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Supreme Court of New Jersey

Docket No. 090940

JAMES G. LOWE, M.D., *Plaintiff-Appellant,* vs. BERNARD AUDET, RICHARD LAVER and THE CREATIVE FINANCIAL GROUP, LTD., *Defendants-Respondents.*	:	CIVIL ACTION MOTION FOR LEAVE TO APPEAL FROM AN INTERLOCUTORY OPINION OF THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION Docket No. A-4093-23 Sat Below: HON. GRETA GOODEN BROWN, P.J.A.D. HON. CHRISTINE M. VANEK, J.A.D.

BRIEF ON BEHALF OF DEFENDANTS-RESPONDENTS BERNARD AUDET AND THE CREATIVE FINANCIAL GROUP IN OPPOSITION TO MOTION FOR LEAVE TO APPEAL

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PRELIMINARY STATEMENT

Since 2006, New Jersey courts have held that insurance producers like Defendants Bernard Audet ("Audet"), The Creative Financial Group i/p/a The Creative Financial Group, Ltd. ("Creative"), and Richard Laver ("Laver") (collectively, "Defendants"), are entitled to the learned professional exemption to liability under the Consumer Fraud Act, N.J.S.A. 56:8-1 to -210 ("CFA"), when acting in their professional capacity. In fact, in 2009, this Court agreed that insurance producers are in the same learned class with doctors and lawyers for this purpose. Lee v. First Union Nat'l Bank, 199 N.J. 251, 263-264 (2009). The Legislature's affirmative acts – enacting both the Insurance Producer Licensing Act, N.J.S.A. 17:22A-26 to -48, and the Affidavit of Merit Statute, N.J.S.A. 2A:53A-26 to -29 – and lack thereof – not amending the CFA to explicitly apply to insurance producers or other learned professionals – constitute universal agreement that insurance producers are beyond the pale of the CFA. The Law Division and Appellate Division correctly recognized that Defendants are exempt when both courts dismissed Plaintiff James G. Lowe, M.D.'s ("Plaintiff") CFA claims with prejudice.

The only confusion appears to lie with Plaintiff. In his motion, Plaintiff identifies no irreparable injury necessitating this Court's involvement. The two cases Plaintiff seeks to pit against each other – Plemmons v. Blue Chip Ins.

Servs., Inc., 387 N.J. Super. 551 (App. Div. 2006) and Shaw v. Shand, 460 N.J. Super. 592 (App. Div. 2019) – show that they are, as the Law Division correctly noted, not necessarily inconsistent as to the learned professional exemption for insurance producers. Plaintiff provides this Court with nothing to show his appeal has merit or that the interests of justice require this Court to overturn nearly twenty years of Audet and Creative's reliance on an exemption from liability under the CFA. Plaintiff's mere personal disagreement with the Law Division and Appellate Division is no basis to cause this Court to intervene. The parties should continue with discovery on the Plaintiff's remaining eight other causes of action.

Accordingly, Audet and Creative respectfully request that Plaintiff's motion for leave for an interlocutory appeal be denied.

PROCEDURAL HISTORY

Plaintiff's Complaint was filed on February 27, 2024. (Pa004 – Pa052.) Defendants then filed pre-answer motions to dismiss pursuant to Rule 4:6-2(e) seeking dismissal, *inter alia*, of Count VII relative to claims under the CFA. (Pa001 – Pa003.) On July 19, 2024, following oral argument and a well-reasoned decision, the Hon. Steven J. Polansky, P.J.Cv., granted, in relevant part, Defendants' motions on the CFA claims and dismissed Count VII with prejudice. (Pa001 – Pa003; Pa213 – Pa233.)

On August 7, 2024, Plaintiff filed a motion seeking interlocutory review only as to the dismissal of the CFA claims. (Pa187.) That same day, Audet and Creative filed their Answer and Affirmative Defenses, and started discovery on the eight other counts asserted in the Complaint. (Pa103 – Pa132.) The Appellate Division granted leave to appeal on August 27, 2024. (Pa102.) The parties proceeded with additional briefing and oral argument was held on February 4, 2025. (Pa189 – Pa212.)

