IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 34944

JAMES G. CLAY and
MICHAEL R. CORBETT

Appellants

vs.

STATE OF WEST VIRGINIA CONSOLIDATED
PUBLIC RETIREMENT BOARD

Appellee

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SUPREME COURT OF APPEALS
OF WEST VIRIGINIA

APPEAL FROM THE CIRCUIT COURT OF KANAWHA COUNTY
Civil Action No. 05-MISC-371
Honorable James C. Stucky, Judge

BRIEF OF APPELLANTS JAMES G. CLAY AND MICHAEL R. CORBETT

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KIND OF PROCEEDING AND NATURE OF RULING BELOW

This is an appeal from a final order of the Circuit Court of Kanawha County, entered on October 20, 2008, which affirmed an administrative decision of the West Virginia Consolidated Public Retirement Board (herein "CPRB"), dated August 2, 2005. The Appellants were challenging the action of the State Teachers Retirement System ("TRS") established by West Virginia. Code § 18-7A-1 *et seq.*[1] The CPRB administers the TRS along with other public employee pension funds.[2]

The Appellants are two teachers, James G. Clay and Michael R. Corbett, who were members of the TRS. The issues in this matter involve loans obtained by the Appellants from the TRS in 1984 and 1985, pursuant to West Virginia Code §18-7A-34. Subsequently, in 1986 the Appellants filed for bankruptcy under Chapter 7 of the Bankruptcy Code and received a discharge. The loans from the TRS were listed in the bankruptcy petitions, which were served on the TRS. The TRS never challenged the dischargeability of the loans at the time, and the Appellants reasonably believed that the loans had been discharged. Sixteen years later, the CPRB on behalf of the TRS notified Appellants Clay and Corbett *for the first time* that it contended that the loans had not been discharged in bankruptcy, that interest had continued to accumulate, compounded monthly, for the entire sixteen years, and that they must repay the loans and interest or suffer an offset against their retirement benefits which would significantly reduce their pensions.

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[1]The proceedings before the CPRB and the Circuit Court of Kanawha County were consolidated proceedings which included the two Appellants herein and a third individual, Katherine Hoopengarner. The Court has consolidated Ms. Hoopengarner's appeal with this appeal for argument and decision.

[2]Since the Teachers Retirement System is the particular pension fund at issue, the CPRB and the TRS will be designated jointly herein as the "TRS."

Appellants contend that the actions and inaction of the TRS breached its fiduciary duties to the Petitioner as beneficiaries of the TRS under well established principles of trust law. The Appellants also submit that the TRS should be estopped from collecting or offsetting the excess interest because its conduct led them to believe that the loans had been discharged, to their detriment. They would have paid the original loans years ago had they known that the TRS contended that they were not discharged in bankruptcy. Finally, the TRS' claim should be barred by laches in view of the sixteen year delay in notifying Appellants of its claim that the debts still existed and were accumulating additional interest. These issues are matters of law and are subject to *de novo* review.

The Appellants, when they were notified of the TRS' assertion that the loans were not discharged in bankruptcy, offered to pay the amounts which were owed at the time of the bankruptcy proceedings, but objected to paying the additional interest which accrued during the sixteen years during which the TRS failed to notify them that it considered the debt still owed. Appellants remain willing to do so.[3]

STATEMENT OF FACTS

A. The Bankrupcy Proceedings

In 1984 and 1985, the Appellants, Clay and Corbett, each took out loans from the TRS, pursuant to West Virginia Code §18-7A-34. That provision permits members of the TRS to borrow from their accounts up to $8,0000, repayable over a maximum of 60 months. Payments are to be made

[3]In fact, Appellant James Clay has already paid the amount of the debt accrued at the time of the bankruptcy ($2,103) in response to the initial demand letter from the TRS in May 2003, only to receive a second letter in January 2004, demanding $9,997. The TRS kept the original check. See *infra* at pp 7-8.

by payroll deductions by the employer (the board of education) upon notification of the loan by the TRS. *See*, § 18-7A-34 (5). Clay borrowed $3,830 at 9.5% interest in 1984 to purchase a piece of farm equipment. (AX 8).[4] Corbett borrowed $4,647.27 in 1986 at 11.25%. (AX 9).

