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## **DeMarco v. Stoddard: A Compulsory Liability Insurance State Burdens the Consumer**

In 1998, the New Jersey legislature, joining numerous other states, instituted a compulsory statute requiring medical professional liability insurance for podiatrists.<sup>1</sup> N.J.S.A § 45:5-5.3 codifies the requirement, mandating that each podiatrist maintaining a professional practice in New Jersey must be covered by at least a minimum amount of medical liability coverage prescribed by the New Jersey Board of Medical Examiners (BME).<sup>2</sup> The BME then established a regulation quantifying that minimum required amount of coverage at “\$1 million per occurrence and \$3 million per policy year.”<sup>3</sup> In the event that coverage is unavailable, the physician may provide a letter of credit evidencing the minimum amount of funds to cover liabilities.<sup>4</sup>

Similar to compulsory automobile insurance, medical professional liability insurance is meant to insulate the negligent from catastrophic liability payouts while also protecting the consumer from the negligent running out of personal funds.<sup>5</sup>

In 2015, a Supreme Court of New Jersey ruling established that a New Jersey health care consumer can no longer passively rely on compulsory medical malpractice insurance statutes to ensure recourse in the event of their medical practitioner’s negligence.<sup>6</sup> In *DeMarco v. Stoddard*, the Court held that an insolvent-podiatrist’s insurance company, though having received premiums for over three years, would not be obligated to indemnify its previously-insured podiatrist named in a malpractice claim because, upon notification of the claim, the insurance

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<sup>1</sup> DeMarco v. Stoddard, 223 N.J. 363, 374 (2015).

<sup>2</sup> N.J.S.A § 45:5-5.3

<sup>3</sup> N.J.A.C §. 13:35–6.18.

<sup>4</sup> *Id.*

<sup>5</sup> See National Association of Insurance Commissioners, Medical Professional Liability Insurance, (January 7, 2016), available at [http://www.naic.org/cipr\\_topics/topic\\_med\\_mal.htm](http://www.naic.org/cipr_topics/topic_med_mal.htm).

<sup>6</sup> See DeMarco, 223 N.J. at 374.

company discovered that the podiatrist had misrepresented information in his application for obtaining coverage.<sup>7</sup> Even with its power to promulgate an equitable ruling, the Court has left an injured victim with no choice but to file suit against the negligent podiatrist alone, he who has defaulted on his student loans and holds a significant amount of additional debt.<sup>8</sup>

Currently, New Jersey's compulsory medical liability insurance statute, though likely unknown to most, promises protection for both the consumer and the practitioner; yet, *DeMarco* seemingly turns that promise upside down and potentially forces a patient to re-think seeking any medical help at all, even simple, routine preventative care.<sup>9</sup> This Note will explore the decision in *DeMarco v. Stoddard*. First, the Note will discuss the statutory background of New Jersey's compulsory liability insurance statute and the medical malpractice cause of action. This Note will further discuss *DeMarco v. Stoddard* and its implications towards New Jersey's compulsory medical liability insurance statute. This Note will conclude by arguing that *DeMarco v. Stoddard*, though arguably sound in legal analysis, should have been ruled with a more appropriate, equitable result.

## **Part I: Medical Malpractice – a History**

### *A. The Anatomy of the Medical Malpractice Cause of Action*

Under one form or another, medical malpractice has occurred in the physician-patient setting for centuries.<sup>10</sup> Dating even as far back as 2030 B.C., the Hammurabi Code stated, “[i]f the doctor has treated a gentleman with a lancet of bronze and has caused the gentleman to die,

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<sup>7</sup> *DeMarco*, 223 N.J. at 374.

<sup>8</sup> *See id.* at 369.

<sup>9</sup> *See id.* 363.

<sup>10</sup> *See* Melissa Patterson, *The Medical Malpractice Crisis: The Product of Insurance Companies and a Threat to Women's Health*, QUINNIPIAC HEALTH L.J. 109, 112 (citing Melvin M. Belli, Sr., J.D., *The Evolution of Medical Malpractice Law*, Legal Aspects of Medicine, 3 (J.R. Vevaina et al. eds., Springer Verlag 1989)).

or has opened the abscess of the eye of a gentleman with a bronze lancet, and has caused the loss of the gentleman's eye, one shall cut off his hand.”<sup>11</sup> Though dramatically stricter than the present judicial methods in handling medical malpractice cases, it is clear that governing bodies tend to have an interest in ensuring that the everyday medical consumer is at least minimally protected by the practitioner’s potential for liability.

Medical malpractice arises as a cause of action in tort when a practitioner enters into a physician-patient relationship, subsequently deviates from the professional standard of care, and that deviation proximately causes the patient’s injury.<sup>12</sup> Medical malpractice is the root of a consistently present source of injury, damaging the lives of patients across the United States, and for that matter, the planet. At first glance, it can be seemingly simple to understand: doctors are humans; humans make mistakes. When accounting for intentional deviations from the standard of care, it can seem even more plausible that medical malpractice may never be defeated. Medical practitioners are aware when entering the profession that this has simply become a factor of the job.<sup>13</sup>

The availability of a medical malpractice action in tort brings with it various positives and negatives to the world of the consumer. On one hand, the practitioner is threatened with liability in the absence of acting within the prescribed duty of care because each patient that walks through the front door of the professional office has in his pocket the medical malpractice cause of action.<sup>14</sup> Understandably, when the body is involved, a patient expects nothing short of

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<sup>11</sup> *Id.*

<sup>12</sup> See *Verdicchio v. Ricca*, 179 N.J. 1, 23 (2004) (citing *Rosenberg v. Cahill*, 99 N.J. 318 (1985); *Clark v. Wichman*, 72 N.J. Super. 486, 179 (App. Div. 1962); *Germann v. Matriss*, 55 N.J. 193 (1970)).

<sup>13</sup> 16 Am. Jur. Trials § 471 (1969).

<sup>14</sup> See generally Alan Feigenbaum, *Special Juries: Deterring Spurious Medical Malpractice Litigation in State Courts*, 24 CARDOZO L. REV. 1361, 1362 (2003).

perfection from his physician.<sup>15</sup> In the event of even the slightest of unfavorable outcomes to the patient, the threat of a lawsuit will forever be looming in the background.<sup>16</sup>

On the other hand, the availability of this cause of action provides the patient with the ability to feel at ease with reliability when seeking medical treatment, knowing that recourse is available if injured at the hands of a negligent practitioner.

Beginning in the 1970s, the size of jury verdicts awarded in successful medical malpractice cases rose substantially.<sup>17</sup> For example, “[the] average malpractice jury verdicts rose from \$50,000 and \$125,000 in Chicago and San Francisco, respectively, in the 1960s, to \$600,000 and \$450,000 in the 1970s, to \$1.2 million in each city in the 1980s.”<sup>18</sup> Economically, where the potential for liability can stretch as far as the eye can see, a business is to be had in providing coverage and indemnification from that liability. In comes medical malpractice insurance.

