



NEW JERSEY LAW REVISION COMMISSION

Draft Tentative Report Addressing Non-admitted Insurers Act – Jurisdiction Over Violations (N.J.S. 17:32-20)

October 10, 2023

The New Jersey Law Revision Commission is required to “[c]onduct a continuous examination of the general and permanent statutory law of this State and the judicial decisions construing it” and to propose to the Legislature revisions to the statutes to “remedy defects, reconcile conflicting provisions, clarify confusing language and eliminate redundant provisions.” *N.J.S. 1:12A-8*.

This Report is distributed to advise interested persons of the Commission's tentative recommendations and to notify them of the opportunity to submit comments. Comments should be received by the Commission no later than **December 08, 2023**.

The Commission will consider these comments before making its final recommendations to the Legislature. The Commission often substantially revises tentative recommendations as a result of the comments it receives. If you approve of the Report, please inform the Commission so that your approval can be considered along with other comments. Please send comments concerning this Report or direct any related inquiries, to:

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Project Summary¹

The Non-Admitted Insurers Act² (Act) was created in 1968 to protect “the health and welfare of persons resident in New Jersey by subjecting nonadmitted insurers . . . to the laws which govern all foreign insurers which do business in the State of New Jersey.”³ The Act expressly authorizes the New Jersey Department of Banking and Insurance Commissioner (DOBI Commissioner) to “regulate the activities of non-admitted foreign insurance companies.”⁴

Section 20 of the Act (N.J.S. 17:32-20), however, states that “the Attorney General, upon the request of the commissioner, shall institute a civil action in the Superior Court” when it appears that an insurer has violated the provisions of the Act.⁵

In *Applied Underwriters Captive Risk Assurance Co., Inc. v. New Jersey Department of Banking & Insurance*, the Court examined N.J.S. 17:32-20 to determine whether the DOBI Commissioner is *required* to request judicial relief from the Attorney General when a provision of the Act is violated, or if the DOBI Commissioner may choose to pursue administrative remedies.⁶

The Commission recommends a statutory amendment intended to clarify the authority of the DOBI Commissioner to choose between initiating an administrative action or requesting that the Attorney General file a civil action in the Superior Court in cases where an insurer or one of its agents is alleged to have violated a provision of the Act.

Statute Considered

N.J.S. 17:32-20, entitled “Violations; institution of relief; process” states that:

Whenever it shall appear to the commissioner that any insurer, or any employee, agent, promotional medium, or other representative thereof, has violated, is violating, or is about to violate the provisions of this act, the Attorney General, upon the request of the commissioner, shall institute a civil action in the Superior Court for injunctive relief and for such other relief as may be appropriate under the circumstances. Process in such action may be served in accordance with the provisions of chapter 330 of the laws of 1952 (C. 17:51-1 et seq.) or as provided in the laws of this State and the rules of the Superior Court. Such action may proceed in a summary manner or otherwise. Nothing contained in this section shall limit or abridge the right to serve any process, notice or demand upon any person or insurer in any other manner now or hereafter deemed lawful.⁷

¹ Preliminary work on this matter was conducted by Kyle Ryan, Legislative Law Clerk, during his tenure with the N.J. Law Revision Comm’n, Summer of 2023. *Minutes*, N.J. Law Revision Comm’n Meeting, July 07, 2023, ‘Memorandum Regarding Non-Admitted Insurers Act – Jurisdiction Over Violations in N.J.S. 17:32-20’ [hereinafter *Minutes*] (July 07, 2023).

² N.J. STAT. ANN. §§ 17:32-1 to -22 (West 2023).

³ N.J. STAT. ANN. § 17:32-16 (West 2023).

⁴ *Applied Underwriters Captive Risk Assurance Company, Inc. v. NJ Dep’t of Banking & Ins.*, 472 N.J. Super. 26, 39 (App. Div.), *leave to appeal denied*, 251 N.J. 213 (2022).

⁵ N.J. STAT. ANN. § 17:32-20 (West 2023).

⁶ *Applied Underwriters*, 472 N.J. Super. at 30.

⁷ N.J. STAT. ANN. § 17:32-20.

