

# New Jersey Law Journal

VOL. CLXXXVII—NO.11—INDEX 1007

MARCH 12, 2007

ESTABLISHED 1878

IN PRACTICE

## INSURANCE LAW

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### Insurance Brokers Shielded from CFA Liability

Decision may leave policyholders remediless for a broker's false or misleading marketing

A recent Appellate Division decision significantly diminishes protection for New Jersey policyholders who fall prey to the sharp practices in which some insurance brokers engage to obtain a competitive edge. *Plemmons v. Blue Chip Insurance Services*, 387 N.J. Super. 551 (App. Div. 2006). The court held that insurance brokers are not subject to liability under the Consumer Fraud Act because the CFA does not apply to services rendered by “semi-professionals” who are subject to “comprehensive regulation.” *Plemmons* is fundamentally flawed because it rests on the misinterpretation of a Supreme Court decision and the incorrect assumption that all “brokerage services” are regulated by the New Jersey Department of Banking and Insurance.

The *Plemmons* court failed to recognize that insurance brokers can, and routinely do, act in dual capacities — i.e., functioning as a “professional” to place a policy for

a policyholder and functioning as a salesperson that convinces customers to use their brokerage services over those of a competitor. Increasingly, insurance brokers are making broad representations regarding the scope of their services to compete in the marketplace, and then fail to deliver on those representations. Importantly, the unfulfilled promises do not always result in a complete loss of coverage. Instead, policyholders may obtain less coverage than they would otherwise be entitled to or may be placed in a weaker bargaining position on a disputed claim because of the broker’s “overselling.”

Moreover, unlike other professionals, such as attorneys and physicians, insurance brokers are not subject to any — let alone rigorous — regulation with respect to these types of sales or advertising activities. Thus, unless the holding in *Plemmons* is revisited or overruled, New Jersey policyholders may be left remediless for an insurance broker’s inappropriate marketing tactics, and such unseemly broker misconduct will evade review.

The facts of *Plemmons* are unremarkable. A homeowner purchased an insurance policy for property he intended to convert from residential to commercial use.

After the insured property was damaged by a storm and alleged contractor negligence, the homeowner made a claim under the policy. Unbeknownst to the homeowner, however, he had no coverage because the policy had lapsed when the closing date of the property was delayed and the residential policy did not cover the new commercial use of the property. The homeowner sued for, inter alia, recovery under the CFA on the theory of negligent performance of brokerage services. The Appellate Division dismissed the CFA claim because, it held, insurance brokers are “semi-professionals” who are subject to a regulatory scheme in connection with the rendition of “brokerage services” such that they should be immune from CFA liability.

In shielding the insurance broker from CFA liability, the *Plemmons* court heavily relied on the Supreme Court’s decision in *Macedo v. Dello Russo*, 178 N.J. 340 (2004), which held that “professionals” are not subject to liability under the CFA for the rendition of “professional services” that are governed by “comprehensive regulations.” *Macedo* involved a situation where dissatisfied patients sued their physician for alleged misrepresentations in an advertisement for lasik eye surgery.

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According to plaintiffs, the advertisement suggested that patients would be treated by properly licensed physicians when in fact the physician who treated plaintiffs was not fully licensed. Although the patients ultimately did not suffer any adverse consequences from their eye surgeries, they sought recovery under the CFA, arguing that allowing an unlicensed physician to treat them constituted false advertising.

The Supreme Court held that the CFA did not apply because the plain language of the statute did not include "professionals" or their advertising activities. The *Macedo* court reasoned that if the Legislature intended to include physicians, or other professionals, within the scope of the CFA, then it would have specifically amended the statute to include the advertising activities of that class of individuals. Because the CFA had not been amended to include professionals, the *Macedo* court held:

advertisements by learned professionals in respect of the rendering of professional services are insulated from the CFA but subject to comprehensive regulation by relevant regulatory bodies and to any common law remedies that otherwise may apply. (emphasis added).

In so holding, the Supreme Court glossed over a line of prior Appellate Division and District Court decisions that evaluated whether a "professional" may function in a nonprofessional capacity such that he may be subject to CFA liability notwithstanding the existence of a regulatory scheme that governs other aspects of the professional's activities. These cases draw a distinction between a claim regarding the quality of professional services rendered, where the CFA would not apply, and a claim involving a professional's efforts to induce a consumer to enter into a consumer transaction, where the CFA would apply.

For example, in *Blatterfein v. Larken*, 323 N.J. Super. 167 (1999), homeowners asserted a CFA claim against an architect in connection with their purchase of newly constructed homes. Notwithstanding the architect's "professional" status, the Appellate Division held that the architect was subject to CFA liability because plaintiffs alleged that the architect's false representations regarding the quality and fitness of certain building materials induced them into purchasing the homes.