Medical professional liability insurance, also known as “medical malpractice insurance” is a type of professional liability insurance which, when purchased by a physician, releases the physician from various amounts of liability “associated with wrongful practices resulting in bodily injury, medical expenses and property damage, as well as the cost of defending lawsuits related to such claims.”<sup>19</sup> Premiums are paid by medical practitioners in exchange for an insurance company’s contractually-bound duty to indemnify the practitioner from victims seeking recourse.<sup>20</sup> Procedurally, a medical practitioner will be named as a defendant to a

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<sup>15</sup> See *id.* (citing Sheila L. Birnbaum, *Physicians Counterattack: Liability of Lawyers for Instituting Unjustified Medical Malpractice Actions*, 45 *FORDHAM L. REV.* 1003, 1008 (1977)).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 1366.

<sup>18</sup> *Id.* (quoting Fulton Haight, Dr., Heal Thyself: Strong Medicine for Professional Woes, *Legal Times*, May 8, 1989, at 25).

<sup>19</sup> National Association of Insurance Commissioners, *Medical Professional Liability Insurance*, (January 7, 2016), available at [http://www.naic.org/cipr\\_topics/topic\\_med\\_mal.htm](http://www.naic.org/cipr_topics/topic_med_mal.htm).

<sup>20</sup> *Id.*

medical malpractice cause of action.<sup>21</sup> Subsequently, the practitioner will notify the insurance company that there is a claim filed against him.<sup>22</sup> At this point, the insurer will likely be named in the lawsuit; however, most cases with merit tend to end in settlement.<sup>23</sup> Though statistically unlikely, if and when a medical practice case goes to trial, the litigation can last anywhere from months to years.<sup>24</sup> Though generally regarded as a much needed form of protection for both the physician and the consumer, the existence of medical malpractice insurance has gone through various crises since its creation.<sup>25</sup>

As previously mentioned, the ever present reality of a patient's tendency to expect nothing less than pristine medical results from their physician has been a prominent factor resulting in a plethora of meritless cases flooding the court system.<sup>26</sup> This ultimately kicked off several major moments in healthcare that have collectively been referred to as the "Medical Malpractice Crisis."<sup>27</sup>

In the 1970s, known as the medical malpractice insurance "Crisis of Availability," this first moment of panic had begun when the insurance industry was plagued with an increasing number of medical malpractice claims ultimately leading to the following historical moment of crisis.<sup>28</sup>

Next, in the 1980s, known as the medical malpractice insurance "Crisis of Affordability," the tremendous amount of malpractice claims led to the insurance industry's substantial increase

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<sup>21</sup> *See id.*

<sup>22</sup> *See id.*

<sup>23</sup> Zachary Matzo, *The Trial Process in a Medical Malpractice Lawsuit: An Overview of Each Stage in a Typical Medical Malpractice Lawsuit*, available at <http://www.alllaw.com/articles/nolo/medical-malpractice/trial-process-lawsuit.html>.

<sup>24</sup> *Id.*

<sup>25</sup> Paul J. Barringer, III, *A New Prescription for America's Medical Liability System*, 9 J. HEALTH CARE L. & POL'Y 235, 237 (2006).

<sup>26</sup> *See* Alan Feigenbaum, *Special Juries: Deterring Spurious Medical Malpractice Litigation in State Courts*, 24 Cardozo L. Rev. 1361, 1362 (2003).

<sup>27</sup> *See id.*

<sup>28</sup> *Id.*

in malpractice insurance premiums.<sup>29</sup> This crisis forced physicians to “either cut down on risky procedures or leave their practices altogether.”<sup>30</sup>

Following, in the late 1990s, an even sharper increase in premium rates occurred due to the inclining frequency and severity of consumer claims coupled with the larger payouts awarded from the judicial system.<sup>31</sup>

Today, theorists believe that the crisis has returned due to the wielding power of the lawsuit.<sup>32</sup> In an effort to curtail the crisis, various jurisdictions have called upon their legislatures to employ various forms of tort reform.<sup>33</sup> Generally, legislative efforts have “focus[ed] on curtailing medical negligence claims by modifying access to the courts, shifting the costs and burdens of litigation from the insurance and the medical industries to plaintiffs and their attorneys, and modifying evidentiary and procedural requirements.”<sup>34</sup> New Jersey, specifically, has included N.J.S.A § 2A:53A-38 in the introduction to its statutory scheme, which embodies various New Jersey legislative findings in reference to the medical malpractice insurance crisis.<sup>35</sup>

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<sup>29</sup> Barringer, III, 9 J. HEALTH CARE L. & POL'Y at 238.

<sup>30</sup> Feigenbaum, 24 CARDOZO L. REV. at 1384; *see also* Carrie Lynn Vine, *Addressing the Medical Malpractice Insurance Crisis: Alternatives to Damage Caps*, 26 N. ILL. U. L. REV. 413 (2006) (citing Steven T. Masada, Comment, *Australia's "Most Extreme Case": A New Alternative for U.S. Medical Malpractice Liability Reform*, 13 PAC. RIM L. & POL'Y J. 163, 164 (2002)).

<sup>31</sup> Barringer, III, 9 J. HEALTH CARE L. & POL'Y at 238-39.

<sup>32</sup> *See id.*

<sup>33</sup> Shirley Qual, *A Survey of Medical Malpractice Tort Reform*, 12 WM. MITCHELL L. REV. 417, 420-21 (1986) (stating that from 1975 to 1976, every state legislature made some attempt at tort reform to curtail medical malpractice claims. Whether these reforms had any effect on medical malpractice litigation or insurance costs is debatable).

<sup>34</sup> *Id.* (analyzing various tort reform approaches which tend to “cause medical malpractice lawsuits to be a more complicated and burdensome procedure for the plaintiff, while implementing no procedure to regulate the insurance industry or to reduce the incidence of malpractice.”).

<sup>35</sup> N.J.S.A § 2A:53A-38.