On June 24, 2025, the Appellate Division affirmed *per curiam* the dismissal of Plaintiff's CFA claims with prejudice. (Pa189 – Pa212.) Plaintiff filed a motion for leave to appeal with this Court on July 14, 2025. Audet and Creative hereby file this opposition.

FACTUAL BACKGROUND[1]

Plaintiff is a neurosurgeon and lawyer who operated multiple businesses, including a medical practice, "medical-legal consulting business," medical billing company, and race car team. (Pa005, Pa007 – Pa011, Pa013, Pa016 – Pa017.) Audet is a licensed insurance broker employed by Creative, which is an insurance and financial services business in Pennsylvania. (Pa005 – Pa007.) Laver is another licensed insurance professional at Creative. (Pa006 – Pa007.)

[1] Like the Court, Audet and Creative are constrained to assume that the facts, as alleged by Plaintiff, are true given the procedural posture. See Lemelledo v. Beneficial Mgmt. Corp. of Am., 150 N.J. 255, 263 (1997).

Plaintiff alleges that Defendants, with his accountant and lawyer, assisted with obtaining a total of four disability and business overhead expense insurance policies from MetLife for him and his medical practice. (Pa007 – Pa025.)

Plaintiff stopped performing neurosurgery in September 2021 because his maculopathy reduced his vision, causing him to cease earning income as a neurosurgeon and divest his interest in his medical practice. (Pa025.) Plaintiff then made a claim for "maximum benefits" under the disability and business overhead expense policies in December 2021. (Pa025.) Plaintiff alleges that MetLife made only partial payments under its policies because it considered Plaintiff's other income sources, such as Plaintiff's "medical-legal consulting business" and a litigated dispute with his former business partner. (Pa025 – Pa030.) Plaintiff claims he went through great lengths to fight for "maximum benefits" under the policies, but despite Defendants' representations otherwise, MetLife refused to pay "full benefits." (Pa025 – Pa030.)

Nowhere in the 46-page Complaint does Plaintiff assert that the relevant services or policies are of the type that are sold or marketed for mass distribution to the general public. (Pa004 – Pa049.) Instead, the Complaint is replete with assertions about the specific nature of Plaintiff's insurance needs and concerns about his situation – mainly, coverage for if or when a disability prevented him from performing neurosurgery. (Pa007 – Pa025.)

Plaintiff asserts causes of action sounding in professional negligence (Count I), negligence *per se* under N.J.A.C. 11:17A-4.10 (Count II), negligent misrepresentation (Count III), breach of fiduciary duties (Count IV), common law fraud (Count V), fraud in the inducement (Count VI), under the CFA (Count VII), breach of the insurance professional special relationship (Count VIII), and breach of contract (Count IX). (Pa031 – Pa047.)

Accompanying the Complaint is an Affidavit of Merit from an insurance producer who "holds widely recognized professional insurance designations." (Pa050.) Plaintiff's purported expert echoes the allegations made in the Complaint as to "professional standards or practices of the insurance industry." (Pa051.) Without waiving any rights, the accompanying *curriculum vitae* demonstrates that insurance producers undergo extensive professional learning and erudition to maintain their licenses – specifically, the education, designations, and licenses needed to work as an insurance broker in New Jersey. (Pa051 – Pa052.)

SUMMARY OF ARGUMENT

This matter is not one of the limited, exceptional, or rare instances in which this Court needs to intervene to prevent irreparable injury. Plaintiff demonstrates no merit to his appeal because there is no confusion that the learned professional exemption applies to insurance producers like Audet and

Creative. The Appellate Court's decisions in Plemmons and Shaw are not inconsistent. Both this Court and the Legislature have included insurance producers in the same learned class as doctors and lawyers. Moreover, Plaintiff's allegations asserted in the Complaint bring this matter squarely within the learned professional exemption. Justice is not served by this Court reengaging in another "nature of the services" analysis that would yield the same result reached by both the Law Division and Appellate Division. Instead, justice is served by preserving an exemption to the CFA on which Audet and Creative have relied for nearly twenty years and allowing the parties to continue with discovery on Plaintiff's eight remaining claims. Thus, Plaintiff's request for an interlocutory appeal should be denied.

