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IN THE INDIANA SUPREME COURT

No. 19A-PL-1498

G&G OIL CO. OF INDIANA,,	)
	)
Plaintiff-Appellant,	)
	)
v.	)
	)
CONTINENTAL WESTERN INSURANCE COMPANY,	)
	)
	)
	)
	)
Defendant-Appellee.	)

AMICUS CURIAE UNITED POLICYHOLDERS' BRIEF IN SUPPORT OF G&G OIL CO. OF INDIANA'S PETITION TO TRANSFER

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I. STATEMENT OF INTEREST OF *AMICUS CURIAE*

Effectuating the purpose of insurance and interpreting insurance contracts require special judicial handling. United Policyholders ("UP") respectfully seeks to assist this Court in fulfilling this important role. UP is a unique non-profit organization founded in 1991 that provides valuable information and assistance to the public concerning insurers' duties and policyholders' rights. UP helps preserve the integrity of the insurance system by educating consumers and advocating for fairness in policy sales and claim handling. Grants, donations and volunteers support the organization's work. UP does not accept funding from insurance companies.

UP assists Indiana residents and businesses through three programs: *Roadmap to Recovery*™ (disaster recovery and claim help), *Roadmap to Preparedness* (disaster preparedness through insurance education), and *Advocacy and Action* (judicial, regulatory and legislative engagements to uphold the reasonable expectations of insureds). UP hosts a library of informational publications and videos related to personal and commercial insurance products, coverage and the claims process at www.uphelp.org. UP communicates with the Indiana Department of Insurance on a regular basis at the tri-annual meetings of the National Association of Insurance Commissioners where UP's Executive Director Amy Bach, Esq. serves as an official consumer representative.

In furtherance of its mission, UP regularly appears as *amicus curiae* in courts nationwide. UP submits this brief because the opinion has a damaging impact on commercial crime insurance policyholders throughout Indiana and the US. The decision is and will continue to be referenced by insurers and their advocates to restrict coverage improperly.

II. ARGUMENT

The decision from the Court of Appeals was wrongly decided and damages the interests of all "crime insurance" policyholders in Indiana. The Court of Appeals should have followed

the rules for interpreting an insurance policy that this Court established in the seminal *Eli Lilly v. Home Insurance* decision. Instead, the Court of Appeals determined that the loss is not covered by relying on out-of-state cases that have been distinguished by multiple courts and substituting a novel public policy determination for the plain language of the contract of insurance. That is inconsistent with Indiana law. It also means that "crime insurance" coverage will be less available to Indiana insureds than in other states.

A. This Court Established Special Rules For Interpreting Insurance Policies.

In Indiana, there are special rules for interpreting insurance policies. In the seminal case of *Eli Lilly & Co. v. Home Insurance Co.*, 482 N.E.2d 467 (Ind. 1985), this Court explained the rules for interpreting an insurance policy. First, "[i]f the policy language is clear and unambiguous, it should be given its plain and ordinary meaning." *Id.* at 470. Second, "[t]he terms of an insurance policy should be interpreted most favorable to the insured if there is an ambiguity in the policy," and "[a]n ambiguous insurance policy should be construed to further the policy's basic purpose of indemnity." *Id.* Third, "courts should strive to give effect to the reasonable expectations of the insured." *Id.* at 471. Fourth, the "objective of promoting coverage" means that courts need not consider "extrinsic evidence" offered by insurers for purposes of "interpretation of the policies." *Id.* at 470. Thus, this Court concluded in a later decision, "[a] reasonable construction [of the insurance policy] that supports the policyholder's position must be enforced as a matter of law." *Everett Cash Mut. Ins. Co. v. Taylor*, 926 N.E.2d 1008, 1014 (Ind. 2010). When the policyholder has offered a reasonable construction of the policy language, it must be applied as a matter of law. *See id.* ("A reasonable construction that supports the policyholder's position must be enforced as a matter of law.").

After *Eli Lilly*, Indiana courts have followed further canons of insurance policy construction. For example, when there is a split in authority regarding the meaning of a clause in

an insurance policy, that indicates the policy language likely is ambiguous, and must be construed in favor of coverage and against the insurer. *See, e.g.*, *Travelers Indem. Co. v. Summit Corp. of Am.*, 715 N.E.2d 926, 938 (Ind. Ct. App. 1999) ("This disagreement among the courts further indicates the ambiguity of the personal injury provisions.").

