

<p>JAMES G. LOWE, M.D.,</p> <p>Plaintiff/Appellant,</p> <p>v.</p> <p>BERNARD AUDET, RICHARD LAVER, and THE CREATIVE FINANCIAL GROUP, LTD.,</p> <p>Defendants/Respondents.</p>	<p>SUPREME COURT OF NEW JERSEY DOCKET NO. 090940</p> <p><u>CIVIL ACTION</u></p> <p>On Appeal from an Interlocutory Order of the Appellate Division, Docket No. A-4093-23</p> <p>Sat Below: Hon. Greta Gooden Brown, P.J.A.D. Hon. Christine M. Vanek, J.A.D.</p> <p>Law Division Docket No. CAM-L-0633-24</p> <p>Sat Below: Hon. Steven J. Polansky, P.J.Cv.</p>
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**BRIEF ON BEHALF OF AMICUS CURIAE,
NEW JERSEY CITIZEN ACTION**

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STATEMENT OF INTEREST OF AMICUS CURIAE

New Jersey Citizen Action (NJCA) is a statewide coalition and grassroots organization that fights for social, racial and economic justice for all. A nonprofit 501(c)(4) organization founded in 1982, NJCA addresses systemic and institutional issues as well as the pressing needs and interests of low- and moderate-income individuals across the state. A core component of our work is focused on consumer financial protections that ensure equitable access to credit and financial products and protect residents from fraud and unfair, deceptive, abusive and predatory business practices. See Certification of Daniel E. Cohen.

PRELIMINARY STATEMENT

The narrow legal issue in this appeal is whether the lower courts ruled correctly in dismissing plaintiff's claims for damages against defendant insurance brokers under the Consumer Fraud Act (CFA) for fraudulently misrepresenting the benefits that plaintiff would realize from the purchase of disability insurance coverage for plaintiff and his medical practice. Plaintiff's substantial damage claims, which would be trebled under the CFA and augmented by counsel fees, were dismissed by the lower courts on the basis of the decision in Plemmons v. Blue Chip Ins. Servs. Inc., 387 N.J. Super. 551 (App. Div. 2006), which held that insurance producers are "semi-professionals," and thereby exempt from CFA

liability based on this Court’s judicially created CFA exemption for “learned professionals.” Macedo v. Della Russo, 178 N.J. 340, 345-46 (2004).

Plaintiff argues that the ruling in Plemmons was superseded by the Appellate Division decision in Shaw v. Shand, 460 N.J. Super. 592 (App. Div. 2019), which rejected a “learned professional” immunity from the CFA for home inspectors licensed under the Home Inspection Licensing Act (N.J.S.A. 45:8-61 to -76), and expressed agreement with the contention in the Attorney General’s amicus brief that if this Court “continues to recognize a ‘learned professional’ doctrine, ideally that doctrine should be narrowly construed to include only those professions who have historically been recognized as ‘learned’ based on the requirement of extensive learning or erudition.” Shaw v. Shand, 460 N.J. Super. at 618-19.

As perhaps suggested by the foregoing quotation from the Attorney General’s amicus brief in Shaw v. Shand, the potentially broader issue raised by this appeal is the appropriateness of a so-called “semi-professional” exemption from the CFA, considering that less than half the states with comparable consumer protection laws have, either by statute or judicial decision, recognized a full “learned professional” exemption from their consumer fraud statutes similar to New Jersey’s. See Mark D. Bauer, The Licensed Professional Exemption in Consumer Protection: At Odds with Antitrust History and Precedent, 73 Tenn. L. Rev. 131, 154-63 (2006). The research revealed by that article, updated to the

present, reveals that New Jersey’s judicially created exemption for “learned professionals” is replicated in the statutes or caselaw applicable to less than one-half of the consumer protection statutes throughout the country. The failure to recognize a “learned professional” exemption in other states, and to recognize a more robust exemption in the states that grant only partial exemptions, may well be influenced by the recognition by the United States Supreme Court that “learned professionals” are not exempt from the anti-trust laws. Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975).

STATEMENT OF FACTS AND PROCEDURAL HISTORY

NJCA adopts the Concise Statement of Relevant Facts and Procedural History set forth in plaintiff’s Brief in Support of Motion for Leave to Appeal.

