SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

JAMES G. LOWE, M.D., Plaintiff-Appellant, v. BERNARD AUDET, RICHARD LAVER, AND THE CREATIVE FINANCIAL GROUP, LTD., Defendants-Respondents.	DOCKET NO. A-4093-23 On appeal from the Superior Court of New, Law Division, Camden County, Docket No. CAM-L-633-24 SAT BELOW: Hon. Steven J. Polansky, P.J.S.C.

BRIEF ON BEHALF OF PLAINTIFF/APPELLANT JAMES G. LOWE, M.D.

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PRELIMINARY STATEMENT

Plaintiff James G. Lowe, M.D. ("Plaintiff") seeks reversal of the trial court's order dismissing with prejudice his claims against Defendants Richard Laver, Bernard Audet, and The Creative Financial Group, Ltd. (collectively "Defendants"), insurance agents, brokers and producers ("producers"), under the New Jersey Consumer Fraud Act, N.J.S.A. 56:8-1 to -210 ("CFA"). The trial court based its ruling on a judicially created exemption to liability under the CFA, which does not apply to insurance producers.

The trial court relied upon Plemmons v. Blue Chip Ins. Servs., Inc., which held insurance producers are "semi-professionals" who are excluded from liability under the CFA based upon a judicially created exemption for "learned professionals." 387 N.J. Super. 551 (App. Div. 2006). Plemmons was superseded by Shaw v. Shand, 460 N.J. Super. 592 (App. Div. 2019). Shaw held that Plemmons was overly broad in its application of the "learned professional" exemption from liability under the CFA and could not be reconciled with Supreme Court precedent and the broad scope of the CFA as intended by the legislature. Shaw held that the judicially created exemption from CFA liability was limited to historically "learned professionals" like doctors and lawyers who have been recognized as "learned" based upon their extensive training and erudition. Shaw explicitly excluded from the CFA exemption licensed semi-

professionals, like Defendants here, who are not even required to obtain a high school education or GED. The trial court, in reconciling Shaw and Plemmons, mistakenly concluded it was bound by Plemmons, since it had not been explicitly overruled and held the Defendants, insurance producers, remain exempt from CFA liability despite this Court's holding in Shaw.

This Court should confirm Shaw's analysis controls and that insurance producers, such as Defendants, are not "learned professionals" exempt from liability under the CFA. The trial court's ruling dismissing the CFA count in the Complaint (Count VII) should be reversed and Plaintiff should be permitted to pursue his CFA claims against all Defendants.

CONCISE STATEMENT OF RELEVANT FACTS

Plaintiff, a neurosurgeon, filed this civil action against Defendants to recover damages suffered as the result of Defendants' willful misrepresentations, fraud, and breaches of duties in connection with the sales, marketing, and procurement of disability insurance coverage for him and his surgical practice. (Pa11-Pa25). Plaintiff was harmed by the conduct of the Defendants, insurance producers, whom he trusted to procure certain insurance coverage as they represented, which would pay benefits in the event he became disabled. (Pa11-Pa30). Despite suffering a disability that the Defendants promised would result in the payment of maximum benefits, Plaintiff has not

received the benefits under the policies as represented by the Defendants. (Pa7-Pa22). The fraudulent conduct and unconscionable commercial practices alleged in the Complaint are the precise type of conduct the CFA was promulgated to punish and stop through enforcement actions by the Attorney General and by lawsuits of private litigants, like Plaintiff.

The Defendants, in their capacity as Plaintiff's insurance producers, made willful misrepresentations and engaged in fraudulent conduct, which constituted unconscionable commercial practices in connection with the sales, marketing and procurement of disability insurance coverage for Plaintiff and his medical practice. (Pa5-Pa6, Pa11-Pa25, Pa34-Pa41). The Defendants' unlawful acts and omissions caused Plaintiff to suffer significant economic damages, including the loss of disability insurance benefits, waiver of premiums, and consequential damages. (Pa4-Pa47).

CONCISE PROCEDURAL HISTORY

On February 27, 2024, Plaintiff filed a Complaint against Defendants asserting nine counts for relief, and seeking damages related to certain insurance policies which did not provide benefits as promised and represented by Defendants. Count VII of the Complaint alleged claims against Defendants based on the CFA. Defendants moved to dismiss certain Counts in the Complaint, pursuant to Rule 4:6-2(e) for failure to state a claim, including the

CFA count. The trial court granted Defendants' motions to dismiss the CFA claim in Count VII, with prejudice. On August 26, 2024, this Court granted leave to appeal the trial court's ruling as to Count VII only. The other aspects of the trial court's ruling on Defendants' motions are not at issue.

LEGAL STANDARD

Appellate review of a trial court's order granting a motion to dismiss for failure to state a claim pursuant to Rule 4:6-2(e) is de novo. Baskin v. P.C. Richard & Son, LLC, 246 N.J. 157, 171 (2021).

LEGAL ARGUMENT

SUMMARY OF THE ARGUMENT

The language of the CFA provides no exemption from liability for anyone or any profession. The "learned professional" exemption to CFA liability is a judicially created doctrine, which is to be narrowly construed. The trial court's ruling improperly expands this judicial exemption, and improperly limits the application and power of the CFA, a remedial consumer protection statute designed to broadly protect consumers.

This Court should reverse the trial court's order granting dismissal of Plaintiff's CFA claims and confirm the "learned professional" exemption does not extend to insurance producers, like Defendants, consistent with the Shaw decision. While the trial court acknowledged Shaw "backed off" of Plemmons,

it mistakenly concluded it was required to follow Plemmons, despite Shaw and its own view as to the appropriate scope of immunity under the CFA. (T32-25 to T35-2). To the extent the trial court perceived a conflict between Plemmons and Shaw, this Court should clarify the application of Shaw, the rejection of Plemmons, and reverse the trial court's orders dismissing with prejudice Plaintiff's CFA claims against all Defendants in Count VII of the Complaint.

I. THIS COURT SHOULD REVERSE THE TRIAL COURT'S ORDERS AND REINSTATE THE PLAINTIFF'S CFA CLAIMS. (T18:11 to 19:18).

This Court should reverse the trial court's interlocutory orders dismissing the CFA claims (Count VII) as Defendants are not "learned professionals" exempt from liability under the CFA.

Shaw found that Plemmons improperly expanded the "learned professional" exemption beyond Supreme Court precedent and to such a degree that the semi-professional exemption had swallowed the rule and rendered the CFA powerless to achieve its broad consumer protection mandate. Shaw, 460 N.J. Super. at 618-19. The trial court erroneously followed the ruling in Plemmons concluding insurance producers and other licensed semi-professionals are immune from liability under the CFA. This rejection of Shaw, the more recent and better reasoned decision, must be reversed. The Shaw panel had the benefit of briefing from the Attorney General which is tasked with

enforcing the CFA, as to its analysis of the CFA and the judicially created exemption at issue in Plemmons.

The appellate panel in Shaw invited the Attorney General to participate as amicus curie "in order to discern both on a narrow basis the agency's view whether home inspectors should be deemed 'learned professionals,' and on a broader basis how and when the 'learned professionals' exemption should be applied by the court to exempt individuals from CFA liability." Shaw, 460 N.J. Super. at 599.

As the panel noted in Shaw, though an appellate court is "not ultimately bound by an agency's statutory interpretation, '[g]enerally, courts afford substantial deference to an agency's interpretation of a statute that it is charged with enforcing.'" Id. at 617 (alteration in original) (citing Univ. Cottage Club of Princeton N.J. Corp. v. Dep't of Env't Prot., 191 N.J. 28, 48 (2007)). The Shaw Court gave considerable deference to the Attorney General's view that licensed semi-professionals should not be exempt from CFA liability. This Court should follow Shaw and, once again, give deference to the Attorney General's restrictive view of CFA immunity.[1]

[1] The Attorney General's Amicus Curie Brief filed in Shaw is included in the Appendix with this filing. (Pa53-Pa82).