Critically, a "well-settled principle of Indiana law [is] that '[courts do] not rewrite an insurance contract.'" *Keckler v. Meridian Sec. Ins. Co.*, 967 N.E.2d 18, 28 (Ind. Ct. App. 2012) (quoting *Bowen v. Monroe Guar. Ins. Co.,* 758 N.E.2d 976, 980 (Ind. Ct. App. 2001)). When courts "interpret insurance policies," they do not "chang[e] their terms," and "[r]eading a 'public policy' exception into [an insured's] policy would be a rewriting of the policy, in contravention of established law that prohibits such rewriting." *Id.* (quoting *Gregg v. Cooper,* 812 N.E.2d 210, 215 (Ind. Ct. App. 2004), *trans. denied*)).

When an insurer could have used a specific term in an insurance policy, but chooses to not do so, the insurer cannot rely on the more restrictive term that it chose not to use and cannot rewrite the policy to incorporate a missing term or some supposed public policy. *See, e.g., State Mut. Ins. Co. v. Flexdar, Inc.*, 964 N.E.2d 845, 852 (Ind. 2012); *Keckler v. Meridian Sec. Ins. Co.*, 967 N.E.2d 18, 28 (Ind. Ct. App. 2012) (insurer may not use a supposed public policy to insert a limitation into the insurance policy when it could have written a narrower form).

It is appropriate to consider dictionary definitions of a policy term to understand its plain meaning. *See, e.g.*, *Smith v. Allstate Ins. Co.*, 681 N.E.2d 220, 223 (Ind. Ct. App. 1997) (using dictionary to define terms in insurance policy).

B. Indiana's Rules Of Insurance Policy Construction Require A Finding That There Was Computer Fraud Here.

1. The Court of Appeals relied on out-of-state cases that are inconsistent with Indiana's rules of interpretation for insurance policies.

Rather than either determining that the plain language of the insurance policy provides coverage (and was within the reasonable expectations of G&G), or finding that the language was ambiguous and construing it in favor of coverage, the Court of Appeals relied on two out-of-state cases to conclude that Computer Fraud requires hackers to make an "unauthorized transfer of funds" and for the public policy principle that applying Computer Fraud coverage in a situation like this "would convert this Crime Policy into a 'General Fraud' Policy." Slip op. at 10. That result is not warranted under Indiana law.

The Court of Appeals relied first on *Pestmaster Services, Inc. v. Travelers Casualty & Surety Co. of America*, 656 F. App'x 332 (9th Cir. 2016), a decision involving a fraud that could have been accomplished without the use of computers.[1] *Pestmaster* is not a solid foundation on which to build Indiana law regarding Computer Fraud coverage. Separate cases interpreting Computer Fraud coverage have distinguished *Pestmaster*. In each, the courts rejected the insurance companies' assertions that under *Pestmaster*, courts must interpret Computer Fraud coverage as applying only to circumstances in which a hacker caused money to be transferred from one computer to the other.

[1] In *Pestmaster*, the policyholder made legitimate payments to its vendor, so that the vendor could pay Pestmaster's taxes for it. *Pestmaster*, 2014 WL 3844627, at *1-2 (C.D. Cal. July 17, 2014), *aff'd in part and vacated in part*, 656 F. App'x 332, 333 (9th Cir. 2016). After Pestmaster wired money for authorized legitimate transactions, the vendor failed to make tax payments for Pestmaster, and kept the money instead. *Id.* The vendor's "fraudulent conduct" was when it misused funds that it obtained by legitimate means, and was not dependent on the use of a computer to complete the scheme. *Id.* at *7. Thus, the fraud in *Pestmaster* could have happened without a computer – the vendor could have misused money deposited by checks – so it is of no moment that the courts refuse to read Computer Fraud coverage as applying. Here, by contrast, the ransomware only works when computers are involved and the user was tricked into downloading malware to let the ransomware take over the network.

