

**SUPREME COURT OF NEW JERSEY**

JAMES G. LOWE, M.D.,

Docket No.: 090940

Plaintiff-Appellant,

CIVIL ACTION

vs.

Appellate Division Docket No.: A-4093-23

BERNARD AUDET,  
RICHARD LAVER, and  
THE CREATIVE FINANCIAL  
GROUP, LTD.,

*Appellate Division:*

Hon. Greta Gooden Brown, P.J.A.D.

Hon. Christine M. Vanek, J.A.D.

Defendants-Respondents.

Law Division Docket No.: CAM-L-0633-24

*Sat Below:*

Hon. Steven J. Polansky, P.J.Cv.

Submitted On: March 31, 2026

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**DEFENDANT-RESPONDENT RICHARD LAVER'S BRIEF IN  
OPPOSITION TO THE AMICUS CURIAE BRIEF FILED BY THE  
ATTORNEY GENERAL OF THE STATE OF NEW JERSEY, IN  
OPPOSITION TO THE AMICUS CURIAE BRIEF FILED BY THE NEW  
JERSEY ASSOCIATION FOR JUSTICE, AND IN OPPOSITION TO THE  
AMICUS CURIAE BRIEF FILED BY THE NEW JERSEY CITIZEN  
ACTION**

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## PRELIMINARY STATEMENT

The amicus curiae briefs filed by the Attorney General of the State of New Jersey (hereinafter, "AGNJ"), the New Jersey Association for Justice (hereinafter, "NJAJ"), and the New Jersey Citizen Action (hereinafter, "NJCA") do not support reversing the Trial or Appellate Division's decisions confirming that insurance producers are learned professionals beyond the New Jersey Consumer Fraud Act's (hereinafter "CFA") scope.

The AGNJ, NJAJ, and NJCA ask this Court to adopt their misguided legislative intent interpretation associated with the CFA to include some professionals within the CFA's scope and exclude others. Such an interpretation is not supported by either the legislative history or controlling common law.

There is no dispute that the only precedent considering the CFA's application, as to insurance producers, was set forth in Plemmons v. Blue Chip Ins. Servs., Inc., 387 N.J. Super. 551 (App Div. 2006). The New Jersey Supreme Court acknowledged this precedent in Lee v. First Union Nat. Bank, 199 N.J. 251 (2009). The AGNJ, NJAJ, and NJCA fail to cite any New Jersey Supreme Court decision and/or legislative action that has been issued in the nearly twenty years, post-Plemmons, that has "*overruled*" and/or "*superseded*" the established precedent.

Additionally, the AGNJ, NJAJ, and NJCA ignore relevant New Jersey Legislative action. N.J.S.A., 2A:53A-26(o) designates an insurance producer as a

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licensed person, classifying said profession in the same category as doctors and lawyers. To maintain a negligence claim against an insurance producer, like a doctor or lawyer, a plaintiff must obtain an affidavit of merit. Plaintiff-Appellant filed an affidavit of merit as to Defendants-Respondents in this case.

Furthermore, despite the AGNJ's, NJAJ's, and NJCA's contentions, the CFA has continuously evolved throughout the past fifty years, through legislative and court intervention/interpretation, which has created exceptions, while also strengthening the act itself, continuing its reputation as one of the strongest consumer fraud acts in the country. Therefore, any "fear" of this exception swallowing the rule is unfounded.

For the reasons set forth herein, as well as set forth in our opposition to Plaintiff-Appellant's motion for leave to appeal to the Supreme Court, the Trial and Appellate Division's decisions must be affirmed.

### **CONCISE STATEMENT OF RELEVANT FACTS**

In the interest of judicial economy, we refer this court to the concise statement of relevant facts set forth in our in our opposition to Plaintiff-Appellant's motion for leave to appeal to the Supreme Court.

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## CONCISE PROCEDURAL HISTORY

In the interest of judicial economy, we refer this court to the concise procedural history set forth in our in our opposition to Plaintiff-Appellant's motion for leave to appeal to the Supreme Court.

