



KATHY HOCHUL
Governor

KAITLIN ASROW
Acting Superintendent

November 7, 2025

VIA ECF

The Honorable John G. Koeltl
United States District Court, Southern District of New York
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street
New York, NY 10007-1312

Re: *Barbato and North Jersey Public Adjusters, Inc. v. Interstate Fire & Casualty Company, et al.*, 25-cv-5312 (JGK)

Dear Judge Koeltl:

I am a Deputy General Counsel at the New York State Department of Financial Services (“DFS”), a non-party in the above-referenced action.¹ I write on behalf of DFS at the invitation of the Court in its Order dated October 8, 2025 (Document No. 18). Specifically, the October 8, 2025 Order invited DFS to “advise whether the Department has primary jurisdiction over this case.” DFS appreciates the opportunity to provide the Court with its view on that question, which view is set forth in the balance of this letter. In short, DFS does not have primary jurisdiction in this case.

The primary jurisdiction doctrine “comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views.” *United States v. Western Pacific Railroad Company*, 352 U.S. 59, 64, 77 S.Ct. 161, 165, 1 L. Ed.2d 126 (1956) (citation omitted). “No fixed formula exists for applying the doctrine of primary jurisdiction. In every case the question is whether the reasons for the existence of the doctrine are present and whether the purposes it serves will be aided by its application in the particular litigation.” *Id.*

The purposes served by the primary jurisdiction doctrine include “preserv[ing] the integrity of the administrative process” and “promot[ing] consistency in the interpretation and application of the relevant regulatory scheme.” *Azby Brokerage, Inc. v. Allstate Ins. Co.*, 637 F.Supp. 382, 384

¹ Plaintiffs originally named as a defendant former Superintendent of Financial Services Adrienne A. Harris in her official capacity as head of DFS, but the Court dismissed Superintendent Harris as a party by Order dated October 17, 2025 (Document No. 19).

(1986). Another purpose of the doctrine is to “promote[] judicial economy by avoiding needless litigation of matters that can effectively be resolved at the agency level.” *Id.* (citations omitted).

In this case, applying the primary jurisdiction doctrine will not aid the purposes that the doctrine serves. First, applying the doctrine will not “preserve the integrity of the administrative process” in this case because DFS does not have the power to provide the remedies that plaintiffs are seeking here – a declaratory judgment, an injunction, and damages – administratively.

Further, applying the primary jurisdiction doctrine here would not “promote consistency in the interpretation and application of the relevant regulatory scheme,” because there is no “relevant regulatory scheme” that governs this case. Neither the Insurance Law, nor the Financial Services Law, nor the regulations promulgated under either law, expressly address anti-public adjuster (“APA”) clauses, let alone prohibit them.

Nor would applying the primary jurisdiction doctrine here “avoid[] needless litigation of matters that can effectively be resolved at the agency level,” because DFS cannot effectively resolve plaintiffs’ complaint administratively. Again, DFS is not authorized to issue declaratory judgments or injunctions, nor to order an insurer to pay damages to an aggrieved public adjuster, and APA clauses are not expressly prohibited by the laws and regulations that DFS is tasked with implementing in any event. In addition, plaintiffs are challenging the actions of an excess line insurer.² In New York, an excess line insurer is not licensed to do an insurance business and is only able to do an insurance business in the state without a license through an exception set forth in Insurance Law § 1101(b)(2)(F) that pertains to business done in the excess line market in conformance with Insurance Law § 2105. Unlike a licensed insurer, an excess line insurer is not subject to all of the requirements set forth in the Insurance Law and regulations promulgated thereunder, including review and approval of policy forms. Without approval authority over defendants’ policy forms, DFS cannot directly bar defendants from including APA clauses in their policies.

Defendants claim that certain provisions of Financial Services Law Article 4 (“Article 4”) provide DFS with general administrative jurisdiction over the conduct of any insurer, whether an excess line insurer or not. *See* Defendants’ Memorandum of Law in Support of Motion to Dismiss (“Def. Mem.”) (Document No. 13-3) at 6 (claiming that “the New York Legislature has vested DFS with primary jurisdiction to investigate any entity (which includes surplus [sic] insurers) that has engaged, or is engaging, in misconduct with respect to the insurance law.”)(citing Financial Services Law § 404(b)). This assertion overstates DFS’s authority, however. The provision defendants cite, Financial Services Law § 404 (“Section 404”), grants DFS the authority to investigate only “fraud or misconduct” under the Banking Law, Insurance Law, or Financial Services Law, not just any conduct. In other words, DFS must have a reasonable suspicion that an insurer’s conduct has violated or violates one of those laws before it has the authority to investigate. An excess line insurer’s inclusion of an APA clause in its policy cannot violate the Insurance Law or the Financial Services Law because neither law expressly bars such language.

² Plaintiffs describe defendants in this case as “foreign insurers writing surplus lines of insurance.” Complaint ¶ 18 (Document No. 1-1). While other states use the term “surplus lines,” New York uses the term “excess line” for the type of insurer defendants are describing. Accordingly, this letter uses the term “excess line.”

And while an excess line insurer's insistence on including an APA clause in an insurance contract might be a sharp business practice, it is neither "fraud" nor "misconduct" within the meaning of Article 4. Thus, Article 4 does not grant DFS the authority to investigate the conduct at issue here.

Defendants also miss the mark in characterizing Financial Services Law § 408(a) ("Section 408(a)") as stating that DFS has the general authority to "issue a statement of charges and hold a hearing in respect" to an Insurance Law violation. Section 408(a) contains no such language. Rather, Section 408(a) authorizes DFS to impose a civil penalty for a limited class of offenses: intentional fraud or misrepresentation regarding financial products or services; violations of state or federal fair debt collection practices or federal or state fair lending laws; and any other violation of the Financial Services Law or regulations thereunder. The conduct plaintiffs complain about in this case fits none of these categories. To be sure, Section 408(a) does require DFS to provide notice and a hearing before imposing a civil penalty, but it is not a provision that authorizes DFS to hold a hearing on any Insurance Law violation.

Finally, defendants mischaracterize Financial Services Law § 409(a) ("Section 409(a)") when they claim the provision states that "where the Superintendent [of Financial Services] is satisfied that a violation of the insurance law has occurred or been attempted, the Superintendent reports it the [sic] district attorney of the county in which such acts were committed or to the attorney general." Def. Mem. (Document No. 13-3) at 6. Section 409(a) does not provide for the reporting of any Insurance Law violation whatsoever. Rather, it provides for the reporting of the limited class of Section 408(a) offenses "or *fraud* or other *criminal activity* under the insurance law or banking law." Financial Services Law § 409(a) (emphasis added). And the report need only go to such authorities as "the superintendent deems appropriate." *Id.* For example, non-criminal activity would not be reported to the district attorney of the county where the activity occurred, but it might be reported to the "appropriate licensing agency" if the provider of financial products or services were licensed by an entity other than DFS.

This case is neither *Azby Brokerage* nor *Fusco v. New York Property Underwriters Assocs.*, 70 A.D.2d 895 (N.Y. App. Div. 2d Dep't 1979), the two cases defendants rely on as support for their contention that DFS has primary jurisdiction here. Unlike those two cases, this case does not involve a legislatively created insurance mechanism – like the New York Automobile Insurance Plan or the New York Property Insurance Underwriting Association – with a comprehensive administrative or statutory scheme governing it. Nor does DFS have the power to provide plaintiffs the remedies they seek. Accordingly, DFS does not have primary jurisdiction in this case.

Respectfully submitted,

/s/ Martha A. Lees

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