In *American Tooling Center, Inc. v. Travelers Casualty & Surety Co.*, 895 F.3d 455 (6th Cir. 2018), the policyholder received a phishing email,[2] and, then sent money to the hacker as a result of the message. The Sixth Circuit held that Computer Fraud covered the funds lost because the insured sent them to the hacker. Coverage was not limited to circumstances, as the insurer argued, "to hacking and similar behaviors in which a nefarious party somehow gains access to and/or control's the insured's computer." *Id.* at 462. The court rejected the insurer's argument that Computer Fraud coverage "require[s] . . . that the fraud 'cause the computer to do anything.'" *Id.* Rather, the phishing emails and subsequent sending of money to the hacker was sufficient for Computer Fraud coverage to apply. *See id.* at 463; *see also Ubiquiti Networks v. Nat'l Union Fire Ins. Co.*, No. 18CV322879, slip op. at 7 (Cal. Super. Ct. July 30, 2018) (rejecting insurer's argument that "courts have consistently interpreted this language as covering losses occurring when a 'scheming third-party hacker [breaks] into the computer to directly cause the transfer via the computer'"). Similarly, in *Medidata Solutions, Inc. v. Federal Insurance Co.*, 268 F.3d 471, 478-79 (S.D.N.Y. 2017), *aff'd*, 729 F. App'x 117 (2d Cir. 2018), the District Court rejected *Pestmaster*'s narrow interpretation of Computer Fraud, and ruled that a phishing email and subsequent sending of funds satisfied the definition of Computer Fraud. Finally, the District Court in *Cincinnati Insurance Co. v. Norfolk Truck Center, Inc.*, 430 F. Supp. 3d 116 (E.D. Va. 2019) considered whether Computer Fraud coverage applied to circumstances where the policyholder received a phishing email and sent money to the hacker six days later, and rejected the insurer's reliance on *Pestmaster* in arguing against coverage. It

[2] "Phishing 'is a method of . . . using deceptive e-mails . . .' to 'trick an e-mail recipient into believing that the message is something they want or need from a legitimate or trustworthy source and to subsequently click on [a] link or download an attachment.'" *Jantzer v. Elizabethtown Cmty. Hosp.*, No. 819CV00791BKSDJS, 2020 WL 2404764, at *1 (N.D.N.Y. May 12, 2020) (quoting complaint in motion to dismiss). After the user clicks on the fraudulent link, "'the credentials are then used to gain unauthorized access into a system.'" *Id.*

recognized that Computer Fraud coverage "does not require a fraudulent payment by computer; rather it requires a computer's use to fraudulently cause a transfer of money." *Id.* at 131. In contrast to the decision from the court below, those courts recognize that Computer Fraud "coverage covers loss 'resulting directly from the use of any computer to fraudulently cause **a transfer** of [money.] . . . Thus, the cause of the transfer must be fraudulent; however, the payment itself need not be fraudulent." *Id.* at 131 n. 11 (emphasis in original).

Moreover, the Court of Appeals' citation to *Pestmaster* for a public policy-based reason to deny coverage is contrary to Indiana law. The Court of Appeals stated a concern that a finding of coverage when a hacker did not transfer funds from one computer to another "would convert this Crime Policy into a 'General Fraud' Policy" on the basis that "computers are used in almost every business transaction." Slip op. at 10. That is not consistent with Indiana law. Refusing to apply the plain language of an insurance policy, because of a public policy concern about insurance policies being read too broadly, violates the rule that Indiana courts do "not rewrite an insurance contract" or insert some sort of "'public policy' exception into" the insurance contract. *Keckler*, 967 N.E.2d at 28 (quoting *Bowen,* 758 N.E.2d at 980).

If Continental wanted to narrow the scope of the insurance policy's Computer Fraud coverage, it could have written more restrictive policy language, and it could avoid future liability by using such language going forward. This Court has explained that updated policy terms, which are more restrictive, are evidence that an insurer could have engaged in "more careful drafting" if the insurer wanted to limit coverage. *Flexdar*, 964 N.E.2d at 852. Continental had sufficient time to narrow its policy language. The policy form that it used for this matter dates to 2005, and the event at issue took place in 2017. (Appellant's App. 3:67, 3:154.) "Although [Continental] could have more clearly defined "[Computer Fraud]" . . ., it

failed to do so. [Courts] cannot now re-write the insurance policy" to reflect the arguments of litigation counsel. *Michigan Mut. Ins. Co. v. Combs*, 446 N.E.2d 1001, 1007 (Ind. Ct. App. 1983).

