SUPREME COURT OF NEW JERSEY

Docket No.: 088274

MERCK & CO., INC., et al., Plaintiffs-Respondents, vs. ACE AMERICAN INSURANCE COMPANY, et al., Defendants-Appellants.	CIVIL ACTION ON APPEAL FROM THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION DOCKET NOS. A-1879-21 A-1882-21 Sat Below: HON. HEIDI WILLIS CURRIER, P.J.A.D., HON. JESSICA R. MAYER, J.A.D., HON. CATHERINE I. ENRIGHT, J.A.D.

BRIEF OF AMICI CURIAE: 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

Amici curiae are the following organizations.

- 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, which is home to approximately 7,000 manufacturing firms. Manufacturing employs nearly 13 million men and women, contributes $2.91 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts over half 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") represents the country's leading innovative biopharmaceutical research companies, which are devoted to discovering and developing medicines that enable patients to live longer, healthier and more productive lives. Over the last decade, PhRMA member companies have more than doubled their annual investment in the search for new treatments and cures, including nearly $101 billion in 2022 alone. 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. Restaurants are also a driving force in New Jersey's economy. The foodservice industry creates thousands of jobs, supports career growth, and plays a vital role in every community across the state. New Jersey is home to about 20,000 restaurants and other food service establishments, providing over 350,000 jobs, roughly 9% of the state's overall employment. A thriving restaurant industry benefits the entire New Jersey economy with every dollar spent in New Jersey's restaurants contributing $2.11 to the state economy. 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.

Amici represent the interests of companies that are incorporated in or conduct substantial business operations in New Jersey and, therefore, rely significantly upon insurance policies to provide coverage for their various risks. Amici respectfully submit this brief to advocate for New Jersey's continued adherence to longstanding principles of insurance policy interpretation, including the rule that policy language must be construed according to its plain meaning and that exclusions from "all risks" coverage are strictly construed. These principles greatly impact amici and their members, 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. Ensuring that policies covering cyber risks continue to be construed according to predictable, settled rules of policy interpretation is, therefore, of great importance to amici, which represent a cross-section of vital industries, large employers, and business leaders.

Even beyond cyber risks, rules of insurance policy interpretation have far-reaching impact on the many insurance products that businesses buy to manage their varied risks and protect themselves from losses in this and other states. These rules are particularly vital in the construction and application (if at all) of 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. It is essential for both individuals and businesses, in the management of their affairs, that courts construing such standard-form language under New Jersey law do so fairly and uniformly.

Amici offer a broad perspective regarding the insurance issues involved in this dispute. Amici engage in such activities as manufacturing, pharmaceuticals, food service, product development or sales, as well as many other critical fields, and maintain coverage with regard to cyber, property, liability, and various other risks. Amici are therefore well-positioned to highlight the importance 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

This case involves coverage that Merck & Co., Inc. ("Merck") seeks 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 those policies expressly included cyber risk coverage in the grants of coverage. The non-settled Merck insurers denied coverage, pointing to standard-form War Exclusions[1] that the insurance industry developed years before cyber risks emerged. Both the trial court and the Appellate Division determined that 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. In so holding, both the trial court and the Appellate Division employed the policies' plain

[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.

language and adhered to relevant and important case law respecting policy construction.

By employing settled rules of interpretation (as the lower courts did here), New Jersey courts have created an environment in which policyholders can conduct business in a sensible, reasonable 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. Moreover, these rules (particularly the principle that policy exclusions are strictly and narrowly construed) incentivize insurers to be clear and specific when they wish to exclude particular perils from their insuring agreements.

This appeal by a handful of Merck's non-settled insurers (the "Insurers") raises unsettling questions concerning how insurance contracts and exclusions should be interpreted and applied. Specifically, the Insurers challenge their obligations to Merck, contending that their standard-form War Exclusions should be applied broadly to bar coverage for Merck's cyber-related losses, even though (1) the policies expressly provide broad cyber coverage, (2) the plain language of their exclusions says nothing about cyber loss, and (3) the involved exclusions have long been construed to apply only to events that involve or are closely connected with the use of armed force (unlike NotPetya). The trial court and the Appellate Division

correctly rejected the Insurers' unprecedented position, which is wholly inconsistent with settled New Jersey rules for interpreting policy language.

Amici are concerned that the Insurers' proposed interpretation and application of the 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. If insurers were permitted to offer newly devised, broad and unprecedented interpretations of their policy exclusions after a policyholder suffers a loss, it would unfairly inject needless uncertainty into the claims process.

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. 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 of an insurer's standard-form exclusion was not uniform, but was driven by a policyholder's alleged "sophistication," as the insurance industry proposes in its amici brief filed on June 15, 2023, then the same standard exclusion could take on different meanings for different policyholders. *See* Amicus Brief of American Property Casualty Insurance Association in Support of Petition for Review. The very same exclusion could bar

coverage depending 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. Those debates could potentially require a factual determination before a court could decide or narrow a coverage dispute by interpreting, as a matter of law, even a standard form insurance exclusion drafted by the insurer. But in any event, this Court does not need, in this appeal, to reach the issue of whether a so-called "sophisticated insured exclusion" applies, because neither Merck nor the courts below rely on *contra proferentem* principles for resolving the issue here. Rather, this case can be resolved based on the straightforward and long-standing rule that "all risk" policies are to be interpreted broadly, and any exclusions must be clear about the risk that is being excluded.