II. THE TRIAL COURT ERRED IN FINDING DEFENDANTS, INSURANCE PRODUCERS, ARE IMMUNE FROM LIABILITY UNDER THE NEW JERSEY CONSUMER FRAUD ACT. (T18:11 to 19:25).

The trial court ruled that the Defendants are not subject to liability under CFA because they enjoy "learned professional" immunity as articulated in Plemmons, which has been superseded by Shaw. (T34-20 to 35-2). Shaw restored CFA immunity to historically "learned professionals" like doctors and lawyers. 460 N.J. at 627. The Defendants, in their capacity as licensed semi-professional insurance producers, do not enjoy the limited immunity from CFA liability under the judicially created "learned professional" exemption because they are not "learned professionals." The trial court erred in dismissing with prejudice Plaintiff's CFA claims (Count VII) and extending CFA immunity to Defendants.

A. The CFA Applies to Marketing, Sale and Procurement of Insurance. (T23:13 to 24:16; T28:21 to 29:4).

"The CFA was enacted to 'provide[ ] relief to consumers from fraudulent practices in the market place.'" Dugan v. TGI Fridays, Inc., 231 N.J. 24, 50 (2017) (alteration in original) (internal citations omitted) (quoting Lee v. Carter-Reed Co., LLC, 203 N.J. 496, 521 (2010)). The CFA is "applied broadly in order to accomplish its remedial purpose, namely, to root out consumer fraud." Manahawkin Convalescent v. O'Neill, 217 N.J. 99, 121 (2014) (quoting

Gonzalez v. Wilshire Credit Corp., 207 N.J. 557, 576 (2011)). The New Jersey Supreme Court, in Lemelledo v. Benefit Mgmt. Corp. of Am., held that the CFA "is ample enough to encompass the sale of insurance policies as goods and services that are marketed to consumers." 150 N.J. 255, 265 (1997).

As alleged in the Complaint, Defendants engaged in unconscionable commercial practices, deception, fraud, false promises and omission of material facts in the marketing, sale and procurement of the disability insurance policies, and in the processing of claims made by Plaintiff, in violation of the CFA. (Pa26-Pa27, Pa32-Pa44, Pa60-Pa62). The acts and omissions alleged in the Complaint give rise to valid causes of action against the Defendants under the CFA. Blanket immunity for insurance producers from liability under the CFA cannot be reconciled with Lemelledo's confirmation that the sale of insurance policies falls within the scope of the CFA.

B. The Judicially Created "Learned Professional" Exemption to CFA Liability Does Not Apply to Insurance Producers or Other Semi-Professionals. (T16:10 to 19:25).

The trial court's exclusive reliance on Plemmons to support the conclusion that insurance producers are "learned professionals" exempt from liability under the CFA is misplaced. (T32-16 to 35-2). Plemmons, and the unpublished, non-precedential cases cited by the Defendants in their motion to dismiss below, have been superseded by Shaw.

In Shaw, 460 N.J. Super. at 599, this Court superseded its decision in Plemmons on precisely the same issue relied upon by the trial court and the Defendants, holding:

> To the extent our prior decisions, including Plemmons v. Blue Chip Ins. Servs., 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 Mgmt. Corp. of Am., 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.
>
> [Ibid.]

In returning to the historically restricted definition of "learned professional" and rejecting the judicially created exemption for liability under the CFA for semi-professionals, the Shaw Court gave "due deference to the Attorney General's concern that a wide-ranging interpretation of the learned profession exception would unfairly restrict the ability of private litigants and the Division to seek redress for fraudulent commercial practices . . . ." Shaw, 460 N.J. Super. at 619-20. The Court in Shaw adopted the Attorney General's view on the appropriate scope of the "learned professional" exemption:

> We agree with the Attorney General that the learned professional doctrine, as interpreted, threatens to become the exception that swallows the rule, in contravention of the canon of statutory

> interpretation that requires that exceptions to a remedial statute are to be narrowly construed. We also agree with the Attorney General's argument that, to the extent the Supreme 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. We are unpersuaded that the Legislature acquiesced in all semi-professional CFA immunity.
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> [Id. at 618-19.]

The Shaw Court held "that home inspectors and other licensed semi-professionals are not learned professionals simply because they are otherwise regulated." Id. at 620 (emphasis added). Shaw made clear licensed semi-professionals, like Defendants, "remain subject to the CFA absent a finding that 'a direct and unavoidable conflict exists' between application of the CFA and application of the other regulatory scheme or schemes." Shaw, 460 N.J. Super. at 619 (emphasis added) (quoting Lemelledo, 150 N.J. at 270). Shaw properly reset the judicially created exemptions from liability under the CFA. Since Shaw, exemptions from liability under the CFA are to include only "learned professionals." Licensed semi-professionals, like the Defendants, are excluded from the judicially created limited exception to the CFA. Id. at 620. This is consistent with the CFA itself, as well as the Attorney General's position on this very issue, upon which Shaw relied. Id. at 609.

It is well established that "where the purpose of legislation is remedial and humanitarian, any exemption must be narrowly construed, giving due regard to the plain meaning of the language and the legislative intent." Serv. Armament Co. v. Hyland, 70 N.J. 550, 559 (1976). As Shaw held:

> [t]hus, broadly construing the reach of the CFA as a remedial statute, and narrowly construing any exceptions to the CFA, we agree with the Attorney General that there is nothing in the text or the purpose of the CFA that supports an exemption for fraudulent or unconscionable activities of semi-professionals such as home inspectors.
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> [Shaw, 460 N.J. Super. at 609.]

The "judicially created learned professional exception must be narrowly construed to exempt CFA liability only as to those professionals who have historically been recognized as 'learned' based on the requirement of extensive learning or erudition." Id. at 599 (emphasis added).

Plaintiff is unaware of any binding precedent defining "learned professional" to include insurance producers. "Originally, and historically, the word 'profession' was applied only to law, medicine and theology or divinity, and these were known as the three 'learned professions,' and it has frequently been said that formerly these three disciplines were known as 'the professions.'" Shaw, 460 N.J. Super. at 611 (quoting Plaza Bottle Shop, Inc. v. Al Torstrick Ins. Agency, 712 S.W.2d 349, 351 (Ky. Ct. App. 1986). In Macedo v. Dello Russo, the Supreme Court noted that only lawyers and doctors have been

identified as learned professionals beyond the reach of the CFA so long as they are acting in their professional capacities. 178 N.J. 340, 344-46 (2004). "Macedo did not, however, extend the exception to semi-professionals or licensed professionals." Shaw, 460 N.J. Super. at 615 n.13. To the extent that Plemmons offers any value to the analysis, it simply confirms that insurance producers, like Defendants, are semi-professionals and not learned professionals. 387 N.J. Super. at 564. Under the Shaw analysis, that is insufficient to qualify them for the exemption from liability under the CFA.

If there was any doubt about the importance of Shaw and its requirement that courts narrowly construe the "learned professional" exemption for CFA liability, this Court should look to its recent decision in Williams-Hopkins v. Medwell, LLC, No. A-0273-21, 2024 N.J. Super. Unpub. LEXIS 569 (App. Div. Apr. 5, 2024)[2], which revisited the applicability of the CFA to learned professionals and semi-professionals. The Court in Williams-Hopkins upheld Shaw and left no doubt that Plemmons was overruled:

> The types of professionals protected by the exception include doctors, [Macedo, 178 N.J.] at 346, and attorneys, Vort v. Hollander, 257 N.J. Super. 56, 62 (App. Div. 1992). In Shaw v. Shand, 460 N.J. Super. 592 (App. Div. 2019), we concluded "'semi-

[2] Williams-Hopkins, No. A-0273-21, 2024 N.J. Super. Unpub. LEXIS 569 (App. Div. Apr. 5, 2024) is an unpublished opinion. Pursuant to Rule 1:36-3, Plaintiff is not aware of any contrary unpublished opinions since Williams-Hopkins was decided. A copy of this opinion was submitted to the trial court and is included in the Appendix with this filing. (Pa83-Pa101).

