No. 15-1319

In The Supreme Court of the United States

THOMAS DEMARCO and CYNTHIA DEMARCO,

Petitioners,

v.

MEDICAL MALPRACTICE JOINT UNDERWRITING ASSOCIATION OF RHODE ISLAND,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of New Jersey

BRIEF IN OPPOSITION

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OBJECTION TO PETITIONERS' QUESTIONS PRESENTED

The proper issue before this Court is whether the Petitioners' questions – asserting supposed violations of their procedural and substantive due process rights with respect to the decision by the Supreme Court of New Jersey that a medical (podiatric) malpractice policy of insurance issued by the Respondent – Medical Malpractice Joint Underwriting Association of Rhode Island ("RIJUA"), could be voided, *ab initio*, due to admitted fraud in the application by the policyholder – warrant review on Writ of Certiorari, where the impetus for appeal does not involve a question of federal law, nor depart from established precedent; but rather, whether the Supreme Court of New Jersey properly applied the applicable decisional law of that state in finding that the insurance policy at issue was void due to the admitted fraud committed in its procurement, and therefore mandated full rescission.

THE PARTIES

Petitioners – Thomas DeMarco and Cynthia DeMarco

Respondent – Medical Malpractice Joint Underwriting Association of Rhode Island, as created by *R.I. Gen. Laws* § 42-14.1-1, *et seq*.

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STATEMENT OF THE CASE

Between 2004 and January 2011, co-defendant Sean Robert Stoddard, a podiatrist, treated plaintiff Thomas DeMarco. Stoddard was licensed to practice in New Jersey and Rhode Island. DeMarco claims that Stoddard committed malpractice in conjunction with surgery that was performed in September 2010 in New Jersey.

At the time of the allegedly botched surgery, Stoddard was insured via a malpractice occurrence policy issued by the RIJUA. Stoddard initially applied for this policy on January 16, 2007. The policy was issued on March 1, 2007 and subsequently renewed for the following years, remaining in effect through January 2011.

The RIJUA's Underwriting Policies and Procedures state that it "will only extend coverage to physicians who apply for full-time coverage . . . with the proviso that fifty-one percent (51%) of their professional time and efforts are spent providing healthcare within the State of Rhode Island." The "51% Rule" has been the "unwavering practice of the RIJUA since its inception in 1975", and serves to promote the RIJUA's purpose as a means for providers of health care in Rhode Island to secure coverage.

In all of his applications, Stoddard affirmed that "at least fifty-one percent of [his] practice [was] generated in Rhode Island." Indeed, each application also stated: "IF YOUR ANSWER IS NO, DO NOT CONTINUE. You are not eligible for coverage under the

Rhode Island MMJUA." In addition to affirming that he met the 51% requirement, Stoddard warranted that the information he provided was "accurate and complete to the best of [his] knowledge" when he executed the applications for coverage. By his own admission, however, Stoddard never generated at least 51% of his practice in Rhode Island.

The RIJUA filed a Declaratory Judgment Complaint in the Superior Court of Rhode Island seeking rescission of the March 1, 2010 policy due to Stoddard's material misrepresentations. The DeMarcos were named in the Rhode Island action, but did not appear. When Stoddard failed to respond, the Rhode Island court entered Default; and then an Order and Judgment by Default, declaring that Stoddard made material misrepresentations to the RIJUA by claiming that at least 51% of his practice was generated within Rhode Island, which prejudiced the RIJUA. The Rhode Island court further declared that Stoddard was never eligible for coverage through the RIJUA, and further declared via Judgment for Rescission that the RIJUA has no duty to indemnify Stoddard as to any claim, including the Petitioners' (DeMarcos), brought against him as to any alleged malpractice during the effective dates of the March 1, 2010 policy.

While the Rhode Island action was pending, the DeMarcos filed a First Amended Complaint in their New Jersey-based podiatric malpractice action, by which they asserted direct claims against the RIJUA and sought a declaration that, despite the material misrepresentations by Stoddard, the RIJUA nevertheless

owes $1,000,000 in coverage for this case. On Cross-Motions for Summary Judgment, the trial court entered an Order granting the relief sought by the DeMarcos. More specifically, the motion judge declared that the RIJUA must indemnify Stoddard up to the $1,000,000 limits, notwithstanding the contrary ruling of the Rhode Island court.