Background

In *Applied Underwriters*, Appellants were four affiliated companies participating in insurance-related activities in New Jersey: Applied Underwriters, Inc. (Applied); Applied Underwriters Captive Risk Assurance Company, Inc. (AUCRA); Applied Risk Services, Inc. (ARS); and Continental Indemnity Company (Continental).⁸ Neither Applied nor AUCRA was an authorized or admitted insurer in New Jersey.⁹ However, ARS was licensed as an insurance producer, and Continental was an admitted insurer in the State.¹⁰ Applied was the parent company of the three other affiliated companies.¹¹

Sometime after 2012, the Department of Banking and Insurance (DOBI) began to receive complaints from New Jersey policyholders regarding elevated premium amounts associated with the programs offered by the appellants.¹² Applied sold a unique type of workers' compensation insurance that involved fluctuating, rather than fixed, premiums.¹³ The premiums could vary throughout the policy period, contingent upon the "actual cost of any claims filed with the insured."¹⁴ In 2017, a DOBI representative met with Applied as part of an investigation into the activities of the appellants.¹⁵

Following the investigation, DOBI issued a letter demanding that "Applied 'make whole' all New Jersey businesses that had been harmed by its programs."¹⁶ If Applied failed to take such measures, DOBI indicated that it "would seek 'formal enforcement actions' against it."¹⁷ Appellants filed a petition with DOBI seeking transmission of the dispute to the Office of Administrative Law ("OAL"); the petition was denied.¹⁸

Subsequently, the appellants filed a complaint in the Law Division, contending that DOBI did not have jurisdiction over them. The appellants sought declaratory and injunctive relief designed to compel the DOBI Commissioner to address the matter in a judicial forum.¹⁹ In response, the DOBI Commissioner moved to dismiss the complaint, "assert[ing] that jurisdiction over the dispute was properly before the Commissioner as an administrative case."²⁰ The trial court then transferred the matter to the Appellate Division to determine the appropriate jurisdiction of for the matter.²¹

⁸ *Applied Underwriters*, 472 N.J. Super. at 31.

⁹ *Id.* at 32-33.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* at 33.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at 33-34.

¹⁶ *Id.* at 34.

¹⁷ *Id.*

¹⁸ *Id.* at 34-35 (explaining that although the application was denied, the DOBI Commissioner filed an order to show cause, and the matter was transferred to an assigned Administrative Law Judge, who eventually signed "an order of inactivity, directing that the contested case in the OAL remain inactive to await the Superior Court's decision").

¹⁹ *Id.* at 35-36.

²⁰ *Applied Underwriters*, 472 N.J. Super. at 36.

²¹ *Id.*

Analysis

The sole issue on appeal was a jurisdictional issue, specifically whether the DOBI Commissioner had the authority to initiate an administrative action against non-admitted insurers for their alleged involvement in improper insurance-related practices within the state.²² The central inquiry was whether the DOBI Commissioner was obligated to seek the involvement of the Attorney General to file a lawsuit in the Superior Court instead.²³ To answer this question, the *Applied Underwriters* Court examined the legislative history of the Act, the statutory language, and the public policies underlying the Act.

Legislative History and Intent

The Sponsor’s Statement accompanying the bill that established the Act explicitly stated that it was designed to “bring within the purview of the [DOBI] certain previously non[-]admitted insurance companies.”²⁴ The Act was specifically enacted to provide DOBI with jurisdiction over activities of unauthorized insurers.²⁵ The Court concluded that the legislative history “does not signify the Commissioner has a ‘lack of jurisdiction over [non-admitted] companies.’”²⁶

The Court cited N.J.S. 17:32-16, which states that the Act’s purpose as “remedial legislation” is to protect “the health and welfare” of the people of the State.²⁷ It reasoned that the DOBI Commissioner “should have wide discretion to apply her Department’s expertise in the most expeditious manner,” including by choosing the forum in which to pursue violations of the Act.²⁸

Statutory Language

Against this background, the Court considered the language in N.J.S. 17:32-20 which mandates the Attorney General, “upon the request of the Commissioner,” to bring a civil proceeding against parties who have violated the Act.²⁹ The appellants contended that the statute requires the DOBI Commissioner to request that the Attorney General “file a lawsuit in the Superior Court if [the DOBI Commissioner] perceives the Act has been violated” or is about to be violated.³⁰ DOBI asserted that the language provides the DOBI Commissioner with “discretion to eschew litigation in the Superior Court and instead pursue an administrative action against the putative violators.”³¹

Given “the legislative history of the Act and the public policies that underlie it,” the Court concluded “the phrase ‘upon the request of’ [should be read] as a discretionary, not a mandatory,

²² *Id.* at 30.

²³ *Id.*

²⁴ *Id.* at 40.

²⁵ *Id.* at 39 (noting the Act replaced a statutory scheme that “did not address what authority, if any, the Commissioner had over non-admitted foreign insurance companies transacting insurance business in this State”).

²⁶ *Id.* at 50 (quoting *In re Midland Ins. Co.*, 167 N.J. Super. 237, 248 (App. Div. 1979)).