- a. One of the most vital interests of the State is to ensure that high-quality health care continues to be available in this State and that the residents of this State continue to have access to a full spectrum of health care providers, including highly trained physicians in all specialties;
- b. The State's health care system and its residents' access to health care providers are threatened by a dramatic escalation in medical malpractice liability insurance premiums, which is creating a crisis of affordability in the purchase of necessary liability coverage for our health care providers;
- c. One particularly alarming result of rising premiums is that there are increasing reports of doctors retiring or moving to other states where insurance premiums are lower, dropping high-risk patients and procedures,

Though the various moments of crisis have tended to be instigated by increasing amounts of medical malpractice litigation, there is still the growing amount of malpractice claims with actual merit, calling upon more strenuous of consumer protection.<sup>36</sup> One method of legislative action has been through insurance regulation.<sup>37</sup> New Jersey, for example, has favored protection for the medical consumer by passing legislation requiring that medical practitioners obtain and maintain at least a minimum amount of medical malpractice insurance coverage.<sup>38</sup>

### *B. Statutory Background*

In 1998, the New Jersey legislature implemented its mandatory malpractice insurance for podiatrists and physicians.<sup>39</sup> This statute, and its 2004 accompanying regulation, mandates that, in order to practice medicine in New Jersey, physicians and podiatrists must maintain at least a minimum amount of malpractice insurance at \$1 million per occurrence and \$3 million per policy year.<sup>40</sup> Failure to comply with this requirement could result in disciplinary action and/or various civil penalties, such as “revocation or suspension of the physician’s license to practice medicine in this State.”<sup>41</sup>

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and practicing defensive medicine in a manner that may significantly increase the cost of health care for all our citizens

d. The reasons for the steep increases in the cost of medical malpractice liability insurance are complex and involve issues related to: the State's tort liability system; the State's health care system, which includes issues related to patient safety and medical error reporting; and the State's regulation and requirements concerning medical malpractice liability insurers;

e. It is necessary and appropriate for the State to take meaningful and prompt action to address the various interrelated aspects of these issues that are impacted by, or impact on, the State's health care system; and

f. To that end, this act provides for a comprehensive set of reforms affecting the State's tort liability system, health care system and medical malpractice liability insurance carriers to ensure that health care services continue to be available and accessible to residents of the State and to enhance patient safety at health care facilities.

<sup>36</sup> See generally Qual, n.j12 WM. MITCHELL L. REV. at 417.

<sup>37</sup> *Id.*

<sup>38</sup> N.J.S.A § 45:9-19.17.

<sup>39</sup> L. 1997, c. 365, § 1 (codified by N.J.S.A § 45:9-19.17); L. 1997, c. 365, § 2 (codified by N.J.S.A § 45:5-5.3).

<sup>40</sup> N.J.S.A § 45:5-5.3; N.J.A.C §. 13:35-6.18.

<sup>41</sup> Jarrell v. Kaul, 223 N.J. 294, 306 (2015) (citing N.J.S.A § 45:1-21).

Generally, N.J.S.A § 45:9 has been interpreted as “regulat[ing] the practice of medicine and further requir[ing] physicians to undertake certain health-related tasks.”<sup>42</sup> Unfortunately, there is minimal legislative history as to the creation of N.J.S.A § 45:9-19.17 specifically; however, the committee report evidences that the intent of the bill was to “ensure the citizens of the State that they will have some recourse for adequate compensation in the event that a physician or podiatrist is found responsible for acts of malpractice.”<sup>43</sup>

## **Part II: DeMarco v. Stoddard – A Change in Interpretation**

The seemingly simple statutory mandate for medical malpractice insurance in New Jersey was entrenched with a new layer of complexity, handed down by the Supreme Court of New Jersey in 2015.<sup>44</sup> *DeMarco v. Stoddard* considered the issue as to “whether [a] Rhode Island Medical Malpractice Joint Underwriting Association (RIJUA) must defend and indemnify a podiatrist in a medical malpractice action pending in New Jersey following rescission of the podiatrist's medical malpractice liability policy.”<sup>45</sup> The facts of the case embody a classic situation of physician negligence leading to a medical malpractice lawsuit.

Defendant, Sean Robert Stoddard, D.P.M., practiced as a podiatrist at the Center for Advanced Foot & Ankle Care, Inc., in New Jersey, which had offices located in both Toms River and Lakewood, New Jersey.<sup>46</sup> Further, Dr. Stoddard also maintained a podiatrist’s office in

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<sup>42</sup> *Id.* at 308.

<sup>43</sup> Assembly Health Comm., Statement to S. 267 (Sept. 19, 1996).

<sup>44</sup> *DeMarco v. Stoddard*, 223 N.J. 363 (2015).

<sup>45</sup> *Id.* at 366.

<sup>46</sup> *Id.* at 367

Rhode Island.<sup>47</sup> The trial court found Dr. Stoddard's Rhode Island office to be an insignificant portion of his medical business.<sup>48</sup>

In 2007, Dr. Stoddard applied for medical malpractice liability insurance through the RIJUA, a Rhode Island insurance company.<sup>49</sup> Dr. Stoddard specified within the application that he was "licensed to practice podiatry in both Rhode Island and New Jersey, that his office address was in Newport, Rhode Island, and that he was applying for affiliation with Newport Hospital in Rhode Island."<sup>50</sup> Further, Dr. Stoddard listed his New Jersey office telephone number on the application.<sup>51</sup> The underwriting rules of the RIJUA required that, in order to obtain medical malpractice insurance, the applicant must both be licensed to practice in Rhode Island and that 51% or more of the physician's medical practice occurs in Rhode Island.<sup>52</sup> The application contained a box for the applicant to confirm that at least 51% of the applicant's medical practice was generated in Rhode Island.<sup>53</sup> Dr. Stoddard checked this box in affirmance.<sup>54</sup>

From 2007 to 2011, Dr. Stoddard honored his arrangement by paying monthly premiums in exchange for the RIJUA's contractual promise to indemnify in the event of a malpractice lawsuit.<sup>55</sup> From 2007 to 2009, Dr. Stoddard filed renewal applications each year to which he included information identical to the inaugural application.<sup>56</sup> In 2010, upon receipt of the year's renewal application, Dr. Stoddard listed the Lakewood, New Jersey, office address, as well as its

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<sup>47</sup> *Id.*

<sup>48</sup> *Id.*; *see also* DeMarco v. Stoddard, 434 N.J. Super. 352, 362 (App. Div. 2014) appeal granted, 218 N.J. 270 (2014) and rev'd, 223 N.J. 363 (2015).

<sup>49</sup> DeMarco 434 N.J. Super. at 361.

<sup>50</sup> DeMarco v. Stoddard, 223 N.J. 363, 367 (2015).

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 393 (Albin, J., dissenting).