The "Loan Agreement" signed by Clay and Corbett clearly indicates that it is a promissory note to the Teachers Retirement Board.[5]

A few years later, due to financial problems, Clay and Corbett each filed for bankruptcy on advice of counsel. Both of them listed their debt to the TRS in their petitions. In each case, a notice of the bankruptcy filing was sent to the TRS. Clay and Corbett each received an order from the United States Bankruptcy Court in 1987 discharging their debts. (AX 13 as to Clay, AX 12 as to Corbett). The TRS was also notified of the discharge.[6]

Although notified and aware of the bankruptcy proceedings, the TRS made no appearance in the bankruptcy case. The only thing the TRS did do was to notify the boards of education who employed the Appellants to stop the withholding of the loan payments from the debtor's pay, which

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[4]The exhibits will be referred to by the designation "AX" (Applicant's Exhibits) used in the Administrative hearing, and appear at Tab 7 of the record. The transcript of the administrative hearing of December 14, 2004, at Tab 5 in the record, will be referred to as "T___." Additional documents in the record other than the administrative hearing exhibits are also tabbed.

[5]The "Loan Agreement" states:

> This note evidences a loan obtained by me in pursuance of the provisions of [18-7a-34], and the provision of that section are made a part herof. In installments as herein stated, for value received, I promise to pay to the TEACHERS RETIREMENT BOARD, an instrumentality of the State of West Virginia, created by [18-7a] of the West Virginia Code, the principal sum of ___, with interest from the date hereof at the rate of __% per annum, add on method of calculation, not to exceed an annual actuarial percentage rate of 14.68% based on term of loan.

[6]The bankruptcy notices and discharges are also in the individual files maintained by the TRS on Clay and Corbett, at Tab 8 of the record.

it apparently believed it was required to by the automatic stay of 11 U.S.C. § 362. The TRS did not file a motion to challenge the dischargeability of the TRS debt pursuant to 11 U.S.C. § 523. It did not file a motion to lift the automatic stay to permit the payroll deductions for the loan payments to continue. It did not notify the debtors or their bankruptcy counsel that the TRS believed that the debt was not dischargeable in bankruptcy. It did not warn the Appellants that the debt would continue to accrue interest until the debt was paid in full, or that the failure to pay the debt would result in an offset of the debt from their retirement benefit at the time they retired. (T. 112, 114).

The bankruptcy cases were closed within months and the automatic stay lifted, but the TRS took no action to reinstate the payroll deduction or to request the Appellants to do so. In addition, the Appellants received annual statements from the TRS, reflecting their contributions and the refundable balance of their contributions. Those statements did not disclose that there was an unpaid liability on the loans that could be offset against their future benefits. (AX 1, 2). The Appellants testified at the administrative hearing that they believed that the debts on the loans had been discharged in their bankruptcy cases. (T. 89-92, 112-115). The silence of the TRS regarding its assertion that the debts were not subject to discharge, its failure to raise the issue in the bankruptcy proceeding, the termination of the payroll deductions at the instance of the TRS, and the furnishing of statements of contributions and balances which did not disclose such a liability all confirmed their understanding that the loans had been discharged in the bankruptcy case.

B. The Swart Memorandum.

The first arguable indication of the position now advanced by the TRS is an internal memorandum dated January 22, 1990, from Assistant Attorney General James A. Swart to the

executive director of the TRS. That memorandum, drafted more than two years *after* the Appellants received their discharges and their bankruptcy cases were closed, states that:

> In the future, I have argued to the Bankruptcy Court for the Southern District of West Virginia that the outstanding loan balance owed to TRS by a member who files for Chapter 7 bankruptcy is a pre-petition offset and that the only relief available to the member in the Bankruptcy Court is a suspension of the monthly repayment on the loan following the filing of the bankruptcy petition. In other words, if a member has a balance outstanding of $10,000.00 and is making a monthly payment of $200.00, that following the filing of the bankruptcy petition the member would not be required to make the $200.00 monthly payment.
>
> However, and this is most important, the outstanding balance owed to the TRS shall not be eliminated and is not dischargeable by the Court. The outstanding balance of the loan shall be collected from the member whenever the member reaches retirement status, or whenever the member terminates his employment and requests the withdrawal of any contributions. In either case, payment of the outstanding loan balance shall be made first prior to any moneys being paid the member.