LEGAL ARGUMENT

POINT I

AS THIS COURT HAS SPECIFICALLY HELD, OTHER REGULATORY REGIMES WILL NOT SUPERCEDE THE CONSUMER FRAUD ACT UNLESS THERE IS A DIRECT CONFLICT BETWEEN THE PROVISIONS OF THE OTHER REGULATORY SCHEME AND THE CONSUMER FRAUD ACT.

NJCA strongly believes that a so-called “semi-professional” exemption for quasi-professionals is flatly inconsistent with the Legislature’s intent that the CFA serve as a broad and comprehensive vehicle “to root out consumer fraud.”

Lemelledo v. Beneficial Mgmt. Corp. of Am., 150 N.J. 255, 264 (1997). The issue

in Lemelledo concerned “loan packing,” a practice used by commercial lenders to increase the principal amount of a loan by packaging the loan to include unwarranted services such as credit insurance. The borrower in Lemelledo filed a class action suit against the lender challenging the extra charges added to her loan, and included a claim under the CFA for treble damages and counsel fees. Defendant successfully moved in the Law Division to dismiss the CFA claim, but the Appellate Division reversed. This Court granted defendant’s motion for leave to appeal the reinstatement of the CFA claim.

In affirming the Appellate Division’s ruling, this Court noted that the CFA’s definition of merchandise was “any objects, wares, goods, commodities, services or anything offered directly or indirectly to the public for sale.” N.J.S.A. 56:8-1(c). The Court observed that that broad definition of merchandise was “more than sufficiently broad to include the sale of credit.” Lemelledo, 150 N.J. at 265. Concerning the cost of the credit insurance policy that was unilaterally added by defendant to the cost of plaintiff’s loan, this Court held that the CFA’s language “is ample enough to encompass the sale of insurance policies as goods and services that are marketed to consumers.” Ibid.

But defendant argued that because it was subject to regulation by several state agencies, subjecting it to CFA liability as well would be inconsistent with this Court’s usual reluctance to impose inconsistent obligations on regulated parties.

Nevertheless, this Court emphatically rejected defendant's contention that the CFA should not apply to its sale of credit insurance to loan customers because it was subject to regulation by governmental agencies.

In determining whether the existence of other regulations creates an exemption to the CFA for particular conduct that otherwise would fall within its provisions, it should ordinarily be assumed that the CFA applies to the covered practice. That assumption is appropriate because of the strong and sweeping legislative remedial purpose apparent in the CFA. The CFA explicitly states that the 'rights, remedies and prohibitions' that it creates are cumulative to those created by other sources of law. N.J.S.A. 56:8-2.13.

The Legislature, of course, need not diffuse enforcement power to combat fraud, and it certainly may concentrate that authority in one or more agencies or in private citizens. The judgment, however, is for the Legislature, not for this Court. We are loathe to undermine the CFA's enforcement structure, which specifically contemplates cumulative remedies and private attorneys general, by carving out exemptions for each allegedly fraudulent practice that may concomitantly be regulated by another source of law. The presumption that the CFA applies to covered practices, even in the face of other existing sources of regulation, preserves the Legislature's determination to effect a broad delegation of enforcement authority to combat consumer fraud.

In order to overcome the presumption that the CFA applies to a covered activity, a court must be satisfied, as this Court was in Daaleman [v. Elizabethtown Gas Co.], 77 N.J. 267 (1978)], that a direct and unavoidable conflict exists between application of the CFA and application of the other regulatory scheme or schemes. It must be convinced that the other source or sources of regulation deal specifically, concretely, and pervasively with the particular activity, implying a legislative intent not to

subject parties to multiple regulations that, as applied, will work at cross-purposes. We stress that the conflict must be patent and sharp, and must not simply constitute a mere possibility of incompatibility. If the hurdle for rebutting the basic assumption of applicability of the CFA to covered conduct is too easily overcome, the statute's remedial measures may be rendered impotent as primary weapons in combatting clear forms of fraud simply because those fraudulent practices happen also to be covered by some other statute or regulation. See Therrien v. Resource Financial Group., 704 F. Supp. 322, 328 (D.N.H. 1989) (reasoning that exemption from New Hampshire Unfair and Deceptive Acts and Practices Act for regulated industries would cause the exemption to 'swallow the rule').

[Lemelledo, 150 N.J. at 268-270.]

