

**[J-84A-2022, J-84B-2022, J-84C-2022, J-84D-2022] [M.O. – Mundy, J.]  
IN THE SUPREME COURT OF PENNSYLVANIA  
MIDDLE DISTRICT**

**TODD, C.J., DONOHUE, DOUGHERTY, WECHT, MUNDY, BROBSON, JJ.**

IN RE: AMERICAN NETWORK : No. 58 MAP 2021  
INSURANCE COMPANY (IN :  
LIQUIDATION) : Appeal from the Commonwealth  
: Court Order dated July 9, 2021 at  
: No. 1 ANI 2009.

APPEAL OF: MIKE HUMPHREYS, :  
ACTING INSURANCE COMMISSIONER : SUBMITTED: October 18, 2022,  
OF THE COMMONWEALTH OF : 2022  
PENNSYLVANIA :

IN RE: PENN TREATY NETWORK : No. 59 MAP 2021  
AMERICA INSURANCE COMPANY (IN :  
LIQUIDATION) : Appeal from the Order of  
: Commonwealth Court at No. 1 PEN  
: 2009 dated July 9, 2021.

APPEAL OF: MIKE HUMPHREYS, :  
ACTING INSURANCE COMMISSIONER : SUBMITTED: October 18, 2022  
OF THE COMMONWEALTH OF :  
PENNSYLVANIA :

IN RE: AMERICAN NETWORK : No. 7 MAP 2022  
INSURANCE COMPANY (IN :  
LIQUIDATION) : Appeal from the Commonwealth  
: Court Order dated December 22,  
: 2021 at No. 1 ANI 2009.

APPEAL OF: MIKE HUMPHREYS, :  
ACTING INSURANCE COMMISSIONER : SUBMITTED: October 18, 2022  
OF THE COMMONWEALTH OF :  
PENNSYLVANIA :

IN RE: PENN TREATY NETWORK : No. 8 MAP 2022  
AMERICA INSURANCE COMPANY (IN :  
LIQUIDATION) : Appeal from the Order of  
: Commonwealth Court at No. 1 PEN  
: 2009 dated December 22, 2021.

APPEAL OF: MIKE HUMPHREYS, ACTING :  
INSURANCE COMMISSIONER OF THE : SUBMITTED: October 18, 2022  
COMMONWEALTH OF PENNSYLVANIA :

## OPINION

**JUSTICE MUNDY**

**DECIDED: October 19, 2022**

In this declaratory judgment action brought in the context of two insurance-company liquidation matters, the parties assert they informally agreed, among themselves and the single Commonwealth Court Judge<sup>1</sup> overseeing the cases, to a procedure for a three-judge panel of the Commonwealth Court to render a decision to be reviewable via exceptions by the Commonwealth Court, *en banc*. However, as the agreement was not memorialized as of record, the party aggrieved by the panel opinion, the statutory liquidator, lodged an immediate appeal with this Court after that opinion and order were filed, and then filed exceptions with the Commonwealth Court, *en banc*. After the Commonwealth Court, *en banc*, rendered a second opinion and order, overruling the exceptions and confirming the panel's initial decision, the statutory liquidator filed a second appeal with this Court parallel to the first. As explained herein, this raised a jurisdictional question of which appeal is properly before us. Accordingly, we must resolve that threshold question before turning to the merits.

By way of background, this matter first came before this Court via a notice of appeal filed by Appellant, Jessica K. Altman, Insurance Commissioner of the Commonwealth of Pennsylvania, in her capacity as statutory liquidator of Penn Treaty Network America Insurance Company and American Network Insurance Company<sup>2</sup>, from

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<sup>1</sup> Judge Mary Hannah Leavitt was the Commonwealth Court Judge assigned to the rehabilitation, and subsequent liquidation proceedings involving the captioned insolvent insurance companies.