The RIJUA filed a Notice of Motion for Leave to Appeal from Interlocutory Order, which was granted. The Superior Court of New Jersey – Appellate Division then affirmed the trial court's decision, holding that, although the RIJUA policy was voided by virtue of Stoddard's fraud, its limit of $1,000,000 was "re-formed" (or "molded") to that required by the statutory mandate for podiatric malpractice coverage in New Jersey – which is also $1,000,000.

Subsequently, the RIJUA filed a Notice of Appeal with the Supreme Court of New Jersey, arguing that the decisions below were contrary to the clear and unequivocal public policy of the state of New Jersey, that an insured cannot deceive its insurer in the course of applying for or renewing a policy, or during an investigation subsequent to a loss. If a material misrepresentation is made, the insured will lose the benefit of the coverage, which will be voided *ab initio* due to the fraud.

In its Opinion dated December 1, 2015, the Supreme Court of New Jersey declared that the RIJUA was entitled to a full rescission of the policy due to Stoddard's material misrepresentations in his

applications. In so holding, the Supreme Court of New Jersey applied existing New Jersey case law, including *First American Title Insurance Company v. Lawson*, 177 N.J. 125, 827 A.2d 230 (2003), which finds that compulsory coverage can be voided in its entirety due to the misbehavior of the policyholder, even if that rescission results in there being no indemnity coverage available for otherwise innocent third-parties to collect against. The Supreme Court of New Jersey thus aligned physician and podiatric malpractice policies with those issued to other professionals, including attorneys. The Supreme Court of New Jersey also rejected the lower courts' reliance upon cases involving automobile insurance coverage, based upon the distinction between the "web of interrelated provisions" that exist in the context of the automobile insurance statutes but not in the physician professional liability insurance laws.

On December 11, 2015, the DeMarcos filed a timely Motion for Reconsideration of the Judgment by the Supreme Court of New Jersey, arguing, as they do here, that the outcome was violative of the Full Faith and Credit Clause of Article IV, § 1 of the United States Constitution. The Supreme Court of New Jersey properly rejected the DeMarcos' arguments by way of an Order that was filed on January 29, 2016.

This Petition for Writ of Certiorari follows.

REASONS FOR DENYING THE PETITION

The issue presented to the Supreme Court of New Jersey was straightforward: what should the proper rescission remedy be, where a professional malpractice insurance policy was procured via an admitted, material fraud in the application that went directly to the insured's eligibility for coverage in the first instance? In determining this issue, the Supreme Court of New Jersey applied the decisional law of New Jersey to two questions: a choice of law issue, as to whether the law of Rhode Island or of New Jersey should apply; and the substantive question of how the rescission remedy was to be crafted, which required a review of the potentially-applicable case law of New Jersey and, specifically, a balancing of the equities involved.

The Petitioners (DeMarcos) argue to this Court that the conclusion reached by the New Jersey Supreme Court violated their Federal constitutional rights, because the decision allegedly "enforced" an Order entered by the Superior Court of Rhode Island rescinding the policy, despite a lack of personal jurisdiction of the courts of Rhode Island over the DeMarcos. The Petitioners further claim that their due process rights were violated because the New Jersey Supreme Court's decision deprives them of a vested property right in the proceeds of the policy issued by the RIJUA to Dr. Stoddard.

The DeMarcos are patently incorrect in both respects. Simply put, this matter does not involve the application of the Full Faith and Credit Clause, as the

New Jersey Supreme Court did not impose a judgment of the Superior Court of Rhode Island. Rather, after extensively evaluating the legal and equitable issues implicated by the case, the Supreme Court of New Jersey held that, other than in the field of compulsory motor vehicle liability insurance, a liability insurer may rescind an insurance policy *ab initio* because of a material misrepresentation by its insured in the course of applying for and renewing the policy. In so holding, the Supreme Court of New Jersey distinguished the "web of interrelated provisions attending the no-fault automobile liability model, including the compulsory automobile liability provisions", from other sorts of (mandatory) insurance, including medical malpractice. *DeMarco v. Stoddard*, 223 N.J. 363, 379, 125 A.3d 367, 376 (2015). Moreover, the issue of whether the Petitioners may have had a vested property interest in the insurance policy issued by the RIJUA to Dr. Stoddard was never raised below. Even if it were, however, the DeMarcos are incorrect in their assertion that they had a vested property interest in Dr. Stoddard's policy; indeed, it is well-established that no such right exists.