As this Court made clear in Lemelledo, before it can be concluded that another statutory or regulatory scheme precludes application of the CFA to a particular industry, it must be demonstrated that

A direct and unavoidable conflict exists between application of the CFA and application of the other regulatory scheme or schemes . . . and that the other . . . sources of regulation deal specifically, concretely, and pervasively with the particular activity . . . We stress that the conflict must be patent and sharp, and must not simply constitute a mere possibility of incompatibility.

[Id. at 270.]

It is highly doubtful whether the caselaw relied on by defendants in the courts below meets the high standard established by this Court for the recognition of regulatory conflicts with the CFA.

Nevertheless, defendants rely primarily on the Appellate Division's decision in Plemmons v. Blue Chip Ins. Servs. Inc., 387 N.J. Super. 551 (App. Div. 2006), for their argument that "learned professionals" and also "semi-professionals" are outside the scope of the CFA whether or not there is a direct conflict between the CFA and the statutory or regulatory regime applicable to the semi-professional in question. In Plemmons, plaintiff signed an agreement to acquire a residentially zoned property that he planned to convert to commercial use. He contacted defendant Pullaro, an insurance broker employed by defendant Blue Chip Insurance Services, requesting insurance coverage for the property. Plaintiff paid the \$361 premium and Blue Chip issued a declaration sheet for a homeowner's policy. That policy was voided when the closing was adjourned.

Prior to the new closing date, Pullaro realized that plaintiff would require a Business Operations Policy (BOP) rather than a homeowner's policy. Plaintiff did not pay the premium for a BOP before the new closing date, and neither a BOP nor a homeowner's policy was issued. Shortly after the closing, the property, still uninsured, was damaged by a storm and by the alleged negligence of contractors hired to perform work on the property. Those occurrences resulted in a lawsuit filed by plaintiff against Pullaro, Blue Chip and other parties.

The suit, including claims for negligence, breach of contract and violations of the CFA, went to trial solely against Pullaro, Blue Chip and Preserve Insurance

Company. After plaintiff presented its case, the trial court dismissed all claims under the CFA and against Preserve. Id. at 559. A molded judgment on plaintiff's negligence claim for \$24,500 was entered by the court.

Plaintiff appealed, raising among other issues the denial of his CFA claims against defendants. The Appellate Division affirmed the dismissal of plaintiff's CFA claims, relying on Neveroski v. Blair, 141 N.J. Super. 365 (App. Div. 1976) and Macedo v. Della Russo, 178 N.J. 340 (2004).

In affirming, the Appellate Division distinguished and diminished this Court's holding in Lemelledo on the basis that even absent an irreconcilable conflict between the CFA and the statutory and regulatory provisions relevant to insurance brokers,

members of 'learned professions,' including those who occupy a 'semi-professional status' engage in an activity beyond the pale of the CFA. Macedo, 178 N.J. at 344 (quoting Neveroski, 141 N.J. Super. at 379).

[Plemmons, 387 N.J. Super. at 564 (cleaned up).]

In effect, the Appellate Division in Plemmons classified insurance brokers as "semi-professionals," and held that that status alone was sufficient to exempt insurance brokers from the CFA, without regard to whether the "irreconcilable conflict" between the CFA and the regulation of insurance brokers could be demonstrated, as this Court had mandated in Lemelledo. To support its holding, the Plemmons court noted that insurance brokers are licensed under the Insurance

Producers Licensing Act, N.J.S.A. 17:22A-26 to -48, and also are required to comply with the Insurance Producer Standards of Conduct promulgated by the Department of Banking and Insurance, N.J.A.C. 11:17A-1.1 to -17D-2.8. The opinion expressed no view on whether those statutory and regulatory provisions created the “irreconcilable conflict” demanded by this Court’s opinion in Lemelledo.

Plaintiff, however, argues persuasively that the holding and reasoning of Plemmons was clearly rejected by the more recent decision in Shaw v. Shand, 460 N.J. Super. 592, 599 (App. Div. 2019). The narrow issue in the Shaw case was whether licensed home inspectors should be deemed to be “semi-professionals” who are entitled to a “learned professional” exemption from the CFA.