## LEGAL ARGUMENTS

### **I. The AGNJ's, NJAJ's, And NJCA's Reliance On Legislative Intent Is Misplaced As The Exclusion Of Insurance Producers From CFA Liability Is Clearly In-Line With The Legislative Intent.**

#### **A. The "Learned Professional" And "Semi-Professional" Exceptions Were Judicially Crafted Interpretations Of The CFA, Which Have Went Undisturbed By The Legislature For Over Fifty Years.**

The AGNJ, NJAJ, and NJCA argue that this Court should, *in part*, rely upon the "plain language of the statute", when determining whether insurance producers are exempt from liability under the CFA. Specifically, the CFA states, in part,

The act, use or employment by any person of any commercial practice that is unconscionable or abusive, deception, fraud, false pretense, false promise, misrepresentation, or the knowing, concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise or real estate, or with the subsequent performance of such person as aforesaid, whether or not any person has in fact been misled, deceived or damaged thereby, is declared to be an unlawful practice.

[N.J.S.A. 56:8-2]

However, within their respective briefs, the AGNJ, NJAJ, and NJCA acknowledge and confirm that a "learned professional" (*which all classify as a*

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*doctor, lawyer, and/or member of the ministry*) is a valid/recognized exception to CFA liability.

These arguments cannot be married, as it is clear, "[t]he CFA does not explicitly provide an exception for or even mention learned professionals." Shaw v. Shand, 460 N.J. Super. 592, 607 (App. Div. 2019).

Both the "learned professional" and "semi-professional" exceptions were introduced/established by the Court in Neveroski, when attempting to interpret the scope/reach of the CFA. Specifically, the Neveroski Court analyzed, "whether the Consumer Fraud Act, in the form it existed at the time of the operative facts involved in this litigation, is applicable to real estate transactions." Neveroski v. Blair, 141 N.J. Super. 365, 379-80 (1976). The Neveroski Court held,

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. 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 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.

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Similarly, in the absence of clear and explicit language in the statute, a broker who negotiates the sale of real estate and thereby renders 'services' is nevertheless outside the scope of persons sought to be covered by the Act.

[Neveroski, 141 N.J.Super. at 379-80]

Thereby the "learned professional" and "semi-professional" exceptions to the CFA were established.<sup>1</sup> Said exceptions have no "plain language" foundation in the CFA itself, but rather as "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." Lee, 199 N.J. at 263. "[W]e have recognized that 'learned professionals' are exempt from CFA claims stemming from the professional's sales or marketing of services that they are licensed to provide."<sup>2</sup> Crisitello v. St. Theresa Sch., 255 N.J. 200 (2023), *as revised* (Aug. 14, 2023).

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<sup>1</sup> Similar to the above, the NJAJ's argument that the "semi-professionals" exception is improper, as Neveroski was *superseded by statute*, cannot be married with the universal acceptance of the "learned professional" exception, based upon the same ruling/reasoning.

<sup>2</sup> This Court should disregard the NJCA's "direct conflict" analysis/argument, based upon Lemelledo v. Beneficial Mgmt. Corp. of Am., 150 N.J. 255 (1997), as said issue was not raised in Plaintiff-Appellant's motion to file an interlocutory appeal; thus, is not properly before this Court. Furthermore, said analysis was directly addressed and dismissed by the Court in Macedo which held, "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 v. Dello Russo, 178 N.J. 340, 345 (2004).

Despite these exceptions to the CFA being created by the Court in 1976, and unanimously followed by Courts thereafter, "the Legislature has not amended the CFA to include ... learned professionals" and/or semi-professionals. Shaw, 460 N.J. Super. at 614. *Conversely*, "[t]he statute has been repeatedly amended and expanded ... often by adding sections to address particular areas of concern and to include them specifically within its protective sweep." Sun Chem. Corp. v. Fike Corp., 243 N.J. 319, 330 (2020).