A similar conclusion was reached in *Waterloov Gutter Protection Systems v. Absolute Gutter Protection*, 64 F. Supp. 2d 398 (D.N.J. 1999), where the New Jersey District Court recognized a distinction between blanket CFA liability and CFA liability based upon the type of transaction at issue. In *Waterloov*, two rain gutter manufacturers sued each other for, inter alia, violations of the CFA. The basis of the claim was alleged misrepresentations made by an attorney regarding investments in a start-up company. While the District Court ultimately held the CFA inapplicable to such investments (not qualifying as "merchandise" under the CFA), the *Waterloov* court endorsed the *Blatterfein* rationale of evaluating the underlying transaction to determine CFA applicability. The *Waterloov* court emphasized that professionals are not "per se excluded" or "per se covered" by the CFA; instead, a more nuanced analysis must take place.

Ultimately, *Macedo* embraced the concept that a professional may function in dual capacities but held that a doctor's advertisement of his "professional services" is immune from CFA liability because he is subject to comprehensive regulation of his advertising activities by other regulatory bodies. Indeed, the *Macedo* Court specifically noted that if a "professional" engages in "merchandising" activities outside his professional capacity, then "he would be subject, as all merchandisers are, to the CFA."

The bright line holding of *Plemmons* that insurance brokers, as

semi-professionals, are immune from CFA liability in connection with any brokerage service they provide is, therefore, a misapplication of *Macedo* because: 1) *Macedo* recognized that a "capacity" analysis must be conducted when CFA liability is evaluated; and 2) the existence of "comprehensive regulation" is critical to that analysis. To justify its holding, the Appellate Division explained that insurance brokers, like physicians, are subject to a regulatory scheme that governs their conduct. The court implied that subjecting insurance brokers to CFA liability would result in a conflict with the Insurer Producer Standards of Conduct promulgated by the Department of Banking and Insurance, N.J.A.C. 11:17A-1.1 to 17D-2.8.

The *Plemmons* court, however, does not discuss the actual substance of those regulations. In fact, the Standards of Conduct do not address false advertising or misleading marketing by brokers. Rather, the "unfair trade practices" proscribed by the regulations, as cited in *Plemmons*, relate to "tie-ins" and coercion involving financial institutions, unfair discrimination towards a policyholder, and rebates and inducements. The only regulation that arguably governs misleading representations concerns "twisting," which apparently focuses on regulating premature termination of a policy, as opposed to regulating "truth in advertising" and fair marketing activities in the acquisition of policies. Further, the Standards of Conduct do not include any penalty provisions that provide redress for a consumer who has been misled by an insurance broker's false advertising or misleading marketing activities.

Because the Standards of Conduct do not include "comprehensive regulation" of broker misconduct and provide no remedy for wronged consumers, a CFA cause of action should be available to policyholders for broker advertising and marketing misconduct pursuant to the Supreme Court's decision in *Lemelledo v. Beneficial*

*Management Corporation*, 150 N.J. 255 (1997). In *Lemelledo*, the Supreme Court held that a commercial lender who sold consumer credit and insurance “as goods and services that are marketed to consumers” was subject to CFA liability, even though additional regulatory schemes governing financial institutions and lenders existed.

The *Plemmons* court attempted to distinguish *Lemelledo* on the basis that *Lemelledo* involved a claim against a commercial lender and not a party who could be characterized as a “professional” or “semi-professional.” The presumption being that professionals are already highly regulated and the CFA liability scheme will conflict

with such regulations. That may be true for professionals such as attorneys and physicians who are held accountable for false advertising under comprehensive regulatory schemes. As demonstrated above, however, the Standards of Conduct do not regulate insurance brokers’ advertising or marketing activities in an equivalent manner.

The *Plemmons* court may have been well-intentioned, but its broad holding left a vacuum of broker accountability for false and misleading marketing tactics. As such, unless the holding in *Plemmons* is revisited or overruled, New Jersey policyholders may, in essence, be remediless for an insurance broker’s false, misleading, and/or

inappropriate marketing tactics.

The Legislature must act to resolve the void of accountability left by *Plemmons*. The Legislature can modify and clarify the Insurance Producer Standards of Conduct to specifically prohibit false advertising and provide a remedy for policyholders equivalent to the CFA’s penalty scheme, such as treble damages and fees. Alternatively, it can amend the CFA to specifically include false advertising and marketing tactics by insurance brokers: “The history of the Act [CFA] has been one of constant expansion of consumer protection.” *Gennari v. Weichert Co. Realtors*, 148 N.J. 582, 604 (1997). ■