The relevant facts are that plaintiff Shaw agreed to purchase a one-family home on Overlook Court in Hampton Township, New Jersey. Plaintiff hired defendant Shand, and his home inspection company, All Points Home Inspection, to conduct an inspection of the property. Plaintiff signed a one-page agreement setting forth the terms of the inspection. Defendant conducted the inspection and mailed his report to Mrs. Shaw. The report concluded that “[t]his structure appears to be very well built utilizing quality materials and professional workmanship. It is in need of only typical maintenance and upgrading.” Id. at 600.

In reliance on defendant's report, plaintiffs proceeded to purchase the property for \$318,000. Ibid. But on occupying the property, the Shaws learned that major repairs were required, including a new roof, repair of the front deck/porch which collapsed shortly after the closing, and replacement of windows and sliding glass doors to address "leaks, draft and rot . . ." Id. at 600-01. Plaintiffs alleged that in addition to the thousands of dollars already spent on repairs, they anticipated having to spend "tens of thousands of dollars" to address a mold issue. Id. at 601.

At his deposition, defendant testified that "he had observed some problems with the home that he did not include in his report." Ibid. Defendant testified that he had attended "hours of schooling," served an apprenticeship and passed an examination before becoming a licensed home inspector. He acknowledged that the Shaw property was his first assignment and that he subsequently had allowed his license to lapse.

Plaintiffs sued defendant for negligence, common law fraud, breach of contract and violations of the CFA. The trial court granted defendant's motion to dismiss the CFA claim, relying on Plemmons, and concluding that because home inspectors were licensed and separately regulated, they qualified as "semi-professionals" and were therefore exempt from liability under the CFA. Id. at 602-03.

The Appellate Division, aware that the CFA is a statute enforced by the Attorney General's office, and also because home inspectors are regulated by the Attorney General's Division of Consumer Affairs, invited the Attorney General to participate as amicus curiae. The thrust of the Attorney General's amicus brief, which strongly urged reversal of the trial court's decision, is revealed by its opening paragraph:

The Attorney General appears as amicus curiae to ask that this court reject the trial court's improper extension of the so-called 'learned professional' exception to the New Jersey Consumer Fraud Act, N.J.S.A. 56:8-1 to -210 (CFA), to encompass 'semi-professionals' such as home inspectors. The trial court's unwarranted expansion of this limited, judicially crafted exception lacks any support in the plain text or purpose of the CFA. Adopting the trial court's reasoning would unduly limit the CFA, which the Legislature intended to be one of the nation's strongest consumer protection laws. The trial court's broad interpretation of the exception significantly curtails the authority of the Attorney General and the Division of Consumer Affairs (Division) to protect New Jersey consumers and limits the redress available to private litigants. The decision below should be set aside.

[Shaw v. Shand, Br. of Amicus Curiae Attorney General of New Jersey, at Aa001-030¹.]

The Attorney General's brief also argued that

Courts generally 'give substantial deference to the interpretation an agency gives to a statute that the agency is charged with enforcing.' R & R Mktg., L.L.C. v. Brown-

¹ Aa = NJCA's Amicus Appendix

Forman Corp., 158 N.J. 170, 175 (1999) (quoting Smith v. Director, Div. of Taxation, 108 N.J. 19, 25 (1987).)

[Aa14.]

The crux of the Attorney General's disagreement with the trial court ruling is explained by the following paragraph from his amicus brief:

Without finding any 'direct and unavoidable conflict' between the CFA and the home inspector statute and regulations, the trial court concluded that home inspectors are exempt from the CFA because they are highly regulated 'semi-professionals'. (Pa379). But the Supreme Court has not extended the learned professional exception to home inspectors (or other 'semi-professionals') and this court should not do so now.

Rather, the narrow, atextual 'learned professional' exception – created by the Court based on its reading of the historical context against which the CFA was enacted – should not be expanded beyond the limited class of professionals described in Macedo. In Macedo, the Court concluded that physicians, attorneys, and similar learned professionals are exempt from the CFA, 'so long as they are acting in their professional capacities,' because, at the time the Legislature established liability for fraud in advertising in 1960, these professionals were not permitted to advertise at all. 178 N.J. at 343. Thus, the Court held that the Legislature could not have intended the CFA's precursor to reach advertising by physicians. Ibid.

[AA18-19.]

