

To: New Jersey Law Revision Commission
From: Kyle Ryan, Legislative Law Clerk
Re: Non-Admitted Insurers Act - Jurisdiction Over Violations (N.J.S. 17:32-20)
Date: July 10, 2023

MEMORANDUM

Project Summary

The Non-Admitted Insurers Act¹ (“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.”² 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.”³

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.⁴

In *Applied Underwriters Captive Risk Assurance Co., Inc. v. NJ 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.⁵

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

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

² N.J. STAT. ANN. § 17:32-16 (West 2023).

³ *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).

⁴ N.J. STAT. ANN. § 17:32-20 (West 2023).

⁵ *Applied Underwriters*, 472 N.J. Super. at 30.

abridge the right to serve any process, notice or demand upon any person or insurer in any other manner now or hereafter deemed lawful.⁶

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”).⁷ Neither Applied nor AUCRA was an authorized or admitted insurer in New Jersey, but ARS was licensed as an insurance producer, and Continental was an admitted insurer in the State.⁸ Applied was the parent company of the three other affiliated companies.⁹

At some point after 2012, DOBI “began to receive complaints about high premium amounts due from New Jersey insureds” under Appellants’ programs.¹⁰ Applied sold a unique type of workers’ compensation insurance which didn’t have “fixed premiums,” but rather premiums that “could fluctuate during the policy period, depending on the actual cost of any claims filed with the insured.”¹¹ In 2017, a representative of DOBI met with Applied as part of an investigation into Appellants’ activities.¹²

Following the investigation, DOBI issued a letter demanding that “Applied ‘make whole’ all New Jersey businesses that had been harmed by its programs.”¹³ If Applied failed to take such measures, DOBI indicated that it “would seek ‘formal enforcement actions’ against it.”¹⁴ Appellants filed a petition with DOBI seeking transmission of the dispute to the Office of Administrative Law (“OAL”); the petition was denied.¹⁵

Appellants subsequently filed a complaint in the Law Division alleging that DOBI did not have jurisdiction over them, and seeking “declaratory and injunctive relief to require the [DOBI] Commissioner to pursue the matter in a judicial . . . forum.”¹⁶ The DOBI Commissioner moved to dismiss the complaint, “assert[ing] that jurisdiction over the dispute was properly before the

⁶ N.J. STAT. ANN. § 17:32-20.

⁷ *Applied Underwriters*, 472 N.J. Super. at 31.

⁸ *Id.* at 32-33.

⁹ *Id.*

¹⁰ *Id.* at 33.

¹¹ *Id.*

¹² *Id.* at 33-34.

¹³ *Id.* at 34.

¹⁴ *Id.*

¹⁵ *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”).

¹⁶ *Id.* at 35-36.

Commissioner as an administrative case.”¹⁷ The trial court transferred the matter to the Appellate Division “to determine where jurisdiction of the matter would properly lay.”¹⁸

Analysis

The appeal concerned a question of jurisdiction only.¹⁹ Specifically, “the question [wa]s whether the DOBI Commissioner may pursue an administrative action against [non-admitted insurers] for engaging in alleged improper insurance-related practices in this State,” or whether the DOBI Commissioner must request that the Attorney General bring suit in the Superior Court.²⁰ 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 to the bill creating the Act specified that it was designed to “bring within the purview of the [DOBI] certain previously nonadmitted insurance companies.”²¹ The Act was specifically enacted to provide DOBI with jurisdiction over activities of unauthorized insurers.²² The Court concluded that the legislative history “does not signify the Commissioner has a ‘lack of jurisdiction over [non-admitted] companies.’”²³

The Court referenced 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.²⁴ 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.²⁵

Statutory Language

Against this background, the Court considered the language in N.J.S. 17:32-20 which requires the Attorney General, “upon the request of the Commissioner,” to bring a civil proceeding against parties who have violated the Act.²⁶ Appellants argued 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 will soon be violated.²⁷ DOBI

¹⁷ *Applied Underwriters*, 472 N.J. Super. at 36.

¹⁸ *Id.*

¹⁹ *Id.* at 30.

²⁰ *Id.*

²¹ *Id.* at 40.

²² *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”).

²³ *Id.* at 50 (quoting *In re Midland Ins. Co.*, 167 N.J. Super. 237, 248 (App. Div. 1979)).

²⁴ *Id.* at 47 (quoting N.J. STAT. ANN. § 17:32-16).

²⁵ *Id.*

²⁶ *Id.* at 30.

²⁷ *Id.* (quoting N.J. STAT. ANN. § 17:32-20).

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.”²⁸

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, path of enforcement.”²⁹

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.³⁰ The *Applied Underwriters* Court described its interpretation of N.J.S. 17:32-20 as 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.’”³¹

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.”³²

With respect to the efficiency with which a violation is resolved, 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.³³ Emphasizing that the DOBI Commissioner holds a level of expertise in insurance regulation which the Court does not, the Court concluded it should not have exclusive jurisdiction over violations of the Act.³⁴

Accordingly, the Court held that N.J.S. 17:32-30 “does not compel this dispute to be litigated in the Superior Court,” and remanded the matter “to [DOBI]’s administrative jurisdiction, with instructions to reactivate the hearing pending before the OAL.”³⁵

Pending Bills

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

²⁸ *Id.* at 46.

²⁹ *Id.*

³⁰ *Id.* at 44.

³¹ *Id.* at 41 (quoting *R.J. Gaydos Ins. Agency, Inc. v. Nat’l Consumer Ins. Co.*, 168 N.J. 255, 280-81 (2001)).

³² *Id.* at 48 (quoting *Muise v. GPU, Inc.*, 332 N.J. Super. 140, 158 (App. Div. 2000)).

³³ *Id.* at 47.

³⁴ *Id.* at 48.

³⁵ *Id.* at 51.

Conclusion

Staff requests authorization to conduct additional research and outreach to determine whether it would be useful to modify N.J.S. 17:32-20 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*.³⁶

³⁶ *Id.*