NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0653-20

APPLIED UNDERWRITERS CAPTIVE RISK ASSURANCE COMPANY, INC., APPLIED UNDERWRITERS, INC., APPLIED RISK SERVICES, INC., and CONTINENTAL INDEMNITY COMPANY,

Plaintiffs-Appellants,

v.

NEW JERSEY DEPARTMENT OF BANKING AND INSURANCE and MARLENE CARIDE, in her official capacity as Commissioner of the New Jersey Department of Banking and Insurance,

Defendants-Respondents.

APPROVED FOR PUBLICATION
April 27, 2022
APPELLATE DIVISION

Argued March 28, 2022 – Decided April 27, 2022

Before Judges Sabatino, Natali, and Bishop-Thompson.

On appeal from an interlocutory order of the Superior Court of New Jersey, Law Division, Mercer County, Docket No. L-0047-20.

Shand S. Stephens (DLA Piper, LLP) of the New York bar, admitted pro hac vice, argued the cause for appellants (DLA Piper, LLP, Duane Morris, LLP, Shand S. Stephens, and Anthony P. Coles (DLA Piper, LLP) of the New York bar, admitted pro hac vice, attorneys; Shand S. Stephens, Anthony P. Coles, Steven M. Rosato, and Paul P. Josephson, on the briefs).

Jeffrey S. Posta, Deputy Attorney General, argued the cause for respondents (Matthew J. Platkin, Acting Attorney General, attorney; Melissa H. Raksa, Assistant Attorney General, of counsel; Jeffrey S. Posta, on the brief).

The opinion of the court was delivered by

SABATINO, P.J.A.D.

This appeal purely concerns a question of jurisdiction. The question is whether the Commissioner of the Department of Banking and Insurance ("DOBI" or "the Department") may pursue an administrative action against two out-of-state companies and their two New Jersey affiliates for engaging in alleged improper insurance-related practices in this State—or whether the Commissioner must instead rely on the Attorney General to bring a lawsuit against those companies in the Superior Court.

Specifically, we are called upon to interpret the following statutory provision, N.J.S.A. 17:32-20 ("Section 20"), which the Legislature enacted in 1968 as part of the Non-Admitted Insurers Act, N.J.S.A. 17:32-16 to -22:

> 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.
>
> [N.J.S.A. 17:32-20 (emphasis added).]

In this matter, four related companies that have been accused of violating New Jersey insurance law (two of which, for the purposes of this opinion, we describe as "non-admitted"), contend Section 20 is an exclusive jurisdictional provision. They argue Section 20 channels all claims of violations of our insurance statutes by non-admitted foreign insurance companies to the Superior Court, and disallows the Commissioner from bringing an administrative action against them.

Conversely, the Commissioner maintains that Section 20 does not confine her jurisdictional recourse to an injunctive action in the Superior Court. She

argues that filing a lawsuit under Section 20 is optional, and that she has the residual power to choose instead to proceed against the companies administratively in the Office of Administrative Law ("OAL").

The trial court did not resolve this jurisdictional conundrum, but transferred the issue to this court.

For the reasons that follow, we conclude Section 20 does not restrict the Commissioner to the path of a Superior Court action. Based on the text, legislative history, and public policies of the statute as a whole, as well as principles of primary jurisdiction, the Commissioner has the authority to pursue an administrative complaint against these companies instead of a lawsuit brought by the Attorney General. Consequently, we remand this matter to the Department and direct that a previously stayed hearing in the OAL be reactivated.

I.

To set the stage for our analysis, we briefly discuss the procedural background of this case, mindful that the facts have yet to be litigated in any forum. In doing so, we express no views about the merits or the legality of appellants' conduct under the insurance laws.

The Parties

The four appellant companies before us are affiliated and participate together in insurance-related activities.[1]

Applied Underwriters, Inc. ("Applied") is a Nebraska financial services corporation. Applied apparently is the parent of the three other appellant companies in this case. In addition to engaging in the payroll processing business, Applied underwrites workers' compensation insurance through its affiliated insurance companies for small and medium sized employers. Applied is not an authorized or admitted[2] insurer in New Jersey.

Applied Underwriters Captive Risk Assurance Company, Inc. ("AUCRA") is an insurer incorporated in Iowa with its principal place of

[1] We recognize the parties dispute the actual status of some of the appellants and their roles in insurance-related activities. Those disputes can be litigated in the OAL proceeding.

[2] As we explain in Part II, infra, the concept of a "non-admitted" insurer is a term of art under the insurance laws. See N.J.S.A. 17:32-16. Briefly stated, the term refers to whether or not a company has been authorized to engage in insurance transactions in the State. The term is often hyphenated in common usage. We will use the hyphenated version in this opinion, except when directly quoting sources that refer to "nonadmitted" insurers.

business in Nebraska. AUCRA acts as a reinsurer for Applied and its affiliates. AUCRA is not an authorized or admitted insurer in New Jersey.