The fundamental flaw in the arguments presented by the Petitioners is that the Supreme Court of New Jersey did not "enforce" the Order entered by the Superior Court of Rhode Island, which held that the RIJUA was entitled to rescission of the policy issued to Dr. Stoddard. Contrary to the assertions made by the Petitioners to this Court, the Supreme Court of New Jersey did not make any "finding" on the question of whether the RIJUA was entitled to rescind Dr.

Stoddard's policy *ab initio*. (Pb22). Rather, the fact that the policy had been rescinded was a fact that all parties – and the courts, accepted.

Moreover, the Petitioners are also incorrect in their assertion that the Supreme Court of New Jersey held that the decision of the Superior Court of Rhode Island "foreclosed it [the Supreme Court of New Jersey] from reaching the equitable question." (Pb10). As a simple review of the Opinion reveals, the vast majority of the analysis by the Supreme Court of New Jersey was of the equities implicated in determining the proper rescission remedy where, as here, a policy was procured via fraud. The fact that the policy issued by the RIJUA was deemed to be rescinded by the Superior Court of Rhode Island was just one of the factors considered by the Supreme Court of New Jersey, just as were the potential applicability of case law arising in the context of the voiding of professional liability policies (accepted) and motor vehicle insurance (rejected). However, the notion that the Supreme Court of New Jersey did nothing more than enforce the judgment of the Superior Court of Rhode Island, as argued by the Petitioners, is self-evidently false.

In sum, since there is no compelling reason to grant this Petition for Writ of Certiorari, the RIJUA respectfully asks that it be denied.

I. The Decision of the Supreme Court of New Jersey Does Not Implicate Any of the Considerations Governing Review on Certiorari

Rule 10 of the Supreme Court of the United States sets forth three bases upon which the Court typically grants Certification:

> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
>
> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
>
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

Equally notably, the Rules also state that "[a] petition for a writ of certiorari is rarely granted when the

asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Simply put, this matter falls into the category of cases in which certiorari is not granted; that is, it is one in which the Petitioners take issue with what they contend was a misapplication by the Supreme Court of New Jersey of the well-established law of that state.

Nowhere in the Petition for Writ of Certiorari do Petitioners point to which of the standards they claim to meet in this case. Notwithstanding this oversight, it is readily apparent that subparagraph (a) does not apply, since this is not a matter involving a United States Court of Appeals. The only argument, then, is that the Petitioners' arguments somehow fall within either or both of subparagraphs (b) or (c). However, any argument under either provision falls flat, since the decision by the Supreme Court of New Jersey did not involve any "federal question" – let alone an "important federal question", as the standards require. Indeed, the only mention by the Supreme Court of New Jersey of the Full Faith and Credit Clause is in its summary of the decision reached by the trial court. *DeMarco*, 223 N.J. at 369-70, 125 A.3d at 370-71.

Rather, the decision of the Supreme Court of New Jersey involves only an interpretation and application of New Jersey law. As framed by the Supreme Court of New Jersey, the question before it was "whether a rescinded policy of medical malpractice liability insurance provides any coverage to the insured for claims that arose prior to the rescission." *DeMarco*, 223 N.J. at 366, 125 A.3d at 369. In reaching its determination

that the RIJUA, and all issuers of professional malpractice policies, were entitled to void coverage in its entirety where a policy was procured by fraud, the Court engaged in a "balancing of equitable principles" as is required under New Jersey law. *DeMarco*, 223 N.J. at 372, 125 A.3d at 373. Indeed, New Jersey law specifically recognizes that, in "molding" equitable remedies where rescission of an insurance policy is at issue, courts are to "provide . . . relief to the defrauded insurance provider", while also protecting "innocent third parties". *DeMarco*, 223 N.J. at 372, 125 A.3d at 372, citing *Citizens United Reciprocal Exch. v. Perez*, 432 N.J. Super. 526, 538, 75 A.3d 1233, 1240 (Ashrafi, J., dissenting) (App. Div. 2013), *rev'd on other grounds*, 223 N.J. 143, 121 A.3d 374 (2015).

