

[20] Thomas Regan & Matthew McCabe, *NotPetya Was Not Cyber "War,"* Marsh & McLennan Companies (Aug. 2018), at https://www.marshmclennan.com/insights/publications/2018/aug/notpetya-was-not-cyber-war.html.

- Similarly, William Boeck, senior vice president at Lockton Insurance, a leading insurance broker, acknowledged that the insurance industry recognized that events like NotPetya would not be barred by war exclusions: "If a cyber attack happens and it's in the context of something that looks an awful lot like an act of war, then, yes, they might apply [the exclusion], but where the attack is in effect hitting an innocent bystander half a world away from the target of the attack, . . . then they're not going to apply it, they're going to regard that as cyber terrorism."[21]

Other members of the insurance industry have focused on how war exclusions are impossible to apply to cyber-related losses. For example, Tracie Grella, AIG's global head of cyber risk insurance, stated that "we are not aware of any claim that's been denied for NotPetya."[22] She also had stated that "[o]ur view on cyber risk is that nearly all insurance policies have some cyber risk in them, whether it's physical or non-physical cyber risk" and that AIG was working to modify its policies "so that our

[21] Mariam Baksh, *Industry leader says "cyber insurance" may be too narrow a designation amid potential threats*, INSIDE CYBER SECURITY (Apr. 16, 2019), at https://insidecybersecurity.com/daily-news/industry-leader-says-cyber-insurance-may-be-too-narrow-designation-amid-potential-threats.

[22] Kate Smith, *An Act of War?*, AM BEST'S REV. (Sept. 2019), at https://news.ambest.com/articlecontent.aspx?pc=1009&AltSrc=108&refnum=288755.

clients are certain about the coverage that they have -- that they have coverage certainty."[23]

These statements by members of the insurance industry after NotPetya show that losses like those caused by NotPetya are not intended to be excluded by war exclusions. At a minimum, the war risk exclusions do not rise to the level of clarity that exclusions must have under well-established principles of New Jersey law.

CONCLUSION

For the foregoing reasons, the above-referenced amici respectfully request that this Court affirm the sensible and well-reasoned decision of the trial court.

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[23] *Mind the (cyber) gap*, REACTIONS (Feb. 12, 2019).