The Court of Appeals' citation to the trial court decision in *InComm Holdings, Inc. v. Great American Ins. Co.*, 2017 WL 1021749 *10 (N.D. Ga. Mar. 16, 2017) for the principle that Computer Fraud coverage requires a "hacking where a computer is caused to cause another computer to make an unauthorized, direct transfer of property or money," which *American Tooling*, *Medidata*, and *Norfolk Truck* rejected, also is inapposite. Slip op. at 10-11. The Court Eleventh Circuit rejected the District Court's decision to "impose[]additional conditions not required by the policy's plain language" – that is, restricting coverage in a way not found in the policy – and determined that there was fraudulent use of computers under Computer Fraud coverage. *Interactive Communications, Int'l, Inc.*[3] *v. Great Am. Ins. Co.*, 731 F. App'x 929, 930, 931-32 (11th Cir.) (*per curiam*). The court ultimately denied coverage because there was a four step process before the insured suffered a loss, and each one of the thousands of transactions led to a "the loss [that] was temporally remote: days or weeks – even months or years – could pass between" the original computer fraud and the loss, and because there was a four step attenuated process before the insured suffered a loss. *Id.* at 931, 935.[4]

Even if the Court were to find the narrow coverage interpretations in those out-of-state cases to be reasonable, it would fly in the face of Indiana law to rely on them to deny coverage. Under Indiana law, when there is a split in authority, that is evidence of ambiguity in an

[3] The policyholder changed its name by the time of the appeal.

[4] The Eleventh Circuit's holding has been distinguished in the context of other Computer Fraud cases when there was not such an attenuated chain of events as there was in *InComm*. *See Am. Tooling*, 895 F.3d at 462-63 (noting that losses from phishing attack were more direct than the four steps before loss in *InComm*); *accord Norfolk Truck*, 430 F. Supp. 3d at 126-27, 130-31 (declining to follow *InComm*).

insurance policy. *See, e.g.*, *Summit Corp. of Am.*, 715 N.E.2d at 938. As detailed above, the decisions on which the Court of Appeals relied have been distinguished, criticized, or rejected. *See Am. Tooling*, 895 F.3d at 462; *Medidata*, 268 F.3d at 478-79; *Norfolk Truck*, 430 F. Supp. 3d at 131. That reflects a split in authority and shows that there is more than one reasonable way to interpret Computer Fraud coverage. Accordingly, the Court of Appeals' reliance on those cases to deny coverage was misplaced.

2. Under Indiana's rules of interpreting the plain language of insurance policies in favor of coverage, the event consists of Computer Fraud.

Following Indiana's principles of insurance policy interpretation leads to the conclusion that this event is covered by the crime policy's Computer Fraud coverage. The Continental policy requires a loss of money "resulting directly from the use of any computer to fraudulently cause a transfer of that property . . . ." (Appellant's App. 3:67.) There was a loss of money, in the form of a purchase of four bitcoins. (*Id.* 3:154-55.)

The loss resulted "directly from the use of any computer." The loss resulted "from the use of any computer" because computer hackers tricked G&G into taking action that locked up its network, and G&G had to buy and pay multiple sets of bitcoins to get them unlocked. (*Id.* 3:154-55.)

The loss was "resulting directly from" the use of a computer. "Resulting directly from" distinguishes between so-called "first party loss," where the insured loses its own money, and "third party loss," where the insured pays damages to a third party after an event. In *Tooling, Manufacturing & Technologies Association v. Hartford Fire Insurance Co.*, 693 F.3d 665 (6th Cir. 2012), the Sixth Circuit explained that "the Surety Association revised its standard fidelity-contract form to replace the term 'loss resulting through' with 'directly resulting from. . . '" "to combat court cases that found coverage under fidelity policies" for third party liabilities, rather

than a loss of the insured's own funds. *Id.* at 674. *Id.* The loss here was direct because it was G&G's own funds, and was not a payment of damages to satisfy a third party liability.[5]

This phrase does not require hackers to send money from one computer to the other to apply; it applies to situations when there is a phishing email (as there was here) and the insured sending money as a result of it. *See generally* § II.B.1, *supra*.