As recognized by the Supreme Court of New Jersey, the problem with the decision of the Superior Court of New Jersey – Appellate Division was that it did not provide any equitable relief to the RIJUA. In this regard, the appellate panel acknowledged that the policy issued to Dr. Stoddard was properly voided due to his fraudulent conduct – a point that was never contested. Nevertheless, the appellate court held that the RIJUA was obligated to provide coverage up to its policy limits of $1,000,000 for the DeMarcos' claim, based upon the required statutory minimum coverage and by applying case law decided in the context of the extensive system of motor vehicle insurance. *DeMarco v. Stoddard*, 434 N.J. Super. 352, 368, 84 A.3d 965, 974-75 (App. Div. 2014).

In reviewing the lower court's finding, the Supreme Court of New Jersey considered multiple issues, including: (1) an analysis of the statutory background of malpractice insurance for physicians in New Jersey (*DeMarco*, 223 N.J. at 374-85, 125 A.3d at 373-74); (2) a discussion of the "well developed body of law" in New Jersey permitting legal malpractice insurers to void, *ab initio*, policies that were procured via fraud (*DeMarco*, 223 N.J. at 375-76, 125 A.3d at 373-74); (3) the distinction of the schemes governing mandatory professional liability policies and mandatory motor vehicle insurance policies (*DeMarco*, 223 N.J. at 378-81, 125 A.3d at 376-78); and (4) the performing of a choice of law analysis (*DeMarco*, 223 N.J. at 381-83, 125 A.3d at 377-78).

The entirety of this analysis was performed under New Jersey law. Ultimately, the Court concluded that, based upon a balancing of the implicated equities, the policy should be voided *ab initio* and its limits reduced to zero dollars. In so holding, the Supreme Court aligned the outcome of cases involving medical malpractice policies with those in which legal malpractice policies procured by fraud are at issue. Indeed, the Supreme Court in *DeMarco* did little more than apply its own analyses in *Lawson* and *Liberty Surplus Ins. Corp. v. Nowell Amoroso, P.A.*, 189 N.J. 436, 916 A.2d 440 (2007), to the present case, involving a physician malpractice policy.

The Petitioners take issue with the result reached by the Supreme Court of New Jersey, since it means that they, as the "innocent victims" of Dr. Stoddard's

malpractice, are left without an insurer from whom they may seek to collect their alleged damages. Rather, the DeMarcos must pursue Dr. Stoddard personally, since his fraudulent conduct caused the policy to be voided. However, this is the same outcome under New Jersey law as what would have occurred in the context of legal malpractice coverage based upon the Supreme Court of New Jersey's decision in *Lawson*, where the Court observed that "innocent" victims of the attorneys whose coverage was voided would be left without a pocket of insurance coverage in the event of a malpractice claim. *Lawson*, 177 N.J. at 143, 827 A.2d at 241.

In the end, this Petition for Certiorari is little more than an effort by Petitioners to cloak state law issues in what they purport to be Federal clothes. The decision reached by the Supreme Court of New Jersey involved a balancing of the equities, as is required in New Jersey, in order to determine the rescission remedy available to an insurer where, as here, an insurance policy is voided due to being procured via fraud (except in cases involving motor vehicle insurance). The DeMarcos' basic claim is that the Supreme Court of New Jersey failed to balance the equities in their favor, rather than in favor of the right of the RIJUA (and other insurers) to counter fraud and misrepresentation by their insureds. This is, however, an issue confined to the law of New Jersey, such that this court should deny the Petition for Certiorari.

II. The Petitioners Do Not Have a Vested Property Right in the Policy Issued by the RIJUA to Dr. Stoddard

In an additional effort to manufacture a federal question in this case, the Petitioners argue that the Supreme Court of New Jersey's application of state law deprives them of a vested property right; to wit, the proceeds of Dr. Stoddard's medical malpractice liability insurance policy. As an initial matter, it must be noted that the "vested property right" issue was not considered by the courts below. Rather, the Petitioners are presenting the issue for the very first time to this Court.

