



## **NEW JERSEY LAW REVISION COMMISSION**

### **Final Report**

### **Relating to New Jersey's Predatory Towing Prevention Act N.J.S. 56:13-21**

**December 17, 2020**

The work of the New Jersey Law Revision Commission is only a recommendation until enacted.

Please consult the New Jersey statutes to determine the law of the State.

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## Executive Summary<sup>1</sup>

In *Pisack v. B & C Towing, Inc.*, the Appellate Division considered whether N.J.S. 56:13-21 of the Towing Act requires a plaintiff to exhaust all administrative remedies before pursuing a claim in the Superior Court against a towing company for a nonconsensual, involuntary towing at the request of a municipal actor.<sup>2</sup>

After considering the history of the Towing Act and language contained in the statute, the New Jersey Supreme Court determined that N.J.S. 56:13-21 does not require the victim of a non-consensual towing ordered by a municipal actor to exhaust any or all administrative remedies before filing a lawsuit against a towing company.<sup>3</sup>

The question of whether or not the victim of a non-consensual towing ordered by a municipal actor must first exhaust administrative remedies before filing a lawsuit is not explicitly answered by the statutory text of N.J.S. 56:13-21. The Commission recommends modification of the Towing Act so that it clearly sets forth the New Jersey Supreme Court's holding in *Pisack v. B & C Towing, Inc.*

## Relevant Statute

N.J.S. 56:13-21 states the following:

Violation of act; unlawful practice

a. It is an unlawful practice and a violation of P.L.1960, c. 39 (C.56:8-1 et seq.) to violate any provision of this act.

b. In addition to any penalties or other remedies provided in P.L.1960, c. 39 (C.56:8-1 et seq.), the director may order a towing company that has billed a person for any nonconsensual towing or related storage an amount determined by the director to be unreasonable to reimburse the person for the excess cost with interest.

## Background

### • *The Towing Act*

Before 2008, the regulation of towing companies was “fragmented among various State agencies and local governments,” “inconsistent or inadequate,” and provided “insufficient recourse [for consumers] ... under the law.”<sup>4</sup> In addition, “the Legislature found companies were

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<sup>1</sup> Preliminary work on this Report was done by Mark Ygarza, Legislative Fellow to the New Jersey Law Revision Commission during his tenure with the Commission.

<sup>2</sup> *Pisack v. B & C Towing, Inc.*, 455 N.J. Super. 225, 234 (App. Div. 2018).

<sup>3</sup> *Pisack v. B & C Towing, Inc.*, 240 N.J. 360, 376-377 (2020) (affirming the “..thorough and thoughtful decision of the Appellate Division [...] as to those issues....”).

<sup>4</sup> *Pisack*, 240 N.J. at 367 (citing N.J. STAT. ANN. § 56:13-8(d) (West 2020)).

‘overcharging consumers for towing services provided under circumstances where the consumer ha[d] no meaningful opportunity to withhold consent.’”<sup>5</sup>

In an effort to stem the ongoing abuse of towing companies against consumers, the New Jersey Legislature enacted the Predatory Towing Prevention Act (Towing Act) in 2008.<sup>6</sup> The Towing Act created “a coordinated, comprehensive framework to establish and enforce minimum standards for tow truck operators.”<sup>7</sup> The primary object of this Act was to stop the predatory towing of vehicles that are removed without the owner's notice or consent and curb instances where the owner was charged an exorbitant fee for the vehicle’s return.<sup>8</sup>

A decade after it was enacted, the Legislature amended the Towing Act, adding a new subsection to N.J.S. 56:13-16,<sup>9</sup> which provided:

i. [No provision of the Towing Act should be interpreted to prevent towing companies] ... “from charging fees for non-consensual towing or related storage services in accordance with a duly-authorized fee schedule established by a municipality or other political subdivision of this State with respect to a vehicle that has been subject to non-consensual towing authorized by a law enforcement officer of this State of the political subdivision.” L. 2018, c. 165, § 3(i) (codified at N.J.S.A. 56:13-16(i)).