Applied Risk Services, Inc. ("ARS"), Applied's billing agent, is licensed as an insurance producer[3] in New Jersey pursuant to N.J.S.A. 17:22A-34.

Lastly, appellant Continental Indemnity Company ("Continental"), is also an insurer formed in Iowa. Unlike AUCRA, however, Continental is an admitted insurer in New Jersey, and is authorized to issue accident and health, property, casualty, and workers' compensation insurance policies. Continental issued the workers' compensation policies that are the subject of this case.

Respondents are DOBI and the Commissioner, whom appellants have sued in her official capacity.

The RPA Programs

Starting in 2008, appellants marketed and sold workers' compensation programs called EquityComp, SolutionOne, and PremierExclusive[4] to at least 300 New Jersey employers. These programs combined a guaranteed-cost

[3] An "insurance producer" is a person or entity required to be licensed in New Jersey to sell, solicit, or negotiate insurance. N.J.S.A. 17:22A-28. An insurance "producer" is distinct from an "insurer."

[4] Lest the reader think our word processor has gone awry, we present these program names as they have been marketed, without spaces between the two words.

workers' compensation policy sold by Continental and another non-party affiliate, with what is known as an "RPA" (i.e., a reinsurance participation agreement) sold by AUCRA. Employers that purchased these programs were required to obtain both components.

The combination of the guaranteed-cost policy and the RPA had the effect of creating a workers' compensation insurance policy with a retrospective rating. Instead of fixed premiums, the premiums for these insurance programs could fluctuate during the policy period, depending on the actual cost of any claims filed with the insured.

Applied obtained in 2011 a patent for the formula used to calculate costs in the RPA. The patent described the program as "a reinsurance based approach to providing non-linear retrospective premium plans to insureds that may not have the option of such a plan directly." The patent further described that the RPA acted, in effect, as a mechanism to avoid "regulatory requirements that do not make specific provision for these plans." The patent further explained how an insured employer would obtain such a retrospective rating plan:

> The reinsurance company does this by entering into a separate contractual arrangement with the insured. If the insured has lower than average losses in the next year, then the reinsurance company can provide a premium reduction . . . . If the insurance has higher than average losses in a given year, then the reinsurance

> company will assess additional premium . . . . The insured can now, in effect, have a retrospective rating plan because of the arrangement among the insurance carrier . . . , the reinsurance company . . . , and the insured, even though, in fact, the insured has Guaranteed Cost insurance coverage with the insurance carrier . . . .

Meetings at the Department to Discuss Appellants' Programs

In June 2012, Applied's general counsel met with staff of DOBI's Compensation Rating and Inspection Bureau ("CRIB") to discuss how Applied's programs operated, and specifically the RPA component. Apparently, that meeting did not result in any formal regulatory approval or action concerning the programs.

Eventually, DOBI began to receive complaints about high premium amounts due from New Jersey insureds under appellants' EquityComp and SolutionOne programs. In August 2017, as part of its investigation into these complaints, an Assistant Commissioner of DOBI met with the general counsel of Applied, who responded to further requests for information.

In May 2018, the Assistant Commissioner issued a letter to Applied's president and general counsel alerting him the Department's investigation into Applied's insurance workers' compensation programs was completed. DOBI had determined the programs Applied was selling were not in accordance with

CRIB's rating system, and therefore were not permissible. In addition, the Assistant Commissioner told Applied that the earlier June 2012 meeting had not constituted the Department's approval of the programs.

The Department was concerned that RPAs, as de facto retrospective rating plans, had the potential to lead to higher and unpredictable assessments against an insured employer. In the Department's view, those assessments materially altered the guaranteed-cost workers' compensation policy that had been filed with CRIB. In addition, the Department expressed concern that employers who enrolled in appellants' programs often owed premiums that exceeded CRIB's approved rates.

The letter demanded Applied "make whole" all New Jersey businesses that had been harmed by its programs, and do so by "unwinding" their existing contracts. If Applied did not take such measures, the Department would seek "formal enforcement actions" against it.

Appellants' Petition Invoking DOBI's Jurisdiction

On March 5, 2019, appellants filed a petition with DOBI seeking, among other things, transmission of the parties' dispute to the OAL as a "contested case" under the Administrative Procedure Act ("APA"), N.J.S.A. 52:14B-1 to -15. See N.J.S.A. 52:14B-9.1 and -10 (concerning "contested cases"). Notably for this

appeal, in paragraph 15 of their petition, titled "Jurisdiction," appellants stated that "DOBI possesses subject matter jurisdiction because this matter relates to the business of insurance. See N.J.S.A. § [sic] 17:1-1; N.J.A.C. § [sic] 1:1-3.1(a)." (Emphasis added). Further, in paragraph 16, the petition asserted that the insurer's "rights, duties, obligations, privileges, or other legal relations vis-à-vis the [RPA] Program must be decided by DOBI after notice and a public hearing pursuant to N.J.S.A. §§ [sic] 17:29B-6 & 34:15-88." (Emphasis added).

