STATE OF MICHIGAN

COURT OF APPEALS

LMI INSURANCE COMPANY, an Ohio stock insurance company,

Plaintiff-Appellant,

v

MICHIGAN COMMISSIONER OF INSURANCE,

Defendant-Appellee.

UNPUBLISHED
May 6, 1997

No. 169840, 181521
Ingham Circuit Court
LC No. 93-75826 AZ
93-75959 AA

Before: McDonald, P.J., and White and P.J. Conlin,* JJ.

PER CURIAM.

In these consolidated cases, plaintiff appeals the decision and order of the circuit court upholding defendant's refusal to requalify LMI for a certificate of authority, after a change of control, under § 405 of the Insurance Code, MCL 500.405, MSA 24.1405 (No. 181521). Plaintiff also appeals the circuit court's denial of preliminary and permanent injunctive relief and the court's declining to hold § 405 unconstitutional (No. 169840). We reverse and remand.

I

LMI[1] is a stock insurance company domiciled in Ohio, and licensed in twenty-nine jurisdictions, excluding Michigan. Before this dispute, LMI had continuously maintained an unrestricted license in Michigan since 1904. On August 7, 1992, Vik Brothers Insurance, Inc. (Vik Bros.), Vik-LMI Holdings, Inc. (Holdings) and Prudential Property & Casualty Insurance Company (Prupac) signed a stock purchase and sale agreement for the purchase of LMI from Prupac by Holdings.

After the agreement was executed, § 405 of the Insurance Code was enacted, taking immediate effect on October 1, 1992. The statute provides:

> The certificate of authority of a foreign insurer with respect to whom control within the meaning of this act changes after the effective date of this section without being subject

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* Circuit judge, sitting on the Court of Appeals by assignment.

> to the commissioner's approval shall be automatically revoked 90 days after the change in control without further action by the commissioner unless, within 90 days of the change of control or a longer period if the commissioner allows, the insurer requalifies for a certificate of authority under the provisions of this act in force as of the change of control. The certificate of authority shall be revoked under such conditions for the protection of policyholders, creditors, and the public as the commissioner may require.

On December 18, 1992, control of LMI passed from Prupac to Holdings. On January 19, 1993, plaintiff notified defendant of the December 18 acquisition. On January 27, 1993, defendant informed plaintiff that requalification was required under § 405, and that plaintiff had to submit an application for admission and requalification for its certificate of authority before March 18, 1993, and receive a favorable determination thereon.

By letter dated March 15, 1993, plaintiff submitted a written application for requalification. Defendant extended the ninety-day period for requalification several times, as authorized by § 405. From March, 1993 through September 1993, the parties had meetings and exchanged letters. Defendant established September 30, 1993 as a final deadline for requalification.

On September 30, 1993, defendant notified plaintiff by letter that "the review period has been concluded and the automatic revocation of LMI Insurance Company's certificate of authority has taken effect due to the insurer's failure to requalify." Defendant's letter listed four remaining concerns which "raised sufficient questions to prevent us from certifying with assurance that the company is 'safe, reliable, and entitled to public confidence' as required by Section 424(3) and Section 403."[2]

No. 16940

On October 7, 1993, plaintiff filed a complaint for equitable relief in circuit court. Plaintiff's complaint alleged that defendant's decision that LMI was not safe, reliable and entitled to public confidence was not rationally based in law or fact, and that the commissioner had erred in refusing to requalify LMI under new ownership and in revoking the certificate of authority without giving plaintiff an opportunity for response. The complaint alleged that plaintiff is safe, reliable, and entitled to public confidence because plaintiff had written insurance in Michigan for eighty-nine years, was licensed and authorized to do business in twenty-nine other jurisdictions, and was rated "A" by A.M. Best Company, and thus had a rating as high or higher than forty-five of the fifty-five property and casualty insurance companies domiciled in Michigan; plaintiff's current assets equal 107% of its liabilities; and plaintiff had $2.75 million on deposit with the Bureau, which equals about sixty-six percent of losses paid to Michigan policyholders in 1992. The complaint further addressed other concerns defendant had raised and requested a temporary restraining order or preliminary injunction restraining the enforcement of defendant's determination, an order that defendant show cause why a preliminary injunction should not issue, and that the court enjoin defendant from disseminating any information regarding the status of plaintiff's certificate of authority and the September 30, 1993 decision.