> professionals' who are regulated by a separate regulatory scheme," such as home inspectors, were not covered by the exception. Id. at 599. We explained the exception "must be narrowly construed to exempt CFA liability only as to those professionals who have historically been recognized as 'learned' based on the requirement of extensive learning or erudition." Ibid. To the extent prior decisions relied upon regulation of semi-professionals to hold otherwise, as in Plemmons v. Blue Chip Ins. Servs., Inc., 387 N.J. Super. 551, 564 (App. Div. 2006) and Atlantic Ambulance Corp. v. Cullum, 451 N.J. Super. 247, 257-58 (App. Div. 2017), we found such rationale "inconsistent with the Supreme Court's decision in Lemelledo v. Beneficial Mgmt. Corp. of Am., 150 N.J. 255 (1997)." Shaw, 460 N.J. Super. at 599, 616. Rather, we held "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.'" Id. at 616 (quoting Lemelledo, 150 N.J. at 270). In other words, semi-professionals are not encompassed in the learned professional exemption simply because they are subject to regulation.
>
> [Id. at 47-48.]

Defendants, as insurance producers, are regulated by the New Jersey Insurance Producers Licensing Act, N.J.S.A. 17:22A-26 to -48 ("NJIPL Act") and the regulations promulgated thereunder. Based on the NJIPL Act and the regulations, there is no support for considering insurance producers, such as Defendants, as a "learned profession." The NJIPL Act and the regulations establish the requirements necessary to become a licensed insurance producer. The educational requirements associated with becoming a licensed insurance producer fall woefully short of the "extensive learning or erudition" necessary to be considered a "learned professional" like doctors or lawyers. The

educational requirements for insurance producers are limited to completing a State-approved education course of 20 hours of education for each type of insurance license being sought. N.J.A.C. 11:17-3.4. They also have to pay a fee, pass a test for the lines of insurance (i.e., life, health, property, casualty and personal) for which they seek a license, complete an application and pass a background check. N.J.S.A. 17:22A-32. A review of the NJIPL Act and the regulations shows that there is no requirement for a high school diploma, a GED, or any level of formal education whatsoever in order to obtain an insurance producer license in New Jersey. The educational requirements for insurance producers are less than the requirements for the home inspector in Shaw, and far below the level of "extensive learning or erudition," necessary to be considered a "learned professional" under New Jersey law. Shaw, 460 N.J. at 618-19.

Further, there is no direct and unavoidable conflict between the application of the CFA and the regulatory scheme governing insurance producers, like Defendants. Tellingly, Defendants did not argue to the contrary before the trial court. More importantly, the trial court did not consider or rely upon any potential conflict between the CFA and the NJIPL Act and the regulations in making its decision. Thus, this issue and its potential application to Defendants' exemption from CFA liability under Shaw is not presented in this appeal. To the extent that this Court chooses to engage in such an analysis,

the CFA and NJIPL Act and the regulations all require honesty, competency and fair dealing in commercial practices while providing punishment mechanisms for those who in engage in fraud, misrepresentations and abuse of consumers. A comparison of the CFA and the regulatory scheme governing insurance producers, even without the benefit of discovery, demonstrates there is no conflict between the two.

Semi-professionals, including insurance producers like the Defendants, are not exempt from liability under the CFA based on Shaw, and no case has so held since Shaw was decided. The trial court failed to follow Shaw and rejected the Attorney General's interpretations of the CFA, which stand for a restricted interpretation of the "learned professional" judicial exception to the CFA. The straightforward and correct path, which should be provided to the trial court, is to follow Shaw, narrowly interpret the judicially created exemption to liability under the CFA, and reverse the orders dismissing the Plaintiff's CFA claims (Count VII).

CONCLUSION

Plaintiff requests the Court reverse the trial court's interlocutory orders dismissing Plaintiff's CFA claims (Count VII). This Court should rule that insurance producers, in their capacity as licensed semi-professionals, are not immune from liability under the CFA, and provide clarity as to the application

of Shaw by confirming Plemmons is no longer controlling or persuasive in determining exemptions to liability under the CFA. The exemption from liability under the CFA is and should be limited to "learned professionals," which does not include Defendants. The trial court's orders should be reversed.

Respectfully submitted,
BROWN & CONNERY, LLP

Dated: October 11, 2024

s/ *Stephen J. DeFeo*
Stephen J. DeFeo

Superior Court of New Jersey

Appellate Division

Docket No. A-4093-23

JAMES G. LOWE, M.D.,	:	CIVIL ACTION
	:	
	:	ON APPEAL FROM
Plaintiff-Appellant,	:	THE SUPERIOR COURT
	:	OF NEW JERSEY,
	:	LAW DIVISION,
vs.	:	CAMDEN COUNTY
	:	
	:	Docket No. CAM-L-633-24
BERNARD AUDET, RICHARD	:	
LAVER and THE CREATIVE	:	Sat Below:
FINANCIAL GROUP, LTD.,	:	
	:	HON. STEVEN J. POLANSKY,
	:	P.J.Cv.
Defendants-Respondents.	:	

BRIEF ON BEHALF OF DEFENDANTS-RESPONDENTS BERNARD AUDET AND THE CREATIVE FINANCIAL GROUP

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PRELIMINARY STATEMENT

The trial court was correct to dismiss with prejudice the claims made under the Consumer Fraud Act, N.J.S.A. 56:8-1 et seq. ("CFA") against Defendants Bernard Audet ("Audet"), The Creative Financial Group, incorrectly named as The Creative Financial Group, Ltd. in the Complaint ("Creative"), and Richard Laver ("Laver") (collectively, "Defendants"). The trial court rightly found that this Court's decision in Plemmons v. Blue Chip Insurance Services, Inc., 387 N.J. Super. 551 (App. Div. 2006), is dispositive. Thus, the decision below should be upheld.

Plaintiff James G. Lowe, M.D. ("Plaintiff") seeks reversal contending that Plemmons was overruled or superseded by Shaw v. Shand, 460 N.J. Super. 592 (App. Div. 2019). But Shaw, a case about a home inspector, cannot upend this Court's analysis or conclusion in Plemmons nor displace Plaintiff's repeated assertions in his Complaint that Defendants are "professionals." This appeal presents an issue that this Court has already decided, and Plaintiff has not provided special justification for deviation. As such, the trial court's decision should be affirmed.

To the extent this Court is inclined to reengage in a "nature of the services" analysis, this Court and Plaintiff have already recognized that the insurance brokerage services Audet and Creative provided are beyond the pale

of the CFA. The allegations asserted in the Complaint, Plaintiff's proffered Affidavit of Merit, and the Legislature and the courts' recognition of the licensing strictures for insurance brokers evidence that the professionals acting in their professional capacity here are on par with other types of professionals excluded from liability under the CFA. While such an analysis is unnecessary, undertaking it supports affirming the trial court's decision.

PROCEDURAL HISTORY

Plaintiff's Complaint was filed on February 27, 2024. (Pa004 – Pa052). Defendants then filed pre-answer motions to dismiss certain Counts within the Complaint pursuant to Rule 4:6-2(e), including Count VII relative to Plaintiff's CFA claims. (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, Tr. at 33:18 – 35:2).

On August 7, 2024, Plaintiff filed a motion seeking interlocutory review only as to the dismissal of the CFA claims. (Pa187). On the same date, Audet and Creative filed their Answer and Affirmative Defenses, and are continuing with discovery on the eight other counts asserted in the Complaint. (Pa103-Pa131). This Court granted Plaintiff's motion seeking leave to appeal on August 26, 2024. (Pa102).

STATEMENT OF FACTS[1]

Plaintiff is a sophisticated, highly educated individual that operates multiple businesses, including a neurosurgery medical practice, "medical-legal consulting business," medical billing company, and race car team, and works with an accountant and lawyer. (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, who was held out as a "disability insurance expert" that advised on coverage. (Pa006-Pa007).

