



provides that this Court may approve the plan, disapprove the plan, or modify the plan and approve it as modified. Section 516(d) states in relevant part, as follows:

The rehabilitator may prepare a plan for the reorganization, consolidation, conversion, reinsurance, merger or other transformation of the insurer. Upon the application of the rehabilitator for approval of the plan, and after such notice and hearing as the court may prescribe, the court may either approve or disapprove the plan proposed, or may modify it and approve it as modified. If it is approved, the rehabilitator shall carry out the plan.

If an abuse is found or a plan otherwise fails to comply with the requirements of Article V or other applicable law or court order, the Court should disapprove the plan.<sup>1</sup>

Alternatively, the Pennsylvania Supreme Court has ruled that Section 516(d) authorizes the Commonwealth Court to modify and approve as modified a proposed plan submitted by the Rehabilitator for the Commonwealth Court’s review as warranted to “check any abuse of discretion by the Commissioner” or to render it “free from any abuse of the Rehabilitator’s discretion.” *Foster v. Mutual Fire, Marine and Inland Ins. Co.*, 531 Pa. 598, 609, 614 A.2d 1086, 1091 (1992) (“*Mutual Fire II*”), *affirming sub nom., remanding in part, Grode v. Mutual*

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<sup>1</sup> In this regard, in accordance with the broad authority that Article V vests in this Court to oversee rehabilitations, the Pennsylvania Supreme Court has affirmed this Court’s authority to issue orders concerning several different forms of relief and to direct a rehabilitator to submit a rehabilitation plan addressing perceived obstacles. *See Mutual Fire II*, 531 Pa. 598, 605-607, 614 A.2d 1086, 1089-90 (1992). For example, in *Mutual Fire*’s rehabilitation, the Commonwealth Court’s directives to the Commissioner included: (i) “to prepare a notice of hearing to be sent to all known policyholders and creditors indicating the procedure for obtaining the plan and raising objections prior to a Court hearing on its approval”; (ii) to file a report on the progress of the rehabilitation; (iii) “to submit to the court a schedule of tasks to be performed in order to complete the evaluation” – with regard to which the Commonwealth Court specified several tasks in advance; (iv) appointment of a deputy rehabilitator upon “close consultation, pursuant to Section 515(c) of the Act”; and (v) upon review of the Rehabilitator’s report that the “1987 Plan was not feasible for several reasons,” a directive that the Rehabilitator submit a modified plan that would include a provision to trigger applicable state insurance guarantee funds (both in Pennsylvania and other states) and a provision for proportionate periodic payments of policyholders’ claims. *Id.*, 531 Pa. at 605-07, 614 A.2d at 1089-90.

*Fire Marine and Inland Ins. Co.*, 527 A.2d 798 (Pa. Cmwlth. 1990) (“*Mutual Fire I*”). Then, “[i]f it is approved, the rehabilitator shall carry out the plan.” Section 516(d).

Section 516(d) contains no limit on the Commonwealth Court’s power to modify a plan of rehabilitation. Under *Mutual Fire II*, the only limitation on the Commonwealth Court’s power to modify a rehabilitation plan is the requirement that the Court’s discretion must be exercised to prevent abuse. The Pennsylvania Supreme Court explained that (at least where a true plan of rehabilitation is presented), “the involvement of the judicial process is limited to the safeguarding of the plan from any potential abuse of the Rehabilitator’s discretion.” *Id.*, 531 Pa. at 609, 614 A.2d at 1091. A necessary corollary is that the greater the potential abuse, the more judicial involvement is warranted to safeguard the plan from the abuse.

The Pennsylvania Supreme Court held that under *Norfolk*, the existence of “bad faith, fraud, capricious action or abuse of power” would constitute an abuse of discretion. *Mutual Fire II*, 531 Pa. at 609-610, 614 A.2d at 1092 (quoting *Norfolk & Western Railway Co. v. Pennsylvania Public Utility Comm.* 489 Pa. 109, 128, 413 A.2d 1037, 1047 (1980) (quoting *Blumenschein v. Housing Authority*, 379 Pa. 566, 573, 109 A.2d 331, 334-35 (1954))). However, “bad faith, fraud, capricious action, and abuse of power” are not the only circumstances constituting an abuse of discretion; indeed, the decision subsequently analyzed whether plan provisions were “arbitrary or unreasonable.” *See id.*, 531 Pa. at 634, 614 A.2d at 1105. The Commonwealth Court subsequently reviewed a proposed rehabilitation plan for abuse of discretion with regard to irrationality, self-dealing, bias, ill-will, and misapplication of law. *See Ario v. Fidelity Mut. Life Ins. Co.*, 935 A.2d 55, 62 (Pa. Cmwlth. 2007).<sup>2</sup>

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<sup>2</sup> In all cases, however, the Commonwealth Court’s review of pure questions of law is plenary in scope. *See Hospital & Healthsystem Assoc. of Pennsylvania v. Insurance Commissioner*, 74 A.3d 1108, 1113 n.12 (Pa. Cmwlth. 2013).

The list of circumstances constituting an abuse of discretion in this short list of decisions involving the review of a proposed plan of rehabilitation under Article V is not exhaustive. Whether there has been an abuse of discretion in these proceedings must be determined in light of the unique facts and circumstances presented here, as Intervenors will argue at the upcoming hearing.

As the moving party, the Rehabilitator has the burden of proof with regard to any application for approval of the proposed plans. *See, e.g.*, Opinion at 122 (quoting *Legion* at 1230). The burden of proof rests with the Rehabilitator, as the moving party, whether or not any objections are filed. Even in the case where the Rehabilitator submits a plan for the Commonwealth Court's review and determination, and no objectors are present, the Commonwealth Court remains statutorily charged to determine whether the plan is worthy of approval, which determination includes judicial review to safeguard the plan from any potential abuse of the Rehabilitator's discretion. The Rehabilitator's burden of proof to demonstrate that the plan is free from abuse of discretion does not shift merely because objectors have submitted objections to the proposed plan for the Commonwealth Court's judicial review.

## **II. CONCLUSION**

As plans calling for the conversion of these rehabilitation proceedings to liquidation proceedings, the legal standard applicable to the Rehabilitator's petition for approval of the proposed Second Amended Plan is the statutory standard for conversion of a rehabilitation to a liquidation under Section 518(a), as set forth at pages 122-135 of this Court's May 3, 2012 Opinion. If the Court instead determines that any of the plans of rehabilitation proposed by the Rehabilitator (including, but not limited to, the April 30, 2013 Plans submitted for the Court's review), constitute plans of rehabilitation, Section 516(d) provides that this Court may approve the plan, disapprove the plan, or modify the plan and approve it as modified. As construed by

the Pennsylvania Supreme Court in *Mutual Fire II*, the Court is authorized to modify any proposed plan submitted for the Court's review under Section 516(d) as warranted to check any abuse of discretion or to free the plan from any abuse of discretion.

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Dated: February 17, 2015

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**CERTIFICATE OF SERVICE**

I hereby certify that on February 17, 2015, I caused a true and correct copy of the foregoing Intervenor's Memorandum Regarding The Legal Standard Applicable To The Court's Review Of The Proposed Plans to be served via e-mail and first-class U.S. Mail on the counsel listed below:

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