The Swart memorandum was apparently provided to some individuals after its creation in 1990. However, there is no evidence that it was ever provided to the Appellants Clay and Corbett for another 13 years. Both Clay and Corbett categorically testified, without contradiction, that they had not received the Swart letter before the litigation. (T 14, 120-21).[7] While this memorandum does

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[7]A copy of the Swart memo appeared in the files maintained by TRS on Clay and Corbett. Both denied ever having seen the Swart memo before this litigation. In his Recommended Decision dated May 25, 2005 ("Decision") the Hearing Examiner made no finding contradicting or discrediting their testimony on the point. Instead he found that the applicants' files contained "a copy of the Swart memo which *purportedly* was sent to the Appellants." (emphasis added). The memo is obviously an internal document for the use of the TRS staff, and not something that would be sent to participants without additional explanation. There is no record of any documents or cover letters to the Appellants in particular or participants in general enclosing or explaining the Swart memo.

The Appellants sought a clearer ruling in a Motion To Amend mailed June 9. In his "Amended Recommended Decision of Hearing Officer" dated July 15, 2005 he declined again to rule that the notices had been received by Corbett and Clay and ruled,

> . . . [w]hether or not the memo was received is not, in any practical manner, pivotal

indicate the TRS position that such loans are not dischargeable, it does not clearly state that compounded interest will continue to accrue until retirement if the loan is not repaid. The Appellants received neither the Swart memorandum nor any notice from the TRS that their particular loans were not discharged in the bankruptcy filing and were still accumulating interest.

C. The 2003 Notice to New Borrowers.

The first communication to members of the TRS which specifically addressed the issue of bankruptcy and loans from the TRS was created in March 2003, sixteen years after the Appellants' bankruptcies. (AX 5, T. 23-24, 60). The document, "West Virginia Teachers Retirement System Loan Procedures," was created for the purpose of providing a description of the loan system to new loan applicants. For the first time, a plain language notice was given to loan applicants regarding bankruptcies and defaults on loans. Paragraph 9 (C) of the document states:

> (C) Any person who has a loan outstanding with the Plan and files bankruptcy remains responsible to see that his or her loan is pain in accordance with the terms of the

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> in this [matter]. *No finding is made in that regard* because of the inherent unreliability of 15-year-old memories and the human tendency to equate lack of recollection to the absence of the occurrence of an event.
>
> Even if the lack of receipt of the memo were sufficiently shown to permit such a finding, the memo does not address the question of continuing interest.
>
> Decision, 4-5 (emphasis added).

In short, the Hearing Officer made no finding either way. The testimony of Appellants Clay and Corbett was not discredited and stands. Further, even if they had received the Swart letter before this litigation, it was no substitute for the measures described herein which the TRS could have taken, including collection or at least reinstating the withholding of payments from their pay checks. The circumstance which most strongly supports a conclusion that there was no effective notification to members with prior discharges in bankruptcy like the Appellants is the admission the debts were simply lost in the administration and disregarded. *See*, testimony of Vicki Sutton, Manager of the Loans Division that many loans were "lost" and only found in 2003 when efforts to comply with the new IRS regulations included an effort to identify loans more than 5 years delinquent. (T. 82).

original promissory note. Individuals who do not maintain their compliance with their promissory note shall incur a deemed distribution and the procedures outlined above shall apply.

The context in which the document was created was an effort by the TRS to comply with federal tax regulations promulgated pursuant to 26 U.S.C. § 72(p), which prescribed the circumstances under which a delinquent loan from a pension plan would be treated as a distribution and taxed as income and might also incur a further penalty for early withdrawal. The TRS was obligated to identify such "deemed distributions" and report then to the IRS by a 1099-R form. (T. 32-35).[8] The TRS reviewed loans with outstanding balances, and sent letters to the members with such loans, including the "Loan Procedures" document.

Sixteen years after his discharge in bankruptcy of April 1987 (at which time the debt owing was $2,103.50), James Clay received a letter dated May 15, 2003 claiming that he still owed the same amount, $2,103.50, which he owed at the time of the bankruptcy.[9] As noted, no effort had been made to directly attack the Bankruptcy discharge order during those sixteen years. Mr. Clay testified without contradiction that the May 15, 2003 letter was the first notice he had received that the debt had not been discharged. Clay eventually submitted a check in December 2003 for the amount requested, which the May 2003 letter indicated would pay the debt in full.