ARGUMENT

I. Plaintiff Fails to Demonstrate Irreparable Injury from the Continued Application of the Learned Professional Exemption to Insurance Producers Sued Under the CFA.

This matter is not one of the rare instances in which an interlocutory appeal must be granted. Rule 2:2-2(a) allows this Court leave to hear interlocutory appeals from orders of the Appellate Division, in part, "when necessary to prevent irreparable injury." See Pressler & Verniero, Current N.J. Court Rules, Comment 3 R. 2:2-2 (GANN) ("The standard for interlocutory appeals to the Supreme Court…requires simply the necessity of 'prevention of

irreparable injury', which adequately expresses the immediacy and urgency which justify prompt Supreme Court review.").

Interlocutory review is "highly discretionary" and "exercised only sparingly," and "limited to those exceptional cases warranting appellate intervention." Grow Co., Inc. v. Chokshi, 403 N.J. Super. 443, 458, 461 (App. Div. 2008) (citing Brundage v. Estate of Carambio, 195 N.J. 575, 599-600 (2008); State v. Reldan, 100 N.J. 187, 205 (1985)). This Court's discretion "turns on whether leave to appeal will 'prevent the court and the parties from embarking on an improper or unnecessary course of litigation.'" Id. (citing Brundage, 195 N.J. at 599). "This exercise requires that the moving party must establish, at a minimum, that the desired appeal has merit and that 'justice calls for [an appellate court's] interference in the cause; such an approach necessarily precludes the granting of leave merely to 'correct minor injustices." Id. (internal citations and quotations omitted).

Plaintiff has not established that merit or justice requires this Court's intervention. Courts in New Jersey have found for almost twenty years that insurance producers are professionals exempt from liability under the CFA. Audet, Creative, and other insurance producers have relied upon this exemption. This Court has favorably grouped insurance producers with doctors and lawyers, to whom the learned professional exemption also applies. See Lee, 199 N.J. at

263-64. Despite Plaintiff's statements to the contrary, there is no confusion. This is evidenced by both the Law Division and Appellate Division correctly dismissing Plaintiff's CFA claims. Plaintiff's reliance upon one unpublished case unrelated to insurance producers does not demonstrate the significant confusion over the applicability of the CFA to insurance producers. Accordingly, Plaintiff has not established that this is one of the limited or exceptional instances in which this Court's involvement is needed to prevent irreparable injury.

A. There Is No Merit to Plaintiff's Appeal Because There Is No Confusion About Insurance Producers Falling Within the Learned Professional Exemption to the CFA.

Plaintiff overstates his cause by asserting that "conflicting decisions in Shaw and Plemmons have created significant confusion regarding the proper scope of the judicially-created learned professional exemption to the CFA." (Pl. Br. at 5.) Not only does Plaintiff fail to demonstrate confusion (never mind, significant), but this Court has already approved the application of the learned professional exemption to insurance producers. Moreover, Plaintiff's own allegations bring this matter squarely within the exemption he seeks to avoid. Accordingly, there is no merit to Plaintiff's argument that this case warrants this Court's intervention.

The CFA "has as its essential purpose the protection of consumers by eliminating sharp practices and dealings in the marketing of merchandise and real estate." Channel Cos. Inc. v. Britton, 167 N.J. Super. 417, 418 (App. Div. 1979). The CFA "was intended as a response only to the public harm resulting from 'the deception, misrepresentation and unconscionable practices engaged in by professional sellers seeking mass distribution of many types of consumer goods' and not to the isolated sale" of a single product. DiBernardo v. Mosley, 206 N.J. Super. 371, 376 (App. Div. 1986) (quoting Kugler v. Romain, 58 N.J. 522, 536 (1971)); see Kugler, 58 N.J. at 536 (noting the recognition in the CFA to avert the "adverse effect on large segments of disadvantaged and poorly educated people, who are wholly devoid of expertise and least able to understand or to cope with" the deceptive, misrepresentative, and unconscionable "practices engaged in by professional sellers seeking mass distribution of many types of consumer goods").