²⁷ *Id.* at 47 (quoting N.J. STAT. ANN. § 17:32-16).

²⁸ *Id.*

²⁹ *Id.* at 30.

³⁰ *Id.* (quoting N.J. STAT. ANN. § 17:32-20).

³¹ *Id.* at 46.

path of enforcement.”³²

Other Considerations

To interpret ambiguous text within a statute, courts may look to extrinsic sources, including the legislative history and the policy considerations underlying the statute.³³ The *Applied Underwriters* Court characterized its interpretation of N.J.S. 17:32-20 as being aligned with “[t]he [‘long-settled and well-established’] principle that ‘the insurance business is strongly affected with a public interest and therefore properly subject to comprehensive regulation in protecting the public welfare.’”³⁴

The Court determined that its construction of N.J.S. 17:32-20 was “consistent with the general doctrine of primary jurisdiction, . . . defined as a situation where a court declines original jurisdiction and refers to the appropriate body those issues which, under a regulatory scheme, have been placed within the special competence of an administrative body.”³⁵

Regarding the expeditious resolution of violations, the Court considered that the DOBI Commissioner “may be able to achieve compliance and a satisfactory result administratively, without the formality and limitations” of bringing a suit in the Superior Court.³⁶ The Court underscored that the DOBI Commissioner holds a level of expertise in insurance regulation which the Court does not and concluded that it should not have exclusive jurisdiction over violations of the Act.³⁷

Consequently, the Court ruled that N.J.S. 17:32-30 “does not compel this dispute to be litigated in the Superior Court,” and remanded the matter “to [the DOBI]’s administrative jurisdiction.”³⁸ The Court instructed that the previously suspended hearing before the Office of Administrative Law be reinstated.³⁹

Pending Bills

There are no pending bills that concern the issue addressed in *Applied Underwriters*.

Conclusion

The Commission proposes that N.J.S. 17:32-20 be modified to clarify that the DOBI Commissioner has discretion to pursue either an administrative action or request judicial action from the Attorney General when an insurer has violated the Non-Admitted Insurers Act, as discussed by the Appellate Division in *Applied Underwriters*.⁴⁰

³² *Id.*

³³ *Id.* at 44.

³⁴ *Id.* at 41 (quoting *R.J. Gaydos Ins. Agency, Inc. v. Nat’l Consumer Ins. Co.*, 168 N.J. 255, 280-81 (2001)).

³⁵ *Id.* at 48 (quoting *Muise v. GPU, Inc.*, 332 N.J. Super. 140, 158 (App. Div. 2000)).

³⁶ *Id.* at 47.

³⁷ *Id.* at 48.

³⁸ *Id.* at 51.

³⁹ *Id.*

⁴⁰ *Id.*

Appendix

The proposed modifications to the following statute are shown with underlining for inserted language and ~~striketrough~~ for deletions.

N.J.S. 17:32-20. Violations; institution of relief; process

(a) Upon the request of the commissioner, the Attorney General [shall] [must]⁴¹ institute a civil action in the Superior Court for injunctive relief and for such other relief as may be appropriate under the circumstances ~~Whenever it shall appear to the commissioner that any insurer, or any employee, agent, promotional medium, or other representative thereof, has violated, is violating, or is about to violate the provisions of this act, the Attorney General, upon the request of the commissioner, shall institute a civil action in the Superior Court for injunctive relief and for such other relief as may be appropriate under the circumstances.~~

(b) Process in such action may be served in accordance with the provisions of chapter 330 of the laws of 1952 (C. 17:51-1 et seq.) or as provided in the laws of this State and the rules of the Superior Court.

(c) Such action may proceed in a summary manner or otherwise.

(d) Nothing contained in this section shall limit or abridge the right to serve any process, notice or demand upon any person or insurer in any other manner now or hereafter deemed lawful.

Comments

As enacted, N.J.S. 17:32-20 is set forth in one paragraph. Consistent with contemporary drafting practices, the proposed modification separates the substance of the statute into four subsections to promote accessibility and readability.

The proposed modification is based upon the Appellate Division's discussion of the discretionary powers of the Commissioner of the Department of Insurance in *Applied Underwriters Captive Risk Assurance Company, Inc. v. NJ Dep't of Banking & Ins.*, 472 N.J. Super. 26, 39 (App. Div.), *leave to appeal denied*, 251 N.J. 213 (2022).

⁴¹ See Minutes, *supra* note 1, at *8 (statement of Commissioner Hartnett having “no objection to moving forward with this project and noting that, with respect to statutory drafting, the word ‘shall’ should be avoided because of its inherently ambiguous nature.”).