This amendment did not, however, address the requirement that litigants exhaust their administrative remedies before filing an action against the towing company in the Superior Court. The statute is silent as to whether consumers must do so, and that silence formed the basis of the three lawsuits discussed in *Pisack v. B & C Towing, Inc.*<sup>10</sup>

• *Pisack v. B & C Towing, Inc.*

Walker, Pisack, and Pellegrino were each charged for the nonconsensual towing of their vehicles by privately-owned towing companies that had contracts with local municipalities to provide towing and storage services.<sup>11</sup> In all three cases, the plaintiffs were all towed from “public roads at the direction of the police....”<sup>12</sup> “None of the three named plaintiffs consented to the

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<sup>5</sup> *Id.* (citing N.J. STAT. ANN. § 56:13-8(a), (b) (West 2020)).

<sup>6</sup> N.J. STAT. ANN. §§ 56:13-7 to -23 (West 2020). *See Pisack*, 240 N.J. at 367 (citing N.J. STAT. ANN. § 56:13-8(e) (West 2020)) (2008). The Act was amended in 2009.

<sup>7</sup> *Id.* (citing N.J. STAT. ANN. § 56:13-8(e) (West 2020)).

<sup>8</sup> *Id.* at 367-368.

<sup>9</sup> After the Appellate Division rendered its decision in *Pisack v. B & C Towing, Inc.*, 455 N.J. Super. 225, 234 (App. Div. 2018), the Legislature amended the Towing Act and added this new subsection to the Act. *See Pisack*, 240 N.J. at 369.

<sup>10</sup> *Pisack*, 240 N.J. at 373.

<sup>11</sup> *Pisack v. B & C Towing, Inc.*, 455 N.J. Super. at 232. These three matters were consolidated by the Appellate Division to address common questions presented by those appeals. Collectively, the cases are referred to as *Pisack v. B & C Towing, Inc.*

<sup>12</sup> *Id.* at 232.

towing of their vehicles.”<sup>13</sup> The plaintiffs were “charged for the non-consensual towing of their vehicles by privately-owned towing companies that had contracts with the local municipalities to provide such towing and storage services.”<sup>14</sup> Each plaintiff paid the charges imposed in order to have their vehicles released from the lots, and did not contest any of the charges at the time.<sup>15</sup>

Two of the three litigants filed pro se actions against the towing companies, and on behalf of similarly situated individuals.<sup>16</sup> These two plaintiffs sought class action status in the Superior Court and alleged that the towing companies violated the Towing Act, Truth-In-Consumer Contract, Warranty and Notice Act (TCCWNA), and the Consumer Fraud Act (CFA).<sup>17</sup> The third litigant filed a class action alleging similar violations.<sup>18</sup> Two of the three trial courts determined that the Towing Act required the plaintiffs to exhaust all of their administrative remedies before filing an action in the Superior Court. The third trial court did not act on that issue.<sup>19, 20</sup>

Each plaintiff appealed the decision of the trial court.<sup>21</sup> Walker appealed from an order granting summary judgment to the defendants.<sup>22</sup> Pisack appealed from the order denying class certification and granting summary judgment to defendants.<sup>23</sup> Pellegrino appealed an interlocutory order denying her request to certify a class and allowing her to proceed only on her individual claims.<sup>24</sup>

The Appellate Division, in *Pisack v. B & C Towing, Inc.*, consolidated the three separate appeals.<sup>25, 26</sup> The defendants argued that the Towing Act “authorizes the Director to order towing companies to reimburse consumers for unreasonable or excessive fees and costs”, instead of allowing a consumer to file a lawsuit in Superior Court.<sup>27</sup> They stated that the Towing Act empowers the Director to establish regulations, which require “require the parties to use ‘good faith efforts’ to resolve a dispute, and if the parties are unable to reach a resolution, the Director

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<sup>13</sup> *Id.*

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

<sup>15</sup> *Id.* at 233-35.

<sup>16</sup> *Id.* at 234.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* It is unclear whether plaintiff Pisack was represented by counsel at this stage of the proceeding.

<sup>19</sup> *Id.* at 236.

<sup>20</sup> The first two trial courts granted the summary judgment motions for the defendants finding that the plaintiff was required to exhaust all their remedies before proceeding to litigation. Although the third trial court did not rule on the issue, the court did deny the defendant’s motion to dismiss which was different than the first two courts’ decisions.