Plaintiff alleges that he turned to Defendants for various insurance and financial services needs for approximately 20 years. (Pa007-Pa025). Plaintiff alleges that "Defendants held themselves and their agents out as highly skilled insurance experts and financial consultants, possessing the special knowledge and expertise needed to market, sell, interpret and understand all insurance policies sold" to Plaintiff. (Pa011). Plaintiff continues that as insurance producers, brokers, and agents selling insurance in New Jersey, Defendants

[1] The parties are constrained to accept as true the allegations asserted in the Complaint at this stage of litigation, though Audet and Creative deny all claims and crossclaims. See Malik v. Ruttenberg, 398 N.J. Super. 489, 494 (App. Div. 2008) ("Thus, like the trial court, this court must accept as true the facts alleged in the complaint, and credit all reasonable inferences of fact therefrom, to ascertain whether there is a claim upon which relief can be granted.") (citing Donato v. Moldow, 374 N.J. Super. 475, 483 (App. Div. 2005); Seidenberg v. Summit Bank, 348 N.J. Super. 243, 250 (App. Div. 2002)).

owed a fiduciary duty to and had a special relationship with Plaintiff. (Pa011 – Pa012). Plaintiff alleges that Defendants, with Plaintiff's accountant and lawyer, assisted with obtaining disability and business overhead expense insurance policies for his medical practice. (Pa007 – Pa025).

No where in the 46-page Complaint is there any assertion 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, Plaintiff's Complaint is replete with assertions about the specific nature of his insurance needs having provided details on all aspects of his personal, business, and investment dealings and expressing concerns about his particular situation – mainly, coverage for if or when a disability prevented Plaintiff from performing neurosurgery. (Pa007-Pa025).

Plaintiff stopped performing neurosurgery in September 2021 because his maculopathy reduced his vision, thus 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 one insurer, MetLife, made only partial payments under its policy because it considered his 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 payments" under the policies, but despite Defendants' representations otherwise, MetLife refused to pay him "full benefits." (Pa025 – Pa030).

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

LEGAL ARGUMENT

SUMMARY OF THE ARGUMENT

The question of whether an insurance broker may be subject to liability under the CFA for the performance of brokerage services was answered in the negative by this Court in 2006. Supreme Court jurisprudence makes clear that the CFA exemption applies to learned and semi-professionals as the nature of the services they render are beyond the ordinary commercial seller of goods and services and do not fall into the category of consumerism. Since 2006, Audet, Creative, and other insurance producers have relied upon this exemption to avoid the application of the CFA to claims concerning the professional nature of services they render to clients. The trial court recognized the continued precedential value of Plemmons and correctly dismissed Plaintiff's CFA claims.

Plaintiff would now like this Court to use Shaw to hold in opposite of what courts in New Jersey have done for the last 18 years. But Plaintiff offers this Court no special justification why this case should be the one to cause the Court to deviate from precedent. Shaw did not "overrule" or "supersede" the overall exemption from the CFA for insurance brokers. Unlike Plemmons and the trial court, Shaw did not answer the question of whether an insurance broker is subject to liability under the CFA. Instead, Shaw rejected the

expansion of the CFA exemption to home inspectors based on concerns that the exception would swallow the rule and, in that context, returned the focus of the analysis to the "nature of services provided" to determine if the professional services rendered are beyond ordinary commercialism. Shaw must be read for what it is – not what Plaintiff would like it to be.

But even if this Court undertakes another analysis of the application of the CFA to insurance brokers, the result here would still require dismissal of the CFA claims. Plaintiff concedes that Defendants rendered professional, licensed services when assisting in the procurement of specific insurance to meet Plaintiff's particular needs. Plaintiff further proffers an expert whose *curriculum vitae* evidences the learning and erudition needed to be an insurance broker. That Plaintiff produced an Affidavit of Merit places Defendants on the same short list of exempt professionals with doctors, lawyers, and architects. This Court's intent to curb the expansion of the CFA exemption in Shaw does not render Plemmons "overruled" or "superseded," nor necessitate shrinking the exemption "to historically 'learned professionals' like doctors and lawyers," as Plaintiff suggests. While undertaking another analysis of the learned and semi-professional exemption is unnecessary as Plemmons is dispositive, it confirms that the trial court's decision should be affirmed.

I. THIS COURT SHOULD AFFIRM THE TRIAL COURT'S ORDERS DISMISSING WITH PREJUDICE PLAINTIFF'S CONSUMER FRAUD ACT CLAIMS AGAINST INSURANCE PRODUCERS.

Appellate review of a motion to dismiss for failure to state a claim pursuant to Rule 4:6-2(e) is *de novo*. See Mac Prop. Grp. LLC & The Cake Boutique LLC v. Selective Fire & Cas. Ins. Co., 473 N.J. Super. 1, 16 (App. Div. 2022), cert. denied sub nom. MAC Prop. Grp. LLC v. Selective Fire & Cas. Ins. Co., 252 N.J. 258 (2022), and cert. denied sub nom. MAC Prop. Grp. LLC v. Selective Fire & Cas. Ins. Co., 252 N.J. 261 (2022). But Plaintiff's appeal reduces to a request to deviate from Plemmons, an established precedent directly on point.

Courts are "bound to adhere to settled precedent" under the principle of *stare decisis*, as the doctrine promotes "a number of important ends," such as "consistency, stability, and predictability in the development of legal principles" along with "respect for judicial decisions." State v. Olenowski, 253 N.J. 133, 152 (2023) (quoting Luchejko v. City of Hoboken, 207 N.J. 191, 208 (2011); State v. Witt, 223 N.J. 409, 439 (2015)). While *stare decisis* is not an inflexible doctrine that deprives courts of the ability to correct errors or perpetuate mistakes, "a 'special justification' is required to depart from precedent" because of the above compelling reasons. Id. at 153 (quoting Witt, 223 N.J. at 439-40). Such special justification "might" exist when time shows

that the ruling was poorly reasoned, changed circumstances have eliminated the original rationale, the rule creates unworkable distinctions, or when a standard defies consistent application by lower courts. Id. (quoting Luchejko, 207 N.J. at 209). A Supreme Court justice has observed that "[t]o the extent that the principle of *stare decisis* affords a measure of stability it is of great social value." David v. Gov't Emps. Ins. Co., 360 N.J. Super. 127, 142 (App. Div. 2003) (internal citations and quotations omitted); cf. Namm v. Charles E. Frosst & Co., Inc., 178 N.J. Super. 19, 35 (App. Div. 1981) (The Appellate Division is "bound by the principles of law developed and declared by our Supreme Court. Extensive policy shifts of this magnitude should not be initiated by an intermediate appellate court. The appropriate tribunal to accomplish such drastic changes is either the Supreme Court or the Legislature."); Shaw, 460 N.J. Super. at 629 (J. Sabatino, concurring) (recognizing the scope of the learned and semi-professional exemption "may well present a suitable opportunity for the [Supreme] Court to provide helpful updated guidance" and that "nothing in this opinion prevents the Legislature from adopting amendments that clarify the statutory scheme.").

The trial court correctly recognized that Plemmons, 387 N.J. Super. 551, is dispositive of the issue presented here. The learned and semi-professional exemption to the CFA has applied to cases involving insurance brokers

rendering brokerage services since 2006. Though this Court in Shaw, 460 N.J. Super. 592, sought to curtail the expansion of the CFA exception, it did not "overrule" or "supersede" Plemmons, as Plaintiff asserts. A review of Supreme Court jurisprudence makes clear that the learned and semi-professional exemption does not apply as Plaintiff might like. But even if this Court were to repeat its analysis of the CFA exemption to insurance brokers, the result in this case would still require affirming the trial court's dismissal of the CFA claims. Plaintiff's allegations in his own pleading places this matter squarely within the exemption to the CFA. In addition, the Legislature and courts in New Jersey have recognized the nature of the services provided, and learning and erudition undertaken by insurance brokers places them in the same category as other professionals exempt from the CFA. Accordingly, the trial court's decision should be affirmed.