Plaintiff also filed an emergency petition under MCL 500.244; MSA 24.1244[3] for stay of the Bureau's order revoking plaintiff's certificate of authority. Plaintiff further alleged that it had a right under MCL 500.437(2), as an aggrieved insurer, to a contested case hearing pursuant to the Administrative Procedures Act (APA), MCL 24.201 *et seq*.; MSA 3.560(101) *et. seq.;* and that it had the right to petition the Ingham Circuit Court for an emergency stay of the order during the pendency of the contested case proceeding under MCL 500.244(2); MSA 24.1244. Plaintiff alleged that on October 7, 1993, it had filed a petition for commencement of a contested case hearing with the Bureau. Plaintiff's emergency petition further alleged that defendant's action of revoking an "A" rated insurance company's certificate of authority was both unwarranted and unprecedented, and that without the issuance of a stay plaintiff would suffer irreparable harm to its business and reputation in Michigan and throughout the United States. The petition alleged that plaintiff would deposit $9,740,751.00 in securities to satisfy the statutory bond requirement within five days of the issuance of the stay, in addition to the $2.75 million already held by the Bureau.

The circuit court granted plaintiff's emergency petition for stay on October 7, 1993, scheduled a hearing for October 21, 1993, and requested briefing.

On October 19, 1993, the commissioner issued an order denying plaintiff's petition for commencement of a contested case.

On October 21, 1993, the circuit court, after hearing oral argument, ruled that the Legislature had a right to regulate the use of licenses, that the automatic stay provision of §244(2) does not apply to the automatic revocation language of § 405 because a stay would be inconsistent with the Legislature's intent to provide for automatic revocation and there had been no commissioner's decision or order here, and that § 405 applied to this case.

On November 10, 1993, the circuit court entered an order denying the motion for stay and preliminary injunction, dissolving the stay and dismissing the case.

No. 181521

On October 22, 1993, plaintiff filed a claim of appeal from defendant's determination to revoke its certificate of authority.[4] The parties argued the appeal in circuit court on August 29, 1994, and on October 18, 1994, the circuit court affirmed defendant's decision denying plaintiff's application for requalification. The circuit court held that the decision was authorized by law and that the appropriate scope of review was limited, quoting *Brandon School Dist v MESSA*, 191 Mich App 257; 477 NW2d 138 (1991):

> Where no hearing is required, it is not proper for the circuit court or this Court to review the evidentiary support of an administrative agency's determination. Judicial review is not de novo and is limited in scope to a determination whether the action of the agency was authorized by law . . . The decision must be affirmed unless it is in violation of statute, in excess of he statutory authority or jurisdiction of the agency, made upon unlawful procedures resulting in material prejudice, or is arbitrary and capricious.

II

Plaintiff raises several issues on appeal. However, our conclusion that plaintiff was entitled to a contested case hearing makes it unnecessary to address all of plaintiff's claims. Further, our decision today applies only to foreign insurers as to which control was transferred between October 1, 1992 and June 27, 1994.

As originally enacted in 1992, as part of a comprehensive amendment of the Insurance Code,[5] the statute did not address the requalification process contemplated by § 405. The statute was silent regarding the procedures to be employed in determining whether a foreign insurer as to which there has been a change in control requalifies under current provisions. The Bureau rejected the contention that a contested case hearing was required, despite the fact that existing certificates were involved. The battle was eventually fought in the Legislature while this case was pending on appeal. In 1994, an amendment that would have provided for application of § 437's revocation provisions (see page 8-9, *infra*) was defeated.[6] A compromise position was adopted. Section 405 was amended to provide for an opportunity to seek requalification before a change of control,[7] and § 405b was added, providing for formal review, findings and a statement of reasons, and the preparation of a record.[8] Sections 405(2) and 405b control the requalification process after the end of June, 1994.

In the instant case, we must decide what requalification procedure was required before the 1994 amendments, when the statute was silent on the issue. We conclude that the requalification of an insurer holding a certificate of authority is more akin to a revocation proceeding than a decision respecting an initial application for qualification, and that a contested case review is most consistent with the statutory scheme as originally enacted.

B

Where the language used in a statute is clear and unambiguous, courts presume that the Legislature intended the meaning it plainly expressed and enforce the statue as written. *Gebhardt v O'Rourke*, 444 Mich 535, 541-542; 510 NW2d 900 (1994). In such instance, judicial interpretation is normally neither necessary nor permitted. *Lorencz v Ford Motor Co.,* 439 Mich 370, 376; 483 NW2d 844 (1992). However, if reasonable minds can differ regarding the meaning of a statute, judicial construction is appropriate. *Dep't of Social Services v Brewer*, 180 Mich App 82, 84; 446 NW2d 593 (1989). When ambiguity exists, courts must give effect to the intent of the Legislature. *Gebhardt, supra* at 543. "Even assuming [an] ambiguity exists, rules of statutory construction require that separate provisions of a statute, where possible, should be read as being a consistent whole, with effect given to each provision." *Id.* at 542. "[S]tatutes must be construed to prevent absurd or illogical results and to give effect to their purposes." *Gross v General Motors Corp*, 448 Mich 147, 164; 527 NW2d 707 (1995). "[S]eeming inconsistencies in the various parts of a statue should be reconciled, if possible, so as to arrive at a meaning that gives effect to all parts of the states." *Id.* Words or phrases must be read in context, *Dedes v Asch*, 446 Mich 99, 105; 521 NW2d 488 (1994), and accorded their plain and ordinary meanings. MCL 8.3a; MSA 2.212(1); *In re PSC'S Determination Regarding Coin-*