That the Insurers seek to call into question basic principles of construction is particularly remarkable in light of the following history:

- Prior to selling policies with such War Exclusion provisions, the Insurers were aware of cyberattacks allegedly involving hostile actions by state-actors, 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, the Insurers were aware that courts had narrowly construed the War Exclusion as having to do with conventional war;
- Before NotPetya, the insurance industry had already developed standard cyber exclusions that bar or limit coverage for loss or damage arising from malicious code or a computer virus, and some of Merck's insurers even wrote them in their policies prior to NotPetya — but the Insurers at issue in this appeal did not; 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 War Exclusion involved here *does not* apply to cyberattacks like NotPetya.

Amici curiae have a significant interest in this case. Their members' 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. 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 Appellate Division Correctly Applied Well-Established Principles of New Jersey Insurance Law.

The Appellate Division's holding that the War Exclusion does not apply to Merck's cyber losses is firmly supported by New Jersey rules 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 — provide clarity and predictability to courts and litigants alike.

Merck purchased "All-Risk" property insurance with $1.75 billion in limits. Opinion at 5. New Jersey courts have 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. Opinion at 6. As such,

the polices expressly provide coverage to Merck 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. The Insurers did not dispute that the coverage grant applied to the loss, but they denied Merck's claim, arguing that their War Exclusions barred coverage.[2] These exclusions, which commonly are used by insurers across many lines of coverage, were drafted by the insurance industry long ago. Opinion at 24-25.

The Appellate Division 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 to disturb the court's ruling. To the contrary, there would be 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. When interpreting an insurance

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[2] 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 7.

policy, courts give the words used their "plain and ordinary meaning." Flomerfelt v. Cardiello, 202 N.J. 432, 441 (2010). 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 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, 202 N.J. at 441-42 (citations and alteration omitted).

The Appellate Division adhered to those basic principles. It noted that the insurer bears the burden of showing a policy exclusion applies, and that exclusions are narrowly construed against the insurer. Opinion at 17. The Court considered the "plain language" of the exclusions and found that it did not support the Insurers' interpretation. Id. at 20. In fact, the Court found "[c]overage could only be excluded here if we stretched the meaning of 'hostile' to its outer limit[,]" and added that that approach conflicted with insurance law principles "requiring a court to narrowly construe an insurance policy exclusion." Id. at 23.

The Court also appropriately considered the body of relevant case law concerning the War Exclusion language. Id. at 25-33. 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 Appellate Division appropriately interpreted the War Exclusions as involving the use of military action. Id. at 20. That circumstance did not occur here; rather, Merck's losses resulted from a hacker's malware (as the Insurers admit). This is the very type of loss for which Merck

purchased affirmative cyber coverage in its property policies. Accordingly, the Appellate Division, employing New Jersey's settled rules of policy interpretation, determined the exclusion did not bar coverage for Merck's claim. Id. at 35.

Because the Appellate Division found that the War Exclusions 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 Appellate Division's careful approach accords with Benjamin Moore, where the New Jersey Supreme Court saw no need to rely on *contra proferentem* because the policy language "clear[ly]" favored the policyholder, albeit 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. The Insurers' Position Violates Well-Established Rules of Policy Interpretation.

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 enforcing interpretive rules consistently with respect to standard-form language, New Jersey courts incentivize

clear drafting by insurers across the board and ensure that identical language is construed uniformly 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 since developed, but which these Insurers did not include in their policies. The Insurers' argument lacks merit, for various reasons:

- The 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 offered policies with affirmative cyber-coverage grants;
- The trial court and the Appellate Division correctly found the War Exclusions clear and interpreted their meaning and application based on their plain language;
- The exclusions at issue 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 efforts by insurers to try to evade coverage at the point of claim, based on novel interpretations of policy language. Insurance contracts are aleatory — *i.e.*, they are contracts in which the insurer receives a premium *up front* for its agreement to compensate the insured *in the future* if (and only if) certain risks occur. Paul Revere Life Ins. Co. v. Haas, 137 N.J. 190, 207 (1994).[3] This lag between the payment of premium and the performance promised by an insurer creates an incentive for mischief by insurers if interpretive rules are not applied consistently. "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

[3] Insurers receive billions of dollars of premium income. *Top 200 U.S. Property/Casualty Writers*, AM BEST'S REV. (July 2020), at http://www.ambest.com/review/displaychart.aspx?Record_Code=274586&src=43&_ga=2.171650912.1123988532.1612739172738922297.1612560642.