A. Based on Plemmons and the Complaint, the Consumer Fraud Act Does Not Apply to Audet and Creative.

Both case law and the Complaint make clear that the CFA does not apply to insurance brokers like Audet and Creative. The CFA prohibits:

> as an unlawful practice, the "act, use or employment of any person of any unconscionable commercial practice, deception, fraud, false pretense, false promise, [or] misrepresentation … in connection with the sale or advertisement of any merchandise or real estate, or with the subsequent performance of such person as aforesaid."

Lee v. First Union Nat'l Bank, 199 N.J. 251, 257 (2009) (quoting N.J.S.A. 56:8-2). The CFA "provides a remedy for any consumer who has suffered an 'ascertainable loss of moneys or property, real or personal, as a result of [a CFA violation],' including treble damages, costs, and attorneys fees." Id. (quoting N.J.S.A. 56:8-19). The CFA includes definitions for "advertisement," "merchandise" and "sale." See N.J.S.A. 56:8-1.

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 (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 (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 advert 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").

"To qualify as a consumer transaction, which is not defined in the CFA, the challenged services generally must be of the type sold to the general public." Finderne Mgmt. Co., Inc. v. Barrett, 402 N.J. Super. 546, 570 (App. Div. 2008). "Furthermore, the entire thrust of the Act is pointed to products and services sold to consumers in the popular sense." Id. (internal quotations and citations omitted); see Princeton Healthcare Sys. v. Netsmart New York, Inc., 422 N.J. Super. 467, 473 (App. Div. 2011) (The CFA is directed primarily at "deception, misrepresentation and unconscionable practices engaged in by professional sellers seeking mass distribution of many types of consumer goods"); All the Way Towing, LLC v. Bucks Cnty. Int'l, Inc., 236 N.J. 431, 447-8 (2019) (for business-to-business transactions, courts look to the "nature of the transaction" to determine whether it can fit within the CFA's definition of "merchandise," through four considerations). "The courts have recognized the 'need to place reasonable limits upon the operation of the [CFA] despite broad statutory language[,] so that its enforcement properly reflects legislative intent….'" Finderne, 402 N.J. Super. at 752 (quoting DiBernardo, 206 N.J. Super. at 375 (internal quotations and citations omitted)).

Since 1976, courts have applied an exemption from the CFA for learned and semi-professionals who act in their professional capacity. See Macedo v.

Dello Russo, 178 N.J. 340, 345-46 (2004) (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.) (services performed by hospital not encompassed by the CFA because hospitals are heavily regulated by the state), certif. denied, 144 N.J. 588 (1996); Vort v. Hollander, 257 N.J. Super. 56, 62 (App. Div.) (professional services rendered by attorneys regarding their clients' rights as owners of real estate were not covered by the CFA), certif. denied, 130 N.J. 599 (1992). Although the legislature subsequently amended the CFA to expressly apply to real estate brokers, the following rationale for the exemption remains true:

> 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, 178 N.J. at 344 (citing Neveroski v. Blair, 141 N.J. Super. 379 (App. Div.1976) (superseded by statute, as stated in Lee, 199 N.J. 251). While this exemption is a judicially created rule, courts have uniformly followed it and "the Legislature has not amended the CFA to include…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.").

In 2006, this Court took 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. This Court tracked the history of the CFA exemption to learned and semi-professionals. Id. at 561-63. While the plaintiff there argued that the case was controlled by Lemelledo v. Beneficial Management Corp., 150 N.J. 255 (1997), this Court 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 the Supreme 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. This Court 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. Accordingly, this Court 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.

Plaintiff points to no poor reasoning, changed circumstances, unworkable distinctions, or defiance of consistent application of the exemption to the CFA to insurance brokers since Plemmons was decided almost 20 years ago. See Olenowski, 253 N.J. at 153. Since then, the Legislature has not amended the CFA to expressly include insurance brokers. See Lee, 199 N.J. 251. Instead, Audet, Creative, and other insurance brokers have relied upon courts in New Jersey to apply the exemption to the CFA to 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).

Moreover, the Complaint expressly pleads facts that are directly within the exemption to the CFA. 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).

If there was any doubt, Plaintiff 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," opines that Defendants departed from the "professional standards or practices of the insurance industry" and echoes the allegations made in the Complaint that Defendants "deviated from the accepted professional standards or practices of the insurance industry." (Id.) While

reserving all rights and waiving none, Plaintiff's proposed expert's *curriculum vitae* shows the extensive professional learning and erudition needed for insurance brokers in New Jersey. (Pa052). Continuing to apply the exemption to insurance brokers makes sense as the Legislature has designated an insurance producer 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.

The trial court was correct when it dismissed with prejudice Plaintiff's CFA claims. Plaintiff and Defendants are now undertaking 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 offers this Court no reason why he, a sophisticated, highly educated doctor and businessowner represented by an accountant and an attorney to address particular insurance needs, warrants this Court's deviation from well-established precedent.

Accordingly, based on the Complaint and well-settled law, the trial court's decision to dismiss with prejudice Plaintiff's CFA claims should be affirmed.

B. The Trial Court Correctly Determined that Shaw Does Not Alter the Application of the CFA Exemption to Audet and Creative.

Plaintiff's linchpin argument is that Shaw "overruled" or "superseded" Plemmons. Reading Shaw for what it is – not what Plaintiff would like it to be – shows that the trial court was correct that Plemmons is still dispositive of the issue presented here.

In Shaw, this Court 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, this Court invited the Attorney General's Division of Consumer Affairs to participate *amicus curiae*. Id. On the narrow issue, which is important for context, this Court 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 basis, this Court 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)).[2] 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

[2] Plaintiff cites to an unpublished opinion that reiterates that "semi-professionals are not encompassed in the learned professional exemption *simply* because they are subject to regulation." See Williams-Hopkins v. Medwell, LLC, No. A-0273-21, 2024 N.J. Super. Unpubl. LEXIS 569, at *47-48 (N.J. App. Div. Apr. 5, 2024) (Pa096) (emphasis added). There, this Court was faced, in relevant part, with determining whether the nature of the services provided to the plaintiffs (called "treatments") by a medical, physical therapy, and chiropractic entity fell within the professional exemption of the CFA. Id. at *38-39 (Pa093 – Pa094). Ultimately, this Court remanded for further discovery because the record was unclear that the services at issue were within the professional capacity of the defendant-professionals. Id. at *48-49 (Pa096 – Pa097). There is no doubt that the services at issue here were conducted by exempt professionals within their professional capacity based on the Complaint.

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 a certain profession in the first instance, this Court traced the history of the learned and semi-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.
>
> * * *
>
> 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 Court's analysis in Shaw arose out of 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 about extending this exception to professionals that might not be considered as "learned" as doctors, lawyers, and clergy makes

sense. Id. at 616 ("Plemmons thus paved the wave 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 involved services provided by learned professionals in their professional capacity,'" (internal quotations omitted)).

Worries about the exception swallowing the CFA rule in a case about home inspectors does not mean that the entirety of Plemmons was overruled or superseded, as the trial court here correctly recognized. The Hon. Jack M. Sabatino, P.J.A.D.'s concurring opinion in Shaw specifically preserved the exception for insurance professionals. As His Honor 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. This Court did not eliminate the application of the exemption to insurance brokers and other semi-professionals based on the nature of the

services they provide, nor could it given the Supreme Court and other courts' repeated reliance on Neveroski:

> 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…*

Macedo, 178 N.J. at 344 (quoting Neveroski, 141 N.J. Super. at 379) (emphasis added).

This Court in Shaw never answered whether the exemption to the CFA applies to insurance brokers. This Court in Plemmons and the trial court here did. Courts have answered that specific question in the negative since 2006 without issue. Given the Complaint and case law, the trial court was correct to dismiss Plaintiff's CFA claims. This Court should affirm.

C. Repeating an Analysis of the Application of the Exemption to the Consumer Fraud Act Supports Affirming the Trial Court's Decision.

