

**To: New Jersey Law Revision Commission**  
**From: Mark Ygarza**  
**Re: Predatory Towing Prevention Act**  
**Date: February 10, 2020**

## MEMORANDUM

### Executive Summary

In *Pisack v. B & C Towing, Inc.*, the New Jersey courts considered whether N.J.S. 56:13-21 of the Predatory Towing Prevention Act (Towing Act) requires a plaintiff to exhaust all administrative remedies before pursuing a claim in Superior Court against a towing company after a nonconsensual involuntary towing at the request of a municipal actor.

After reviewing the history of the Towing Act and language contained in the statute, the Appellate Division determined that N.J.S. 56:13-21 does not require the victim of a non-consensual towing ordered by a municipal actor to exhausted any or all administrative remedies before filing a lawsuit against a towing company.<sup>1</sup> The New Jersey Supreme Court affirmed the Appellate Division decision on this issue.<sup>2</sup>

### Relevant Statute

N.J.S. 56:13-21, titled Violation of act; unlawful practice, states the following:

- 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,” was “inconsistent or inadequate,” and provided “insufficient recourse [for consumers] ... under the law.”<sup>3</sup> In addition, some “towing companies engaged in predatory practices such as ‘charging unwarranted or excessive fees,’ and found were

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<sup>1</sup> *Pisack v. B & C Towing, Inc.*, 455 N.J. Super. 225, 234 (App. Div. 2018).

<sup>2</sup> *Pisack v. B & C Towing, Inc.*, 2020 WL 237201, at \*4 (N.J. Jan. 16, 2020).

<sup>3</sup> *Pisack v. B & C Towing, Inc.*, 2020 WL 237201, at \*4 (N.J. Jan. 16, 2020) (citing N.J.S. 56:13-8(d)).

“overcharging consumers for towing services provided under circumstances where the consumer ha[d] no meaningful opportunity to withhold consent.”<sup>4</sup>

In 2008, the New Jersey Legislature enacted the Predatory Towing Prevention Act.<sup>5</sup> The Towing Act created “a coordinated, comprehensive framework to establish and enforce minimum standards for tow truck operators.”<sup>6</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 is charged an exorbitant fee for the vehicle's return.<sup>7</sup>

After a decade, the Legislature amended the Towing Act. In 2018, a new subsection was added to N.J.S. 56:13-16.<sup>8</sup> This subsection provided:

[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 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 regarding whether consumers must exhaust their administrative remedies before filing suit against a towing company in the Superior Court. This silence resulted in three lawsuits consolidated as *Pisack v. B & C Towing, Inc.*<sup>9</sup>

• *Pisack v. B & C Towing, Inc.*

Walker, Pisack, and Pellegrino were three individuals who were 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>10</sup> In all three cases, the plaintiffs were towed from “public roads at the direction of the police...”<sup>11</sup> Additionally, “[n]one of the three

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<sup>4</sup> *Id.* at \*4 (citing N.J.S. 56:13-8(a), (b)).

<sup>5</sup> N.J.S. 56:13-7 to -23. *See Pisack v. B & C Towing, Inc.*, 2020 WL 237201, at \*4 (N.J. Jan. 16, 2020) (citing N.J.S. 56:13-8(e)) (2008).

<sup>6</sup> *Pisack v. B & C Towing, Inc.*, 2020 WL 237201, at \*4 (N.J. Jan. 16, 2020) (citing N.J.S. 56:13-8(e)).

<sup>7</sup> *Id.* at \* 4, citing the *Consumer Affairs Comm. Statement to A. 4053 1* (May 17, 2007).

<sup>8</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 v. B & C Towing, Inc.*, 2020 WL 237201 at \*5 (N.J. Jan. 16, 2020).

<sup>9</sup> *Pisack v. B & C Towing, Inc.*, 081492, 2020 WL 237201, at \*4 (N.J. Jan. 16, 2020).