Despite its broad legislative intent, the CFA's reach is not unbounded or without reasonable limits on its operation. Lee, 199 N.J. at 262-63 (quoting DiBernardo, 206 N.J. Super. at 375). One bound or limit is an exemption of liability for learned professionals who are sued for acts taken in their professional capacity. While this exemption originated with real estate brokers, who by legislative amendment now fall within the scope of the CFA, the

rationale for the exemption has been continuously applied to various learned professionals since 1976:

> A real estate broker is in a far different category from the purveyors of products or services or other activities. He is in a semi-professional status subject to testing, licensing, regulations, and penalties through other legislative provisions. See N.J.S.A. 45:15-1 [e]t seq. Although not on the same plane as other professionals such as lawyers, physicians, dentists, accountants or engineers, the nature of his activity is recognized as something beyond the ordinary commercial seller of goods or services –an activity beyond the pale of the act under consideration…
>
> Certainly no one would argue that a member of any of the learned professions is subject to the provision 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 v. Dello Russo, 178 N.J. 340, 344 (2004) (citing Neveroski v. Blair, 141 N.J. Super. 379 (App. Div.1976) (superseded by statute, as stated in Lee, 199 N.J. 251); see e.g. Macedo, 178 N.J. at 345-46 (physician's advertisement in respect of the rendering of professional services are insulated from the CFA); Blatterfein v. Larken Assocs., 323 N.J. Super. 167, 175 (App. Div. 1999) (architect providing professional architectural services may not be covered by the CFA); Hampton Hosp. v. Bresan, 288 N.J. Super. 372, 383 (App. Div.),

certif. denied, 144 N.J. 588 (1996) (services performed by hospital are not encompassed by the CFA because hospitals are heavily regulated by the state); Vort v. Hollander, 257 N.J. Super. 56, 62 (App. Div.), certif. denied, 130 N.J. 599 (1992) (professional services rendered by attorneys regarding their clients' rights as owners of real estate were not covered by the CFA). Though a judicially created exemption, courts have uniformly followed it and "the Legislature has not amended the CFA to include advertising by learned professionals." Shaw, 460 N.J. Super. at 614; see Macedo, 178 N.J. at 345-46 ("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.").

i. For Nearly 20 Years Following Plemmons, New Jersey Courts, Including This Court, Have Recognized That Insurance Producers Are Exempt From Liability Under The CFA.

In 2006, the Appellate Division addressed head-on the question of "whether an insurance broker may be subjected to liability under the CFA for the performance of brokerage services." Plemmons, 387 N.J. Super. at 560. The Appellate Division in Plemmons tracked the history of the CFA exemption for learned and semi-professionals. Id. at 561-63. While the plaintiff there argued that the case was controlled by Lemelledo, 150 N.J. 255, the Appellate Division

found that "Lemelledo did not involve a CFA claim against an insurance broker or other party who could be characterized as a 'professional' or 'semi-professional.'" Id. at 563. As this Court observed, "Lemelledo would be dispositive here if the issue presented was whether the separate regulatory scheme governing physicians preempts the application of the CFA. It is entirely irrelevant to the threshold question of whether the CFA applies to learned professionals in the first instance." Macedo, 178 N.J. at 345. The Appellate Division was "furthermore" satisfied that insurance brokers were semi-professionals excluded from CFA liability for services rendered within the scope of their professional licenses. Plemmons, supra, at 564-65. Thus, the Appellate Division concluded "that an insurance broker is a semi-professional, who is subject to testing, licensing and regulation under other statutory provisions, and therefore is excluded from liability under the CFA for the performance of brokerage services." Id. at 556.