<sup>2</sup> Jessica K. Altman resigned her position effective February 25, 2022. On February 28, 2022, Michael Humphreys was named acting Insurance Commissioner. In his capacity as liquidator in the instant matters he continues with the pending appeals.

the July 9, 2021, order of a panel of the Commonwealth Court. After Appellant filed the first notice of appeal, the parties presented a Joint Application for a Stay, explaining that the parties and the Commonwealth Court Judge attached to the liquidation proceedings agreed to a specific procedure to address Appellant's Application, as noted above. To that end, the parties noted the Commonwealth Court issued an order on July 20, 2021, setting August 23, 2021, as the due date for any exceptions to be filed, a date beyond the 30-day deadline for an appeal to be filed. Thus, Appellant filed the notice of appeal at 58 & 59 MAP 2021 "in an abundance of caution and without the intent of circumventing the Commonwealth Court's process." Appellant's Brief at 3. In a per curiam order entered on October 8, 2021, this Court granted the stay but denied other sought relief, including any determination relative to the Commonwealth Court's continued jurisdiction. Appellant filed a subsequent notice of appeal from an order of the Commonwealth Court, *en banc*, dated December 22, 2021. The July 9, 2021 order denied Appellant's "Application for Declaration Regarding Policyholder Claims for Non-Guaranty Association Policy Benefits" filed March 20, 2019, and the December 22, 2021 order overruled Appellant's exceptions to the July 9, 2021 order.<sup>3</sup>

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<sup>3</sup> Appellant raised identical issues in her jurisdictional statements accompanying each notice of appeal, to wit:

1. Whether the Commonwealth Court erred in prohibiting the Liquidator from paying claims for policy benefits not covered by the state guaranty associations.
2. Whether the Commonwealth Court erred in permitting the Health Insurers to intervene and oppose the Application.
3. Whether the Commonwealth Court erred in its findings regarding the scope of transfers permitted by 40 P.S. § 221.23(8), including that the Liquidator could not establish a captive insurer to assume policy liabilities.

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4. Whether the Commonwealth Court erred in deciding that paying policyholder claims through more than one source of funds impermissibly severs those policies.
  5. Whether the Commonwealth Court wrongfully ignored controlling law making all policyholder claims Class (b) claims, regardless of when those claims accrue or how they are paid.
  6. Whether the Commonwealth Court erred in deciding that the Liquidator could not value policyholder claims on a breach of contract basis.
  7. Whether the Commonwealth Court erred in finding that policyholders have no claims against a liquidation estate for losses occurring more than thirty days after the liquidation order.
  8. Whether the Commonwealth Court erred in deciding that policyholder claims for losses occurring more than thirty days after the liquidation order must be given a zero valuation under *Warrantech Consumer Prods. Servs. Inc. v. Reliance Ins. Co.*, 96 A.3d 346 (Pa. 2014).
  9. Whether the Commonwealth Court erred in applying Article V, the PLHIGA Act, the NAIC Model Act, the NAIC Receivership Handbook, and/or the Insurer Receivership Model Act.
  10. Whether the Commonwealth Court erred in finding that state guaranty associations have a claim to estate assets exceeding the value of their administrative claims and their subrogated interest in policyholder claims.
  11. Whether the Commonwealth Court erred in deciding that the Liquidator cannot rely on equitable principles when performing her statutory duties.
  12. Whether the Commonwealth Court erred in concluding that common law pre-dating the current insolvency statutes is no longer valid.

Appellant's Jurisdictional Statement, 08/09/2021, at 5-6; Appellant's Jurisdictional Statement 01/21/2022, at 4-6.

The underlying matters were addressed to the Commonwealth Court's original jurisdiction thus giving this Court exclusive appellate jurisdiction.<sup>4</sup>

Relative to the notice of appeal filed from the December 22, 2021, *en banc* decision of the Commonwealth Court, this Court deferred determination of our jurisdiction to hear the appeal and directed the parties to address the issue in their briefs:

In addition to the issues identified in the jurisdictional statements, the parties are DIRECTED to address the propriety of the Commonwealth Court entertaining and ruling upon Appellant's exceptions to the July 9 opinion after Appellant had filed her initial appeals from that opinion with this Court. See generally *Moses v. T.N.T. Red Star Express*, 725 A.2d 792, 795 n.4 (Pa.Super. 1999) (holding that the trial court was without jurisdiction to vacate a summary judgment order that had been appealed). See also 42 Pa.C.S. §5505

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<sup>4</sup> The relevant provisions state as follows.

#### **§ 723. Appeals from Commonwealth Court**

**(a) General rule.**--The Supreme Court shall have exclusive jurisdiction of appeals from final orders of the Commonwealth Court entered in any matter which was originally commenced in the Commonwealth Court except an order entered in a matter which constitutes an appeal to the Commonwealth Court from another court, a magisterial district judge or another government unit.