In Shaw v. Shand, the Appellate Division concluded that its decision in Plemmons, was erroneous and inconsistent with this Court's decision in

Lemelledo. Accordingly, it reversed the trial court's dismissal of plaintiff's CFA claim and remanded for further proceedings:

Considering the CFA's remedial purpose and applying well-established canons of statutory construction, we conclude that the judicially created learned professional exception must be narrowly construed to exempt CFA liability only as to those professions who have historically been recognized as 'learned' based on the requirement of extensive learning or erudition. To the extent our prior decisions, including Plemmons v. Blue Chip Insurance Services, Inc., 387 N.J. Super. 551 (App. Div. 2006), have applied the learned professional exception to 'semi-professionals' who are regulated by a separate regulatory scheme, we are constrained, upon further review, to depart from that reasoning as inconsistent with the Supreme Court's decision in Lemelledo v. Beneficial Management Corp. of America, 150 N.J. 255 (1997). As the Court explicitly held in Lemelledo, the existence of a separate regulatory scheme will 'overcome the presumption that the CFA applies to a covered activity' only when 'a direct and unavoidable conflict exists between application of the CFA and application of the other regulatory scheme or schemes.' 150 N.J. at 270.

Our decision comports with the Attorney General's persuasive interpretation of the CFA and addresses the Attorney General's policy concern that an expansive interpretation of the learned professional exception unduly curtails the authority of the Attorney General and the Division of Consumer Affairs to protect New Jersey consumers and limits the redress available to private litigants.

Accordingly, because home inspectors are not historically recognized learned professionals and because no direct and unavoidable conflict exists between the CFA and the regulations governing home inspectors, we conclude that the CFA applies to the activities of licensed home

inspectors. Therefore, we reverse the trial court's summary judgment dismissal of the CFA claim against defendants and remand for further proceedings.

[Shaw v. Shand, 460 N.J. Super. at 599-600.]

Significantly, Judge Sabatino, who joined in the Appellate Division's decision in Shaw v. Shand, wrote a concurring opinion in which he stated that he had served on the Panel that had decided Plemmons in 2006, but that he no longer agreed with the Plemmons decision that exempted insurance brokers from the CFA. Shaw v. Shand, 460 N.J. Super. at 628 (Sabatino, P.J.A.D., concurring).

POINT II

NEITHER THE NEW JERSEY INSURANCE PRODUCER LICENSING ACT NOR THE INSURANCE PRODUCER'S STANDARDS OF CONDUCT INCLUDE PROVISIONS THAT DIRECTLY CONFLICT WITH THE CFA.

The fact that the State of New Jersey licenses and regulates insurance producers is not a coherent basis for excluding them from the CFA. The licensing process outlined in the Insurance Producer Licensing Act simply requires applicants to be over 18 years of age and to pass the State licensing examination. Neither a college degree nor graduation from high school is a prerequisite for a license. N.J.S.A. 17:22A-31 and -32. The applicant also must complete a pre-licensing course of study for the lines of authority for which the applicant seeks to be licensed. N.J.S.A. 17:22A-32. A background check to determine if the applicant

has a criminal history also is required, and various acts of misconduct can result in suspension of the applicant's license. N.J.S.A. 17:22A-32 and 40.

In addition, the Act provides for suspension of an insurance producer's license in the event the licensee misrepresents facts on his license application, violates insurance laws or regulations, is convicted of a felony or other serious crime, or commits an unfair insurance trade practice or fraud. N.J.S.A. 17:22A-40. But these routine and appropriate regulatory provisions governing the licensing of insurance producers fall far short of the "patent and sharp conflict" required by this Court in Lemelledo, 160 N.J. 255, between the Insurance Producer Licensing Act and the CFA, that implies "a legislative intent" not to subject parties to multiple regulations that, as applied, will work at cross purposes. Id. at 270.

Moreover, the relatively insubstantial requirements imposed by the Act as a predicate for eligibility for licensing as an insurance producer cannot fairly be compared with the rigorous requirements for licensing applicable to physicians and attorneys, the learned professionals exempted from the CFA in Macedo v. Della Russo, 178 N.J. 340. Those professionals not only were college graduates but also had to attend and graduate from law school and medical school, and pass rigorous examinations demonstrating the required degree of proficiency in their respective professions. By contrast, licensed insurance producers need not be college or even high school graduates to be eligible for licensing. Clearly, nothing in the provisions

of the Insurance Producers Licensing Act remotely suggests any incompatibility between that Act and the CFA.