After the check had been submitted and cashed by the TRS in December 2003, the TRS sent Clay another letter dated January 28, 2004, indicating that the interest had been recalculated, that he owed $9,969.96, more than four times the amount of the debt he owed at the time of the bankruptcy

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[8]The TRS later determined that it was not required to send out 1099-R forms on old loans such as those of Clay and Corbett because they were "grandfathered in." (T. 38).

[9]This and the similar May 2003 letter received by Corbett are located in the files maintained by TRS, in the record at tabs 7 and 8). The same is true of the January 2004 letters mentioned below.

discharge. Since Mr. Clay had retired at that point, the TRS offset the $2,103.50 and reduced his pension benefit to cover the remaining $7,671.24.

Likewise, *sixteen years* after his 1987 bankruptcy release, Mr. Corbett received a similar notification dated June 10, 2003 that he still owed $5,251.30. The notification was a shock to him since he thought the debt had been discharged sixteen years ago. Later, he received another letter dated August 19, 2004, stating that he owed $20,601.22, more than five times the amount of the debt owing at the time of discharge. The various amounts are summarized in the table below:

Name	Age as of 2004	Years Teach-ing	Loan date, amount	Date of bankruptcy filing	Date of discharge	Amount owing at time of discharge	Amount claimed owed in 2003	Amount claimed owed in 2004	Hiatus
James Clay	55	31	7/2/84 3,830	10/24/86	4/23/87	2,103	2,103	9,997	17
Michael Corbett	53	32	12/11/85 4,647	11/26/86	4/24/87	4,022	5,251	20,601	16

Until those letters, the Appellants had no idea that the TRS took the position that their loans were not discharged. The annual statements they received did not reflect any such debt or liability, and the TRS brochure distributed with those statements contains only a short paragraph regarding loans, but no mention of bankruptcy. (AX 6).

The Appellants reasonably believed that their loans were discharged in bankruptcy, and the actions and inaction of the TRS at the time of the bankruptcy proceedings reinforced that understanding. They relied on the information they received annual regarding their retirement benefits from the TRS, none of which indicated an outstanding loan obligation, in making decisions about their retirement and their financial affairs. Moreover, had they been timely advised of the TRS position they certainly would not have simply allowed the interest on the debts to continue to

accumulate, but would have either paid the debt or sought a legal resolution of the issue. Had they been advised of the TRS position in 1987, they could have, and likely would have simply reinstated the wage deductions and repaid the entire amount within a few years with little additional interest.

D. The Procedural History of the TRS and Circuit Court Proceedings.

Following notification, each of the Appellants attempted individual negotiations with the TRS to no avail.[10] They then sought relief using the in-house, internal procedure and then through the hearing procedures provided by 162 CSR 2-7. The matter proceeded to an administrative hearing on December 14, 2004. (Tab 5 of the record).[11] Following the hearing, post-hearing briefs and proposed findings were submitted, the final Recommended Decision of the Hearing Examiner was issued on July 15, 2005, denying the Appellants' appeal.

The Appellants' positions were based primarily on breach of fiduciary duty of the TRS by failing to warn them as beneficiaries that the interest was accumulating, and also on promissory estoppel. The Amended Recommended Decision, which was adopted by the CPRB, ruled primarily on the promissory estoppel issue, and failed to consider Appellants' claims of breach fiduciary duty. In passing, the TRS ruled that because promissory estoppel did not apply to government agencies, the rules of private sector fiduciary relationships also did not apply in the public sector.

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[10]Those procedures were invoked by a letter from counsel which also sought discovery. See letter dated October 1, 2004, tabs 7, 8 and 9 in the record.

[11]Three cases were heard on a consolidated basis, those of Clay and Corbett and Kathleen Hoopengarner, whose appeal has been consolidated with those of Clay and Corbett before this Court. An individual decision was issued as to each of the three, which are identified in the Index to Administrative Record and are found in the administrative record respectively behind tabs 7 as to Clay, and 8 to Corbett.

The Appellants and Ms. Hoopengarner appealed to the Circuit Court of Kanawha County. The Circuit Court issued an order on October 20, 2008, affirming the administrative decision of the CPRB. The Appellants appeal from that order, and request that the ruling of the Circuit Court be reversed.