That said, the Petitioners devote little discussion to the topic aside from string-citing a series of New Jersey state court decisions holding that a named beneficiary of a life insurance policy has a vested property right in the policy's benefits. Contrary to what the Petitioners imply, these cases do not hold that all third parties have constitutionally-protected property interests in liability insurance proceeds. Nor do they hold that the rescission of a life insurance policy due to a material misrepresentation in the procurement of the policy somehow violates the named beneficiary's Fourteenth Amendment substantive due process rights.

To the contrary, the law is well-established that "an injured person's rights to insurance proceeds of the insured vest only when the insured's actual liability [is] conclusively established." *In re MF Global Holdings Ltd.*, 469 B.R. 177, 195 (2012) (citing *Merchants'*

Mut. Automobile Liability Ins. Co. v. Smart, 267 U.S. 126, 131, 45 S.Ct. 320, 69 L.Ed. 538 (1925)). In this respect, the Petitioners' argument ignores the clear distinction between first-party life insurance policies and third-party liability policies. With respect to the former, it is inevitable that the insured or the insured's beneficiaries will receive some form of payment under the policy, as contracted for by the insured. By contrast, under the latter, the third-party's right to the insured's policy proceeds occurs only upon the fortuitous happening of an event. Thus, for example, in *Kollar v. Miller*, 176 F.3d 175 (3d Cir. 1999), the Third Circuit explicitly held that liability insurance proceeds did not constitute property of the injured plaintiffs. The court rejected the categorization of the anticipated liability insurance proceeds as "property or other rights," noting:

> While they [the Kollars] may have had rights in a choice of action, they had at most an expectation that, if they prevailed in their tort claim and if the defendant sought to have its insurance carrier pay the judgment and if the claim fell within the terms of the policy, they would receive proceeds paid by another party's liability insurance policy. [*Id.* at 181].

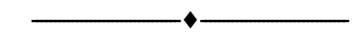
The reasoning of *Kollar* applies equally here. More specifically, the DeMarcos claim to have a vested property right in Dr. Stoddard's medical malpractice insurance proceeds, notwithstanding that payment of those proceeds would arise only: (1) if the petitioners prevailed in their tort claim; (2) if the claim fell within the

terms of the policy; and (3) if Dr. Stoddard sought to have the RIJUA pay the judgment. Simply stated, the contingent nature of the expectation of the liability insurance proceeds at issue here, in and of itself, belies the notion that such proceeds are "vested" property rights.

However, even if Petitioners were correct that they have a vested property right in the proceeds of Dr. Stoddard's liability policy (a position the RIJUA vigorously disputes), the argument that the rescission *ab initio* of the policy violates their substantive due process rights is undercut by the decisions of courts across the country that have unanimously allowed insurers to rescind policies based on the insured's material misrepresentations in the application process. The DeMarcos' argument is further undermined by the fact that many of these cases involve the same life insurance and other first-party policies that the Petitioners seek to use to build their argument in the first place. *See*, *e.g.*, *Ledley v. William Penn Life Ins. Co.*, 138 N.J. 627 (1995) (New Jersey court holding that insurer was entitled to rescind life insurance policy as to the named beneficiary based on insured's failure to disclose a known history of thyroid problems); *Parker v. Prudential Ins. Co. of Am.*, 900 F.2d 772 (1990) (Rhode Island court holding same); *Guardian Life Ins. Co. of Am. v. Tillinghast*, 512 A.2d 855 (1986) (Rhode Island court holding that insurer was allowed to rescind disability insurance policy due to insured's misrepresentations as to his medical history); *Gasaway v. Northwestern Mut. Life Ins. Co.*, 26 F.3d 957 (9th Cir. 1994) (same).

Stated another way, the "vested" property right the DeMarcos claim, if one exists at all, is not inviolate.

As it is clear that the decision by the Supreme Court of New Jersey does not violate any property right held by the DeMarcos or any other similarly-situated plaintiff, the RIJUA respectfully requests that this Court deny the Petition for Writ of Certiorari.



CONCLUSION

For the foregoing reasons of fact and law, the Medical Malpractice Joint Underwriting Association of Rhode Island respectfully submits that the Petition for Writ of Certiorari filed by Thomas and Cynthia DeMarco should be denied.

Respectfully submitted,

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