The Legislature's continuous decision not to act (*throughout the last fifty years*) has been considered, by many, as their acquiescence that said exceptions fall directly within the original legislative intent of the CFA. In 1992, the court in Vort specifically noted the legislature's action/inaction, wherein it "made the point that the Legislature had amended the CFA to add real estate sales but had remained silent in the face of Neveroski's characterization of the applicability of the CFA to learned professionals is ludicrous" Macedo, 178 N.J. at 345.

The Court in Macedo affirmed this sentiment, "[t]hus, 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.... If we are incorrect

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in our assumption, we would expect the legislature to take action to amend the statute." Macedo, 178 N.J. at 345-46.

In 2006, the Court in Plemmons held “members of ‘learned professions,’ including those who occupy a ‘semi-professional status,’ [*such as insurance producers*] engage in ‘an activity beyond the pale of the [CFA].” Plemmons, 387 N.J. Super. at 564–65. Thereby, excluding insurance producers from liability under the CFA.<sup>3</sup> Plemmons, 387 N.J. Super. at 564–65. Since that date, approximately twenty years ago, the Legislature and/or the Supreme Court has failed/refused to take any affirmative action limiting said established precedent.<sup>4</sup>

This is dissimilar to Neveroski, wherein the Legislature acted quickly and efficiently to add real estate agents within the CFA's purview, during the course of

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<sup>3</sup> This precedent was followed by the New Jersey District Court in Ace Eur. Grp. v. Sappe, No. CIV.A. 08-412 JLL, 2012 WL 1994471, at \*6 (D.N.J. June 1, 2012), and again in 2022 (*post-Shaw*) in McCray v. Sanders, No. CV2012370ZNLHG, 2022 WL 3868058 (D.N.J. Jan. 21, 2022). This precedent was followed by the Hon. Steven J. Polansky, P.J.Cv., in deciding the underlying motion, and said decision was affirmed by the Appellate Division, which clearly stated "for the purposes of the CFA, insurance brokers are categorically exempt from liability when performing brokerage services."

<sup>4</sup> “It is assumed that the Legislature is thoroughly conversant with its own legislation and the judicial construction of its statutes.” Ayres v. Dauchert, 130 N.J. Super. 522, 528 (App. Div. 1974). The Supreme Court, in Brewer recognized “[t]he long acquiescence of the Legislature in [a particular] judicial construction further emphasizes the conclusion that such construction was consistent with and expressive of legislative intent.” Brewer v. Porch, 53 N.J. 167, 179 (1969). In David, the Court considered the inaction by Legislature, throughout the five (5) years following the judicially crafted interpretation, as its acquiescence of such, and thus a factor in its decision. David v. Gov't Emps. Ins. Co., 360 N.J. Super. 127, 143 (App. Div. 2003).

the litigation, which has been subsequently upheld by the courts. Neveroski, 141 N.J.Super. 365.

"Macedo concluded that our jurisprudence and the Legislature differentiate between real estate professionals and members of the learned professions, such as medicine, dentistry, accounting, law and engineering. The Court observed that although the CFA has not been 'amended to encompass the advertising of professionals[,] ... the only major substantive change' to the substance of the CFA was a 1976 amendment that included 'the sale of real estate in the definition of 'merchandise.'.... Thus, Macedo affirms the viability of the 'learned professional' exemption to the CFA yet did not apply the exception to real estate brokers." De Pompe v. Weichert Realtors, No. A-4912-09T2, 2011 WL 2566132, at \*5 (N.J. Super. Ct. App. Div. June 30, 2011) (internal citations omitted).

This inaction by the Legislature with respect to insurance producers insinuates that this precedent is in line with the CFA's original legislative intent.

Furthermore, this acquiescence has been mirrored by the Supreme Court, throughout the years, as Lee stated,

That 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. See, e.g., Macedo, supra, 178 N.J. at 346, 840 A.2d 238 (physicians' services insulated from CFA); Plemmons v. Blue Chip Ins. Servs., Inc., 387 N.J.Super. 551, 556, 904 A.2d 825 (App.Div.2006) (same for insurance brokers' services) ...