Nor is there any apparent conflict between the CFA and other statutory provisions that prohibit licensed insurance producers from offering any rebates or special inducement to clients other than as set forth in the insurance contract.

N.J.S.A. 17:29A-15; N.J.S.A. 17B:30-13.

Notwithstanding the fact that New Jersey, like other states, has enacted statutory and regulatory provisions applicable to the business operations of insurance agents and producers, defendants fail to cite any statutory or regulatory provisions that meet the high standard set forth by this Court in Lemelledo, requiring

that the other source or sources of regulation deal specifically, concretely, and pervasively with the particular activity, implying a legislative intent not to subject parties to multiple regulations that, as applied, will work at cross purposes.

[Lemelledo, 150 N.J. at 268-70.]

POINT III

**THE FACT THAT LESS THAN HALF OF ALL STATES
RECOGNIZE, BY STATUTE OR JUDICIAL DECISION, A
BLANKET LEARNED PROFESSIONAL EXEMPTION FROM
THEIR CONSUMER FRAUD STATUTES SUGGESTS THE
NEED FOR CAUTION IN CONSIDERING THE
APPROPRIATENESS OF A “SEMI PROFESSIONAL”
EXEMPTION FROM THE CFA.**

This Court first recognized a learned professional exemption to the CFA in Macedo v. Dello Russo, 178 N.J. 340. Plaintiffs sued Dr. Joseph Dello Russo, the entities he established to perform laser surgery, and Dr. William Kellog, alleging that defendants, among other claims, violated the CFA by permitting Kellog, who lacked full licensing, to treat plaintiffs. The allegation was not that Kellog's medical services were sub-standard, but that defendants falsely represented that plaintiffs would be treated by licensed physicians with no limitations on their licenses. The trial court granted defendants' motion to dismiss the CFA count because claims against physicians were beyond the purview of the CFA. The Appellate Division reversed, observing:

There is no logical underpinning for a rule that permits professionals and their practice entities to evade the strictures of the Act simply because of their professional status. Such an arbitrary standard would, without any basis contained in the Act itself, create a special class among those engaging in activity the Legislature has generally subjected to special scrutiny in its endeavor to protect consumers. See Cox v. Sears Roebuck & Co., 138 N.J. 2, (1994). We can find nothing in the Act that suggests the Legislature ever intended to exempt classes of service purveyors from its coverage based on the nature of the service provided. When professionals engage in common commercial activity designed to attract the patronage of the public, they should be held to the same standards of truth and completeness that govern the sales activities of all other persons or entities.

[Macedo v. Dello Russo, 359 N.J. Super. 78, 83-84 (App. Div. 2003).]

In a per curiam opinion, this Court reversed the Appellate Division, and held that the provisions of the CFA did not apply to “learned professionals.” The Court noted that when the Legislature in 1960 adopted the precursor to the CFA, creating liability for fraud in advertising, it was clear that the law did not apply to physicians (and lawyers) who were not then permitted to advertise, Macedo, 178 N.J. at 343, a legal restriction that subsequently was reversed. Bigelow v. Virginia, 421 U.S. 809 (1975); Bates v. State Bar of Arizona, 433 U.S. 350 (1977).

In holding that “learned professionals” were exempt from suit pursuant to the CFA, the court’s opinion quoted with approval the following excerpt from the court’s opinion in Neveroski v. Blair (holding that broker who negotiates sale of real estate is outside scope of CFA):

Certainly no one would argue that a member of any of the learned professions is subject to the provisions of the Consumer Fraud Act despite the fact that he renders ‘services’ to the public. And although the literal language may be construed to include professional services, it would be ludicrous to construe the legislation with that broad a sweep in view of the fact that the nature of the services does not fall into the category of consumerism.

[Macedo, 178 N.J. at 344 (quoting Neveroski, 141 N.J. Super. at 379).]

The Court in Macedo noted that the Legislature is assumed to be aware of the judiciary’s consistent interpretation of the CFA to exclude learned

professionals. Accordingly, the Court concluded that it was bound by the Legislature's acquiescence to the judiciary's interpretation of the CFA:

Thus, today, forty years after the CFA was enacted, our jurisprudence continues to identify learned professionals as beyond the reach of the Act so long as they are operating in their professional capacities. The Legislature is presumed to be aware of that judicial view.