The Commissioner's Administrative Order to Show Cause

The following day, March 6, 2019, the Commissioner denied appellants' petition. At the same time, the Commissioner issued an administrative order to show cause why Continental's authority to transact workers' compensation and employer liability insurance should not be suspended pursuant to N.J.S.A. 34:15-88, and why ARS's insurance producer license should not be revoked. All four appellants were ordered to show cause why they should not be assessed fines for violations of the Insurance Producer Licensing Act of 2001, N.J.S.A. 17:22A-26 to -57, as well as why they should not have to pay restitution.

In addition, the Commissioner ordered appellants to show cause why they should not cease and desist from collecting additional premiums under the retrospective rating program, pursuant to N.J.S.A. 34:15-88. Finally, the

Commissioner ordered appellants to show cause why they should not have to "unwind" the programs they sold, pursuant to N.J.S.A. 34:15-88. In the letter accompanying the order to show cause, the Commissioner made clear that "Applied and any other named respondents will have the opportunity to answer the charges contained therein and request a contested case hearing at the OAL" at that time.

The next month, appellants filed an answer to the administrative order to show cause and demanded a plenary hearing in the OAL to resolve all issues as a contested case. The matter was assigned to an administrative law judge ("ALJ"), but the hearing was delayed to accommodate settlement discussions, which were unfruitful.

The Companies' Lawsuit in the Law Division

Despite having initially filed an administrative petition with DOBI, and despite having thereafter demanded a hearing in the OAL, appellants filed in the Law Division in January 2020 a complaint in lieu of prerogative writs against the Commissioner and DOBI. The complaint alleged that DOBI does not have jurisdiction over the appellants. Accordingly, appellants sought declaratory and injunctive relief to require the Commissioner to pursue the matter in a judicial, rather than an administrative, forum.

The next month, the Commissioner and DOBI moved in lieu of an answer to dismiss appellants' Law Division complaint, pursuant to Rule 4:6-2(e). They asserted that jurisdiction over the dispute was properly before the Commissioner as an administrative case, and that fact-finding should proceed in the OAL. Respondents further asserted that appellants had not exhausted their administrative remedies and that their Superior Court complaint was not timely.

Meanwhile, in February 2020, an ALJ signed an order of inactivity, directing that the contested case in the OAL remain inactive to await the Superior Court's decision.

The Trial Court Transfers the Jurisdictional Dispute to this Court

Oral argument on respondents' motion to dismiss appellants' complaint was held before the trial court on March 30, 2020. That same day, the trial court issued an oral decision denying the motion.

The trial court found that appellants did not need to have exhausted their administrative remedies. The court also found they had timely filed their

complaint. However, the court transferred the matter to this court to determine where jurisdiction of the matter would properly lay.[5]

A corresponding order was entered on April 1, 2020, stating that the question of respondents' right to seek administrative enforcement against appellants was within the exclusive jurisdiction of the Appellate Division to resolve.

The Present Appeal

This appeal followed. Appellants[6] continue to insist that the Superior Court is the sole forum that has jurisdiction over the parties' dispute, whereas the Commissioner maintains that her Department has concurrent jurisdiction to address the dispute administratively. The parties' jurisdictional disagreement hinges upon the meaning of Section 20, which we quoted in full at the opening of this opinion and to which we now turn our attention.

[5] Because we are resolving the jurisdictional question in this opinion, we need not address whether the trial court was correct in believing that it lacked the authority to resolve the question itself.

[6] It is happenstance that the four companies are designated as the "appellants" in this transferred case, as the Commissioner could likewise have been the appellant if she had filed her own request for review with us first.

II.

As we noted at the outset, the Legislature adopted Section 20 in 1968 as part of the Non-Admitted Insurers Act, N.J.S.A. 17:32-16 to -22. To understand the significance and context of that larger enactment, we briefly explain the overall statutory scheme under the pertinent insurance laws.

A.

DOBI has general regulatory authority over insurance activities in New Jersey. See, e.g., N.J.S.A. 17:1-1. Two types of insurance-providing entities under New Jersey law are pertinent to this case: insurance "producers" and "insurers." N.J.S.A. 17:22A-28. Different statutes apply to each type of entity.

An "insurer" is "any person, association or corporation engaged in the transaction of the business of insurance, and shall include, without limitation, interinsurance exchanges and mutual benefit societies." N.J.S.A. 17:32-17. Insurers can be "domestic," meaning that they are formed in New Jersey, whereas "foreign" insurers are formed in other states or countries. N.J.S.A. 17B:17-7; N.J.S.A. 17:32-2. Both domestic and foreign insurers must be "authorized" or "admitted" by the DOBI Commissioner to engage in insurance activities in New Jersey. N.J.S.A. 17:17-1 to -20; N.J.S.A. 17:32-1 to -22.