In 2019, the Appellate Division in Shaw addressed both the "narrow issue" of "whether semi-professionals such as home inspectors should be deemed to be learned professionals" for the purposes of exemption from the CFA, in addition to the "broader basis [of] how and when the 'learned professional' exemption should be applied by courts to exempt individuals from CFA liability." 460 N.J. Super. at 599. To aid it in resolving both issues, the

Appellate Division invited the Attorney General's Division of Consumer Affairs to participate *amicus curiae*. Id. On the narrow issue, which is important for context, the Appellate Division declined to extend the exemption to home inspectors because (a) home inspectors are not historically recognized learned professionals, and (b) no direct and unavoidable conflict exists between the CFA and the regulations governing home inspectors. Id. at 599.

On the broader issue, the Appellate Division limited the application of the exemption when it agreed with the Attorney General that the CFA's plain text and purpose did not "support a blanket exception for semi-professionals based *solely* on the existence of a separate regulatory scheme that also regulates the subject industry." Id. at 607 (emphasis added); see id. at 620 ("For these reasons, we hold that home inspectors and other licensed semi-professionals are not learned professionals *simply because* they are otherwise regulated...'" (emphasis added)); id. at 627 ("[W]e decline to extend the learned professional exception to licensed home inspectors *simply because* they are regulated by the HIPLA." (emphasis added)). Thus, when preemption of a non-consumer statute or regulation is at issue, courts would need to turn to a direct, unavoidable conflict analysis found in Lemelledo to determine whether that separate statutory/regulatory scheme placed a class of professionals beyond the reach of the CFA. Id. at 609-11, 620.

But regarding the CFA's application to certain professionals in the first instance, the Appellate Division – like other courts – traced the history of the learned professional exemption to recenter the analysis on the "nature of the services" provided:

> [O]ur focus in Neveroski was on the "nature of the services," not on the extent to which a particular semi-professional was otherwise regulated. … Despite the Legislature's abrogation of Neveroski's holding, subsequent decisions of this court have seemingly accorded its semi-professional exemption precedential weight.
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> Thus, the "learned professional" exemption recognized in Macedo, like the "semi-professional" exception in Neveroski, focused on the "nature of the services" provided to support its conclusion that learned professionals are not subject to CFA liability.

Id. at 613-15 (internal citations omitted).

This analysis in Shaw – whether dicta or not – arose from a concern that "[t]he expansion of the 'learned professional' exception to home inspectors – who are not even required to have a college degree – stretches the exception far beyond its limited origin." Id. at 605. Looking at other cases decided prior to Shaw for context, the concern makes sense. Id. at 616 ("Plemmons thus paved the way for subsequent decisions, including the trial court's decision in this case, holding that the mere existence of a separate regulatory scheme would

automatically preempt application of the CFA." (citing cases on the application of the CFA to ambulance service providers and a nursing home's billing and collection functions)); see also Manahawkin Convalescent v. O'Neill, 217 N.J. 99, 124 (2014) ("We have serious doubts that the billing and collection function [of a nursing home] at issue in this case would qualify for the learned professional exception to the CFA, 'whereby certain transactions fall outside the CFA's purview because they involve services provided by learned professionals in their professional capacity.'" (internal quotations omitted)).

But Shaw's limiting the expansion of the exemption to avoid it swallowing the rule means neither the exemption no longer applies nor that there is confusion on the exemption's application to insurance producers. The Hon. Jack M. Sabatino, P.J.A.D.'s concurring opinion in Shaw specifically preserved the exception for insurance professionals, having observed, "the licensure requirements for insurance brokers – and their associated fiduciary duties – appear to me to be more stringent than those governing home inspectors." Id. at 628. As Judge Polansky aptly noted, Shaw and Plemmons are "not necessarily inconsistent" on this issue. (Pa230 at 34:12 – 35:2.)

