



## NEW JERSEY LAW REVISION COMMISSION

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

**April 16, 2020**

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 **June 15, 2020**.

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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## Executive Summary

In *Pisack v. B & C Towing, Inc.*,<sup>1</sup> the New Jersey Supreme Court 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 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 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>3</sup>

## 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,” was “inconsistent or inadequate,” and provided “insufficient recourse [for consumers] ... under the law.”<sup>4</sup> In addition, some “towing companies engaged in predatory practices such as ‘charging unwarranted or excessive fees,’ and found were “overcharging consumers for towing services provided under circumstances where the consumer ha[d] no meaningful opportunity to withhold consent.”<sup>5</sup>

In 2008, 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).<sup>6</sup> The

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<sup>1</sup> *Pisack v. B & C Towing, Inc.*, 2020 WL 237201, at \*4 (N.J. Jan. 16, 2020).

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

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

<sup>4</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)).

<sup>5</sup> *Id.* at \*4 (citing N.J.S. 56:13-8(a), (b)).

<sup>6</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).

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 is charged an exorbitant fee for the vehicle's return.<sup>8</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>9</sup> This subsection 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, however, did not address the requirement that litigants exhaust their administrative remedies before filing an action against the towing company in the Superior Court.

To this date, 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 formed the basis of the three lawsuits filed in *Pisack v. B & C Towing, Inc.*<sup>10</sup>

• *Pisack v. B & C Towing, Inc.*

Walker, Pisack, and Pellegrino were three plaintiffs 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>11</sup> In all three cases, the plaintiffs were all towed from “public roads at the direction of the police...”<sup>12</sup> Additionally, “[n]one of the three named plaintiffs consented to the towing of their vehicles.”<sup>13</sup> The plaintiffs were then “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>

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<sup>7</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>8</sup> *Id.* at \* 4.

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

<sup>10</sup> *Pisack v. B & C Towing, Inc.*, 081492, 2020 WL 237201, at \*4 (N.J. Jan. 16, 2020).

<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.

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

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

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>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 trial courts involved in hearing the litigation 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 upon that issue.<sup>19,20</sup>

Each plaintiff appealed the decision of the trial court. 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>21</sup>

The Appellate Division, in *Pisack v. B & C Towing, Inc.*, consolidated these three separate appeals concerning the non-consensual towing of their respective vehicles.<sup>22,23</sup> Collectively, 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>24</sup> The defendants stated that the Towing Act empowers the Director to establish regulations, which “requires 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>25</sup>

## Analysis

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<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 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>21</sup> *Id.* at 236.

<sup>22</sup> *Id.* at 231.

<sup>23</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>24</sup> *Id.*

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

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. The Appellate Division examined the provision that gives the Director “the permissive ‘may’ authority to order a reimbursement.”<sup>26</sup>

N.J.S. 56:13-21 (b) provides, in relevant part:

[...] [T]he 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].

In examining the relevant language of the statute, 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>27</sup>

The same provision states that it is “unlawful practice and a violation [of the CFA] to violate any provision of the Towing Act.”<sup>28</sup> Furthermore, the court 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>29</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>30</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 reached a settlement with the towing company.<sup>31</sup>

It should be noted that 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. In such instances, a litigant might be unaware that he or she is not required to exhaust administrative remedies before seeking redress in the Superior Court.

### **Conclusion**

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

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<sup>26</sup> *Id.*

<sup>27</sup> *Pisack v. B & C Towing, Inc.*, 455 N.J. Super. 243-44.

<sup>28</sup> *Id.* at 244.

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

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

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

The following page proposes amendatory language for N.J.S. 56:13-21 according to the principles set out 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), follow:

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 that seeks reimbursement for charges against a towing company is not required to exhaust their administrative remedies before either: the Division of Consumer Affairs or any dispute resolution procedures established by municipalities that have towing ordinances.

(3) Nothing in this section shall prevent an individual from filing a claim in court for reimbursement of fees from a non-consensual towing or related storage fees.

## Comments

Section b. has been divided into three subsections to incorporate the holding of the New Jersey Supreme Court in *Pisack v. B& C Towing, Inc.* In subsection (2), the Supreme Court of New Jersey established that the statute does not require that an individual pursue administrative remedies prior to commencing an action in Superior Court. Rather, the statute was established to allow for consumers and towing companies to use good-faith efforts to resolve claims prior to initiating an action. Yet, the Towing Act does not create mandatory administrative remedies that a vehicle owner must adhere to. This was determined by the Appellate Division and subsequently affirmed by the New Jersey Supreme Court.

Subsection 3 in Section b., specifies that an individual need not exhaust their administrative remedies specifically before the Division of Consumer Affairs and any other dispute resolutions established by municipalities. This language is consistent with the Supreme Court's holding in *Pisack v. B& C Towing, Inc.*