ARGUMENT

I. THE TRS BREACHED ITS OBLIGATION TO EXERCISE "THE HIGHEST FIDUCIARY DUTY" IN ITS DEALINGS WITH THE APPELLANTS BY FAILING TO OBJECT TO THE DISCHARGE OF THE LOANS OR DISCLOSE TO APPELLANTS THAT IT CONSIDERED THE LOANS STILL OWED

The acts and omissions of the Teachers Retirement System breached its fiduciary obligations to the Appellants, participants in the TRS, by leading them to reasonably believe that their loans had been discharged in bankruptcy, by its failing to communicate to the Appellants in any form its asserted position that the loans were not subject to discharge in bankruptcy, at a time when Appellants could have paid off the debt at a fraction of the amount now demanded. The TRS further violated its fiduciary duty by notifying the Appellants sixteen years after the fact of its claim that the loans were not discharged, then using its control of the Appellants' retirement benefits to shift to the Appellants the cost of its failure to challenge the discharges in the bankruptcy proceeding. In short, the Trustees breached a well-defined fiduciary duty when they failed to advise the Appellants that their debts were still owing and interest was accruing.

A. The Appellants Were Led by the Actions and Conduct of the TRS to Reasonably Believe That the Loans Were Discharged in Bankruptcy.

It is clearly established that both of the Appellants filed for Chapter 7 bankruptcy protection in the United States Bankruptcy Court, Clay in the Southern District of West Virginia and Corbett

in the Northern District. The TRS received notices of the bankruptcy cases, and the Appellants listed the loans from the TRS in their bankruptcy petitions. The TRS did not object to the dischargeability of the loans, nor did it notify the Appellants or their bankruptcy counsel, formally or informally, that the TRS believed that the loans in question were not dischargeable. Instead, the TRS instructed the boards of education who employed them to cease deducting the loan payments from their paychecks. It took no action to lift the automatic stay to allow the payments to resume, nor did it reinstate the deductions once the bankruptcy case was closed and the automatic stay was no longer in effect.

At the time of the bankruptcies of the Appellants, there was no statutory exception in the Bankruptcy Code making loans extended to participants by pension plans nondischargeable. Such a provision was added to the Bankruptcy Code only in 2005, as part of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, applicable only to cases filed after October 17, 2005.[12] Obviously the statutory exception to discharge does not apply to the Appellants' bankruptcy cases in 1987.

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[12]11 U.S.C. § 523(a)(18):

A discharge under section 727 . . .does not discharge an individual debtor from any debt -

(18) owed to a pension, profit-sharing, stock bonus, or other plan established under section 401, 403, 408, 408A, 414, 457, or 501(c) of the Internal Revenue Code of 1986, under -

(A) a loan permitted under section 408(b)(1) of the Employee Retirement Income Security Act of 1974, or subject to section 72(p) of the Internal Revenue Code of 1986; or

(B) a loan from a thrift savings plan permitted under subchapter III of chapter 84 of title 5, that satisfies the requirements of section 8433(g) of such title;

but nothing in this paragraph may be construed to provide that any loan made under a governmental plan under section 414(d), or a contract or account under section 403(b), of the Internal Revenue Code of 1986 constitutes a claim or a debt under this title.

The TRS apparently relies upon In re Villarie, 648 F.2d 810 (2d Cir. 1986), a *per curiam* decision holding that a loan from the debtor's pension fund was not a "debt" subject to discharge, reversing the ruling of the bankruptcy judge. Villarie characterized the situation as if the debtor were actually obtaining an advance from his pension, much like a person borrowing from his own life insurance policy.[13]

While some courts have followed that holding, others have criticized it. The court in In re Buchferer, 216 B.R. 332 (Bankr. E.D.N.Y. 1997) strongly disagreed with the result in Villarie, noting that the Villarie court relied on analogous situations under the Bankruptcy Act, while the enactment of the Bankruptcy Code in 1978 substantially enlarged the definitions of "debt" and "claim." The court held that the plain language of the Bankruptcy Code was unambiguous, and that the definitions of those terms under the Bankruptcy Code led to the conclusion that the pension loan was a non-recourse secured claim, subject to treatment and discharge in the bankruptcy proceeding.[14] *See also*,