Moreover, just three years after Plemmons, this Court discussed the learned professional exemption in Lee. The Hon. Jaynee LaVecchia, J.S.C., writing for this Court, reiterated "[t]hat [the CFA] exception is a judicially

crafted rule, whereby certain transactions fall outside the CFA's purview because they involve services provided by learned professionals in their professional capacity." 199 N.J. at 263. Though stopping short of applying the exemption to securities brokers, this Court listed cases and professionals for which the exception applies, placing Plemmons and insurance producers alongside doctors and lawyers. Id. at 264. Having addressed this issue, at least in part, this Court need not do so again.

ii. Shaw Has Not Confused the Courts About Whether Insurance Producers are Exempt from the CFA.

In support of his argument, Plaintiff cites one unpublished case that post-dates Shaw and neither involves insurance producers nor demonstrates significant confusion. In Williams-Hopkins v. Medwell, LLC, the Appellate Division was asked to determine, in part, whether the nature of the "treatments" provided to the plaintiffs by a medical, physical therapy, and chiropractic entity fell within the learned professional exemption. No. A-0273-21, 2024 N.J. Super. Unpubl. LEXIS 569, at *38-39 (N.J. App. Div. Apr. 5, 2024). The court ultimately remanded for further discovery as the record was unclear on whether the services at issue were within the scope of the defendants' professional capacity. Id. at *48-49. In addition to having nothing to do with insurance producers, a remand for further discovery in one unpublished case does not demonstrate significant confusion about the learned professional exemption. To

the contrary, like in this case, courts have continued to apply the learned professional exemption to insurance producers after Shaw. See, e.g., McCray v. Sanders, No. 20-12370 (ZNQ) (LHG), 2022 WL 3868058, at *7 (D.N.J. Jan. 21, 2022) (holding that "[t]o the extent Plaintiff complains of Defendant Sanders' conduct as an insurance agent, Plaintiff's consumer fraud claims fall squarely within the learned professional exemption").

iii. Through the Complaint, Plaintiff Has Brought His Claims Against Audet and Creative Squarely Within the Exemption to the CFA.

To be sure that there is no confusion, Plaintiff expressly brought his claims within the exemption to the CFA. In the Complaint, Plaintiff alleges that Defendants are licensed, professional insurance brokers who "were acting within the scope of their employment" with Creative when they marketed, sold, and procured insurance products to Plaintiff. (Pa005 – Pa006, Pa011). Plaintiff alleges that the nature of the services provided were professional, and that Defendants owed a fiduciary duty to and had a special relationship with Plaintiff. (Pa031 – Pa047). Plaintiff also produced an Affidavit of Merit pursuant to N.J.S.A. 2A:53A-27. (Pa050 – Pa052). The sworn certification from Plaintiff's proposed expert, who holds "widely recognized professional insurance designations," asserts that Defendants departed from the "professional standards or practices of the insurance industry." (Id.) Without waiver of rights,

Plaintiff's proposed expert's *curriculum vitae* shows the extensive professional learning and erudition needed for insurance brokers in New Jersey. (Pa052). Thus, Plaintiff admits through his own allegations that Defendants are professionals, each designated under the law as a "licensed person" in the same classification as attorneys, architects, doctors, and other healthcare providers. See generally N.J.S.A. 2A:53A-26.

Thus, as it relates to insurance producers like Audet and Creative, there is no confusion that the learned professional exemption applies. Both the Law Division and Appellate Division correctly applied this CFA exemption to the allegations in the Complaint. Plaintiff's CFA claims were properly dismissed. There is no merit to Plaintiff's appeal. This Court need not intervene.

B. Justice Does Not Require This Court to Repeat the "Nature of the Services" Analysis for Insurance Producers.

Plaintiff attempts to invoke the interests of justice by arguing this case holds "significant issues of public interest" and "broad policy implications." (Pl. Br. at 4-5.) But this case involves neither the prohibition of the possession of a loaded gun near an occupied dwelling or school playground for hunting like in Twp. of Chester v. Panicucci, 62 N.J. 94 (1973), the introduction of evidence in cases pertaining to murder, kidnapping, and sexual assault like in State v. Marrero, 148 N.J. 469 (1997), nor any significant public interest issue that is could be considered close.