"Foreign" insurers may be "admitted" by DOBI to transact insurance business in New Jersey under more stringent conditions than those placed upon domestic insurers. See N.J.S.A. 17:32-2 (listing conditions for the admission of foreign insurers). The statute detailing the admissions process for foreign insurance companies in New Jersey, as well as the various laws they must follow in their activities, is N.J.S.A. 17:32-1 to -15.

By way of example, Applied is (1) a foreign company because it was formed in Nebraska and (2) it is not admitted to transact the business of insurance in New Jersey. Applied is therefore apparently a "non-admitted foreign insurer," and the Non-Admitted Insurers Act, which we will describe shortly, regulates its activities.

The Non-Admitted Insurers Act excludes, among other things, "[t]ransactions involving group life insurance, group or blanket accident and health insurance . . . ." N.J.S.A. 17:32-21(e). Appellants sell workers' compensation coverage, which does not fall within the definition of any of these types of excluded insurance. See N.J.S.A. 17B:17-4 (definition of "health insurance"); N.J.S.A. 17B:17-3 (definition of "life insurance"); N.J.S.A. 17B:27-32 (definition of "blanket insurance"). Therefore, appellants' insurance

activities are within the scope of the Non-Admitted Insurers Act, thereby making Section 20 of that statute relevant to our analysis.

B.

The genesis of the Non-Admitted Insurers Act is instructive. A previously adopted statute, N.J.S.A. 17:32-1 to -15, governs how foreign insurance companies can gain admission to transact insurance business in New Jersey, as well as the Commissioner's regulatory authority over such companies. However, that statute did not address what authority, if any, the Commissioner had over non-admitted foreign insurance companies transacting insurance business in this State. It was perceived that the State lacked such express regulatory authority over such non-admitted foreign insurers.

The Non-Admitted Insurers Act accordingly was enacted to address this perceived gap by expressly authorizing the Commissioner to regulate the activities of non-admitted foreign insurance companies. At that time, particular concerns arose over non-admitted insurers who were then selling life insurance policies[7] of "questionable value" to parents in New Jersey of children who were serving in the Armed Services.

[7] In 1972, the statutory scheme was amended to shift the regulation of life insurance companies to Title 17B. N.J.S.A. 17B:17-1 to -31.

On March 10, 1967, DOBI Commissioner Charles R. Howell wrote a letter to Lawrence Bilder, who was then an Executive Assistant to the Governor, recommending that Senate Bill No. 724 ("S. 724") (which became the Non-Admitted Insurers Act) be signed into law by the Governor. Commissioner Howell wrote:

> The attached bill is strongly recommended . . . to provide this Department with jurisdiction over the activities of unauthorized insurers which can and do solicit and insure our citizens through the U.S. Mails with impunity under our present laws. This bill has been drafted along the lines of a Wisconsin statute[8] which was enacted in 1961 and which recently was upheld in a test case taken up to the United States Supreme Court.[9]
>
> . . . .
>
> This problem has been a matter of great concern to this Department and to the United States Congress . . . . Recent activities of some of these unauthorized insurers have been directed to the parents of those inducted in the Armed Services who may have purchased life insurance policies of very questionable value from

[8] See Wis. Stat. § 201.32 to -.42 (1961).

[9] The Supreme Court "test case" the letter is referencing is Ministers Life & Cas. Union v. Haase, 385 U.S. 205 (1966) (granting the State's motion to dismiss the insurance company's appeal for lack of substantial federal question). The Court's disposition therefore left in place the Wisconsin Supreme Court's opinion holding the State's "Unauthorized Insurance Act" (analogous to the New Jersey Non-Admitted Insurers Act) constitutional under the Due Process Clause. See Ministers Life & Cas. Union v. Haase, 141 N.W.2d 287 (Wisc. 1966).

> these companies. Under the present laws, the Department is also powerless to prevent advertising by such insurers in our newspapers and other periodicals.
>
> The purpose and scope of this proposed legislation is covered in the statement appended to it.
>
> [Letter from Charles R. Howell, Comm'r, Dep't of Banking & Ins., to Lawrence Bilder, Exec. Assistant to the Governor (March 10, 1967) (on file with the N.J. State Archives) (emphasis added).]

The Sponsor's Statement accompanying S. 724, referred to above in Commissioner Howell's letter, further substantiates the statute's objective to extend the regulatory reach of DOBI to the activities of non-admitted insurers affecting our State's residents. The full Statement declared as follows:

> This bill will bring within the purview of the Department of Banking and Insurance certain previously nonadmitted insurance companies which, by newspaper advertising, mail solicitations, and otherwise, have effected insurance from foreign States upon New Jersey residents without being subject to the laws of this State. In consequence, residents of New Jersey have heretofore not received adequate protection when dealing with such companies. This legislation has now been made possible by recent constitutional decisions in State and Federal Courts.[10] The bill is

[10] This cross-reference seemingly alludes to the Wisconsin case noted in Commissioner Howell's letter, and similar case law.