Dictionary definitions also are instructive. The Merriam-Webster unabridged dictionary definition of "directly" includes, "after a little **:** in a little while **:** shortly, presently" and uses an example of <we'll discuss that *directly*; first we must act on this motion>, illustrating that there may be an step in between the original action and the requested action. Merriam-Webster, *Directly*, Merriam-Webster Unabridged, http://unabridged.merriam-webster.com/unabridged/directly (last visited June 18, 2020). Black's Law Dictionary defines "directly" as "1. In a straightforward manner. 2. In a straight line or course. 3. Immediately." *Directly*, Black's Law Dictionary (11th ed. 2019).

Those definitions are consistent with what happened here. Merriam-Webster's example definition makes clear that there may be an intervening step ("first we must act on this motion") before something may be accomplished "directly." Further, the time-based definitions – "in a little while," "shortly," and "immediately after" also describe what happened here. The only thing that G&G could do, after its computers were locked up, was figure out a way to buy bitcoin and then give it to the hackers. (Appellant's App. at 3:154-55.)

[5] Specific to Indiana law, over 40 years ago, the Court of Appeals has held "direct" to be ambiguous in the context of what consists of "direct loss" in an insurance policy. *See Farmers Mut. Aid Ass'n. v. Williams*, 386 N.E.2d 950, 952 (Ind. Ct. App. 1979). Nonetheless, Continental continues to use that term in its policy. It is stuck with the consequences—a finding of coverage—arising from its use that ambiguous term. *See Flexdar*, 964 N.E.2d at 852.

Finally, a computer was used "to fraudulently cause a transfer of that property" to someone else. (Appellant's App. 3:67.) There was phishing here (*id.* at 3:154), and the entire concept of phishing is that "deceptive e-mails . . . 'trick an e-mail recipient'" and convince the target into downloading malware or sending money to the hackers'" *Jantzer*, 2020 WL 2404764, at *1. The emails had to be fraudulent to be phishing; otherwise, they would have been legitimate messages. That fraud via computer caused G&G to transfer money (in the form of bitcoin) to the hackers.

There also was Computer Fraud when the hackers defrauded G&G into paying an additional bitcoin, after the initial three, to get the keys to unlock the ransomware. (Appellant's App. 3:154.) This Court has stated, "[o]rdinary people commonly understand 'fraud' to mean 'trickery,' 'deception,' or 'deceit.'" *Brown v. State*, 868 N.E.2d 464, 468 (Ind. 2007).[6] The hackers engaged in trickery, deception, and deceit in connection with the bitcoins to be paid to unlock the ransomware when they lied to G&G by saying that a payment of three bitcoins would be enough to get the passwords to unlock the systems (Appellant's App. 3:154.) After G&G paid the original ransom of three bitcoins, the hackers demanded another bitcoin to fully unlock the ransomware. (Appellant's App. 3:155.) In short, the hackers engaged in trickery to induce G&G to give up possession of money (three bitcoins) because they did not intend to give the keys for that amount. The Court of Appeals' statement that "there was no deception involved in the hijacker's demands for ransom in exchange for restoring G&G's access to its computers"

[6] Under the definitions that the Court of Appeals used, "fraud is the 'intentional perversion of truth in order to induce another to part with something of value or to surrender a legal right'" or "'[a] deception practiced in order to induce another to give up possession of property or surrender a right.'" Slip op. at 10 (quoting Merriam-Webster Dictionary and American Heritage Dictionary).

ignores the hackers' deception when they lied about being willing to unlock the computers for only three bitcoins.

C. Under The Court Of Appeals' Decision, Indiana Policyholders Will Receive Less Coverage Than Policyholders In Other States.

As computer-based risks have expanded, courts around the country have construed Computer Fraud coverage in a number of contexts, and have determined that Computer Fraud covers a variety of risks; the coverage is not limited to situations in which a hacker uses a computer to transfer funds from one computer to another.