<sup>56</sup> DeMarco v. Stoddard, 434 N.J. Super. 352, 361 (App. Div. 2014) appeal granted, 218 N.J. 270 (2014) and rev'd, 223 N.J. 363 (2015).

corresponding phone number within the application.<sup>57</sup> Further, Dr. Stoddard repeatedly affirmed the box on the application requesting acknowledgment that at least 51% of the physician's medical practice operated out of Rhode Island.<sup>58</sup>

From 2004 to 2011, Plaintiff, Thomas DeMarco, was under Dr. Stoddard's care and supervision for treatment related to Chronic Plantar Fasciitis.<sup>59</sup> Typically, this illness involves discomfort caused by "an inflammation of the tough, fibrous band of tissue connecting the heel bone to the base of the toes."<sup>60</sup> DeMarco was officially diagnosed with a split peroneal tendon.<sup>61</sup> In response to this diagnosis, Dr. Stoddard performed three separate surgical procedures throughout the duration of their medical relationship.<sup>62</sup> The basis of DeMarco's complaint is formed from the circumstances of the September 2010 third and final surgery.<sup>63</sup>

In September, Dr. Stoddard performed the final foot surgery just before informing DeMarco that he would be terminating his New Jersey practice in favor of moving to California.<sup>64</sup> Over the subsequent months, DeMarco's foot condition grew worse and was forced to undergo two additional surgeries from a separate physician.<sup>65</sup> Subsequently, DeMarco filed a medical malpractice lawsuit against Dr. Stoddard in New Jersey.<sup>66</sup>

The complaint alleged that "[Dr.] Stoddard had negligently performed the September 2010 foot surgery."<sup>67</sup> The complaint and summons were served to Dr. Stoddard in California

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<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> DeMarco v. Stoddard, 223 N.J. 363, 367 (2015).

<sup>60</sup> 25 Westlaw Journal Professional Liability 7 (2016).

<sup>61</sup> *DeMarco*, 223 N.J. at 367.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> DeMarco v. Stoddard, 434 N.J. Super. 352, 361 (App. Div. 2014) appeal granted, 218 N.J. 270 (2014) and rev'd, 223 N.J. 363 (2015).

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

and, subsequently, forwarded to the RIJUA, per procedure.<sup>68</sup> The RIJUA responded to the documents with a reversion of rights letter stating, the “RIJUA only provides coverage for physicians who maintain [51%] of their ‘professional time and efforts’ in Rhode Island” and that the RIJUA was “in the process of securing facts concerning whether [Dr. Stoddard] ... met the [51%] requirement for the provision of insurance coverage from the [RI]JUA.”<sup>69</sup> At this point, once the RIJUA had performed additional research after the complaint had been filed, the RIJUA had rescinded its insurance policy on the basis that Dr. Stoddard had misrepresented that 51% of his medical practice was operating within Rhode Island.<sup>70</sup> Subsequently, the RIJUA refunded Dr. Stoddard’s premiums paid for the period of March 2010 through January 2011.<sup>71</sup> All previous premiums were not returned to Dr. Stoddard.<sup>72</sup>

On March 9, 2012, DeMarco filed an amended complaint seeking a declaratory judgment in New Jersey.<sup>73</sup> The amended complaint sought a ruling that the RIJUA must indemnify Dr. Stoddard for the malpractice claim.<sup>74</sup> Both the RIJUA and DeMarco filed cross-motions for summary judgment seeking a ruling on whether “the RIJUA was required to defend and indemnify Dr. Stoddard.”<sup>75</sup> The RIJUA’s motion alleged that Dr. Stoddard had procured their services through methods of misrepresentation, specifically, in falsely affirming the portion of the application requiring at least 51% of the practitioner’s medical practice operating within

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<sup>68</sup> *Id.*

<sup>69</sup> DeMarco v. Stoddard, 223 N.J. 363, 368 (2015).

<sup>70</sup> *Id.* at 386.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> DeMarco v. Stoddard, 434 N.J. Super. 352, 362 (App. Div. 2014) appeal granted, 218 N.J. 270 (2014) and rev’d, 223 N.J. 363 (2015).

<sup>74</sup> *Id.*

<sup>75</sup> DeMarco v. Stoddard, 223 N.J. 363, 369 (2015). The case also includes an issue involving a choice of law analysis. The trial court ruled that New Jersey law would govern; however, this issue will not be discussed in further detail within this note.

Rhode Island.<sup>76</sup> The trial court ruled in favor of DeMarco on both motions.<sup>77</sup> The court held that, even though Dr. Stoddard misrepresented facts on his application for insurance, “compulsory insurance cannot be voided as to an innocent third party.”<sup>78</sup>

The RIJUA motioned the Appellate Division for leave to appeal.<sup>79</sup> Upon considering the legal issue as to “whether a medical malpractice insurance carrier may rescind a policy so that the carrier has no duty to indemnify the insured doctor for injuries suffered by an innocent third party who made a malpractice claim before the policy was rescinded,” the Appellate Division affirmed the trial court’s ruling and held that the RIJUA was required to indemnify Dr. Stoddard.<sup>80</sup> The court stated,

“The rescission remedy available to an insurance carrier may preclude the insured doctor from demanding coverage when he gave materially false information in his application for insurance, but that remedy does not permit a malpractice policy to be voided from its inception and in its entirety when an innocent patient seeks coverage.”<sup>81</sup>

Finally, the RIJUA motioned the Supreme Court of New Jersey for leave to appeal.<sup>82</sup> The Court reversed the Appellate Division’s decision.<sup>83</sup> The Court held that the RIJUA owed no duty to indemnify or defend Dr. Stoddard in the medical malpractice action.<sup>84</sup>

### **Part III: The Supreme Court of New Jersey Has Stifled the Medical Consumer**

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<sup>76</sup> *DeMarco*, 434 N.J. Super. at 362.

<sup>77</sup> *Id.* at 371.

<sup>78</sup> *Id.*

<sup>79</sup> *DeMarco v. Stoddard*, 434 N.J. Super. 352, 370 (App. Div. 2014) appeal granted, 218 N.J. 270 (2014) and rev’d, 223 N.J. 363 (2015).

<sup>80</sup> *Id.* at 367.

<sup>81</sup> *Id.* at 370 (citing *Dillard v. Hertz Claim Mgmt.*, 277 N.J. Super. 448, 451 (App. Div. 1994) aff’d, 144 N.J. 326 (1996)).

<sup>82</sup> *DeMarco v. Stoddard*, 218 N.J. 270 (2014).

<sup>83</sup> *DeMarco v. Stoddard*, 223 N.J. 363, 384 (2015).

<sup>84</sup> *Id.*

In *DeMarco*, the Court turned its back on the medical consumer in reversing the Appellate Division when interpreting New Jersey's compulsory medical liability insurance statute without implementing a more equitable ruling.<sup>85</sup> With intensity, the Court acted swiftly in disapproval when discussing the Appellate Division's actions in analogizing compulsory medical liability insurance with the present-day compulsory automobile liability insurance model, in favor of comparing it rather to legal malpractice insurance and other forms of professional liability insurance.<sup>86</sup> In doing so, the Court stated, "[I]t is well established in this State that a professional who has made a misrepresentation of material fact in an application for professional liability insurance can expect that the policy may be rescinded on application of the insurer."<sup>87</sup>

The majority's ruling has significant meaning for this context, in particular, because of the facts surrounding this case. The ruling effectively makes it nearly impossible for the injured third-party to have the ability to obtain recourse from the judicial system.<sup>88</sup> The defendant-podiatrist has been unsuccessful in his efforts to practice medicine in California and is still in debt, recovering from student loan default.<sup>89</sup> This ruling begs the question as to whether there is a mandate that the everyday medical consumer must do an extensive background check on her doctor in order to feel comfortable going in for medical treatment.