> recommended by the Insurance Law Revision Commission.[11]
>
> [Sponsor's Statement to S. 724, at 4 (May 6, 1968) (emphasis added).]

Although its wording is slightly different in places, the New Jersey Non-Admitted Insurers Act parallels the content of a Model Act to regulate non-admitted insurers subsequently developed and endorsed by the National Association of Insurance Commissioners (the "NAIC"). Among other things, the Model Act similarly declares it shall be "liberally construed and applied to promote its underlying purposes," one of which is to "[p]rovid[e] a system[,] . . . which subjects nonadmitted insurance activities in this state to the jurisdiction of the insurance commissioner and state and federal courts in suits by or on behalf of the state." Nonadmitted Ins. Model Act § 2 (Nat'l Ass'n of Ins. Comm'rs 2002) (emphasis added).

---

[11] The former Insurance Law Revision Commission was one of several commissions that preceded the creation of the New Jersey Law Revision Commission in 1986. See N.J.S.A. 1:12A-1. As stated in the Introductory Statement to Senate Bill No. 3438 creating the New Jersey Law Revision Commission, "Law revision projects [to date] have been under the auspices of the Legislative Services Commission through its Office of Legislative Services. These projects were initiated on an as-needed basis, but were not the result of a continuous review of the statutory law of this State." We have been unable to locate the Insurance Law Revision Commission's report recommending the adoption of S. 724, as mentioned in that 1968 bill's Statement, and it was not supplied to us by counsel.

The Non-Admitted Insurers Act was adopted by our Legislature on July 31, 1968, as Chapter 234 of the 1968 Session Laws. The statute consists of seven sections, codified from N.J.S.A. 17:32-16 through -22. Over the years, the Act has been amended in various ways, but Section 20, which is the focus of this appeal, has remained unaltered.

In its opening section, N.J.S.A. 17:32-16 ("Section 16"), the Act recites its broad remedial purpose, as well as the Legislature's mandate that its provisions be liberally construed:

> This act is deemed and declared to be remedial legislation for the protection of the health and welfare of persons resident in this State by subjecting nonadmitted insurers which solicit, insure, or cause to be solicited such resident persons to the laws which govern all foreign insurers which do business in the State of New Jersey. This act shall be liberally construed to effectuate its purpose and intent.
>
> [N.J.S.A. 17:32-16 (emphasis added).]

This declaration of legislative intent is consistent with other statutory provisions and case law that recognize the wide scope of the regulatory authority of DOBI over the practices of insurance companies in this State.

"The principle that 'the insurance business is strongly affected with a public interest and therefore properly subject to comprehensive regulation in protecting the public welfare' is long-settled and well-established." R.J. Gaydos

Ins. Agency, Inc. v. Nat'l Consumer Ins. Co., 168 N.J. 255, 280-81 (2001) (quoting Sheeran v. Nationwide Mut. Ins. Co., 80 N.J. 548, 559 (1979)). To safeguard that public welfare, DOBI has "broad and comprehensive regulatory authority . . . over the business of insurance." In re Twin City Fire Ins. Co., 129 N.J. 389, 407 (1992).

This regulatory authority extends to workers' compensation insurance, the core component of appellants' products. In re Pathmark Stores, Inc., 367 N.J. Super. 50, 55-56 (App. Div. 2004). Every insurance company that insures employers against liability to employees because of personal injuries (i.e., workers' compensation insurance) is required to file with the Commissioner

> its classification of risks and premiums and rules pertaining thereto, together with the basis rates and system of merit or schedule rating applicable to such insurance . . . . Neither classifications of risk, rules pertaining thereto, basis rates, nor system of merit or schedule rating shall take effect until the commissioner of banking and insurance shall have approved the classification, rules, basis rates and system of merit or schedule rating, as reasonable and adequate for the risks to which they respectively apply . . . . If any insurance company . . . authorized to write work[ers'] compensation or employer's liability insurance in this state shall violate any of the provisions of this act, the commissioner of banking and insurance, may, in his discretion, after public hearing suspend the authority of said insurance company . . . to transact work[ers'] compensation or employer's liability insurance in this state for such period as said commissioner shall fix.

[N.J.S.A. 34:15-88.]

Further, with respect to the premiums charged for workers' compensation coverage, the Commissioner "shall promulgate . . . appropriate fee schedules, as [s]he deems necessary to effectuate the provisions of [the workers' compensation statute]." N.J.S.A. 34:15-77.8. Specifically, CRIB, which is under the aegis of the Department, has the authority to establish and maintain rules, regulations and premium rates for workers' compensation and employers' liability insurance, and equitably adjust the rates to account for the hazard of individual risks. N.J.S.A. 34:15-90.2(f).