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[13]The Villarie court characterized the situation as the debtor borrowing his own money from himself, but the analogy to borrowing from a life insurance policy is not entirely accurate. The TRS is a defined benefit pension plan, not a defined contribution plan. The amount of the pension is not determined by the amount of the employee's contributions, but rather by a formula based upon the average salary of the highest five years and the length of service, while the contributions of employees are based upon a percentage of salaries which may vary from county to county and employee to employee based upon county salary scales and educational credentials. The employees' individual contributions are credited, along with interest, but are not segregated. Only if an employee leaves the plan does he or she receive their contributions back with interest. If the employee retirees under the plan, he receives a pension based upon the statutory formula and his contributions are merged into the general fund. The contributions are the "employee's money" only if he leaves the plan.

[14]The court in Buchferer cited several decisions of the Supreme Court holding that similar obligations were "claims" as defined by the Bankruptcy Code and did not "ride through" the bankruptcy case as was the case under the Bankruptcy Act. Johnson v. Home State Bank, 501 U.S. 78, 111 S.Ct. 2150, 115 L.Ed.2d 66 (1991); Citizens Bank of Maryland v. Strumpf, 516 U.S. 16, 116 S.Ct. 286, 133 L.Ed 2d 258 (1995), Ohio v. Kovacs, 469 U.S. 274, 105 S.Ct. 705, 83 L.Ed.2d 649 (1985).

In re McDonald, 222 B.R. 69, 75-76 (Bankr. E.D. Pa. 1998) (agreeing with the analysis of Buchferer); In re Murray, 238 B.R. 523, 530 (E.D. N.Y. 1999); In re Miranda Soto, 667 F.2d 667 (1st Cir. 1981).

The TRS argued below that the Appellants or their bankruptcy counsel should have known that the pension loans were not dischargeable in the bankruptcy cases, not withstanding its failure to inform them that the TRS took that position. That proposition is clearly not self-evident. In the absence of a statutory exception to discharge, the TRS position relies on Villarie, a case in a different circuit. Counsel has found no binding authority in this jurisdiction adopting the Villarie holding.

Moreover, this case is distinguishable from Villarie, in that the court relied on the inability of the Plan to enforce the obligation as indicating that the loan was not a "debt" within the meaning of the Bankruptcy Code. However, West Virginia Code § 18-7A-34(5) clearly makes the wage deduction mandatory, and provides for other remedies:

> From his or her monthly salary as a teacher the member *shall* pay the loan and interest by deductions which will pay the loan and interest in substantially level payments in not more than sixty nor less than six months. *Upon notice of loan granted and payment due, the employer is responsible for making such salary deductions and reporting them to the retirement board. At the option of the retirement board, loan deductions may be collected as prescribed herein for the collection of the members' contribution, or may be collected through issue of warrant by employer.*

Other courts have held Villarie inapplicable and the loan to be a "debt" where the plan has a remedy to collect the obligation in question. Lugo v. Paulson, 886 F.2d 602, 607 (3d Cir. 1989); In re Thompson, 182 B.R. 140 (Bankr. E.D. Va. 1995).

The only thing arguably preventing the TRS from reinstating the payroll deduction for the loan payments was the automatic stay. However, that obstacle dissolved within months of the bankruptcy filings, when the discharges were granted or the cases closed. 11 U.S.C. § 362(c)(2). The TRS could have reinstated the deductions and collected the loans sixteen years ago.

In addition to the statutory provisions for collecting the debt, the loan agreements are clearly promissory notes from the Appellants to the Teachers Retirement Board, and there is nothing in the statute that prohibits the TRS from collecting the debt through the courts in the same manner as any other promissory note.

There is an even more significant factor which distinguishes the Villarie case from the bankruptcy cases of the Appellants: The plan in Villarie filed an objection to the discharge of the pension loan, and litigated the issue. The TRS did nothing.

Section 727 of the Bankruptcy Code (11 U.S.C. § 727) provides that the bankruptcy court will grant a discharge, in the absence of the disqualifying exceptions listed in the statute. That section also provides that

> (b) Except as provided in section 523 of this title, a discharge under subsection (a) of this section discharges the debtor from all debts that arose before the date of the order for relief under this chapter, and any liability on a claim that is determined under section 502 of this title as if such claim had arisen before the commencement of the case, whether or not a proof of claim based on any such debt or liability is filed under section 501 of this title, and whether or not a claim based on any such debt or liability is allowed under section 502 of this title.