Through use of his strained analogy, Plaintiff seeks to reverse nearly two decades of reliance on Plemmons without any conflicting authority or legislative action otherwise. This Court has already included insurance producers in the same learned class as doctors and lawyers. See Lee, 199 N.J. at 263-64. For almost twenty years, insurance producers like Audet and Creative have relied upon the exemption to the CFA when faced with claims brought by individuals like Plaintiff. See e.g. Call v. Czaplicki, No. 09-6591 (RBK/AMD), 2010 WL 3724275, at *9 (D.N.J. Sept. 16, 2010) (dismissing CFA claims against Audet); Call v. Czaplicki, No. 09-6591 (RBK/AMD), 2011 WL 2532712, at *6-7 (D.N.J. June 23, 2011) (dismissing the CFA claims against Audet and Creative and denying the plaintiff's motion for leave to amend as futile). Further, this matter is confined to insurance producers. It does not involve any novel questions about other learned or semi-professionals and whether they, too, should be exempt from the CFA. See Shaw, 460 N.J. Super. at 611.[2]

[2] While Shaw reemphasizes a "nature of the services" analysis, the decision does not engage in that analysis for home inspectors. Instead, the Appellate Division simply determined that home inspectors are not doctors or lawyers and have the comparatively minimal schooling or apprenticeship. 460 N.J. Super. at 612. But if the exemption applies to only those in law, medicine, or divinity/theology, as Plaintiff advocates, then the "nature of the services" analysis is useless. Shaw's endorsement of the "nature of the services" analysis and the long acceptance of the two-paragraph "semi-professional" pronouncement in Neveroski, as adopted in Macedo, means that the CFA cannot be read as narrowly as Plaintiff might like.

Moreover, the Legislature has not amended the CFA to either expressly include insurance producers or confine the learned professional exemption. See Macedo, 178 N.J. at 345-46 ("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."). In fact, the Legislature – like this Court – has recognized that insurance producers are within the same category as other exempt professionals. See Lee, 199 N.J. at 263-64

Under the Affidavit of Merit Statute, N.J.S.A. 2A:53A-26 to -29, litigants like Plaintiff are required to make a threshold showing that their claim is meritorious by producing an affidavit of merit. See Shamrock Lacrosse, Inc. v. Klehr, Harrison, Harvey, Branzburg & Ellers, LLP, 416 N.J. Super. 1, 14 (App. Div. 2010) (citing In re Petition of Hall, 147 N.J. 379, 391 (1997)). Much like the CFA exemption, not all professionals are covered by the Affidavit of Merit

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Moreover, a purported narrowing of the CFA exemption was based on "historical reasons" – that doctors and attorneys "were not permitted to advertise at all when the Legislature enacted the 1960 precursor to the CFA, creating liability for fraud in advertising." Shaw, 460 N.J. Super. at 605. But these "historically learned professionals have been allowed to freely advertise their services since 1978." Macedo, 178 N.J. at 343. To allow an exception for only a small group of individuals based on a rule that no longer exists defies logic and runs afoul of the long-accepted language in Neveroski, and fifty-year acquiescence of the Legislature.

Statute. The Legislature propounded a strict list of "licensed person[s]" that includes architects, attorneys, physicians, other medical professionals, and insurance producers. See e.g. N.J.S.A. 2A:53A-26(b), (c), (f), and (o). Common among these professionals are the extensive learning and erudition, as well as the heightened licensing and regulation to which they are subjected to both enter the profession and maintain their inclusion in that profession.