<sup>10</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>11</sup> *Id.* at 232.

named plaintiffs consented to the towing of their vehicles.”<sup>12</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>13</sup> Each plaintiff paid all the charges to have their vehicles released from the lots but did not contest any of the charges at the time.<sup>14</sup>

Two of the three litigants filed pro se actions against the towing company on their own behalf, and on behalf of similarly situated individuals.<sup>15</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>16</sup> The third litigant filed a class action alleging similar violations.<sup>17</sup> Two of the trial courts that considered the cases 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>18,19</sup>

All three plaintiffs appealed. Walker appealed from an order granting summary judgment to defendants. Pisack appealed from the order denying class certification and granting summary judgment to defendants. Pellegrino appealed an interlocutory order denying her request to certify a class and allowing her to proceed only on her individual claims.<sup>20</sup>

The Appellate Division, consolidated the three appeals as *Pisack v. B & C Towing, Inc.*, since all involved non-consensual towing.<sup>21, 22</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>23</sup> They stated that the Towing Act empowers the Director to establish regulations, which require the parties to use “good faith efforts” to resolve a dispute, and if the parties are unable to reach a resolution, the Director may determine whether unreasonable fees were charged and order the towing company to reimburse the consumer with interest.”<sup>24</sup>

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

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

<sup>14</sup> *Id.* at 233-35.

<sup>15</sup> *Id.* at 234.

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

<sup>17</sup> *Id.* It is unclear whether plaintiff Pisack was represented by counsel at this stage of the proceeding.

<sup>18</sup> *Id.* at 236.

<sup>19</sup> The first two trial courts granted the summary judgment motions for the defendants saying 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>20</sup> *Id.* at 236.

<sup>21</sup> *Id.* at 231.

<sup>22</sup> Although the matters involved raised issues pertaining to both the CFA and the TCCWNA, the instant discussion has been limited in scope to the necessity to exhaust administrative remedies before a litigant may proceed with their civil claims.

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

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

## Analysis

The Appellate Division examined N.J.S. 56:13-21 to determine whether the vehicle owner was required to exhaust administrative remedies before filing a civil lawsuit against a towing company, including the provision that gives the Director “the permissive ‘may’ authority to order a reimbursement.”<sup>25</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>26</sup>

That same statutory section also states that it is “unlawful practice and a violation [of the CFA] to violate any provision of the Towing Act.”<sup>27</sup>

The Appellate Division decided that the “statutory provision . . . provides that the Director’s authority to order a reimbursement is in addition to any penalties or other remedies provided in [the CFA].”<sup>28</sup> The Court said 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>29</sup> The Appellate Division determined that N.J.S. 56:13-21 of the Towing Act, and the Consumer Fraud Act (CFA), do not require that all administrative remedies be exhausted before a plaintiff may file a lawsuit in Superior Court.<sup>30</sup>

If a towing company charges a fee that is not in accordance with the fee schedule set by the Director or the municipality, an injured party might not be aware that they are not required to exhaust administrative remedies before seeking redress in the Superior Court.

## Recent Activity

On January 16, 2020, the New Jersey Supreme Court decided the case of *Pisack v. B & C Towing, Inc.*, WL 237201 (2020). The Court affirmed in part and reversed in part. The Court affirmed the Appellate Division’s decision on the issues of exhaustion of administrative remedies, derivative immunity, and CFA claims, but reversed on the TCCWNA issue.<sup>31</sup>

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

<sup>26</sup> *Pisack v. B & C Towing, Inc.*, 455 N.J. Super. 243-44.

<sup>27</sup> *Id.* at 244.

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

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

<sup>30</sup> *Id.*

<sup>31</sup> The Court determined that for the TCCWNA to apply, there must be a bailment. For a bailment to exist, the delivery of the property must be by consent. Here, no such voluntary agreement existed, which cannot create an express or implied contract, and thus cannot fall under the TCCWNA. In *Pisack*, the Supreme Court stated that the element of a bailment are “delivery of personal property by one person to another in trust for a specific purpose, acceptance of such

## Conclusion

Although the Supreme Court determined that a litigant need not exhaust their administrative remedies before filing suit against a towing company in the Superior Court, Staff seeks authorization to conduct additional research and outreach to determine whether clarification of N.J.S. 56:13-21 would be of assistance to individuals who may refer to the statute without an awareness of the need to look at the case law.

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delivery, and express or implied agreement to carry out the trust and return of the property to the bailor.” (*Pisack v. B & C Towing, Inc.*, WL 237201 (2020), citing *Mattson v. Aetna Life Ins. Co.*, 124 F. Supp. 3d 381, 3939 (D.N.J. 2015).