**SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION**
**DOCKET NO.: AM-253-21**

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| MERCK & CO, INC. et al.,<br><br>Plaintiffs-Respondents,<br><br>vs.<br><br>ACE AMERICAN INSURANCE COMPANY, et al.,<br><br>Defendants-Petitioners. | CIVIL ACTION<br><br>ON APPEAL FROM THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION<br>DOCKET NO.: UNN-L02682-18<br><br>SAT BELOW:<br><br>Hon. Thomas J. Walsh, J.S.C. |

# BRIEF IN SUPPORT OF UNITED POLICYHOLDERS' MOTION FOR LEAVE TO APPEAR AS AMICUS CURIAE


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**STATEMENT OF INTEREST REGARDING AMICUS CURIAE**

United Policyholders ("UP") is a highly respected national non-profit 501(c)(3) organization. Founded in 1991, for nearly 30 years UP has operated as a dedicated advocate and information resource for individual and commercial insurance consumers throughout the entire United States. UP assists purchasers of insurance who are seeking a policy or pursuing a claim for loss reimbursement. For example, UP is routinely called upon to help policyholders in the wake of large-scale national disasters such as floods, windstorms, and hurricanes in the Gulf States and across the Eastern Seaboard. With grant funding from the Hurricane Sandy New Jersey Relief Fund, UP provided three years of services to Garden State homeowners whose properties had been damaged or destroyed and needed insurance guidance. In that role, UP works with regulators, including the New Jersey Division of Banking and Insurance, on matters related to policy sales and claims and consumer rights.

The application of insurance contracts requires special judicial handling. Commerce, government, and society benefit when losses are indemnified through insurance purchased by individuals and businesses. The insurance system is woven into the fabric of our economy through mandatory purchase requirements, prudent personal and business risk management, and the pricing of goods and services. Each state regulates insurance contracts and transactions through its own set of laws and regulations, yet most insurers

operate in multiple states. Most insurers serve three different masters when carrying out their important purpose, and the resulting conflicts that arise often compel judicial balancing, such as the instant case. Insurers must meet their own revenue objectives *and* the reasonable expectations of policyholders, *and* the demands of their investors and shareholders. Judicial oversight is essential to maintain the purpose and value of insurance purchases by individuals and businesses in this complex system.

The language of insurance policies is increasingly less standardized.[1] That means insurers are using far more creativity in drafting policy terms and conditions and exclusions and limitations than in the past. This has made it much harder for state insurance regulators to review those terms and limitations and determine whether they will effectuate or deprive the purchaser of the protection they intend to purchase. Compounding that challenge to state insurance regulators is that data mining, artificial intelligence, and computerized risk modeling have made it literally impossible to give every new policy form the scrutiny it deserves.

Effectuating indemnification in cases of loss despite these factors remains a fundamental economic and social objective that courts can advance. UP respectfully seeks to assist this Court in fulfilling these important roles.

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[1] Daniel Schwarcz, *Reevaluating Standardized Insurance Policies*, 78 U. Chi. L. Rev. 1263, 1272 (2011).

Public officials, state insurance regulators, academics, and journalists throughout the U.S. routinely seek UP's input on insurance and legal matters. UP serves on the Federal Advisory Committee on Insurance, which briefs the Federal Insurance Office and in turn, the U.S. Treasury Department. UP's Executive Director has been an official consumer representative to the National Association of Insurance Commissioners since 2009. In that role, UP assists regulators in monitoring policy language and claim practices through presentations and collaboration and the development of model laws and regulations.

Since 1991, UP has filed amicus curiae briefs in numerous federal and state appellate courts across the country. Amicus briefs filed by UP have been expressly cited in the opinions of state supreme courts as well as the U.S. Supreme Court. *See, e.g.*, *Humana Inc. v. Forsyth*, 525 U.S. 299, 314 (1999); *Cont'l Ins. Co. v. Honeywell Int'l, Inc.*, 188 A.3d 297, 322 (N.J. 2018); *Allstate Prop. & Cas. Ins. Co. v. Wolfe*, 105 A.3d 1181, 1185-86 (Pa. 2014); *Julian v. Hartford Underwriters Ins. Co.*, 110 P.3d 903, 911-12 (Cal. 2005); *Sproull v. State Farm Fire & Cas. Co.*, 184 N.E.3d 203 (Ill. 2021).