In addition, the Legislature has subscribed educational and licensing requirements for insurance producers:

> Under the Insurance Producer Licensing Act, N.J.S.A. 17:22A-26 to -48, a person "shall not sell, solicit or negotiate insurance in this State unless the person is licensed for that line of authority," N.J.S.A. 17:22A-29. A person obtains a license to "sell, solicit or negotiate insurance" by passing a written examination, N.J.S.A. 17:22A-31, and meeting the application requirements set forth in N.J.S.A. 17:22A-32. In addition, insurance brokers must 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. These standards proscribe various "unfair trade practices," N.J.A.C. 11:17A-2.1 to -2.11, delineate an insurance producer's fiduciary duties to insureds, see N.J.A.C. 11:17A-4.1, -4.3, -4.5, -4.10, set forth requirements regarding commissions, N.J.A.C. 11:17B-2.1, fees, N.J.A.C. 11:17B-3.1 to -3.3, and management of funds, N.J.A.C. 11:17C-1.1 to -2.6, and provide penalties for violations, N.J.A.C. 11:17D-1.1 to -2.8.

Plemmons, 387 N.J. Super. at 564-65; compare Shaw, 460 N.J. Super. at 628 (J. Sabatino, concurring) ("[T]he licensure requirements for insurance brokers –

and their associated fiduciary duties – appear to me to be more stringent than those governing home inspectors.") with Finderne Mgmt. Co., Inc. v. Barrett, 402 N.J. Super. 546, 569 (App. Div. 2008) ("Although competing voluntary associations issue designations to those who seek to be called 'financial planners,' no governmental board or agency regulates or sets uniform minimum education or training criteria.") and Quigley v. Esquire Deposition Serv., 400 N.J. Super. 494, 507 (App. Div. 2008) (federal depositions shorthand reporting services are not semi-professional because services are not subject to regulation under the state statute and regulations governing shorthand reporting).

While the interests of justice are better served by this Court addressing other matters, this Court's repeat analysis yields the same result. As found in Macedo, Neveroski, Plemmons, and Shaw, the Court must look to the "nature of the activity" rendered to determine whether is it "beyond the ordinary commercial seller of goods or services" or "fall[s] into the category of consumerism." Macedo, 178 N.J. at 344 (quoting Neveroski, 141 N.J. Super. at 379); Plemmons, 387 N.J. Super. at 564; Shaw, 460 N.J. Super. at 613-15. But other factors – like education, licensing, services rendered, and other regulations – are also considered. See Shaw, 460 N.J. Super. at 599 (repeatedly referencing that a home inspector does not even need a college degree), 619 (noting "the requirement of extensive learning or erudition") and 628 (J. Sabatino

concurring) (observing the licensure requirements for insurance brokers and their associated fiduciary duties, as compared to home inspectors); Macedo, 178 N.J. at 344 (noting that a real estate broker "is in a semi-professional subject to testing, licensing, regulations, and penalties through other legislative provisions"). As stated, the professional and tailored nature of the services rendered as alleged in the Complaint, the educational and licensing requirements for insurance producers, and the need for an affidavit of merit, all support the same outcome – that the Law Division and Appellate Division were correct to apply the learned professional exemption to Plaintiff's CFA claims against Defendants.

In sum, the interests of justice are not served by this Court's intervention, but instead by the parties continuing to take discovery on the eight other causes of action under which Plaintiff seeks recovery. See Stella v. Dean Witter Reynolds, Inc., 241 N.J. Super. 55, 75-76 (App. Div. 1990) (while there was no claim under the CFA available to the plaintiff, he was entitled to recover compensatory damages based on other causes of action, like negligence, common law fraud, breach of contract, etc.). Plaintiff provides this Court with no justification for involvement aside from his personal disagreement with the decisions rendered below.

CONCLUSION

For the foregoing reasons, Audet and Creative respectfully request that the Court deny Plaintiff's motion for leave for an interlocutory appeal. Both the Law Division and Appellate Division were correct in their interpretation and application of the learned professional exemption to insurance producers acting in their professional capacity when faced with claims under the CFA. Those courts' dismissal of Plaintiff's CFA claims was proper. This is not one of the rare instances in which Plaintiff has demonstrated irreparable injury that necessitates this Court's involvement.

Respectfully submitted,

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