To implement the Non-Admitted Insurers Act's broad declaration of purpose in Section 16, other sections of the Act delineate the statute's function to provide the Commissioner with substantially comparable authority over non-admitted foreign insurers as she has over admitted ones. Section 17(b) sets forth an expansive definition of an "insurer" covered by the Act, sweeping in "any person, association or corporation engaged in the transaction of the business of insurance, and shall include, without limitation, interinsurance exchanges and mutual benefit societies." N.J.S.A. 17:32-17(b) (emphasis added). Section 18

prohibits any foreign insurance companies, or their employees or agents,[12] from conducting "directly or indirectly, the business of insurance within this State unless and until [they are either]: (a) [a]dmitted to transact the business of insurance pursuant to the provisions of [N.J.S.A. 17:32-1 to -22]; or (b) [s]pecifically permitted by any other law of this State to transact the business of insurance within this State." N.J.S.A. 17:32-18. Other portions of the Act address topics not pertinent here.

Viewed in its entirety with the Non-Admitted Insurers Act, N.J.S.A. 17:32-1 to -22 covers foreign insurance companies; that is, any insurance company "formed by authority of another State or foreign government." N.J.S.A. 17:32-1. Regardless of its foreign or domestic status, a company engaged in the insurance business in New Jersey is subject to the "strict regulatory control" of DOBI. In re Markel Ins. Cos., 319 N.J. Super. 23, 28-29 (App. Div. 1999).

[12] As noted above, we defer to the OAL proceeding to address whether these broad definitions cover all of the appellant companies.

C.

With this backdrop in mind, we proceed to construe the key jurisdictional provision at issue, N.J.S.A. 17:32-20. In undertaking that task, we are guided by familiar principles of statutory construction.

To understand the meaning of a statute, "we look for the Legislature's intent." Libertarians for Transparent Gov't v. Cumberland Cty., 250 N.J. 46, 54 (2022) (citing DiProspero v. Penn, 183 N.J. 477, 492-93 (2005)). "We begin with the text of the statute because the language the Legislature chooses is 'generally . . . the best indicator of [its] intent.'" Ibid. (quoting DiProspero, 183 N.J. at 492). However, if the text of a statute is not clear on its face, courts will look to extrinsic aids to interpret it, such as the enactment's legislative history and the policies underlying it. State v. Harper, 229 N.J. 228, 237 (2017); DiProspero, 183 N.J. at 494 (examining an ambiguous statute's legislative history and "the policy considerations undergirding the legislation"); see also Cashin v. Bello, 223 N.J. 328, 336 (2015) (considering whether a proposed reading of the words of a statute is "at odds with either public policy or the overarching statutory scheme of which it is a part"); Murray v. Plainfield Rescue Squad, 210 N.J. 581, 592 (2012) (considering whether an interpretation of a

statute "leads to an absurd result inconsistent with any legitimate public policy objective; or . . . is at direct odds with an overall statutory scheme").

The first sentence of Section 20 is most pertinent to the jurisdictional question before us. Repeating it here for convenience, that rather lengthy sentence reads:

> 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.
>
> [N.J.S.A. 17:32-20.]

We parse this text in segments. The first seven words, "[w]henever it shall appear to the [C]ommissioner . . . ," describe a situation that is perceived by the DOBI Commissioner. Although the third word "shall" often connotes a mandate that "must" be carried out, see Aponte-Correa v. Allstate Ins. Co., 162 N.J. 318, 325 (2000), the context here logically signifies that the word "shall" is being used as a mere placeholder. As used in that passage, "shall" means "does."

It would be absurd to read the opening passage of Section 20 as meaning that the Commissioner must always find that every situation appears to involve a violation of the Non-Admitted Insurers Act. Of course it doesn't. Some

situations presented to the Commissioner will amount to apparent violations of the Act, and others will not.

Courts are to interpret statutes in a fashion that avoids absurd readings. "We . . . look to extrinsic aids if a literal reading of the law would lead to absurd results." Harper, 229 N.J. at 237 (citing Burnett v. Cty. of Bergen, 198 N.J. 408, 425 (2009)); see also State v. Provenzano, 34 N.J. 318, 322 (1961) ("It is axiomatic that a statute will not be construed to lead to absurd results.").[13]

Sensibly construed, therefore, the first thirty-four words of Section 20 mean:

---

[13] The Legislature has sometimes deployed a similar non-mandatory usage of the term "shall" in other statutes. See, e.g., N.J.S.A. 44:8-127 ("The director of welfare may in his discretion summarily revoke any order for continued assistance whenever it shall appear that the person is no longer needy within the meaning of this act or will be otherwise adequately provided for.") (Emphasis added).