Even if this Court were inclined to repeat an analysis of whether insurance brokers like Audet and Creative acting in their professional capacity are exempt from the CFA, the result would still be "yes." As found in

Macedo, Neveroski, Plemmons, and Shaw, this 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, with no one factor controlling – are not ignored. 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").[3]

[3] Shaw does not actually engage in a "nature of the services" analysis. Instead, that panel determined that home inspectors are not doctors or lawyers and was persuaded by the comparatively minimal schooling or apprenticeship needed for home inspectors. 460 N.J. Super. at 612. If, as Plaintiff suggests, Shaw means that the exemption applies to only those in law, medicine, or divinity/theology, then Shaw's announced of a return to the "nature of the services" analysis for those in professions requiring extensive learning and erudition would be rendered meaningless. If the exemption was limited to only those three professions, there would have been no need to announce a test to determine inclusion in this group going forward. Shaw's endorsement of the "nature of the services" test and the long acceptance of the two-paragraph "semi-professional" pronouncement in

Looking at the nature of the services rendered here, Plaintiff alleges that the services provided were professional, beyond the ordinary seller of commercial services, and outside the category of consumerism. Plaintiff himself is a sophisticated, highly educated individual that operates multiple businesses, including a medical practice as a neurosurgeon, "medical-legal consulting business," medical billing company, and race car team, and works with an accountant and lawyer. (Pa005, Pa007-Pa011, Pa013, Pa016-Pa017). No where in the Complaint does Plaintiff allege that the services or policies provided are of the type that are sold or marketed for mass distribution to the general public. (Pa004-Pa049). Instead, Plaintiff emphasizes the specific nature of his insurance needs having provided Defendants with details on his personal, business, and investment dealings and expressing concerns about his particular situation – i.e., his need for coverage for if or when a disability prevented him from performing neurosurgery. (Pa007-Pa025). Given his

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Neveroski, as adopted in Macedo, means that the CFA cannot be read as narrowly as the Plaintiffs and perhaps NJAJ, as *amicus curie*, might like. 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 presumed acquiescence of the Legislature for almost 50 years.

sophistication and resources, Plaintiff's choice to turn to Defendants for assistance with his business and personal insurance needs shows the complexity of the professional services provided. See Finderne, 402 N.J. Super. at 570-73. Moreover, Plaintiff asserts a "fiduciary duty" and a "special relationship," both of which further evidence the professional nature of the services rendered that take Audet and Creative and the services they provided outside the pale of the CFA.

Regarding education and licensing, this Court recognized:

> 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 insured, 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. This level of licensure and regulation is notable, as this Court has observed. 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, 402 N.J. Super. at 569 ("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). Courts in New Jersey have long regarded the licensing strictures for insurance brokers, which puts them on par with other learned professionals. Cf. Mizrahi v. Allstate Ins. Co., 276 N.J. Super. 112, 118-19 (Law. Div. 1994) (interpreting a previous New Jersey Insurance Producer Licensing Act when denying an individual from testifying as an insurance procedure expert).

The Legislature has also recognized that insurance producers are within the same category as other exempt learned professionals. 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)). "The salutary benefit to both sides in eliminating a non-genuine malpractice claim early on is the conservation of resources." Knorr v. Smeal, 178 N.J. 169, 176 (2003). Much like the CFA exemption, not all professionals are covered by the Affidavit of Merit Statute. Instead, 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.

Plaintiff agrees that the licensing and educational requirements for insurance brokers place Audet and Creative on the same short list as doctors, architects, and attorneys having served an Affidavit of Merit with his Complaint. (Pa050 – Pa052). Plaintiff's proposed expert "holds widely recognized professional insurance designations." (Pa050). This proposed expert's *curriculum vitae* demonstrates that insurance brokers undergo extensive professional learning and erudition to maintain their licenses. (Pa051 – Pa052). The courts, the Legislature, and Plaintiff's recognition of the

extensive learning and erudition, along with licensing and regulation required for insurance brokers to act in their professional capacities puts them beyond the ordinary seller of commercial services and outside the category of consumerism contemplated by the CFA.

In sum, a repeat of the analysis found in Shaw, Plemmons, Macedo, and Neveroski supports the trial court's decision to dismiss the CFA claims against Audet and Creative. While such an analysis is unnecessary given Plemmons, this Court should nonetheless affirm.

CONCLUSION

For the foregoing reasons, Audet and Creative respectfully request that the Court affirm the dismissal with prejudice of Count VII relative to Plaintiff's CFA claims. Whether this Court follows its precedent in Plemmons or undertakes another analysis of the CFA exemption, the conclusion supports upholding the decision below. Accordingly, the parties should continue with discovery on the remaining eight counts asserted in the Complaint.

Respectfully submitted,

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Dated: November 13, 2024

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

JAMES G. LOWE, M.D., Plaintiff-Appellant, v. BERNARD AUDET, RICHARD LAVER, AND THE CREATIVE FINANCIAL GROUP, LTD., Defendants-Respondents.	DOCKET NO. A-4093-23 On appeal from the Superior Court of New, Law Division, Camden County, Docket No. CAM-L-633-24 SAT BELOW: Hon. Steven J. Polansky, P.J.S.C.

REPLY BRIEF ON BEHALF OF PLAINTIFF/APPELLANT JAMES G. LOWE, M.D.

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RULES

PRELIMINARY STATEMENT

At its core, this appeal stems from a split in appellate authority on the issue of whether or not, under New Jersey law, insurance agents, brokers, and producers are exempt from liability under the New Jersey Consumer Fraud Act, N.J.S.A. 56:8-1 to -210 ("CFA"). The cases at issue here are Plemmons v. Blue Chip Ins. Servs., Inc., 387 N.J. Super. 551 (App. Div. 2006) which held that insurance producers, as "semi-professionals," are exempt from liability under the CFA, and Shaw v. Shand, 460 N.J. Super. 592 (App. Div. 2019) which found that Plemmons was overbroad, and that the judicially created exemption from CFA liability is properly limited to historically "learned professionals" like doctors and lawyers. This split in this Court's rulings should be resolved consistent with Shaw.

Despite Defendants' insistence that Plemmons controls, Shaw, the more recent of the two cases, *explicitly* recognizes its conflict with Plemmons: "to the extent our prior decisions, including [Plemmons], 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 Mgmt. Corp. of Am., 150 N.J. 225 (1997)." Shaw, 460 N.J. Super. at 599. This split in appellate authority has created uncertainty surrounding the

appropriate scope of the judicially created exemption to the CFA and necessitates further judicial consideration and guidance. In analyzing these issues, this Court should conclude that Shaw, the more recent and better reasoned opinion which relies upon and returns to the Lemelledo approach, should govern.

LEGAL ARGUMENT

I. This Court Should Apply Shaw and Hold that Defendants Are Not Exempt from Liability Under the CFA.

The decisions rendered in Shaw and Plemmons are undeniably conflicting. Unless or until the Supreme Court holds otherwise, this Court is free to decide which case to follow. "[T]he decisions of one panel of the Appellate Division are not binding upon the remaining panels . . . . if [the Appellate panel] disagree[s] with [another Appellate decision], [the panel] [is] not required to follow it." David v. Gov't Emps. Ins. Co., 360 N.J. Super. 127, 142 (App. Div. 2003). See also Pressler & Verniero, Current N.J. Court Rules, cmt. 3.3 on R. 1:36-3 (2024) (noting that Appellate panels "are not 'bound' to rulings of each other . . . .").

A. Shaw is the More Recent, Better Reasoned Opinion.

Despite Defendants' arguments to the contrary, this Court should follow Shaw and find that insurance producers are not shielded from liability under the CFA. Shaw should be followed over Plemmons because it is a more recent,

better reasoned opinion. In fact, one member of this Court who sat on both the Plemmons and the Shaw panels has already concluded as much.

