

**To: New Jersey Law Revision Commission**  
**From: Eileen Funnell and Joseph Pistritto**  
**Re: Consumer Fraud Act - Learned Professionals**  
**Date: November 5, 2018**

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## MEMORANDUM

### Executive Summary

In *Atlantic Ambulance Corporation v. Cullum*, the Appellate Division considered whether denial of class certification for alleged violations of the Consumer Fraud Act (“CFA”) was proper.<sup>1</sup> Defendants refused to pay Atlantic Ambulance for ambulatory services because they believed their bills were “unconscionably high.”<sup>2</sup> They brought a claim under the CFA and sought class certification.<sup>3</sup> The Appellate Division held that although denial of class certification was proper, it was not because Defendants failed to meet the requirements for a class.<sup>4</sup> Instead, the underlying claim of consumer fraud was inapplicable to ambulance service providers as they are within the “learned professional” exception to the CFA.<sup>5</sup>

### Statute

#### **N.J.S. 56:8-2**

The act, use or employment by any person of any unconscionable commercial practice . . . is declared to be an unlawful practice....<sup>6</sup>

### Background

Atlantic Ambulance Corporation (“Atlantic”) filed complaints against defendants Cullum and Hitti (“Defendants”), seeking payment for ambulance services.<sup>7</sup> Defendants counterclaimed alleging Atlantic overbilled for ambulance services in violation of the Consumer Fraud Act (N.J.S. 56:8–1 to –20).<sup>8</sup> They sought class certification of their CFA claims but the trial court denied the motion for failure to meet the commonality, typicality, and representativeness requirements.<sup>9</sup>

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<sup>1</sup> *Atlantic Ambulance Corporation v. Cullum*, 451 N.J. Super. 247, 254 (App. Div. 2017).

<sup>2</sup> *Id.* at 252.

<sup>3</sup> *Id.* at 253.

<sup>4</sup> *Id.* at 255.

<sup>5</sup> *Atlantic Ambulance Corporation v. Cullum*, 451 N.J. Super. 247, 255 (App. Div. 2017).

<sup>6</sup> N.J.S.A. 56:8-2.

<sup>7</sup> *Atlantic Ambulance Corporation v. Cullum*, 451 N.J. Super. at 251 (App. Div. 2017).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 254.

The Appellate Division affirmed the denial of class certification, but for reasons different from those upon which the trial court relied.<sup>10</sup> Instead, the Appellate Division agreed with Atlantic’s argument that the CFA was inapplicable to ambulance service providers under the “learned professional” exception to the CFA.<sup>11</sup> The Court explained that the “learned professional” exception was first recognized by the New Jersey Supreme Court in *Macedo v. Dello Russo*.<sup>12</sup> There, the Court noted that “our jurisprudence continues to identify learned professionals as beyond the reach of the [CFA] so long as they are operating in their professional capacities.”<sup>13</sup> To highlight its reasoning, the Court restated the rationale it offered in the case of *Neveroski v. Blair* where, in discussing why real estate brokers were exempt from the CFA, the Court stated that those in a learned profession are unlike other professions that provide goods or services given how they are “subject to testing, regulations and penalties through other legislative provisions.”<sup>14</sup> The Court in *Neveroski* concluded that learned professions are not engaged in ordinary commercial activities, and are therefore not subject to the CFA.<sup>15</sup>

In the fourteen years since *Macedo*, the Court observed that the Legislature has not amended the CFA to include learned professionals nor has it objected to courts continuing to exempt these occupations from the CFA.<sup>16</sup> The Appellate Division identified a number of professions it already has exempted such as nursing homes, insurance brokers, hospitals, and lawyers, as distinguished from others that remain subject to the CFA, such as educational and vocational training programs.<sup>17</sup> After reviewing the relevant statutory and regulatory provisions, the Court concluded ambulance service providers are excluded from liability under the CFA as “learned professionals.”<sup>18</sup> As long as the services rendered were consistent with their professional license, ambulance service providers are exempt because they are regulated by the

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<sup>10</sup> *Id.* at 255.

<sup>11</sup> *Id.* at 255.

<sup>12</sup> *Atlantic Ambulance Corporation v. Cullum*, 451 N.J. Super. 247, 255 (App. Div. 2017).

<sup>13</sup> *Id.* at 256 (quoting *Macedo v. Dello Russo*, 178 N.J. 340, 345-6 (2004)).

<sup>14</sup> *Id.* at 257.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 255.

<sup>17</sup> *Atlantic Ambulance Corporation v. Cullum*, 451 N.J. Super. 247, 255-256 (App. Div. 2017), wherein the case states that:

our jurisprudence continues to exempt professionals from the CFA. *See Manahawkin Convalescent v. O’Neill*, 426 N.J. Super. 143, 155–56... (App. Div. 2012) (nursing homes insulated from CFA), *aff’d*, 217 N.J. 99... (2014); *Plemmons v. Blue Chip Ins. Servs., Inc.*, 387 N.J. Super. 551, 556... (App. Div. 2006) (insurance brokers, as semi-professionals, insulated from CFA); *Hampton Hosp. v. Bresan*, 288 N.J. Super. 372, 383... (App. Div.) (hospitals insulated from CFA), *certif. denied*, 144 N.J. 588... (1996); *Vort v. Hollander*, 257 N.J. Super. 56, 62... (App. Div.) (attorneys insulated from CFA), *certif. denied*, 130 N.J. 599... (1992). *But see Suarez v. E. Int’l Coll.*, 428 N.J. Super. 10, 39... (App. Div. 2012) (educational and vocational training program governed by the CFA because the program was not overseen by any regulatory body and there were no regulations governing the school that would present “a patent and sharp” conflict with the CFA), *certif. denied*, 213 N.J. 57... (2013).

<sup>18</sup> *Id.* at 257.

Department of Health.<sup>19</sup> In light of the foregoing, denial of class certification on the issue of consumer fraud was proper.<sup>20</sup>

### **Conclusion**

Staff seeks authorization to conduct additional research and outreach regarding this issue in order to determine whether codifying the learned professionals exception by modifying N.J.S.A. 56:8-2 would aid in interpreting the statute and potentially obviate the need for additional litigation regarding the issue addressed in *Atlantic Ambulance Corporation v. Cullum*.

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<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 259.