The phrase, "Whenever it shall appear" can also be read as, "If" or "When." For example, in Simon v. Cronecker, 189 N.J. 304, 321-22 (2007), the Court construed the 1967 version of N.J.S.A. 54:5-89.1 ("No person, however, shall be admitted as a party to such action, nor shall he have the right to redeem the lands from the tax sale whenever it shall appear that he has acquired such interest in the lands for a nominal consideration . . . .") (emphasis added) to mean, "Because N.J.S.A. 54:5–89.1 prohibits a third-party investor from becoming 'a party to [the foreclosure] action' and redeeming a tax certificate if he acquires an interest for only 'a nominal consideration,' . . . ." Id. at 322. Some of the wording of N.J.S.A. 54:5-89.1, not pertinent here, was changed in 2021. See L. 2021, c. 231, § 1.

> Whenever it [does] 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
>
> . . . .

Assuming this predicate of a perceived violation is met, the remainder of Section 20's first sentence reads:

> 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.
>
> [(Emphasis added).]

The parties starkly disagree about the meaning of the underlined passage, "upon the request of the [C]ommissioner." Appellants read it as saying the Commissioner is obligated to request the Attorney General[14] to file a lawsuit in the Superior Court if she perceives the Act has been violated or is about to be violated. They contend that is the Commissioner's sole recourse. Respondents, meanwhile, read the "upon the request of" language to allow the Commissioner

[14] The Attorney General is the presumptive counsel of record to represent the Commissioner in such a lawsuit, since the Attorney General, subject to a few limited exceptions, is the "sole legal adviser" to State Government. N.J.S.A. 52:17A-4(e). Of course, despite Section 20's use of the word "shall," the Attorney General would not be obligated or even permitted to file a lawsuit at the behest of the Commissioner if it would be unethical and frivolous to do so. See Rule of Professional Conduct 3.1 and Rule 1:4-8.

the discretion to eschew litigation in the Superior Court and instead pursue an administrative action against the putative violators.

Having considered this ambiguous wording in light of the legislative history of the Act and the public policies that underlie it, we read the phrase "upon the request of" as a discretionary, not a mandatory, path of enforcement.

As we have already noted, the Commissioner ordinarily has wide discretion in her regulatory oversight of insurance companies. The general provisions of the insurance laws confer upon the Commissioner expansive powers to take various administrative measures against persons or entities who violate those laws. In particular, under N.J.S.A. 17:1-15, the Commissioner is authorized, among other things, to:

> c. Perform, exercise and discharge the functions, powers and duties of the department through those divisions established by law or as the commissioner deems necessary;
>
> . . . .
>
> g. Institute or cause to be instituted the legal proceedings or processes necessary to enforce properly and give effect to any of the commissioner's powers or duties; [and]
>
> . . . .
>
> j. Have the power, in addition to any powers prescribed by law, to order any person violating any provision of

> Title 17 of the Revised Statutes or Title 17B of the New Jersey Statutes to cease and desist from engaging in such conduct[.]
>
> [N.J.S.A. 17:1-15 (emphasis added).]

We must bear in mind that Section 16 of the Non-Admitted Insurers Act declares that the Act is "remedial legislation" devoted to the protection of the health and welfare of the people of this state. N.J.S.A. 17:32-16. To carry out those remedial objectives, the Commissioner should have wide discretion to apply her Department's expertise in the most expeditious manner suited for a particular situation. We doubt the Legislature instead wanted to confine the Commissioner to a "lawsuit-only" jurisdictional straitjacket. The Commissioner may be able to achieve compliance and a satisfactory result administratively, without the formality and limitations of the Rules of Court for civil actions. The Commissioner is allowed to make that choice of forum, consistent with the remedial purposes of the statute and the legislative mandate to construe it liberally.

We do not share appellants' cynical perspective that they necessarily will be better off in the Superior Court rather than the OAL because the Commissioner has the authority under the APA to reject a recommended decision of an ALJ if it is hypothetically in their favor. The APA was amended

several years ago to limit an agency head's prerogative to reject an ALJ's findings of fact. N.J.S.A. 52:14B-10 ("The agency head may not reject or modify any findings of fact as to issues of credibility of lay witness testimony unless it is first determined from a review of the record that the findings are arbitrary, capricious or unreasonable or are not supported by sufficient, competent, and credible evidence in the record."). Moreover, if the Commissioner acts against appellants in an arbitrary or capricious manner, they may appeal to this court to have that action set aside. See N.J.S.A. 52:14B-12; In re Stallworth, 208 N.J. 182, 194 (2011).

To be sure, the Superior Court has cognate jurisdiction under Section 20, but it does not have the Department's special expertise in insurance regulation. Indeed, it speaks volumes that appellants began the legal process by filing an administrative petition before the Commissioner—replete with citations to her legal authority to act—rather than invoking what they now contend is the exclusive jurisdiction of the Superior Court.

D.