42 Pa.C.S.A. § 723.

#### **Rule 1101. Appeals as of Right from the Commonwealth Court**

**(a) Scope of rule.** This rule applies to any appeal to the Supreme Court from an order of the Commonwealth Court entered in:

(1) Any matter which was originally commenced in the Commonwealth Court and which does not constitute an appeal to the Commonwealth Court from another court, a magisterial district judge or another government unit.

Pa.R.A.P. 1101(a)(1).

(allowing a court to modify or rescind an order within 30 days after entry, “if no appeal from such order has been taken or allowed”); Pa.R.A.P. 1701(b) (delineating the authority of a trial court to act after an appeal has been filed, including granting reconsideration if the reconsideration application is filed “within the time provided or prescribed by law”); *id.* NOTE (explaining that Rule 1701(b)(5) “recognizes the authority that an appellate court has to retain jurisdiction while asking a trial court . . . to engage in factfinding”). The parties are further DIRECTED to address the impact of any impropriety on the Commonwealth Court’s procedure upon the viability of the present appeals.

7 & 8 MAP 2022, PCO 3/17/22, at 2.<sup>5</sup> We first address the jurisdictional question of which set of appeals is properly before this Court.<sup>6</sup>

### **PARTIES’ JURISDICTIONAL ARGUMENTS<sup>7</sup>**

Appellant argues that the Commonwealth Court’s July 20, 2021 scheduling order effectively held the finality of the panel’s July 9, 2021, decision in abeyance, thus modifying it to a non-final order pursuant to § 5505.<sup>8</sup> *Id.* at 5. Appellant argues this

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<sup>5</sup> In the order, we consolidated the appeals with those at 58 & 59 MAP 2021. On April 21, 2022, we denied the parties’ Joint Application for Reconsideration and Clarification of the Court’s March 17, 2022 Order.

<sup>6</sup> “[W]e have often said that the timeliness of an appeal is jurisdictional and will be raised by the court *sua sponte*, if necessary. A court’s jurisdiction is a threshold issue that the court may consider of its own motion and at any time.” *McCutcheon v. Philadelphia Elec. Co.*, 788 A.2d 345, 349 (Pa. 2002)

<sup>7</sup> Appellant, Appellees, and amici largely agree that the en banc Commonwealth Court had jurisdiction to address the exceptions filed by the parties and this Court has jurisdiction to consider the appeal from the December 22, 2021 Order.

<sup>8</sup> 42 Pa.C.S. § 5505 provides as follows.

#### **§ 5505. Modification of orders**

Except as otherwise provided or prescribed by law, a court upon notice to the parties may modify or rescind any order within 30 days after its entry, notwithstanding the prior

Court's October 8, 2021, stay order reinforces this conclusion. While the *Moses* case delineated the jurisdictional constraints imposed by § 5505,<sup>9</sup> Appellant distinguishes *Moses* on the basis that that case did not involve a scheduling order comparable to the instant July 20, 2021 order.

Appellee, National Organization of Life and Health Insurance Guaranty Associations (NOLHIGA), adds that this Court's decision in *Appeal of Borough of Churchill*, 575 A.2d 550 (Pa. 1990), allows the fact-finding court in cases not covered by the Rules of Civil Procedure to fashion local rules or case-specific exception procedures. NOLHIGA argues this case falls under the *Churchill* ruling. NOLHIGA's brief at 3-4.

In cases like *Borough of Churchill*, which this one is, the final order from which an appeal is taken is, as it is with post-trial

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termination of any term of court, if no appeal from such order has been taken or allowed.

42 Pa.C.S. § 5505.

<sup>9</sup> The Superior Court in *Moses* noted the following.

Pursuant to 42 Pa.C.S.A. § 5505 the Trial Court "upon notice to the parties may modify or rescind any order within *thirty* days after its entry, notwithstanding the prior termination of any term of court, *if no appeal from such order has been taken or allowed.*" 42 Pa.C.S.A. § 5505 (emphasis supplied). See also *Stockton v. Stockton*, 698 A.2d 1334, 1337 (Pa.Super.1997). Additionally, Pa.R.A.P. 1701(a) provides that the trial court may no longer proceed further in the matter after an appeal has been taken except in limited instances prescribed by Pa.R.A.P. 1701(b), none of which are present here. [] Accordingly, as the Trial Court was without jurisdiction to enter them, the orders of March 3, 1997 and April 1, 1997 were vacated by our April 6, 1998 memorandum and order. The case, therefore, remains in the same procedural posture which it was in after the order granting of the motion for summary judgment was entered on January 28, 1997. It is that order which we now review.