Coverage for a "business email compromise"[7] – losses suffered when an insured is phished and sends money to hackers as a result – is an on point example. Multiple courts have held that Computer Fraud coverage applies to business email compromises that started with phishing attacks; they rejected insurers' arguments that Computer Fraud coverage is restricted to instances in which a hacker uses one computer to transfer funds to a second computer, rather than circumstances when the insured affirmatively sends money to the hackers. *See Am. Tooling*, 895 F.3d at 462 (6th Cir. 2018) (computer fraud coverage applied to losses resulting from a phishing attack when the policyholder later sent the hacker money and rejecting argument that Computer Fraud coverage applies only to hacking and when a hacker "somehow gains access to and/or controls the insured's computer"); *Medidata*, 268 F.3d at 478-79, *aff'd*, 729 F. App'x 117 (2d Cir. 2018) (same); *Norfolk Truck*, 430 F. Supp. 3d at 130-31 (same); *see also*

[7] The F.B.I. defines a business email compromise as follows: "criminals send an email message that appears to come from a known source making a legitimate request" https://www.fbi.gov/scams-and-safety/common-scams-and-crimes/business-email-compromise. Like here, a business email compromise starts with a "phishing scheme," "persuading an employee to" take action (often to wire money to the hacker). *See, e.g.*, *Principle Solutions Group, LLC v. Ironshore Indemnity, Inc.*, 944 F.3d 886, 888 (11th Cir. 2019).

Ubiquiti, slip op. (denying insurer's demurrer and finding that Computer Fraud coverage could apply to business email compromise losses after an initial phishing email).

Variations of Computer Fraud coverage have been found to cover other cyberattacks. In *Retail Ventures, Inc. v. National Union Fire Insurance Co.*, 691 F.3d 821 (6th Cir. 2012), the court analyzed whether a variation of a crime policy's Computer Fraud coverage ("Computer & Funds Transfer Fraud Coverage") applied to damages owed as a result of a hack of a credit card server. Hackers accessed the policyholder's server and viewed credit card numbers; they did not steal money or transfer it from one computer to the other. *See id.* at 824. The policyholder had a multi-million dollar liability to its credit card processor for resulting "charge backs, card reissuance, account monitoring, and fines imposed by VISA/MasterCard." *Id.* at 824-25. The Sixth Circuit recognized that coverage applied, and that the damages owed as a result of the hack "resulted directly" from the computer fraud. *See id.* at 827-28, 831-32.

In *E & A Industries, Inc. v. Federal Insurance Company*, No. 49D04-1503-CT-009175, slip op. (Marion Sup. Ct. June 21, 2016) (order granting sum. j.), *vacated by settlement*, slip op. (Feb. 16, 2017), the court considered whether the crime policy's Computer Fraud coverage applied to losses after "a cyber-attack on [the insured's] computer network, data servers, and individual computers . . . made multiple serves and hard drives inoperable and destroyed unknown quantities of data." Slip op. at 2. The court ruled that "[t]he plain language of Computer Fraud coverage applies, or, alternatively, the language is ambiguous and shall be construed in [the insured's] favor." Slip op. at 12.

These cases demonstrate that Computer Fraud coverage has been interpreted as applying in a variety of circumstances involving some form of fraud via a computer, and that coverage is

not limited to situations in which a hacker uses one computer to transfer funds to a second computer.

The Court of Appeals decision to rely on cases that interpreted Computer Fraud coverage narrowly, and ignore cases interpreting Computer Fraud coverage as applicable to a number of computer-related frauds, conflicts with Indiana's public policy of interpreting coverage broadly and in favor of indemnification. It should be overturned on that basis.

III. CONCLUSION

The Court of Appeals' March 31, 2020 Order conflicts with Indiana insurance law. It uses "public policy" rather than the language of the insurance policy to interpret policy language narrowly and ignores multiple decisions finding that Computer Fraud coverage applies in analogous circumstances. The Court should grant transfer, vacate the Court of Appeals' Order of March 31, 2020, remand with an order determining that the loss was covered, and award all other just and appropriate relief.

Dated: July 6, 2020

Respectfully submitted,

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WORD COUNT CERTIFICATE

I verify that this petition contains no more than 4,200 words.

/s/ Andrew J. Detherage

IV. CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 6th day of July, 2020, the foregoing was electronically filed with the Clerk of the Court of Appeals.

I also certify that on this 6th day of July, 2020, the foregoing was served upon all following Registered Users through E-Service using the Indiana Electronic Filing System ("IEFS"):

/s/ Andrew J. Detherage