[Lee, 199 N.J. at 263–64]

B. Insurance Producer CFA Liability Exclusion Was Confirmed When They Were Added To The Affidavit Of Merit Statute.

No weight should be given to either the AGNJ's, NJAJ's, and/or NJCA's amicus legislative intent positions, as all entities ignore the only other related/relevant demonstration of intent by the New Jersey State Legislature, *within the past fifty years*, with respect to the classification of insurance producers.

On January 8, 2002, the New Jersey State Legislature amended N.J.S.A., 2A:53A-26, *which is commonly referred to as the Affidavit of Merit Statute*, to include insurance producers as a licensed person, classifying said profession in the same category as doctors and lawyers, whom the AGNJ, NJAJ, NJCA, and the Courts (*throughout the years*) acknowledge are definitively a part of the learned professional class.<sup>5</sup> "By its terms, the AOM statute applies to all actions for damages based on professional malpractice." Hill Int'l, Inc. v. Atl. City Bd. of Educ., 438 N.J. Super. 562, 572 (App. Div. 2014). This classification sets insurance producers apart from other commercial purveyors of goods and services. This classification by

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<sup>5</sup> It would be unreasonable for the Court to hold that the "learned professional" exception is limited to only three professions, *doctors, lawyers, and members of the ministry*, based solely upon an advertising ban repealed almost fifty years ago; rather than relying upon the last fifty years of case law (*incorporating other professions and services*), and an explicit legislative classification created within the last twenty-five years.

the New Jersey State Legislature confirms the rationale behind the Plemmons decision, wherein insurance producers are “members of ‘learned professions,’ ... who occupy a ‘semi-professional status,’ [and] engage in ‘an activity beyond the pale of the [CFA].” Plemmons, 387 N.J. Super. at 564–65.

As such, pursuant to N.J.S.A. 2A:53A-27, Plaintiff-Appellant was required to submit an affidavit of merit from an insurance producer expert just to maintain this claim. Here, Plaintiff-Appellant filed an affidavit of merit prepared by Charles W. Bowden, ChFC, with his resume. **Pa050-52**. This filing demonstrates the extensive education and experience required to be an insurance producer.<sup>6</sup> **Pa050-52**. Moreover, Plaintiff-Appellant identified this as a “*professional malpractice*” matter on his Case Information Statement. Finally, Plaintiff-Appellant refers to Mr. Laver as an “*expert*” and “*professional*” numerous times throughout his complaint. **Pa004, 6, 11, 32, 44, ¶'s 2, 5, 29, 132, 202**.

## II. The Scope Of The New Jersey Consumer Fraud Act Is Not As All Encompassing As The AGNJ, NJAJ, And NJCA Set Forth.

“Although intentionally broad, the reach of the CFA is not without boundaries.” Real v. Radir Wheels, Inc., 198 N.J. 511, 522 (2009). The “CFA's reach

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<sup>6</sup> The AGNJ, NJAJ, and NJCA argue that the educational and experience requirements mandated for insurance producers does not meet the same threshold of the other “learned professions”. This argument lacks merit. In the interest of brevity, we refer this Court to Section II(C) of our opposition to Plaintiff-Appellant's motion for leave to appeal to the Supreme Court, setting forth the analysis of such in Plemmons, along with other relevant court precedents.

is not unbounded." Lee, 199 N.J. at 263. Courts have "recognized a need to place reasonable limits upon the operation of the [CFA] 'despite broad statutory language, so that its enforcement properly reflects legislative intent, however ascertained.'" DiBernardo v. Mosley, 206 N.J.Super. 371, 375 (App. Div.), *certif. denied*, 103 N.J. 503 (1986), *quoting Jones v. Sportelli*, 166 N.J.Super. 383, 388 (Law Div. 1979).