*Moses v. T.N.T. Red Star Exp.*, 725 A.2d 792, 795, n.4 (Pa. Super. 1999).

practice, the order entered following the exceptions process. That makes sense, because a court can modify its reasoning or even its decision upon consideration of post-trial motions; indeed, that is the very purpose of post-trial practice. Because the first order appealed from (the Panel Order) was interlocutory, 42 Pa.C.S. § 5505 was “inapplicable.”

*Id.* at 4 (citations omitted) (quoting *Commonwealth v. Jones*, 69 A.3d 180, 186 (Pa. 2013)).

Appellees, intervenors Anthem, Inc. and Unitedhealthcare Insurance Co., argue, similarly with Appellant’s, that this Court’s grant of the parties’ joint application for a stay following the initial notice of appeal, functioned to authorize further action by the Commonwealth Court *en banc*. Even though this Court’s order denied other requests contained in the application, including an express authorization for the *en banc* Commonwealth Court to act, Appellees argue the grant of the stay could serve no other purpose. Appellees’ Brief at 8. In any event, Appellees argue the exceptions should be deemed a motion for reconsideration and the scheduling order a grant of reconsideration. *Id.* at 10.

## **DISCUSSION**

Initially, we emphasize that our *per curiam* order granting the joint stay request but denying all other requested relief was in no way an indication of the jurisdictional propriety of either set of the notices of appeal. That said, part of our initial concern about our jurisdiction over the instant appeals concerned the underlying nature of the “Application” filed in the liquidation proceedings below. Procedures for insurance company Liquidation/Rehabilitation proceedings are set forth in Pa.R.A.P. 3771-3784. Appellant’s pertinent March 20, 2019, filing was captioned “Liquidator’s Application for Declaration Regarding Policyholder Claims for Non-GA Policy Benefits.” The rules permit an application for relief pursuant to Pennsylvania Rule of Appellate Procedure 3776 which provides as follows.

### **Rule 3776. Applications for Relief or Court Approval**



Relief or approval from the Court shall be requested by application. An application for relief or an application by the receiver for the Court's approval shall comply with Pa.R.A.P. 123 (application for relief), except that a response, if any, shall be filed within thirty (30) days of service of an application for relief or an application for Court approval. Upon application, the Court may alter the time for response. The application and any response may be supported by a memorandum of law.

Pa.R.A.P. 3776. Further, a note to the Rule clarifies a purpose for the Rule; “*Court approval*--From time to time, the receiver must obtain the Court’s approval of an action proposed to be taken in the course of administering the estate, such as, but not limited to, making an interim distribution of assets.” *Id. note*. However, Appellant’s application did not seek a determination for an interim action on a specific claim or obligation. Rather it sought a “declaration” concerning the Liquidator’s authority under Article V to process a certain class of claims in accordance with the proposed procedure described in the Application, and the panel treated it as such. *In Re: Penn Treaty Network America Insurance Co. (in Liquidation); In Re: American Network Insurance Co. (in Liquidation)*, 259 A.3d 1028, 1029 (Pa.Cmwlt. 2021). Such a filing, notwithstanding its title, comports with the Declaratory Judgments Act’s designation as a request for relief where “judgment or decree will terminate the controversy or remove an uncertainty.” 42 Pa.C.S. § 7536. We have held that a filing’s substance is determinative of any jurisdictional matter. See *Stackhouse v. Commonwealth*, 832 A.2d 1004, 1008-09 (Pa. 2003). Further, determinations under the Declaratory Judgments Act are final orders for purpose of further appeal. *General Acc. Ins. Co. of America v. Allen*, 92 A.2d 1089, 1095 (Pa. 1997) *citing* 42 Pa.C.S. § 7532 (stating a court’s declaration under the Act “shall have the effect of a final judgment”).