In analyzing applicable exemptions to the CFA, and with the benefit of the Attorney General's "special role" and insight as the enforcer of the CFA[1], the Shaw Court held that "there is nothing in the text or the purpose of the CFA that supports an exemption for fraudulent or unconscionable activities of semi-professionals such as home inspectors." 460 N.J. Super. at 609 (emphasis added). The Court further reasoned that "the learned professional doctrine, as interpreted, threatens to become the exception that swallows the rule, in contravention of the canon of statutory interpretation that requires that exceptions to a remedial statute are to be narrowly construed" and that "to the extent the Supreme 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 . . . .'" Id. at 618-19.

Because Shaw was decided thirteen years after Plemmons, the Shaw Court was in the unique position to review the practical impact of its prior decision.

[1] As the Shaw Court appropriately recognized, the Attorney General's interpretation of the CFA is "entitled to a degree of deference, in recognition of the Attorney General's special role as the sole legal adviser to most agencies of State Government." 460 N.J. Super. at 617 (quoting Quarto v. Adams, 35 N.J. Super. 502, 513 (App. Div. 2007).

With both the benefit of hindsight and the insights provided by the Attorney General, the Shaw Court stated its intention to depart from Plemmons: "[t]o the extent our prior decisions, including [Plemmons] 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]." Id. at 599 (emphasis added).

The Shaw Court issued its opinion in 2019, and since that time, there have been no New Jersey[2] cases—published or unpublished—that diverge from its holding. Even Judge Sabatino, who sat on both the Plemmons and Shaw panels, plainly stated in his concurring opinion in Shaw: "I recognize that thirteen years ago I served on the appellate panel in [Plemmons], which held that an insurance broker is a regulated 'semi-professional' who is excluded from liability under the CFA . . . . With all due respect, I've changed my mind." Id. at 628 (Sabatino, J., concurring).

[2] A recent search has revealed one unpublished, non-binding New Jersey District Court case, McCray v. Sanders, No. 20-12370, 2022 U.S. Dist. LEXIS 11307 (D.N.J. Jan. 21, 2022), that applied the Plemmons holding after Shaw was published. This case was not mentioned in any of Defendants' briefing. In the interest of full transparency, this case is being disclosed to the Court, even though it is an unpublished, non-binding District Court case of no precedential value. In fact, it appears the District Court was not made aware of Shaw since Shaw was not even cited in that opinion.

While Defendants cite pre-Shaw cases to support their position that Plemmons' semi-professional CFA exceptions properly include insurance producers, they fail to cite to any post-Shaw cases supporting that position. This is because the *only* New Jersey case analyzing the learned professional exemptions to the CFA in existence post-2019 is Williams-Hopkins v. Medwell, LLC, where this Court elected to follow Shaw. No.A-0273-21, 2024 N.J. Super. Unpub. LEXIS 569 (2024). Defendants endeavor to minimize the significance of the Williams-Hopkins holding by attempting to distinguish its relevance and highlighting its unpublished status. Despite Defendants' efforts to downplay Williams-Hopkins, the holding is undeniably significant in that it recognizes and accepts Shaw's narrowing of CFA exceptions to liability to historically learned professionals.

The logic and reasoning in Shaw is sound and should continue to be followed as it was in Williams-Hopkins because it properly limits the judicially created exemption to the CFA to historically recognized learned professionals.

II. Under Shaw, Defendants are not Learned Professionals Entitled to Immunity From the CFA.

The Shaw Court reasoned that the learned professional doctrine "should be narrowly construed to include only those professions who have historically been recognized as 'learned' based on the requirements of extensive learning or erudition." 460 N.J. Super. at 618-19 (emphasis added). The categories of

professions historically recognized as learned are limited to legal, medical, and theological. Id. at 611 (citing Plaza Bottle Shop, Inc. v. Al Torstrick Ins. Agency, 712 S.W.2d 349, 351 (Ky. Ct. App. 1986)).

Defendants point to the Affidavit of Merit Statute, N.J.S.A. 2A:53A-26 to -29, the credentials of Plaintiff's proposed expert witness, the licensing and educational standards for insurance producers, and the fact that Plaintiff has referred to Defendants as "professionals" or "experts" as evidence that insurance producers qualify for exemption from liability under the CFA. In their various arguments regarding the classification of insurance producers, Defendants emphasize the skills, licensing, and educational requirements common to insurance producers, as well as the terms used to describe Defendants, seemingly to imply that insurance producers belong in the "learned professional category." However, none of these factors change the fact that insurance producers are not historically "learned professionals" as defined by Shaw.

The requirements of the Affidavit of Merit Statute are not instructive as to whether a member of a certain profession is shielded from liability under the CFA. That Plaintiff complied with the Affidavit of Merit Statute in providing an Affidavit of Merit in connection with this case is entirely irrelevant to an analysis of whether or not insurance producers are learned professionals entitled to exemption from liability under the CFA, a wholly different statute.

Equally irrelevant is any assertion that insurance producers, by virtue of holding certain licenses or having certain educational backgrounds, are entitled to exemption from liability under the CFA. The existence of a licensing framework alone is insufficient to place insurance producers into the category of "learned professionals" as described by Shaw. Insurance producers are essentially salespeople, and, while not diminishing the profession, there are *no educational prerequisites* to obtain such a position. Moreover, any licensing requirements of insurance producers are more analogous to those required to become a licensed driver than they are to the requirements that learned professionals such as doctors and lawyers must satisfy. For example, drivers and insurance producers both must take a written test and must not violate the rules of the road or the rules of insurance sales. Of course, to obtain a driver's license one must also pass a driving test. It appears no such actual field test is required to obtain an insurance producers license. Defendants are asking this Court to place insurance producers in the same category as doctors and lawyers, despite the fact that the educational and licensing requirements simply do not align.

Finally, Defendants' conflation of terms like "professional" and "expert"—general terms with no legal weight—with the term of art "learned professional"—which has an unambiguous legal definition that insurance

producers like Defendants do not meet—is creative and desperate at the same time and is ultimately wholly unpersuasive and lacks any legal support. Shaw was clear that the learned professional exemption should only apply to those occupations which were historically considered "learned," and insurance producers—who may be considered "professionals" in the general sense of the word—do not fall into any of the historically recognized categories.

III. Laver's Arguments on Failure to State a Claim Are Improperly Raised and Should Not be Considered.

Laver's final argument that Plaintiff failed to state a claim is not properly before this Court and therefore should not be considered. This Court granted leave to appeal on the narrow issue of the trial court's orders dismissing Plaintiff's CFA claims (Count VII) and no cross-appeal was filed on any other issue. Even if this Court considers Laver's argument that Plaintiff failed to state a claim under the CFA, the allegations alleged in Plaintiff's Complaint are more than enough to survive a motion to dismiss on that basis.

CONCLUSION

For the reasons set forth more fully above and in Plaintiff's Appellate brief, this Court should reverse the trial court's interlocutory orders dismissing Plaintiff's CFA claims (Count VII). This Court should follow Shaw and find

that insurance producers, in their capacity as licensed semi-professionals, are not immune from liability under the CFA.

Respectfully submitted,
BROWN & CONNERY, LLP

Dated: November 26, 2024

s/ *Stephen J. DeFeo*
Stephen J. DeFeo

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

JAMES G. LOWE, M.D., Plaintiff-Appellant, v. BERNARD AUDET, RICHARD LAVER, AND THE CREATIVE FINANCIAL GROUP, LTD., Defendants-Respondents.	DOCKET NO.: A-4093-23 On appeal from the Superior Court of New Jersey, Camden County Docket No.: CAM-L-633-24 Sat Below: Hon. Steven J. Polansky, P.J.S.C. Dated Submitted: November 27, 2024

AMICUS CURIAE BRIEF ON BEHALF OF NEW JERSEY ASSOCIATION FOR JUSTICE

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PREFATORY STATEMENT

This amicus brief is respectfully submitted on behalf of New Jersey Association of Justice (hereinafter "NJAJ"), a statewide professional organization of over 2000 attorneys in private practice and public service as well as paralegals, law clerks and law students.