"[T]he CFA 'is not intended to cover every transaction that occurs in the marketplace.'" <sup>7</sup> Hoffman v. McGraw-Hill Financial, Inc., No. ESX-C-216-13, 2014 WL 7639158, at \*13 (N.J.Super.Ch. Dec. 31, 2014), *quoting Cetel v. Kirwan Fin. Group, Inc.*, 460 F.3d 494, 514 (3d Cir. 2006); *see also Arc Networks, Inc. v. Gold Phone Card Co.*, 333 N.J.Super. 587, 590 (Law Div. 2000).

Under this idea, numerous professions have been found to be exempt from CFA liability. *See Macedo*, 178 N.J. 340 (physicians are excluded from CFA liability); Hampton Hosp. v. Bresan, 288 N.J.Super. 372 (App. Div. 1996) (hospitals

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<sup>7</sup> In addition to the judicially crafted exception, discussed herein, the CFA also has been held inapplicable, in the following settings: claims under the Products Liability Act, N.J.S.A. 2A:58C-1 to -11, Sinclair v. Merck & Co., Inc., 195 N.J. 51 (2008); fraud on the market claims, Int'l Union of Operating Eng'rs v. Merck & Co., Inc., 192 N.J. 372 (2007); refusal to service domestically vehicles purchased abroad, Wilson v. General Motors Corp., 190 N.J. 336 (2007); sale of bulk tax sale certificates was not a per se violation of the CFA, Varsolona v. Breen Capital Servs. Corp., 180 N.J. 605 (2004); claims preempted by federal law, Glukowsky v. Equity One, Inc., 180 N.J. 49 (2004); claims subject to the filed rate doctrine, Smith v. SBC Communications, Inc., et. al., 178 N.J. 265 (2004); and, disclosure claims under the New Jersey Real Estate Residential Off-Site Conditions Disclosure Act, N.J.S.A. 46:3C-1 to -12, Nobrega v. Edison Glen Assoc., 167 N.J. 520 (2001).

are insulated from CFA liability), *certif. denied*, 144 N.J. 588 (1996); Vort v. Hollander, 257 N.J. Super. 56 (App. Div. 1992) (attorneys are excluded from CFA liability); Atl. Ambulance Corp. v. Cullum, 451 N.J. Super. 247 (App. Div. 2017) (ambulance service providers are excluded from CFA liability); Manahawkin Convalescent, 426 N.J. Super. 99 (App. Div. 2014) (nursing homes are insulated from CFA liability); Plemmons, 387 N.J. Super. at 564–65 (insurance producers are excluded from CFA liability); Borough of Caldwell v. Cozzarelli Cirminiello Architects, LLC, 482 N.J. Super. 492 (App. Div. 2025) (architects are excluded from CFA liability); Riad v. Dey Equine Veterinarians, P.A., No. CV226927RKJBD, 2023 WL 7648714 (D.N.J. Nov. 15, 2023) (veterinarians are excluded from CFA liability); Arons v. Rite Aid Corp., No. BER-L-4641-03, 2005 WL 975462 (N.J. Super. Ct. Law Div. Mar. 23, 2005) (pharmacists are excluded from CFA liability); Wartsila NSD N. Am., Inc. v. Hill Int'l, Inc., No. CV 99-4565 (SSB), 2000 WL 36740984 (D.N.J. Sept. 29, 2000) (engineers are excluded from CFA liability).

Thus, the idea that some professions and/or services are excluded from liability under the CFA is not a new and/or novel practice. These exclusions do not defeat the purpose or effectiveness of the CFA. The AGNJ's, NJAJ's, and NJCA's argument that the exception will swallow the rule is inconsistent with the fifty-year history since these exceptions were established. If anything, Shaw reinforces the

position that these exceptions are narrowly tailored, by conclusively excluding home inspectors. Shaw, 460 N.J. Super. 592.

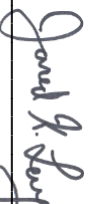
**CONCLUSION**

For the reasons set forth herein, as well as set forth in our opposition to Plaintiff-Appellant's motion for leave to appeal to the Supreme Court, insurance producers are learned professionals excluded from CFA liability. Therefore, the Trial and Appellate Division's decisions must be affirmed.

Dated: March 31, 2026

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By: \_\_\_\_\_



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