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<sup>85</sup> *See id.* at 363.

<sup>86</sup> *Id.* at 366 ("We also conclude that the compulsory automobile insurance model has no relevance to the remedial response to a fraudulently obtained policy of professional liability insurance and the effect of rescission on innocent third parties.")

<sup>87</sup> *Id.* at 379. The issue on appeal is not whether or not the insurer had the right to rescind the policy. The Court concluded that the insurer did have the right to rescind the contract.

"A misrepresentation makes a contract voidable if a party's manifestation of assent is induced by either a fraudulent or a material misrepresentation by the other party upon which the recipient is justified in relying, the contract is voidable by the recipient. Susan Koehler Sullivan, David A. Ring, *Recurring Issues in Rescission Cases*, 42 Tort Trial & Ins. Prac. L.J. 51, 52 (2006) (citing Section 164(1) of the Restatement (Second) of Contracts section 164(1)).

<sup>88</sup> *See generally* *DeMarco v. Stoddard*, 223 N.J. 363 (2015).

<sup>89</sup> *Id.* at 369.

As Justice Albin’s dissent argues, the majority’s approach rests on reasoning that completely contravenes New Jersey’s public policy.<sup>90</sup> Justice Albin states, “The aim of the law is to provide financial protection to every patient in the State.” With no existence of controlling precedent on point supporting the majority’s position, the majority has left a consumer without any real possibility in receiving adequate recourse, yet the insurance company has walked away with a windfall in insurance premiums.<sup>91</sup> The insurance company has been allowed to accept insurance premiums, wait to be notified that there is a pending claim against one of its “insureds,” and, subsequently, devote its resources to research if a possible road out of its obligation exists.<sup>92</sup> Upon finding that road out, it may completely rescind its contract, without an ounce of reprimand for failing to put in a good faith effort to ensure that this problem was extinguished at the outset.

The *DeMarco* dissent, in agreeance with the trial court and Appellate Division, embodies the theme that “every patient has a right to presume that his physician is in compliance with the law.”<sup>93</sup> As the *DeMarco* majority mentioned, there has been miniscule amounts of case law interpreting compulsory liability insurance statutes specific to physicians and podiatrists required to maintain medical malpractice liability insurance.<sup>94</sup> In New Jersey alone, there has only been one other case addressing the issue as to the consequences to an injured third party when a medical malpractice liability insurance policy has been rescinded by the insurer, including this case under discussion; however, the case does not discuss the present issue.<sup>95</sup>

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<sup>90</sup> *Id.* at 385 (Albin, J., dissenting).

<sup>91</sup> *Id.* at 389. (Albin, J., dissenting). Justice Albin states, “the RIJUA in this case has reaped a windfall—it pocketed three years of premiums, backdated a rescission, and is not required to expend a single dollar of collected premiums to compensate the innocent patient and his wife victimized by Dr. Stoddard's alleged medical malpractice.”

<sup>92</sup> *See generally* *DeMarco v. Stoddard*, 223 N.J. 363 (2015).

<sup>93</sup> *Id.* at 384. (Albin, J., dissenting).

<sup>94</sup> *Id.* at 375.

<sup>95</sup> *Id.* (citing *Jarrell v. Kaul*, 223 N.J. 294, 297 (2015)).

When there is an absence of controlling precedent, courts typically look to other areas of reasonably similar situations in order to respect the intent of the legislature.<sup>96</sup> Therefore, the Court chose to analyze various other forms of compulsory liability insurance schemes and how various court interpretations as influential in its decision-making process.<sup>97</sup>

Though insufficient case law on point, the case law interpreting various other compulsory insurance statutes have drawn a distinction between “the party who procures an insurance policy through misrepresentations and the innocent party who plays no role in a fraud on the insurer and is a victim falling within the coverage protections of the insurance policy.”<sup>98</sup> *Fisher* explains, “The insurance carrier's liability to its [in]sured who may be guilty of some act or conduct which renders a policy void *ab initio* is therefore distinct from its liability to an injured third person.”<sup>99</sup> Thus, “an insurer cannot, on the ground of fraud or misrepresentations relating to the inception of the policy, retrospectively avoid coverage under a compulsory or financial responsibility insurance law so as to escape liability to a third party.”<sup>100</sup>

*A. Protecting the Party Who Plays No Role in a Fraud in the Absence of Controlling Precedent*

In recognition of an absence of any controlling precedent, the *DeMarco* Appellate Division began its plunge into similar areas of the law analysis by comparing the New Jersey compulsory medical liability insurance statute with the similarly applicable compulsory automobile insurance

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<sup>96</sup> See *DeMarco v. Stoddard*, 434 N.J. Super. 352, 367 (App. Div. 2014) appeal granted, 218 N.J. 270 (2014) and rev'd, 223 N.J. 363 (2015).

<sup>97</sup> *Id.*

<sup>98</sup> *DeMarco v. Stoddard*, 223 N.J. 388 (2015) (Albin, J., dissenting) (citing *Fisher v. N.J. Auto. Full Ins. Underwriting Ass'n*, 224 N.J. Super. 552, 557 (App. Div. 1988)).

<sup>99</sup> *Fisher*, 224 N.J. Super at 558.

<sup>100</sup> *Id.*

statute and legal malpractice insurance statutes.<sup>101</sup> With an understanding that there are no directly relevant cases on point to decide this issue, the Appellate Division seemed to take a presumption that New Jersey would seek to protect the interests of innocent third parties.<sup>102</sup>

## **1. Compulsory Automobile Insurance Statutes**

The New Jersey legislature implemented N.J.S.A § 39:6A-3, a compulsory automobile insurance coverage statute, which requires that every owner of an automobile in New Jersey must maintain a minimum amount of automobile liability insurance coverage.<sup>103</sup> This statutory requirement for automobile insurance was “designed to ensure that the persons injured in motor vehicle accidents are compensated promptly for their injuries and financial losses by immediate recourse to insurance or public funds.”<sup>104</sup> In various states where no statutory requirement exists, one can imagine a scenario all too often occurring in which a driver, through no fault of her own, is hit by an uninsured or underinsured motorist. The innocent driver’s ability for recovery is at the mercy of the chance that this faulty driver actually has funds to cover the losses. The New Jersey requirement ensures that all drivers will be covered by insurance in efforts to prevent this injustice from continuing to occur.<sup>105</sup>

In the case of compulsory automobile insurance, New Jersey courts have generally concluded that “the rescission remedy available to insurance carriers when a policy was procured by means of a material misrepresentation may not infringe upon the rights of innocent third parties who

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<sup>101</sup> *Id.* at 375-79.