Our construction of Section 20 as a non-exclusive jurisdictional pathway is also consistent with the general doctrine of primary jurisdiction. Primary jurisdiction has been 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." Muise v. GPU, Inc., 332 N.J. Super. 140, 158 (App. Div. 2000) (quoting Daaleman v. Elizabethtown Gas Co., 77 N.J. 267, 269 n.1 (1978)). "The general test for when a court should defer to an agency's primary jurisdiction is [whether] . . . 'deny[ing] the agency's power to resolve the issues in question' would be inconsistent with the 'statutory scheme' which vested the agency 'with the authority to regulate [the] industry or activity' [that] it oversees." Id. at 160 (third alteration in original) (quoting United States ex rel. Haskins v. Omega Inst., Inc., 11 F. Supp. 2d 555, 561 (D.N.J. 1998)).

A reason for applying primary jurisdiction is to permit an administrative agency to apply its expertise to questions which require interpretation of its regulations, and to preserve uniformity in that interpretation as it is applied. Id. at 159-60. Retaining primary jurisdiction in the courts in lieu of the administrative process at times can "dislocate the intricate regulatory structure governing a sensitive industry." Campione v. Adamar of N.J., Inc., 155 N.J. 245, 264 (1998). The business of insurance is such an industry with an "intricate regulatory structure."

"[T]he grant of authority to an administrative agency is to be liberally construed in order to enable the agency to accomplish its statutory responsibilities and . . . courts should readily imply such incidental powers . . . are necessary to effectuate fully the legislative intent." N.J. Guild of Hearing Aid Dispensers v. Long, 75 N.J. 544, 562 (1978). "[T]he breadth of an agency's authority encompasses all express and implied powers necessary to fulfill the legislative scheme that the agency has been entrusted to administer." In re Virtua-W. Jersey Hosp. Voorhees for a Certificate of Need, 194 N.J. 413, 422-23 (2008).

These principles further support our construction of Section 20 as a non-exclusive jurisdictional provision. Because the Commissioner in this case would prefer to address the insurance program sold by appellants in the administrative arena, we should defer to that choice.

E.

Lastly, we reject appellants' argument that this court's previous opinion in In re Midland Ins. Co., 167 N.J. Super. 237 (App. Div. 1979) requires us to remand this case to the Law Division. In Midland, after an administrative hearing had been conducted, a foreign insurance company authorized to do business in New Jersey, was fined and ordered to cease and desist certain

practices by the Commissioner of Insurance. Id. at 241. The administrative order was based on the company's failure to satisfy judgments and forfeitures on its bail bond obligations. Id. at 241. On appeal, the company argued that the Commissioner had no authority to impose a monetary penalty, asserting that the exclusive remedy was injunctive relief pursuant to N.J.S.A. 17:32-20. Id. at 247.

This court held in Midland that under the plain language of the statute, injunctive relief was not the sole remedy available to the Commissioner. Ibid. The opinion also observed in dicta:

> [T]o the extent that N.J.S.A. 17:32-20 may be deemed an exclusive remedy, it would be thus limited only to nonadmitted foreign carriers . . . which do not have a certificate of authority to do business here . . . . This act was basically intended as remedial legislation in order to subject nonadmitted insurers to the laws governing all foreign insurers doing business in this State . . . . In all likelihood, the rationale for the requirement of N.J.S.A. 17:32-20 that an action commence in Superior Court, rather than before the Commissioner, is the Commissioner's lack of jurisdiction over [non-admitted] companies.
>
> [Id. at 248.]

The opinion added in a footnote that N.J.S.A. 17:32-20 "conceivably . . . may also justify resort to the courts by the Commissioner for relief from hazardous operations by a licensed foreign carrier." Ibid. n.3.

This dicta within our opinion in Midland, 167 N.J. Super. at 248, does not require us to remand this case to the Law Division. For one thing, Midland factually concerned an admitted foreign insurance company, whereas the parties in this case include two non-admitted companies, i.e., Applied and AUCRA. The observations in Midland about the statute's impact on non-admitted insurers were surplusage and unnecessary to the result.

Furthermore, as our in-depth discussion of the legislative history of the Non-Admitted Insurers Act, supra, shows, the Act does not signify the Commissioner has a "lack of jurisdiction over [non-admitted] companies." Id. at 248. With all due respect to our predecessors, that dicta from Midland is incorrect. As the letter quoted above from then-Commissioner Howell to the Governor's Office evidences, the Act was specifically passed to "provide [the] Department with jurisdiction over activities over unauthorized insurers." See Letter from Charles R. Howell to Lawrence Bilder (emphasis added). Likewise, the Sponsor's Statement to S. 724, which we also quoted above, makes clear that the statute was designed to "bring within the purview of the Department . . . certain previously nonadmitted insurance companies." Sponsor's Statement to S. 724, at 4 (emphasis added). Neither of these highly illuminating extrinsic sources of legislative intent was discussed in Midland. Hence, we do not adopt

the dicta from Midland relied upon by appellants, and are guided by our own independent legal analysis.

III.

For all of these reasons, we hold that Section 20 does not compel this dispute to be litigated in the Superior Court. The matter is accordingly remanded to the Department's administrative jurisdiction, with instructions to reactivate the hearing pending before the OAL.

Remanded to the Department of Banking and Insurance.