Such appeals are governed by our Rules of Appellate Procedure and 42 Pa.C.S.A. § 5505. In the context of statutory proceedings for which no statute or rule has made the rules of civil procedure expressly applicable, this Court has noted that trial courts may

promulgate local rules, or in the absence of local rules “each trial court has been vested with the full authority of the court to make rules of practice for the proper disposition of cases before them[.]” *Appeal of Borough of Churchill*, 575 A.2d 550, 554 (Pa. 1990) (involving the trial court’s invitation to file exceptions in an action under the General County Assessment Law Act, 72 P.S. § 5020-518.1).<sup>10</sup> However, that case concerned the timeliness of statutory appeals taken from the order denying exceptions, and whether such exceptions were authorized, rather than the order to which the invited exceptions

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<sup>10</sup> *Borough of Churchill* has engendered some perceived tension between the holding in that case and Pa.R.C.P 227.1(g). Rule 227.1(g) provides “[a] motion for post-trial relief may not be filed in an appeal from a final adjudication or determination of a local or a Commonwealth agency as to which jurisdiction is vested in the courts of common pleas.”

In *Churchill*, this Court held respecting post-trial relief in Statutory appeals:

In this case, the trial court invited the parties to file exceptions and accepted them and disposed of them, and then issued its final order. This practice was not in violation of our case law or state-wide rules. Our precedents have recognized the practice of inviting exceptions in tax assessment cases, and it is interesting to note that we have never imposed this step on the trial courts but have merely recognized that if they feel that such a practice is beneficial to them, who are we to interfere with the trial court’s regulation of the practice before it.

*Churchill*, 575 A.2d at 555. The Commonwealth Court subsequently addressed the relationship between the rule and this Court’s holding.

In *Eachus [v. Chester County Tax Claim Bureau]*, 612 A.2d 586 (1992) this court reconciled *Borough of Churchill* with Rule 227.1(g) by noting that the Supreme Court focused on the authority of a trial court to “invite” post-trial motions or exceptions. We concluded that in statutory appeals, where both the Rules of Civil Procedure and local rules are silent as to the right to file post-trial motions, none may be filed unless the court explicitly directs otherwise. In that case, because post-trial motions were not invited, the trial court’s original order was final when entered.

*Shapiro v. Center Tp., Butler Cnty.*, 632 A.2d 994, 999 (Pa.Cmwltth.1993).

were addressed. It did not address the effect of the filing of a timely notice of appeal prior to the filing or consideration of invited exceptions, which is the current scenario. Nor did it involve a petition seeking declaratory judgment which proceeds under the procedures governing the underlying actions. The rules governing insurance rehabilitation or liquidation proceedings include the option for appointing a referee or hearing by a judge of the court in the case of objections to actions of the Liquidator, Pa.R.A.P. 3781(d), or adversarial proceedings, Pa.R.A.P. 3783(c). Additionally, Pennsylvania Rule of Appellate Procedure 3783(b) dictates that the Rules of Civil Procedure shall apply.

While Appellant asserts that there was agreement among the parties and the court concerning the exception procedure employed, there is nothing in the record evidencing that such procedure was adopted by the court. The July 9, 2021 order from the panel did not indicate it was anything but a final order or that it would only become final at a future date or pending further conditions.<sup>11</sup> Additionally, the court's July 20, 2021 scheduling order did not alter that status.<sup>12</sup> One deficiency with the parties' arguments is that they

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<sup>11</sup> The order states:

AND NOW, this 9<sup>th</sup> day of July, 2021, the Application for Declaration Regarding Policy holder Claims for Non-Guaranty Association Policy Benefits filed by Pennsylvania Insurance Commissioner Jessica K. Altman, in her capacity as Statutory Liquidator of Penn Treaty Network America Insurance Company (In Liquidation) and American Network Insurance Company (In Liquidation) in the above-captioned matter is DENIED.

Commonwealth Court Order 7/9/21, No. 1 PEN 2009; No 1 ANI 2009.

<sup>12</sup> The order states:

AND NOW this 20<sup>th</sup> day of July, 2021, it is ORDERED that exceptions to the Court's order in the above-captioned matter dated July 9, 2021, denying the Statutory Liquidator's Application for Declaration Regarding Policyholder Claims for Non-Guaranty Association Policy Benefits shall be filed on or before August 23, 2021.