<sup>102</sup> *See DeMarco v. Stoddard*, 434 N.J. Super. 352, 368 (App. Div. 2014) appeal granted, 218 N.J. 270 (2014) and rev'd, 223 N.J. 363 (2015).

<sup>103</sup> N.J.S.A § 39:6A-3.

<sup>104</sup> *Citizens United Reciprocal Exch. v. Perez*, 223 N.J. 143, 152 (2015) (citing *Craig & Pomeroy, New Jersey Auto Insurance Law* § 1:1 (2015)).

<sup>105</sup> *See generally* N.J.S.A § 39:6A-3.

might need to rely on insurance coverage to compensate them for their injuries.”<sup>106</sup> Essentially, the courts have ruled in favor of the innocent consumer.<sup>107</sup> For example, in *Marotta*, the court held that a driver has the “right to expect that all other drivers will be insured to the extent required by compulsory insurance.”<sup>108</sup>

In *Fisher v. New Jersey Auto*, Thomas Lafferty applied for automobile insurance through New Jersey Automobile Full Insurance Underwriting Association.<sup>109</sup> Within the application, Lafferty was requested to list the various vehicles that were registered under his name, along with their accompanying Vehicle Identification Number and license plate number.<sup>110</sup> Lafferty was quickly approved for insurance.<sup>111</sup> One month later, Plaintiff, a passenger in the Lafferty vehicle, was injured in a collision with another automobile.<sup>112</sup> Plaintiff did not have automobile insurance coverage in her household so she applied for benefits through the policy issued to Lafferty.<sup>113</sup> After the insurer researched the claim, Lafferty was notified that his policy was deemed void *ab initio* due to his “[failure] to register his vehicle as required by N.J.S.A § 17:30E-3m in order to be considered a qualified applicant under the plan.”<sup>114</sup> Subsequently, the premiums were returned and Plaintiff’s claim for benefits was denied.<sup>115</sup> Plaintiff brought suit against the insurance company claiming that, as an injured third-party, “she should not have been

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<sup>106</sup> *DeMarco v. Stoddard*, 434 N.J. Super. 352, 368 (App. Div. 2014) appeal granted, 218 N.J. 270 (2014) and rev'd, 223 N.J. 363 (2015). (citing *Rutgers Cas. Ins. Co. v. LaCroix*, 194 N.J. 515, 524–31 (2008); *Fisher v. N.J. Auto. Full Ins. Underwriting Ass'n*, 224 N.J. Super. 552, 557–59 (App. Div. 1988)).

<sup>107</sup> *See id.*

<sup>108</sup> *Marotta v. New Jersey Auto. Full Ins. Underwriting Ass'n By & Through Liberty Mut. Ins. Co.*, 280 N.J. Super. 525, 532 (App. Div. 1995) aff'd, 144 N.J. 325 (1996).

<sup>109</sup> *Fisher v. New Jersey Auto. Full Ins. Underwriting Ass'n By & Through Hanover Ins. Co.*, 224 N.J. Super. 552, 553 (App. Div. 1988).

<sup>110</sup> *Id.* at 554.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 555

<sup>115</sup> *Fisher v. New Jersey Auto. Full Ins. Underwriting Ass'n By & Through Hanover Ins. Co.*, 224 N.J. Super. 552, 555 (App. Div. 1988).

precluded from claiming PIP benefits under the New Jersey Automobile Reparation Reform Act ... simply because Lafferty-the insured-failed to meet the eligibility requirements set forth in N.J.S.A § 17:30E-3m.”<sup>116</sup> The court held, “even though Lafferty's misrepresentations may have rendered the insurance policy void *ab initio* as to him, we hold that Hanover cannot now avoid liability to plaintiff for PIP coverage by declaring the insurance policy null and void after the accident.”<sup>117</sup>

*Fisher* can almost be seen as a parallel universe of relationships to the present case between the podiatrist and the patient. Here, Dr. Stoddard was required by statute to obtain medical liability insurance.<sup>118</sup> Similarly, the driver in *Fisher* was required to obtain automobile insurance.<sup>119</sup> Both parties in each case had made material representations on their applications for insurance, which allowed the insurer to rescind the policy.<sup>120</sup> Further, both instances involved an innocent third party becoming injured.<sup>121</sup> Though factually similar, *Fisher* and *DeMarco* arrived at different conclusions.<sup>122</sup> *Fisher*, on the one hand, employed the widely held approach that, “an insurer cannot, on the ground of fraud or misrepresentations relating to the inception of the policy, retrospectively avoid coverage under a compulsory or financial responsibility insurance law so as to escape liability to a third party.”<sup>123</sup> *DeMarco*, following no precedent on point, ruled in favor of allowing the insurer to avoid coverage.<sup>124</sup>

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<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 557.

<sup>118</sup> *DeMarco v. Stoddard*, 223 N.J. 363, 366 (2015).

<sup>119</sup> *Fisher*, 224 N.J. Super. at 557.

<sup>120</sup> *Id.*; *DeMarco*, 223 N.J. at 363.

<sup>121</sup> *Fisher v. New Jersey Auto. Full Ins. Underwriting Ass'n By & Through Hanover Ins. Co.*, 224 N.J. Super. 552, 557 (App. Div. 1988).

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 588 (citing 7 Am.Jur.2d, *Automobile Insurance* § 37, p. 493 (1980)).

<sup>124</sup> *DeMarco v. Stoddard*, 223 N.J. 363, 384 (2015).

The *DeMarco* majority attempted to analyze the compulsory automobile insurance line of cases from the present situation, ultimately stating, “The compulsory automobile insurance model has no relevance to the remedial response to a fraudulently obtained policy of professional liability insurance and the effect of rescission on innocent third parties.”<sup>125</sup> The majority attempts to bolster its argument by distinguishing the compulsory automobile liability insurance model with the medical liability insurance model by claiming that the former has “created an expectation among those operating motor vehicles that every individual who may be in an accident will be insured.”<sup>126</sup> Does New Jersey’s compulsory medical liability insurance statute not create this expectation as well? As referred to in Part I, the intent of the legislature when creating the medical liability insurance requirement was to “ensure the citizens of the State that they will have some recourse for adequate compensation in the event that a physician or podiatrist is found responsible for acts of malpractice.”<sup>127</sup> This statute should allow the patient-consumer to have the presumption that all physicians in New Jersey will be insured. The *DeMarco* majority seems to think otherwise.<sup>128</sup>

Disqualifying the compulsory automobile insurance model from influence, the *DeMarco* majority follows by analyzing interpretations of the compulsory legal malpractice statutes for guidance in its decision.<sup>129</sup>

## **2. Compulsory Legal Malpractice Statutes**

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<sup>125</sup> *Id.* at 378.