By submitting a brief in this matter, UP seeks to fulfill the classic role of amicus curiae in a case of general public interest, supplementing the efforts of counsel, and drawing the Court's attention to law that escaped consideration. This is an appropriate role for amicus curiae. As commentators have often stressed, an

amicus is often in a superior position to "focus the court's attention on the broad implications of various possible rulings." R. Stern, E. Greggman & S. Shapiro, *Supreme Court Practice*, 570-71 (1986) (quoting Bruce J. Ennis, *Effective Amicus Briefs*, 33 Cath. U. L. Rev. 603, 608 (1984)).

## PRELIMINARY STATEMENT

UP respectfully submits this Amicus Brief to preserve and apply established principles of New Jersey insurance law to which the Law Division's decision correctly adhered. The trial court properly granted Respondents' motion for partial summary judgment after finding that the policies' "war exclusion" did not apply to bar coverage for Respondents' claim for damages resulting from the underlying cyber-attack. The trial court correctly interpreted the war exclusion based on its plain language. The court's interpretation comported not only with well-settled case law interpreting "all-risk" policies, but also with the insurance industry's understanding of how coverage is both provided under, and excluded from, "all-risk" policies such as those at issue here. This Court should affirm the trial court's decision for a number of reasons, including the following:

First, it is well settled in the insurance industry that an "all-risk" insurance policy, such as the policies sold to Plaintiffs here, is intended to provide coverage for risks "not usually contemplated" by other, specified-perils coverages. *Victory Peach*

*Grp., Inc. v. Greater N.Y. Mut. Ins. Co.*, 310 N.J. Super. 82, 87 (App. Div. 1998) (quoting 43 Am. Jur. 2d Insurance § 505 (1982)). Such coverage was intended to include, as the name suggests, *all* risks. Thus, absent a clear exclusion barring coverage for a particular loss, an all risks policy is expected by the policyholder, and understood by the insurer, to provide coverage for such loss.

Second, the insurers' present attempt to interpret their war exclusion to bar coverage for a loss that was not expressly excluded — specifically, loss from a cyber-attack carried out against their policyholder — is an egregious attempt to undermine the expansive coverage promise inherent in the all-risk policies here. Had the insurers intended to exclude such an event, such exclusionary language should have been expressly included in Plaintiffs' policies. It is wholly improper, and contrary to both legal authority and insurance industry standards, to read such an exclusion into the policies where it doesn't otherwise exist.

Third, it would contradict the very concept of insurance itself to permit insurers to re-define the language of existing policy exclusions only after a loss has occurred. This is precisely what the insurers seek to do here. Faced with substantial indemnity obligations resulting from the cyber-attack at issue, and recognizing they cannot avoid the reality that these liabilities are covered, the insurers advance an interpretation of the war exclusion that was never intended when negotiating, drafting, or selling the policies.

But the insurers are not permitted to benefit from 20-20 hindsight to the detriment of their insured. If the insurers determine that a "new" risk must be excluded, they must expressly and unambiguously exclude it before any loss occurs.

Accordingly, UP requests the Court grant its motion for leave to appear as amicus curiae and find in favor of Plaintiffs-Respondents.

## STATEMENT OF FACTS

UP adopts Plaintiffs' Statement of Facts and incorporates it here in its entirety. *See* Pl's Mem. In Supp. of M. for Partial Summ. J. on the War Exclusion, 3-9 (Apr. 23, 2021).

## LEGAL ARGUMENT

### I. Principles of Insurance Policy Construction.

Under bedrock insurance law, it is the burden of the insurer in the face of uncertain exclusionary language to prove there is no possibility of coverage. *See Sinopoli v. N. River Ins. Co.*, 244 N.J. Super. 245, 251 (App. Div. 1990) ("The burden is on the carrier to bring the case within the exclusion.") (citing *Burd v. Sussex Mut. Ins. Co.*, 56 N.J. 383, 399 (1970)). This is consistent with New Jersey principles of insurance policy interpretation. *See id.* Indeed, New Jersey is consistent with the prevailing law throughout the country, requiring insured-friendly policy construction across the board: "[p]rinciples of insurance contract interpretation `mandate [a] broad reading of coverage provisions, [a] narrow reading

of exclusionary provisions, [the] resolution of ambiguities in the insured's favor, and [a] construction consistent with the insured's reasonable expectations[.]'" *Hampton Med. Grp. v. Princeton Ins. Co.*, 366 N.J. Super. 165, 172 (App. Div. 2004) (quoting *Search EDP, Inc. v. Am. Home Assur. Co.*, 267 N.J. Super. 537, 542 (App. Div. 1993)); *see also Jeffer v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 306 N.J. Super. 82, 87 (App. Div. 1997) (stating that exclusionary clauses in liability insurance policies "must be strictly construed in favor of the insured, with any doubt as to the existence of coverage resolved in a manner that affords coverage to the insured"); *Sinopoli*, 244 N.J. Super. at 250 (citations omitted) ("[T]he language of liability insurance policies should be construed liberally in favor of the insured and strictly against the insurer, and in such manner as to provide full coverage of the indicated risk rather than to narrow protection.").