<sup>21</sup> *Pisack*, 455 N.J. Super. at 236.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 231.

<sup>26</sup> Although the matters involved raised issues pertaining to both the CFA and the TCCWNA, the discussion in this Report is limited to the necessity of exhausting administrative remedies before a litigant may proceed with their civil claims.

<sup>27</sup> *Id.*

may determine whether unreasonable fees were charged and order the towing company to reimburse the consumer with interest.”<sup>28</sup>

### Analysis

In *Pisack*, the Appellate Division examined N.J.S. 56:13-21 to determine whether the vehicle owner was required to exhaust all administrative remedies before proceeding to file a civil lawsuit against the towing companies, focusing on the provision that gives the Director “the permissive ‘may’ authority to order a reimbursement.”<sup>29</sup>

N.J.S. 56:13-21 (b) provides, in relevant part that “the director **may** order a towing company that has billed a person for any nonconsensual towing or related storage an amount determined by the director to be unreasonable to reimburse the person for the excess cost with interest. [emphasis added].” The Court observed that when a statutory provision “contains both the words ‘may’ and ‘shall,’ it is presumed that the lawmaker intended to distinguish between them, ‘shall’ being construed as mandatory and ‘may’ as permissive.”<sup>30</sup>

The same statutory provision states that it is an “unlawful practice and a violation [of the CFA] to violate any provision of the Towing Act.”<sup>31</sup> The Court determined that “the Director’s authority to order a reimbursement is in addition to any penalties or other remedies provided in [the CFA].”<sup>32</sup> The Court concluded that the Legislature “contemplated that vehicle owners could file their CFA claims in court, and nothing in the Towing Act or its regulations limits that right.”<sup>33</sup> The Appellate Division determined that the Towing Act, specifically N.J.S. 56:13-21, and the Consumer Fraud Act (CFA), do not require all administrative remedies to be exhausted before a plaintiff may file a lawsuit in Superior Court without having reached a settlement with the towing company.<sup>34</sup>

A towing company may still charge an individual a fee that is not in accordance with the fee schedule set by either the Director or the municipality.<sup>35</sup> If that happens, a litigant might not be aware that they are not required to exhaust administrative remedies before seeking redress in the Superior Court.

### Outreach

In connection with this Report, the Commission sought comments from several knowledgeable individuals and organizations. These stakeholders included: the Local Government Law Section of the New Jersey State Bar Association; the Department of Law and Public Safety;

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<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Pisack v. B & C Towing, Inc.*, 455 N.J. Super. 243-44.

<sup>31</sup> *Id.* at 244.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Pisack*, 240 N.J. at 369.

the Towing and Recovery Association of New Jersey; the Garden State Towing Association, Inc.; the New Jersey League of Municipalities; the New Jersey Association of Counties; the New Jersey State Association of Chiefs of Police; and, the New Jersey Police Traffic Officers Association.

• *Response(s) Received*

The Towing and Recovery Association of America, Inc. (TRAA), the Garden State Towing Association (GSTA), and the Conference of Northeast Towing Associations (CNTA) each provided the Commission with comments and recommendations regarding the proposed statutory revisions.<sup>36</sup>

The GSTA recognizes that pursuant to the New Jersey Supreme Court decision in *Pisack*, that “...N.J.S. 56:13-21 does not require a plaintiff to exhaust all administrative remedies before pursuing a claim in the Superior Court against a company for a nonconsensual involuntary tow at the request of a municipal actor.”<sup>37</sup>

In response to the statutory modifications proposed by the Commission, both the TRAA and the GSTA proposed language that would require “[a]ny consumer challenging fees charged for non-consensual towing... in accordance with a duly-authorized fee schedule established by a municipality... [to] exhaust all administrative remedies before filing suit against a towing company in the [Superior][sic] Court of New Jersey.”<sup>38</sup> The CNTA advised that it “... fully support[s the] GSTA’s position regarding consumer challenging fees charged in accordance with an authorized fee schedule...”<sup>39</sup>