<sup>126</sup> *Id.* at 380.

<sup>127</sup> Assembly Health Comm., Statement to S. 267 (Sept. 19, 1996).

<sup>128</sup> *See DeMarco*, 223 N.J. at 378.

<sup>129</sup> *Id.* at 376.

In 1997, the New Jersey legislature established N.J.S.A § 14A:17-1.<sup>130</sup> This statute mandates that lawyers who choose to organize in professional corporations or limited liability partnerships must purchase and maintain legal malpractice insurance.<sup>131</sup> In comparing this type of compulsory insurance statute, it is key to note that, unlike automobile insurance and medical malpractice insurance, New Jersey does not require that all who enter the legal field obtain legal malpractice insurance.<sup>132</sup> Regardless of that point, New Jersey courts have adjudicated various cases involving those lawyers qualifying to be required to obtain legal malpractice insurance. Similar to the cases interpreting compulsory automobile insurance, a distinction has been drawn in this setting between “the insured as the wrongdoer and an innocent third party.”<sup>133</sup>

In *First American Title Insurance Co. v. Lawson*, a three-member law firm was established as a Limited Liability Company in New Jersey.<sup>134</sup> While the third member, Snyder, remained innocent and unaware, the other two, Lawson and Wheeler, had been involved in a kiting scheme.<sup>135</sup> Lawson had discovered that the other culprit, Wheeler, had been “transferring money

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<sup>130</sup> N.J.S.A § 14A:17-1.

In 1997, the Court adopted rules that require firms organized to practice law as professional corporations pursuant to The Professional Service Corporation Act, N.J.S.A § 14A:17-1 to -18, as limited liability companies pursuant to the New Jersey Limited Liability Company Act, N.J.S.A § 14A:2B-1 to -70 (now repealed), or as limited liability partnerships pursuant to the Uniform Partnership Act, N.J.S.A § 42:1A-1 to -56, to obtain and maintain professional liability insurance.

<sup>131</sup> DeMarco v. Stoddard, 223 N.J. 363, 375 (2015) (Albin, J., dissenting).

<sup>132</sup> *Id.* at 390. (Albin, J., dissenting).

<sup>133</sup> DeMarco v. Stoddard, 434 N.J. Super. 352, 369 (App. Div. 2014) appeal granted, 218 N.J. 270 (2014) and rev'd, 223 N.J. 363 (2015).

<sup>134</sup> *First Am. Title Ins. Co. v. Lawson*, 177 N.J. 125, 129 (2003).

<sup>135</sup> *Id.* at 130-31 (citing *First American Title Ins. Co. v. Lawson*, 351 N.J. Super. 407, 414 (App. Div. 2002)).

A “kiting” scheme whereby monies from one client trust account would be transferred to pay the obligations of another client. Monies were also being transferred from client trust accounts to the law firm's business account to pay expenses of the law firm, including partners' draws. On occasion, Lawson also used client trust account funds, including those of his mother, for his own personal use. By all accounts, Snyder was neither privy, nor a party, to this scheme. *First American Title Ins. Co. v. Lawson*, 351 N.J. Super. 407, 414 (App. Div. 2002).

improperly from various client accounts ... into other client accounts and into the firm's business account."<sup>136</sup> Upon confronting Wheeler, Lawson decided to go along with the scheme.<sup>137</sup>

Upon receiving three grievances regarding the firm's handling of certain transactions, the Office of Attorney Ethics (OAE) conducted an audit of the firm's books which ultimately resulted in the disbarment of Lawson and various claims from victims of the scheme.<sup>138</sup> Once named as defendants in the various claims, the firm notified its insurer.<sup>139</sup>

The firm had maintained the statutorily required minimum amount of legal malpractice insurance; however, the insurance company sought to release itself from the obligation to indemnify based on the argument that the firm's managing partner had knowingly made material misrepresentations when he applied for the insurance.<sup>140</sup> The material misrepresentation referred to involves a warranty statement signed by Wheeler.<sup>141</sup> The warranty specifically asked, "After inquiry, is any attorney in your firm aware of: ... B. Any acts, error or omissions in professional services that may reasonably be expected to be the basis of a professional liability claim?"<sup>142</sup> Wheeler checked the box marked "NO" and subsequently signed the warranty statement asserting to the insurer that the information on the application was accurate.<sup>143</sup>

The Supreme Court of New Jersey affirmed the Appellate Division's decision with respect to releasing the insurer from the obligation to indemnify with respect to the two wrongdoers; however, not with respect to the firm's innocent third-party member.<sup>144</sup> In a decision based on

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<sup>136</sup> *Id.* at 130.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at 132.

<sup>139</sup> *Id.* at 133.

<sup>140</sup> *First Am. Title Ins. Co. v. Lawson*, 177 N.J. 125, 129 (2003).

<sup>141</sup> *Id.* at 233.

<sup>142</sup> *Id.* at 131.

<sup>143</sup> *Id.*

<sup>144</sup> Nathan M. Crystal, *Malpractice Insurance Applications and Renewals-Don't Just Say "No"*, S.C. LAW., JULY 2015, at 12 (2015).

equitable principles and public policy, the court reasoned that “rescinding the policy as to the innocent member was inconsistent with the public policy of protecting consumers of legal services with malpractice insurance.”<sup>145</sup>

Though the court ruled in favor of the innocent third-party, the *DeMarco* majority attempts to use its decision in *Lawson* to bolster its current decision, interpreting that the rule in *Lawson* as, “Upon rescission, the insurer owes no duty to defend or indemnify the law firm or any defalcating attorney of the firm for any complaints pending or claims that accrued at the time of rescission.”<sup>146</sup> However, because the majority decided to let the innocent third member of the firm continue to claim coverage from the insurer, *Lawson* stands for the position that a balancing of equities is the appropriate measure in analyzing this type of issue.<sup>147</sup> Rather than a governing rule to deny insurance coverage to the innocent patient, the *DeMarco* majority should have interpreted *Lawson* as requiring the court to balance the equities in a totality of the circumstances approach based on public policy.