New Jersey law makes clear that the above rules apply with equal force whether the policyholder is an individual consumer or a sophisticated corporate entity: "These principles are no less applicable merely because the insured is itself a corporate giant." *CPS Chem. Co. v. Cont'l Ins.*, 222 N.J. Super. 175, 190 (App. Div. 1988); *see also Abboud v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 450 N.J. Super. 400, 409 (App. Div. 2017) ("[T]he [reasonable expectations] doctrine has been applied to commercial lines, as well"); 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.").

## II. ALL-RISK INSURANCE IS AN EXPANSIVE COVERAGE PROMISE FOR ALL INSUREDS, INCLUDING COMMERCIAL INSUREDS, WHICH CAN ONLY BE LIMITED BY CLEAR EXCLUSIONARY LANGUAGE.

An "all-risk" insurance policy is a "special type of insurance extending to risks ***not usually contemplated***, and recovery under the policy will generally be allowed, at least for all losses of a fortuitous nature, in the absence of fraud or other intentional misconduct of the insured, unless the policy contains a ***specific provision expressly excluding*** the loss from coverage." *Victory Peach Grp.*, 310 N.J. Super. at 87 (quoting 43 Am. Jur. 2d *Insurance* § 505 (1982)) (emphasis supplied); *see also Kopp v. Newark Ins. Co.*, 204 N.J. Super. 415, 421 (App. Div. 1985) ("The [s]pecial [m]ulti-[p]eril [p]olicy," unlike a named peril policy, extends to all fortuitous losses unless caused by fraud or intentional conduct or unless expressly excluded). All-risk policies insure fortuitous losses, or ones that are "dependent on chance." *Victory Peach Grp.*, 310 N.J. Super. at 87 n.1 (citing 5 Appleman, *Insurance Law & Practice* § 3092 (Supp. 1996-97)).

Absent clear exclusionary language to the contrary, insurers

broadly promise to indemnify their policyholders for all amounts they must pay because of a fortuitous loss. *See Victory Peach Grp.*, 310 N.J. Super. at 87-88. This is because an insurer, as a risk expert "learned in the law of insurance," is expected to have the competence required to "constrict the coverage provided by their standard-form policies," and can "easily" do so with "clear and unequivocal" text. *CPS Chem. Co.*, 222 N.J. Super. at 189-90.

Indeed, this interpretation of "all risk" insurance is consistent across jurisdictions.

## III. THE INSURERS' INTERPRETATION OF THE WAR EXCLUSION IS AN EGREGIOUS ATTEMPT TO UNDERMINE THE EXPANSIVE COVERAGE PROMISE PROVIDED FOR IN THE ALL-RISK POLICIES AT ISSUE.

The war exclusion at issue is standard-form language drafted by the insurance industry tracing back hundreds of years. Jeffrey W. Stempel, *The Insurance Aftermath of September 11: Myriad Claims, Multiple Lines, Arguments Over Occurrence Counting, War Risk Exclusions, the Future of Terrorism Coverage, and New Issues of Government Role*, 37 Tort & Ins. L.J. 817 (Spring 2002). It is a standard feature of property and other insurance policies. *Id.* Accordingly, this exclusion was not negotiable. *Id.* Rather, this is a form exclusion solely drafted by the insurers without input from, or discussion with, Plaintiffs. As the primary drafters, the insurers alone bear the consequences and shortcoming of their exclusive creation. *See Allen v. Metropolitan Life Ins. Co.*, 44 N.J. 294, 305 (1965) ("The company is expert in its field and its

varied and complex instruments are prepared by it unilaterally whereas the assured or prospective assured is a layman unversed in insurance provisions and practices. He justifiably places heavy reliance on the knowledge and good faith of the company and its representatives and they, in turn, are under correspondingly heavy responsibility to him. His reasonable expectations in the transaction may not justly be frustrated and courts have properly molded their governing interpretative principles with that uppermost in mind. Thus we have consistently construed policy terms strictly against the insurer and where several interpretations were permissible, we have chosen the one most favorable to the assured."). And even if the exclusion had been negotiated, it still must be strictly construed in favor of the insured, with any doubt as to the existence of coverage resolved in a manner that affords coverage to the insured. *See id.*