* * *

We therefore must assume that the Legislature approves of the consistent judicial interpretation of the CFA that has been extant for four decades. Under that interpretation, advertisements by learned professionals in respect of the rendering of professional services are insulated from the CFA but subject to comprehensive regulation by the relevant regulatory bodies and to any common-law remedies that otherwise may apply. We consider ourselves bound by that Legislative acquiescence. If we are incorrect in our assumption, we would expect the Legislature to take action to amend the statute.

[Macedo, 178 N.J. at 345-46].

A different perspective is offered by the law review article cited earlier in this brief: Mark D. Bauer, The Licensed Professional Exemption in Consumer Protection: At Odds with Antitrust History and Precedent, 73 Tenn. L. Rev. 131 (2006). That article asserts that state consumer protection laws are analogous to anti-trust laws, such as the Federal Trade Commission (FTC) Act, 15 U.S.C. 41-48 (2000), and that the fact that licensed professionals are not exempt from anti-trust

laws should give courts reason to reconsider the grant of “learned professional” exemptions from state consumer fraud laws.

The United States Supreme Court addressed the issue of the exemption of attorneys from anti-trust laws in Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975). In Goldfarb, petitioners, a married couple, had agreed to buy a home in Fairfax County, Virginia, and their lender required title insurance which in turn mandated a title examination that could be performed only by a member of respondent Virginia State Bar. But no lawyer they approached would perform the title exam for less than the fee set forth in a minimum fee schedule published by the Fairfax County Bar Association and enforced by the Virginia State Bar. Plaintiff sued the State and County Bar Associations, alleging that the fee schedule and its enforcement constituted price-fixing in violation of the Sherman Act. The District Court for the Eastern District of Virginia held that the State Bar was exempt from the Sherman Act, but granted judgment against the County Bar and set down the case for trial on damages. Goldfarb, 421 U.S. at 779 (citing Goldfarb v. Virginia State Bar, 355 F. Supp. 491 (E.D. Va. 1973)). The Court of Appeals reversed, holding that the State Bar’s conduct was immune from liability as “state action,” but that the County Bar also was immune because the practice of law, as a “learned profession,” did not constitute “trade or commerce” under the Sherman Act. Id. at 779-80 (citing Goldfarb v. Virginia State Bar, 497 F.2d 1 (4th Cir. 1974))

The Supreme Court reversed the Court of Appeals, concluding that Congress, in enacting the Sherman Act, would not have intended to exempt “learned professionals.”

In arguing that learned professions are not ‘trade or commerce’ the County Bar seeks a total exclusion from antitrust regulation. Whether state regulation is active or dormant, real or theoretical, lawyers would be able to adopt anticompetitive practices with impunity. We cannot find support for the proposition that Congress intended any such sweeping exclusion. The nature of an occupation, standing alone, does not provide sanctuary from the Sherman Act . . . nor is the public-service aspect of professional practice controlling in determining whether s 1 includes professions. Congress intended to strike as broadly as it could in s 1 of the Sherman Act, and to read into it so wide an exemption as that urged on us would be at odds with that purpose.

[Id. at 787 (internal citations omitted).]

The court also declined to hold that the enforcement of the minimum fee schedule by the State Bar Association constituted “state action” that was exempt from the anti-trust laws, although the court acknowledged the State’s strong interest in establishing standards for licensing and regulating the practices of learned professionals:

The fact that the State Bar is a state agency for some limited purposes does not create an antitrust shield that allows it to foster anticompetitive practices for the benefit of its members. . . . The State Bar, by providing that deviation from County Bar minimum fees may lead to disciplinary action, has voluntarily joined in what is essentially a private anticompetitive activity, and in that

posture cannot claim it is beyond the reach of the Sherman Act. Its activities resulted in a rigid price floor from which petitioners, as consumers, could not escape if they wished to borrow money to buy a home.

We recognize that the States have a compelling interest in the practice of professions within their boundaries, and that as part of their power to protect the public health, safety, and other valid interests they have broad power to establish standards for licensing practitioners and regulating the practice of professions. We also recognize that in some instances the State may decide that ‘forms of competition usual in the business world may be demoralizing to the ethical standards of a profession.’ The interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been ‘officers of the courts.’ In holding that certain anticompetitive conduct by lawyers is within the reach of the Sherman Act we intend no diminution of the authority of the State to regulate its professions.