Operated Telephones, No. 2, 204 Mich App 350, 353; 514 NW2d 775 (1994). Courts should presume that every word has some meaning and should avoid any construction which would render a statute, or any part of it, surplusage or nugatory. *Popma v Auto Club Ins Ass'n* 446 Mich 460, 470; 521 NW2d 831 (1994).

C

A certificate of authority or permit is akin to a license as defined by the APA. *Michigan Intra-State Motor Tariff Bureau, Inc v Public Service Comm.*, 200 Mich App 381, 389; 504 NW2d 677 (1993). The APA defines "license" to include "the whole or part of an agency permit, certificate, approval, registration, charter, or similar form of permission required by law," except for "a license required solely for revenue purposes." *Id.*, citing MCL 24.205(1); MSA 3.560(105). A licensee holds a property interest in a license. See *Brown v Yousif*, 445 Mich 222, 228-229; 517 NW2d 727 (1994) (liquor license); citing, in part, *Bundo v Walled Lake*, 395 Mich 679; 238 NW2d 154 (1976).

Section §92 of the APA requires that

> [b]efore the commencement of proceedings for suspension, revocation,. . . or amendment of a license, an agency shall give notice, personally or by mail, to the licensee of facts or conduct which warrant the intended action. The licensee shall be given an opportunity to show compliance with all lawful requirements of retention of the license. [MCL 24.292; MSA 3.560(192).]

Once the licensee has received notice of the facts or conduct constituting the alleged violation and has had an informal opportunity to show compliance, the issuing agency must give notice of the hearing and also hold the required hearing. *Rodgers v State Bd of Cosmetology*, 68 Mich App 751, 754, 756-758; 244 NW2d 20 (1976).

Section 437(1) of the insurance code provides that the commissioner shall initiate a proceeding to suspend, revoke or limit an insurer's certificate of authority by giving the insurer an opportunity to show compliance pursuant to § 92 of the APA. If the commissioner concludes that the insurer should be suspended, revoked or limited, based upon one or more factors set forth in § 436, the commissioner "shall" state the determination and the reasons for the determination in the order. MCL 500.437(1); MSA 24.1437(1). Section 437(2) provides that an insurer aggrieved by the commissioner's §436 determination and order "shall be entitled to a contested case hearing" pursuant to the APA.

After the conclusion of the contested case hearing, the insurer may seek judicial review of the order under the provisions of the APA. MCL 24.301-.328; MSA 3.560(301) - (328). MCL 500.244(1); MSA 24.1244(1); see MCL 500.437(3); MSA 24.1437(3).

Section 405 is triggered when there has been a change in control of a foreign insurer without prior approval of the commissioner:

> The certificate of authority of a foreign insurer with respect to whom control within the meaning of this act changes after the effective date of this section without being subject to the commissioner's approval shall be automatically revoked 90 days after the change in control without further action by the commissioner unless, within 90 days of the change of control or a longer period if the commissioner allows, the insurer requalifies for a certificate of authority under the provisions of this act in force as of the change of control. The certificate of authority shall be revoked under such conditions for the protection of policyholders, creditors, and the public as the commissioner may require.

At issue is what is meant by the phrase "automatically revoked without further action of the commissioner" and what requalification process and review was contemplated by the statute as originally enacted. We conclude that when considered in the context of the entire statutory scheme, the phrase "automatically revoked without further action of the commissioner" means that if, within the allotted time, the foreign insurer fails to seek requalification, or seeks requalification and fails to requalify, its certificate of authority is to be automatically revoked, and the commissioner is not obliged to follow the procedures it would otherwise be required to follow as set forth in § 437(1) of the insurance code and § 92 of the APA; i.e., the commissioner need not commence a proceeding to revoke, and need not provide the insurer with an additional opportunity to show compliance with all lawful requirements.