Tellingly, before the cyber-attack at issue, in which malware called NotPetya infected Plaintiffs' computer network worldwide and shut down over 40,000 computers within hours, the insurance industry had never applied a war exclusion to exclude coverage for any loss resulting from a cyber-event. Rather, the insurance industry consistently applied the war exclusion only to losses resulting from or closely connected to the use of armed forces during "conventional" warfare. *See, e.g.*, *Stanberry v. Aetna*, 26 N.J. Super. 498, 507 (Law. Div. 1953); *Univ. Cable Prods., LLC v. Atl. Spec. Ins. Co.*,

929 F.3d 1143, 1162 (9th Cir. 2019); *Queens Ins. Co. v. Globe Rutgers Fire Ins. Co.*, 282 F. 976, 979-982 (2d Cir. 1922); *Holiday Inns, Inc. v. Aetna Ins. Co.*, 571 F. Supp. 1460, 1464-65 (S.D.N.Y. 1983); *Pan Am. World Airways, Inc. v. Aetna. Cas. & Sur. Co.*, 368 F. Supp. 1098, 1131-32 (S.D.N.Y. 1973); *Int'l Dairy Eng'g Co. of Asia, Inc. v. Am. Home. Assur. Co.*, 352 F. Supp. 827, 828-831 (N.D. Cal. 1970).

The insurers are aware that to exclude cyber-attacks from an all-risk property policy, they must add a cyber-exclusion that explicitly says so. Having not done that here, the insurers cannot now shoehorn an otherwise plainly covered loss into an exclusion that was never meant to apply to such circumstances.

Moreover, the Court should find it particularly telling that, in the wake of NotPetya and the growing prevalence of cyber-attacks more generally, insurers have drafted ***new*** exclusions specific to cyber events, recognizing that war exclusions such as that at issue here are not the proper way to exclude these types of loss. Alice Uribe, Leslie Scism, & David Uberti, *Ukraine War Has Insurers Worried About Cyber Policies*, Wall St. J., Mar. 14, 2022. The industry's efforts to add new exclusionary language to its policies explicitly tailored to cyber-attacks is itself evidence that the pre-NotPetya war exclusion at issue here was not intended to exclude Plaintiffs' loss. At a minimum, the insurance industry seeks to exclude something different than intended by the exclusion or rectify what may be an ambiguity in the existing war exclusion. As this Court is

well aware, any ambiguity in the exclusion must be resolved in favor of coverage. *Pizzulo v. N.J. Mfrs. Ins. Co.*, 196 N.J. 251, 270-71 (2008); *see also Wakefern Food Corp. v. Lib. Mut. Ins. Co.*, 406 N.J. Super. 524, 541 (App. Div. 2009) ("[A]n ambiguous provision must be construed favorably to the insured.").

## IV. IT IS IMPORTANT TO HOLD INSURERS TO THEIR PROMISES TO COVER LOSS ARISING FROM CYBER EVENTS.

The Insurers have attempted to stretch an old, standard-form exclusion to bar coverage for something that was entirely uncontemplated when the exclusion was first drafted. This tactic is unsupportable because it contradicts the foundation of what an all-risk policy is intended to cover: all risks that are not ***specifically*** excluded. Insurers are essentially arguing that their exclusions can be amorphous and, as time goes on, they just read them more-and-more broadly. Such an approach to interpreting all-risk policies and their specific exclusions is unworkable as it would create unnecessary uncertainty in the insurance industry and contravene the very purpose of all-risk insurance. Instead, the insurer, as the drafter of the policy, must include clear exclusionary language barring coverage for cyber events similar to NotPetya.

* * * * *

The trial court's December 6, 2021 summary judgment ruling should be affirmed; to hold otherwise would allow insurers to renege on their promises to cover cyber losses under property

policies, cyber policies, and other policies by relying on century-old war exclusions or other exclusions that were never intended to exclude such cyber losses.

## CONCLUSION

For all the foregoing reasons, UP respectfully requests that this Court grant its motion for leave to appear as *amicus curiae* and affirm the trial court's summary judgment ruling in favor of Plaintiffs.

Dated: May 6, 2022 By: /s/ Nicholas M. Insua

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