After the Appellate Division rendered its decision in *Pisack v. B & C Towing, Inc.*<sup>40</sup> the Legislature amended the Towing Act<sup>41</sup> to permit towing companies to charge a fee that is not in accordance with a duly authorized fee schedule established by either the Director or the municipality.<sup>42</sup> The amendment did not, however, address the question of whether litigants must exhaust their administrative remedies before filing an action against the towing company in the Superior Court.<sup>43</sup>

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<sup>36</sup> See letter from Joanne Blyton, President, Towing and Recovery. Ass’n of America, Inc. \*1 to Samuel M. Silver, Deputy Dir., New Jersey Law Revision Comm’n (Oct. 30, 2020) (on file with the NJLRC); letter from Matthew J. Giacobbe, Esq., Gen. Counsel, Garden State Towing Ass’n \*1 to Samuel M. Silver, Deputy Dir., New Jersey Law Revision Comm’n (Oct. 27, 2020) (on file with the NJLRC); and, letter from John Glass, President, Conference of Northeast Towing Ass’ns \*1 to Samuel M. Silver, Dep. Director, New Jersey Law Revision Comm’n (Oct. 23, 2020) (rec’d Nov. 03, 2020 and on file with the NJLRC).

<sup>37</sup> See letter from Matthew J. Giacobbe, Esq., General Counsel, Garden State Towing Ass’n \*1 to Samuel M. Silver, Deputy Dir., New Jersey Law Revision Comm’n (Oct. 27, 2020) (on file with the NJLRC).

<sup>38</sup> Blyton, Towing and Recovery Ass’n of America at \*1; and Giacobbe, Garden State Towing Ass’n at \*2.

<sup>39</sup> Glass, Conference of Northeast Towing Ass’ns, at \*1.

<sup>40</sup> *Pisack*, 455 N.J. Super. 225 (App. Div. 2018).

<sup>41</sup> *Pisack*, 240 N.J. at 369.

<sup>42</sup> *Pisack*, 240 N.J. at 369.

<sup>43</sup> See page 3 of this Report, *supra*, for a discussion of the 2018 addition of subsection N.J.S. 56:13-16 and the legislative silence regarding the requirement that litigants exhaust their administrative remedies before filing suit against a company in the Superior Court of New Jersey.

## **Conclusion**

In its current form, N.J.S. 56:13-21 does not indicate whether individuals who have been the subject of the nonconsensual towing of their vehicles at the direction of a municipal actor are required to exhaust their administrative remedies before filing suit against a towing company in the Superior Court. To clarify the statute for practitioners, the general public, and pro se litigants, the statute may benefit from the addition of clarifying language.

The following Appendix proposes adding language for N.J.S. 56:13-21 consistent with the determination of the New Jersey Supreme Court in *Pisack v. B & C Towing, Inc.*

## Appendix

The proposed modifications to **N.J.S. 56:13-21 Violation of act; unlawful practice,** (shown with ~~striketrough~~, and underlining):

a. It is an unlawful practice and a violation of P.L.1960, c. 39 (C.56:8-1 et seq.) to violate any provision of this act.

b. (1) In addition to any penalties or other remedies provided in P.L.1960, c. 39 (C.56:8-1 et seq.), the director may order a towing company that has billed a person for any nonconsensual towing or related storage an amount determined by the director to be unreasonable to reimburse the person for the excess cost with interest.

(2) An individual who seeks reimbursement from a towing company for charges paid is not required to exhaust administrative remedies with either the Division of Consumer Affairs, or any dispute resolution entity identified or established by a municipality, before filing a claim in court.

## Comments

Section b. has been divided into two subsections to incorporate the determination of the New Jersey Supreme Court in *Pisack v. B& C Towing, Inc.* Subsection b.(2), reflects the Court's determination that the statute does not require that an individual pursue administrative remedies prior to commencing an action in Superior Court. The statute was established to allow for consumers and towing companies to use good-faith efforts to resolve claims prior to initiating an action but does not mandate the pursuit of administrative remedies before, or instead of, the filing of a complaint. In addition, this subsection makes clear that an individual need not exhaust their administrative remedies specifically before the Division of Consumer Affairs or any other dispute resolution mechanism established by a municipality. This language is consistent with the Supreme Court's determination in *Pisack v. B& C Towing, Inc.*