Commonwealth Court Order 7/20/21, No. 1 PEN 2009; No 1 ANI 2009.

advocate a determination that the July 9, 2021 order was not a final order by implication. This is problematic. The single judge could have entered an order memorializing agreed to procedure but did not. The panel could have stated in its order that the determination was not final, essentially a decree nisi, but did not. The court's scheduling order could have stated it was an acceptance of an agreement for reconsideration, but again did not. To impute such intent by implication would complicate the jurisdictional limitations our courts must abide by.<sup>13</sup>

Appellant's contention that the exceptions should be deemed the equivalent of a grant of reconsideration, thereby invoking the ability of a trial court to reconsider an otherwise final order already appealed from, might have validity if the exceptions had not been filed beyond the 30-day period for appealing the July 9th order, see Pa.R.A.P. 1701(b)(3); see also *In re: Penn Treaty Network Am. Ins. Co.*, 268 A.3d 1154, 1159 n.6 (Pa. Cmwlth. 2021) (*en banc*) ("By analogy to the procedure followed in tax appeals, exceptions filed to a final order of this Court have the effect of an order granting reconsideration."). This is because Rule 1701, by its terms, only authorizes the conversion of a final order to a reconsidered one if reconsideration is granted "in the trial court . . . within the time prescribed by these rules for the filing of a notice of

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<sup>13</sup> We recognize that Pennsylvania Rule of Appellate Procedure 905 addresses the situation where a premature notice of appeal is filed before exceptions are ruled upon. In that scenario the appeal is perfected by the issuance of a final order on the exceptions. See Pa.R.A.P. 905(a)(5) ("A notice of appeal filed after the announcement of a determination but before the entry of an appealable order shall be treated as filed after such entry and on the day thereof."). If it had been clear that the panel's July 9th ruling was not a final order but the equivalent of a decree nisi because some agreement was placed in the record prior to its issuance to proceed with exceptions, a stronger argument could be made that the first appeal was premature and was perfected by the December 22nd order as the final, appealable one. We presently offer no definitive ruling on that scenario, but note only that, although all parties concur there was an (apparently informal) agreement to proceed in that manner, they fail to identify any aspect of the record suggesting the Commonwealth Court gave formal approval to such procedure.

appeal[.]” Pa.R.A.P 1701(b)(3)(ii). Appellant’s exceptions were filed on August 23, 2021, beyond the 30-day deadline for the filing of an appeal. They therefore cannot have implicated the court’s reconsideration authority under Rule 1701(b)(3).

Therefore, Appellant’s August 9, 2021, notice of appeal from the panel’s July 9, 2021, order was a timely appeal as of right from a final order in a declaratory judgment action. The filing of the notice of appeal triggered the jurisdictional limitations imposed by § 5505. *See supra*. Accordingly, the appeals at 7 & 8 MAP 2022 are dismissed for want of jurisdiction. The appeals at 58 & 59 MAP 2021 are properly before us and we proceed to the merits.<sup>14</sup>

Relative to the merits of Appellant’s issues on appeal, we find that the panel’s July 9, 2021 published opinion provides an accurate and detailed summary of the history and posture of the case, and the Liquidator’s proposal for which she sought a declaration of legal authority to fulfill, which we incorporate herein by reference. *See In Re: Penn Treaty Network America Insurance Co. (in Liquidation); In Re: American Network Insurance Co. (in Liquidation)*, 259 A.3d at 1030-1035. The proposal presented a pure question of law, and the Commonwealth Court panel comprehensively addressed the statutory framework and caselaw interpreting those statutes, concluding they did not authorize Liquidator’s proposed diversion of funds to a captive insurer to provide benefits to policy holders above the limit applicable to the statutory guaranty association limits. The Panel concluded “[t]here is simply no statutory authority for this well-intentioned proposal [or] any standard to guide the Liquidator’s establishment [of the proposal] or [the Commonwealth Court’s] evaluation thereof.” *Id.* We agree, and affirm the Panel’s July 9, 2021 Order on the basis of its accompanying opinion.

Chief Justice Todd and Justices Donohue and Wecht join the opinion.

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<sup>14</sup> The issues raised by Appellant involve questions of law for which our scope of review is plenary and our standard of review is *de novo*. *See, e.g., Alliance of Carlisle v. Bd. of Assessment Appeals*, 919 A.2d 206, 214 (Pa. 2007).

Justice Wecht files a concurring opinion in which Justice Dougherty joins.

Justice Brobson did not participate in the consideration or decision of this matter.