The objectives of NJAJ are to, *inter alia*, uphold and defend the Constitution of the United States of America and the State of New Jersey; to advance the science of jurisprudence; to educate and train in all fields and phases of advocacy; to promote the administration of justice for the public good.

The members of NJAJ have appeared as amicus curiae in many cases in support of the public interest including, the proper administration of the legal system. NJAJ has a special interest in this issue because it involves the construction of the appropriate scope of the CFA, which is one of the broadest consumer protection statutes in the United States. The decision of this Court may impact the rights of numerous individuals in the State of New Jersey and elsewhere. Accordingly, NJAJ's members and their clients will be directly impacted by the outcome of this case.

The trial court erred by ruling that the Defendants were entitled to the learned professional exception under the CFA based upon Plemmons v. Blue Chip Ins. Serv. Inc., 387 N.J. Super. 55 (App. Div. 2006) erroneously finding that insurance

producers are semi-professionals. The trial court refused to apply Shaw v. Shand, 460 N.J. Super. 592 (App. Div. 2019), which limited the learned professional exemption to doctors and lawyers and those who qualify as learned based upon "extensive training and erudition."

The trial judge concluded that it was bound by Plemmons because that case was never explicitly overruled by the Appellate Division or New Jersey Supreme Court. However, significant, recent Appellate and Supreme Court decisions support expanding the scope of the CFA, not contracting it further. This is an opportunity for this Court to resolve this issue once and for all.

I. THE DECISION BELOW SHOULD BE REVERSED

The New Jersey Supreme Court stated in All the Way Towing, LLC v. Bucks Cnty. Int'l, Inc., 236 N.J. 431, 442 (2019), that the CFA provides broad protections and must be liberally construed:

> The CFA's history has been "one of constant expansion of consumer protection." Gennari v. Weichert Co. Realtors, 148 N.J. 582, 604, 691 A.2d 350 (1997). The CFA's reach presently protects the public even when a merchant acts in good faith. Cox, 138 N.J. at 16, 647 A.2d 454. In 1971, the Attorney General's powers, which already included the power to prosecute and to regulate fraudulent and unlawful activities under the CFA, were broadened; the prohibition against unconscionable commercial practices was added; and the Act began to allow for private causes of action. Cox, 138 N.J. at 15, 647 A.2d 454.

> In light of the Act's original remedial purpose and its subsequent and continuous expansion by the Legislature, courts have consistently recognized that the CFA must be liberally construed. Furst v. Einstein Moomjy, Inc., 182 N.J. 1 at 11-12 (2004), 860 A.2d 435 (citing Cox, 138 N.J. at 15-16, 647 A.2d 454) ("The [CFA] is remedial legislation that we construe liberally to accomplish its broad purpose of safeguarding the public.").

The opinion of the trial court below does just the opposite.

The Appellate Division properly granted leave to appeal as the decision below undercuts the broad protection of the New Jersey Consumer Fraud Act, N.J.S.A. 56: 8-1 and creates for the first time in New Jersey a non-statutory exemption for insurance agents and brokers and other semi-professionals. Without legislative mandate, the trial court has now insulated these semi-professionals from the reach of the CFA and has bestowed great harm upon the public.

The CFA has been liberally construed in favor or providing broad protections to our citizens. Cox v. Sears Roebuck & Co., 138 N.J. 2 (1994). The CFA's remedial goal is to "establish a broad business ethic promoting a standard of conduct that contemplates good faith, honesty in fact and observance of fair dealing." Cox at 18. Any exemption must be narrowly construed, giving due regard to the plain meaning of the language and the legislative intent of the CFA which is "remedial and humanitarian" and anything that undercuts this lofty purpose by granting immunity must be narrowly applied. See, e.g. Armament Co. v. Hyland, 70 N.J. 550, 559 (1976).

The decision below exempting semi-professionals who engaged in fraud and other deceptive business practices negates the very purpose of the CFA and must be vacated.

II. INSURANCE PROFESSIONALS ARE NOT LEARNED PROFESSIONALS AND ARE NOT EXEMPT FROM THE CFA

Several decades ago, our Supreme Court addressed whether a doctor who used advertisements which contained misrepresentation could be sued under the CFA. See Macedo v. Dello Russo, 178 N.J. 340 (2004). In holding that doctors and other learned professionals were exempt if the misrepresentations involved the rendering of professional services, the Court reasoned that these learned professionals were regulated in their permitted advertising and speech and that the legislature had failed to amend the Act, despite knowing that these were part of the public discourse.

The first step in the analysis of whether the insurance semi-professionals are exempt from the Act is the determination of whether they are deemed to be learned professional or semi-professionals. The test set forth in Shaw, 460 N.J. Super. at 619 is quite simple: does the professional have "extensive learning or erudition?" The answer is a flat no. The insurance professional does not require advanced degree, or even a high school education. The only requirements are to pass an exam and pay the fee, hardly meeting the high standard under the law to qualify as a learned professional.

Second, in order to apply the exemption, there must be a "direct and unavoidable conflict" between application of the CFA and application of other regulatory schemes. Lemelledo v. Beneficial Mgmt. Corp., 150 N.J. 255, 270 (1997). No such conflict exists.

Third, in Lemelledo the New Jersey Supreme Court has already ruled that the CFA covers "the sale of insurance policies as goods and services that are marketed to consumers." 150 N.J. at 265. In the nearly three decades since Lemelledo was decided the legislature has chosen to leave intact this decision and not grant an exemption to insurance professionals.

Finally, if there is any question as the applicability of the CFA to insurance professionals, we only need to look at the position taken by the Attorney General who was invited by the Appellate Division in Shaw to weigh in on whether there should be a judicially created exemption for semi-professionals. There, the court gave substantial deference to the Attorney General's position and agreed that semi-professionals were not exempt under the CFA. Shaw, 460 N.J. Super. at 618-619. ("Home inspectors and other licensed semi-professionals are not learned professionals simply because they are otherwise regulated"). Quite plainly, if the legislature intended to exempt semi-professional it would have done so in the many decades that this issue has been before the courts.

The more recent case law has reiterated that semi-professionals like the insurance salesman in the present case would not be except under the CFA. Earlier this year, in Williams-Hopkins v. Medwell LLC, No A-0273-21, 2024 WL 1476821 at *16 (April 5, 2024), the Appellate Division made clear that its reasoning in Plemmons would not apply to semi-professionals:

> The types of professionals protected by the exception include doctors, id. at 346, and attorneys, Vort v. Hollander, 257 N.J. Super. 56, 62 (App. Div. 1992). In Shaw v. Shand, 460 N.J. Super. 592 (App. Div. 2019), we concluded "'semi-professionals' who are regulated by a separate regulatory scheme," such as home inspectors, were not covered by the exception. Id. at 599. We explained the exception "must be narrowly construed to exempt CFA liability only as to those professionals who have historically been recognized as 'learned' based on the requirement of extensive learning or erudition." Ibid. To the extent prior decisions relied upon regulation of semi-professionals to hold otherwise, as in Plemmons v. Blue Chip Insurance Services, Inc., 387 N.J. Super. 551, 564 (App. Div. 2006) and Atlantic Ambulance Corporation v. Cullum, 451 N.J. Super. 247 at 257-58 (App. Div. 2017), we found such rationale "inconsistent with the Supreme Court's decision in Lemelledo v. Beneficial Management Corp. of America, 150 N.J. 255 (1997)." Shaw, 460 N.J. Super. at 599, 616 . . . In other words, semi-professionals are not encompassed in the learned professional exemption simply because they are subject to regulation.

This court should again make clear that the CFA does not exempt semi-professionals, including insurance salesmen, agents, and brokers.

CONCLUSION

Hence, this Court should reverse the decision below and hold that the Defendants may not avoid liability under the CFA predicated upon a non-existent, non-statutory, semi-professional exemption.

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Dated: November 27, 2024

By: ***Bruce H. Nagel***
BRUCE H. NAGEL