Section 405 embodies the legislative intent that a change in control of a foreign insurer trigger an immediate inquiry into the present fitness of the insurer to conduct business in Michigan, and that the insurer be required to requalify. Were it not for § 405, the commissioner would be obliged to commence a proceeding if the commissioner desired to suspend, revoke or limit the certificate of a foreign insurer after a change in control. Section 405 relieves the commissioner of the burden of identifying and pursuing the foreign insurer and commencing a proceeding under § 437, and makes it the foreign insurer's responsibility to itself seek requalification or face automatic revocation, and to affirmatively establish its present fitness under the code. Further, without § 405 the commissioner would have no special obligation to focus on and evaluate the current qualifications of a foreign insurer as to which there has been a change in control. Section 405 forces both sides to engage in a timely reevaluation of the insurer's fitness.

Section 405 effectively renders the revocation procedures of § 437(1) automatic, and not dependent on the commissioner's actions, by providing for automatic revocation in the absence of requalification initiated by the insurer. We conclude that this is meaning of the phrase "automatically revoked . . . without further action by the commissioner unless . . . the insurer requalifies." The "further action by the commissioner" that is not required after requalification efforts have failed is the initiation of a proceeding by the granting of an opportunity to show compliance with all lawful requirements.

Thus, we conclude that § 405 in effect substitutes for § 437(1) and triggers the automatic reevaluation of a foreign insurer's fitness to conduct business in Michigan upon a change in control of the insurer. The evaluation is compelled by statute and the commissioner need do nothing to initiate it; if the

commissioner determines that the foreign insurer fails to requalify, the certificate is automatically revoked without resort to any other process.

However, the phrase "automatically revoked . . . without further action by the commissioner unless . . . the insurer requalifies" does not inform us regarding the requalification procedure. We must fill the gap by attempting to determine the process intended by the Legislature. Where the statute is silent, we seek to discern the process most consistent with the legislative scheme as enacted. See *People v Trotter*, 209 Mich App 244, 247; 530 NW2d 516 (1995). There is no reason to conclude that the Legislature in enacting § 405 intended that the foreign insurer be accorded no more process than an initial applicant. We therefore conclude that a procedure that accords a contested case hearing is most consistent with the overall statutory scheme, the APA, and related case law extant at the time. See *Bundo, supra.*

Plaintiff was denied a contested case hearing and we therefore remand for such a hearing. We decline to remand for the review contemplated by § 405b because, while the section is currently in effect, plaintiff did not have the benefit of the amendment to § 405 that was passed in conjunction with § 405b, providing for an opportunity to obtain a determination of the requalification issue before control is acquired.[9] Indeed, when the agreement to acquire LMI was entered into, § 405 had not been enacted.

Our decision that plaintiff was entitled to a contested case hearing effectively disposes of the remaining issues. The automatic revocation is vacated, and the matter is remanded to the Bureau for a contested case hearing.

/s/ Gary R. McDonald
/s/ Helene N. White
/s/ Patrick J. Conlin

[1] Prior to the acquisition LMI was named Prudential-LMI Insurance Company. It was renamed LMI Insurance Company.

[2] The four concerns were stated in an eight-page letter as: 1) deviation from industry averages, surplus adequacy, past and projected surplus and surplus maintained by comparable insurers; 2) losses-historical, current and projected; 3) failure to respond and to file information, including the audited financial statements of controlling individuals; 4) unproven track record of new management and questionable financial stability on new parent.

[3] MCL 500.244; MSA 24.1244 provides in part:

> (1) A person aggrieved by a final order, decision, finding, ruling, opinion, rule, action, or inaction provided for under this act may seek judicial review in the manner provided for in chapter 6 of the administrative procedures act of 1969 . . . being sections 24.301 to 24.328.

> (2) An insurer may petition of right for a stay of an order issued pursuant to sections 436, 436a, 437, or any other proceeding for the suspension, revocation, or limitation of a certificate of authority. The petition shall be on an emergency basis to the circuit court for the county in which the insurer has its principal place of business in the state or to the circuit court for Ingham county. The petition shall be disposed of within 14 days. The court shall direct the filing and time of filing of appropriate pleadings. A court shall not issue a stay unless the court finds that the issuance of a stay is not hazardous to policyholders, creditors, or the public. The decision of the court shall be limited to the issue of a stay, and the court shall not decide the merits of the case, which shall be determined pursuant to section 437 or to any other provision of this act under which the proceeding for the suspension, revocation, or limitation of the certificate of authority is being conducted.

[4] On November 19, 1993, plaintiff filed a motion for leave to conduct an evidentiary hearing or to present additional evidence and for scheduling of pretrial conference. Plaintiff argued that because of "the irregularities in the procedure" before the Bureau the court should conduct an evidentiary hearing and hear oral arguments pursuant to its authority under the MAPA or, alternatively, remand the case to the Bureau for additional evidence to be taken because of the inadequacy of the record below.