436, 447 (Del. 1996) ("Unlike other contracts, the insured has no ability to 'cover' if the insurer refuses without justification to pay a claim.").

The War Exclusions, which say nothing about cyber events or about events unconnected to the use of armed force, clearly do not apply to bar coverage for Merck's loss. And the Insurers' novel interpretation of those exclusions at the point of claim cannot defeat the clear and affirmative grants of cyber coverage that those Insurers sold Merck. As such, there is absolutely no reason for the Court to consider, as some of the Insurers' amici urge, the degree of an insured's sophistication when interpreting them. The War Exclusions do not apply based on their clear and plain language.

Not only is an inquiry into the sophistication of the insured unnecessary here, such an inquiry "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 proferentem to the sophisticated insured*, 1 LAW & PRAC. OF INS. COV. LITIG. § 1:12 (July 2021).

Relevant here, amici include businesses that are "sophisticated" in their respective fields – e.g., healthcare, manufacturing, pharmaceuticals, product development, and food service – but they are not "sophisticated" in the insurance

space like their insurers, who are expert in it. 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."). In any event, no matter how allegedly "sophisticated" an insured in terms of its financial means, such a finding is entirely irrelevant to the court's proper interpretation of a standard-form exclusion — like that at issue here. In Diamond Shamrock Chemicals Co. v. Aetna Cas. & Sur. Co., 258 N.J. Super. 167, 209 (App. Div. 1992), the 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 individual degrees of sophistication and bargaining power**.

In sum, under well-established principles of New Jersey insurance law, the Insurers have failed to meet their burden of defeating cyber coverage by identifying clear and specific exclusions on point. The Insurers' standard-form War Exclusion

does not and cannot wipe out coverage for the NotPetya malware incident, which is expressly included in the affirmative grants of cyber coverage in Merck's policies.

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

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 insurers could have (but did not) make their intention to limit coverage clear, the lack of clarity they created was resolved against them. Id.

Such precedent 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. In fact, Merck's insurers had the opportunity to add any number of cyber-related exclusions to the All-Risk policies that they issued to Merck, but the Insurers at issue in this appeal did not do 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."[4] CL380 was available to the Insurers as a standard exclusion since 2003, but none of the Insurers at issue in this appeal opted to include it in the property policies they issued to Merck.

Moreover, the insurance industry has developed new war exclusion language targeting cyber risks when writing "All Risk" coverage. For instance, 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" separately and specifically define the terms:

> **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

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

> 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. 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. Industry-accepted language was available for use, but it was not incorporated in these insurers' policies. This Court should consider the Insurers' failure to use such language fatal to their current position. See 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 to justify the Insurers' desire to dishonor the plain language of their insurance promise.

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. Cypress Point Condo. Ass'n, Inc. v. Adria Towers, L.L.C., 226 N.J. 403, 430–31 (2016); DEB Assocs. v. Greater New York Mut. Ins. Co., 407 N.J. Super. 287, 301 n.5 (App. Div. 2009). Courts have considered insurers' admissions that there are "gray areas" in the coverage,[5] public expressions about the scope of coverage,[6] insurance industry publications,[7] and public statements and testimony regarding the development of policy language.[8]

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.

The industry's custom and practice has long been to pay cyber claims even when 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"

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[5] See, e.g., DEB Assocs., 407 N.J. Super. at 301 n.5.
[6] See, e.g., Diamond Shamrock Chem. Co. v. Aetna Cas. & Sur. Co., 258 N.J. Super. 167, 210 (App. Div. 1992).
[7] See, e.g., Cypress Point Condo. Ass'n, 226 N.J. at 430–31.
[8] See e.g., Morton Int'l, Inc. v. Gen. Acc. Ins. Co. of Am., 134 N.J. 1, 77 (1993); Nav-Its, Inc. v. Selective Ins. Co. of Am., 183 N.J. 110, 122 (2005).

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."[9]

Senior insurance industry executives and brokers also have acknowledged the lack of clarity 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." 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."[10]

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

[10] 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.

- 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."[11]

- Discussing the possibility of having to cover cyber-related losses, Chris Storer, head of Munich Re's cyber centre of excellence, recently observed that "any insurer who chooses not to update their war language is running a material risk."[12]

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[11] 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.

[12] Daphne Zhang, *Cyber Insurance Market in Turmoil Over State-Backed Attacks*, Bloomberg Law (May 22, 2023), at https://news.bloomberglaw.com/insurance/cyber-insurance-market-in-turmoil-over-state-backed-attacks

- 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."[13] She also 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 clients are certain about the coverage that they have -- that they have coverage certainty."[14]

These statements by insurance industry members show that losses like those caused by NotPetya are not intended to be (and were not) excluded by the War Exclusion. At a minimum, the exclusion does not offer the required clarity (with respect to cyber risks) that exclusions must have to be applicable under well-established principles of New Jersey law.

[13] 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.

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

CONCLUSION

For the foregoing reasons, amici respectfully request that this Court affirm the sensible and well-reasoned decision of the Appellate Division.

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