[Goldfarb, 421 U.S. at 791-93 (internal citations omitted).]

The Supreme Court’s decision in Goldfarb may very well have been an influential consideration in the determinations made by other states throughout the country on whether to exempt “learned professionals” from their consumer fraud statutes. For the Court’s convenience, a chart is included in the appendix (Aa031-Aa037) reflecting in summary fashion the determinations made by all fifty states on that issue. Twenty of the fifty states appear to have no exemption at all, either by statute or judicial decision. Fourteen states provide an exemption to some extent for malpractice claims, on the basis that their consumer fraud laws cover “only the

entrepreneurial or commercial aspects of the profession.” In those states, a physician would be subject to suit under the consumer fraud law if he or she fraudulently misrepresented the scope and extent of his medical experience, but the law would not apply to a claim based on medical malpractice. See, e.g., Haynes v. Yale-New Haven Hosp., 699 A.2d 964, 972-73 (Conn. 1997), in which the Connecticut Supreme Court dismissed a medical malpractice claim brought pursuant to the Connecticut Unfair Trade Practice Act, explaining that

professional negligence – that is, malpractice – does not fall under CUTPA. Although physicians and other health care providers are subject to CUTPA, only the entrepreneurial or commercial aspects of the profession are covered, just as only the entrepreneurial aspects of the practice of law are covered by CUTPA. ‘Although an attorney is not exempt from CUTPA’; Heslin v. Connecticut Law Clinic of Trantolo & Trantolo, 190 Conn. 510 (1983); we made it clear in Heslin that we were not deciding ‘whether every provision of CUTPA permits regulation of every aspect of the practice of law . . .’ Id. at 520. We have held that it is important not to ‘interfere with the attorney’s primary duty of robust representation of the interests of his or her client.’ Mozzochi v. Beck, [204 Conn. 490, 497 (1987)]. This public policy consideration requires us to hold that CUTPA covers only the entrepreneurial or commercial aspects of the profession of law. The noncommercial aspects of lawyering – that is, the representation of the client in a legal capacity – should be excluded for public policy reasons.

[Haynes, 699 A.2d at 34-35.]

NJCA’s analysis of the determinations made by our sister states reveals that in 34 of the 50 states, learned professionals, including doctors and lawyers, are

subject to suit under a State’s consumer fraud law for claims arising from the commercial or entrepreneurial aspects of the profession, such as a claim that a doctor or lawyer falsely misrepresented the extent or scope of his professional training or experience. Although neither the chart nor NJCA’s extensive research purports to examine the treatment of so-called “semi-professionals” by those states, the relative caution exercised by a majority of the states in recognizing blanket exemptions from consumer fraud laws for learned professionals clearly should be of concern to this Court in deliberating on whether to extend New Jersey’s exemption to “semi-professionals” such as insurance brokers.

As this brief explains, the requirement of licensing for insurance brokers, and any additional regulation of their business practices provided by the State, falls far short of the redress afforded by New Jersey’s CFA, which provides for both treble damages and counsel fees for a successful plaintiff. The imposition of a fine or other discipline by regulatory officials as punishment for an insurance broker’s breach of regulatory standards is small comfort to their client who, like plaintiff Lowe, alleges extraordinary financial losses based on defendants’ alleged misrepresentations concerning the benefits Lowe could expect to receive from the disability insurance policies he purchased based on defendants’ allegedly fraudulent misrepresentations.

CONCLUSION

The business of “insurance brokerage” essentially involves the recommendation and sale of insurance policies by licensed brokers to clients, with the purpose that the benefits payable under the policies fulfill the needs of the client. The broker performs what is essentially the function of an informed seller of a product. Conceptually, misrepresentation about the benefits the proposed policy will provide to the client is a classic example of consumer fraud, and there would appear to be no reason why that fraud should not be encompassed within the CFA.

Under New Jersey law an 18-year-old without even a high school education can, upon passing an examination, become a licensed insurance broker. Because contrary to what was mandated by this Court’s decision in Lemelledo, no “direct and unavoidable conflict exists between application of the CFA and application of the other regulatory scheme or schemes,” 150 N.J. at 270, this Court should reverse the decision below and remand the case to the Law Division for trial.

Respectfully submitted,

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