Plaintiff argued in its brief that all parties agreed that the action was an appeal under § 244(1), and that that section specifies that judicial review of any Bureau decision is under the MAPA.

Defendant opposed plaintiff's motion, arguing that this was the second case plaintiff had filed in response to the automatic revocation of its certificate of authority under § 405, that the first complaint (for equitable relief) had been dismissed because the court agreed that plaintiff's license was revoked under the automatic revocation provision of § 405. Defendant argued that presentation of additional evidence is unnecessary because the circuit court is not permitted to examine the factual basis for the Commissioner's decision. Defendant argued that the scope of review of the circuit court was limited, and that it must affirm the Commissioner's decision unless he acted beyond his authority, contrary to statute, or the decision was arbitrary and capricious. Defendant further argued that plaintiff's request to present additional evidence was untimely and should be denied, and that plaintiff failed to allege such bias as would constitute an irregularity in the proceeding under § 104 of the MAPA, thus the court lacked authority to conduct an evidentiary hearing.

[5] P.A. 1992, No. 182 § 1.

[6] In the Senate on April 28, 1994, Senator Faxon offered an amendment to § 405 to read:

> Beginning October 1, 1992, the certificate of authority of a foreign insurer with respect to whom control as defined in section 115(B) changes without being subject to the commissioner's approval may be revoked pursuant to the procedures established by section 437. [Senate Journal, April 28, 1994, No 37, p 907-908.]

This amendment was narrowly defeated 17-18, with two members excused and one member not voting.

Senator Welborn protested against the adoption of the first set of amendments offered to House Bill No. 4871 and moved that the statement he made during the discussion of the amendments be printed as his reasons for voting "no." His statement was:

> I would like to answer the tirade I just heard. If I could get the Senator from the Fifteenth District to listen, perhaps he would understand why I am opposing his amendment.
>
> One, I do not oppose the due process you are asking for. Two, I think that you are being played and this is an end-run by a lobbyist that was before the Commerce Committee just last Tuesday. And I think you are being played as a sucker in that process because of the fact that the same language you are asking for is nearly the same as appears in House Bill No. 5310, introduced by Representative Brown . . . [which] allows when a hearing is held, the due process. With an amendment that was agreed upon as a floor amendment by basically all five members of the committee, Democrat and Republican alike, an amendment that I will be offering that is already in the amendment package for House Bill No. 5310, it will make certain and guarantee that the information the insurance company is going to file is going to be placed on the record and will be available to build that record to go to court.
>
> On the issue I believe you stated as, "you can't go to court," it is interesting to note that the lobbyist that I am certain wrote the amendment for you has already indicated to the committee that he is in court on this very issue. So we are trying to rectify it. We will do so in House Bill No. 5310.
>
> Why am I against it? I think you have gone too far, Senator, with your amendment and secondly I think you are working in the wrong bill.

House Bill No. 5310 was later enacted as P.A. 1994, No. 226 §1. [Senate Journal, April 28, 1994, pp 910-911.]

[7]Section § 405(2) A person seeking to acquire control of a foreign insurer may request the commissioner to determine whether or not the commissioner would requalify the insurer for a certificate of authority if control is acquired. The commissioner shall determine within 90 days after the request is made whether or not the insurer would requalify for a certificate of authority if control is acquired. The commissioner's determination shall be in writing and shall state the commissioner's reasons as to why the commissioner would either grant or deny requalification for a certificate of authority if control is acquired. If the commissioner does not issue his or her determination within this 90-day period and the person seeking the request acquires control of the foreign insurer within 180 days after the request for

a determination is made, the insurer shall be automatically requalified for a certificate of authority. If the commissioner issues an affirmative requalification determination and the person requesting the determination acquires control of the foreign insurer within 180 days after the request for a determination was made, the commissioner is prohibited from proceeding under subsection (1). This subsection is effective July 1, 1994. [P. A. 1994, No. 228 1, effective June 30, 1994.]

[8] Section 405b. An insurer that seeks requalification pursuant to sections 405 or 405a is entitled to a formal review by the commissioner during which the insurer may submit information, documents, or other data to the commissioner in support of the application of requalification. The commissioner shall act upon the application by an order that embodies the commissioner's findings and reasons for the decision. A record of the review, including the information, documents, or other data submitted by the insurer to the commission in support of the application for requalification, shall be prepared by the insurance bureau and made available. [P.A. 1994, No. 226, § 1, effective June 27, 1994.]

[9] Neither party argues that §405b should be applied retroactively.