While it may be only two members of the dissent of which agree with the Appellate Division’s decision to use a more equitable approach with a balancing of equities, this approach is the proper one that should have been used to influence the majority’s decision.<sup>148</sup> The New Jersey courts have never adjudicated this issue with relation to compulsory medical malpractice insurance statutes.<sup>149</sup> Instead of deciding to consider other factors in a broad scope analysis, the majority attempted to scurry up what it could do to make stretching arguments by analogizing this statute to how courts have interpreted “similar” statutes.<sup>150</sup> Even though the courts have

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<sup>145</sup> *Id.*

<sup>146</sup> *DeMarco v. Stoddard*, 223 N.J. 363, 376 (2015) (citing *First Am. Title Ins. Co. v. Lawson*, 177 N.J. 125, 129 (2003)).

<sup>147</sup> *Id.* at 391 (Albin, J., dissenting).

<sup>148</sup> *See id.* at 384.

<sup>149</sup> *Id.* at 374.

<sup>150</sup> *Id.* at 375.

frequently interpreted compulsory statutes as being protective of the innocent third-party, the Court failed to approach the issue with a balancing of the equities. Had the Court done so in this fashion, not only would the innocent third party would be adequately protected from what he never could have anticipated, but the Court could have, at the outset, left it to the legislature to come up with a fix for this problem of discrepancy as to whether an innocent third-party should suffer based on the physician's actions.

Even though both *Fisher* and *Lawson* act as persuasive authority in influencing the majority to rule in favor of the innocent third-party, neither of the cases involve the compulsory medical malpractice insurance statutes. At this point, the Court would have been correct to rule in favor of the innocent third party as a matter of public policy.

### **3. Public Policy**

The *DeMarco* majority, ruling in favor of the insurance company, concluded by stating, “We have not identified any sound reason to treat medical professionals any differently than other similarly situated professionals.”<sup>151</sup> Strangely enough, other similarly situated professionals, as in *Lawson*, have been afforded with an analysis into public policy where there is an absence of precedent directly on point to help decide the issue.<sup>152</sup> The *DeMarco* majority should have followed up their similar statutory analysis with an analysis into public policy before making its conclusion.

Public policy has been argued to influence the resolution of every single legal dispute.<sup>153</sup> Though fairly difficult to implement a black letter ruling on exactly what is meant by “public

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<sup>151</sup> *DeMarco v. Stoddard*, 223 N.J. 363, 384 (2015).

<sup>152</sup> *E.g., First Am. Title Ins. Co. v. Lawson*, 177 N.J. 125, 129 (2003).

<sup>153</sup> Erich Vieth & James P. Lemonds, *Whence Public Policy?*, 52 J. MO. B. 239 (1996).

policy,” courts have regularly posited, “When we speak of public policy, ‘we mean the law of the state, whether found in the Constitution, the statutes, or judicial records.’”<sup>154</sup>

As the *DeMarco* dissent states, “The approach taken by the majority is at complete odds with our State’s public policy, which finds expression in our compulsory medical malpractice insurance law. The aim of the law is to provide financial protection to every patient in the State.”<sup>155</sup> However, there also is said to be a public policy of the State to discourage fraudulent conduct against an insurer.<sup>156</sup> When comparing the public policy of the State, the Court would have been appropriate to use a balancing of the equities approach in deciding which decision would have better yielded less contravention to public policy.

Balancing the equities is a term of art, which, procedurally, is used to describe a weighing game that courts undertake typically in cases where there is no precedent directly on point, to weigh, based on the totality of the circumstances, any harms each side to a controversy would suffer in the absence of relief from the courts.<sup>157</sup> This process allows the courts to see, from a bird’s eye view, exactly who and what the policy implications would effect given all potential outcomes from a case.<sup>158</sup>

In a balancing the equities approach, the Court would have taken into account the public policy concerns that have been alluded to through the *DeMarco* decision. On the one hand, New Jersey’s public policy hopes to provide financial protection from every patient in the State.<sup>159</sup> On

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<sup>154</sup> *Id.* (citing *State ex rel. Scott v. Dircks*, 111 S.W. 1, 3 (Mo. 1908)).

Broader definitions, vague as they might be, characterize public policy as the principle that “no one can lawfully do that which tends to be injurious to the public or against the public good.” Public policy has even been declared to be synonymous with “the public good.” It has been referred to as the “purpose and spirit of the substantive laws of a state . . .”

<sup>155</sup> *DeMarco v. Stoddard*, 223 N.J. 363, 380 (2015) (Albin, J., dissenting).

<sup>156</sup> Paul F. Clark, *Foot Doctor Defeated in Action for Rescission*, December 3, 2015, *available at* <http://blog.wcmlaw.com/2015/12/foot-doctor-defeated-in-action-for-rescission-nj/>.

<sup>157</sup> *See* 3 N.Y.Prac., Com. Litig. in *New York State Courts* § 18:10 (4th ed.).

<sup>158</sup> *See id.*

<sup>159</sup> *DeMarco*, 223 N.J. at 381 (Albin, J., dissenting).

the other hand, New Jersey acts against any kind of condoning of fraudulent activity against an insurer.<sup>160</sup>

When considering both sides in a totality of the circumstances, the Court should have unmistakably concluded that the innocent third party would be more severely injured by an unfavorable decision with less contravention to public policy, as opposed to the insurance company, which was in the best position to have uncovered Dr. Stoddard's misrepresentation well in advance of the third party's injury.<sup>161</sup> The dissent states, "The RIJUA was in the best position to ferret out any misrepresentation made by Dr. Stoddard when he applied and reapplied for malpractice insurance coverage. The innocent patient was in no position to do so."<sup>162</sup>

#### **Part IV: Conclusion**

It is no longer safe to assume that obtaining medical care is the smartest thing that you can do for your body. It is evident that the decision in *DeMarco v. Stoddard* turned the consumer's market for medical treatment on its head. As in New Jersey, compulsory medical liability insurance statutes were meant to ensure that patients were given financial protection in the case of a negligent physician. The Supreme Court of New Jersey has ruled that, even where medical liability insurance is required by statute, the consumer cannot always rely on the courts to ensure that the patient will receive the recourse they are promised in a situation of a physician's misrepresentation to his insurance provider.

This issue was well deserving of an analysis into the public policy of New Jersey, which ultimately would have led to a balancing of the equities. Unfortunately, it is now left to the

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<sup>160</sup> Paul F. Clark, *Foot Doctor Defeated in Action for Rescission*, December 3, 2015, *available at* <http://blog.wcmlaw.com/2015/12/foot-doctor-defeated-in-action-for-rescission-nj/>.

<sup>161</sup> *See DeMarco v. Stoddard*, 223 N.J. 363, 392 (2015) (Albin, J., dissenting).

discretion of the legislature to ensure that the decision will not have adverse effects on the medical community. The legislature should act quickly to ensure that a situation like this does not happen again by implementing various safeguards to ensure that courts interpret the compulsory liability statute in line with their clear intent in creating the statute.