Rule 4007(c) of the Federal Rules of Bankruptcy Procure provides that a complaint to determine the dischargeability of any debt pursuant to 11 U.S. C. § 523(c) must be filed within 60 days following the first meeting of creditors. Under Rule 4005, the party opposing a discharge has the burden of proof in such a proceeding. Rule 4004 provides that on the expiration of the filing period, "the court shall forthwith grant the discharge . . . "

The failure of the TRS to timely object to the dischargeability of the loans resulted in the discharge of those debts, under the statutes and rules of the Bankruptcy Code. Had the TRS filed a motion objecting to the discharge and cited Villarie, the Bankruptcy Court might well have ruled that

the loans from the TRS were not dischargeable. Either way, the dischargeability issue would have been resolved, and the debt would either have been discharged by the court or the Appellants would have known that the debt was not discharged and would have paid it or reinstated the payments until it was paid. They certainly would not have ignored it for sixteen years while compound interest accumulated.

The point is not whether the debt was, or would have been, discharged at the time of the bankruptcies, but rather that the Appellants believed, and had every reason to believe, that the debts had been discharged. The point is that it was the conduct of the TRS, by stopping the payroll deductions, by failing to respond to the bankruptcy filing by objecting to the discharge, by failing to inform the Appellants of its position that the debt was not discharged, and by providing them with misleading statements of their retirement contributions with no disclosure of any outstanding obligations, that led the Appellants to assume that the debt had been discharged. The Appellants reasonably relied upon the inaction of the TRS in their understanding that the debts had been discharged.

The argument of the TRS that the Appellants or their bankruptcy counsel knew or should have known that the debts were not dischargeable is nonsense in the absence of any statutory provision, or any binding authority in this jurisdiction. The proposition that a consumer bankruptcy attorney counsel should be charged with knowledge of an obscure decision in another circuit involving an arcane point of bankruptcy law is not reasonable. The TRS itself, which confronts the issue with some regularity, was certainly in a better position to have that knowledge. In view of the TRS' inaction, one might suspect that even its counsel may have been unaware of Villarie at the time of the Appellants' bankruptcies.

The Appellants contend that the TRS had a fiduciary duty to notify the Appellants in a timely manner that its position was that the loans were not discharged. The failure to do so until 16 years after the fact, and then demanding 16 years of compound interest or the threat of reducing their retirement pensions, was breach of that fiduciary duty to the Appellants, and the TRS should be equitably estopped from using its control of the Appellant's pensions to force them to pay the interest which accrued due to its own failure to act for sixteen years.

B. The TRS Breached Its Broad Fiduciary Duty to the Appellants to Disclose the Its Contention That the Loans Were Not Discharged.

The relationship of participants in and the Trustees of the TRS is also regulated by the law of trusts. The TRS is without question an institutional type of trustee and both the members of its Board and the higher members of its staff are "fiduciaries" as described in Dadisman v. Moore, 181 W.Va. 779, 784-5, 384 S.E.2d 816, 821-2 (1988). This Court outlined the scope of the fiduciary duties of the trustee's predecessor, the PERS:

> By the very use of the term "Trustee," as well as by the allocation of responsibilities to them, the Legislature has placed the Respondent Trustees in a fiduciary relationship with the PERS and its participants. Other courts examining the role of statutorily designated trustees judge their action by the *high standard to which fiduciaries are held....* We conclude that the Respondent Trustees have *the highest fiduciary duty* to maintain the terms of the PERS trust, as spelled out in the statute.
>
> (Emphasis added).

The fiduciary responsibility of the CPRB and the TRS is not limited to protecting the solvency of the trust, but extends as well to its dealing with individual participants. This Court stated in Flanigan v. West Virginia Public Employees Retirement System, 176 W.Va. 330, 335, 342 S.E. 2d 414 (1986) that:

> . . . under West Virginia Code § 5-10-3a (1979) Replacement Vol.) we are directed to give substantial weight to the remedial nature of the PERS Act by the legislative ordination to construe its provisions liberally in favor of its intended beneficiaries. *We are also guided by the proposition that "a governmental body, charged with as important function as the administration of a public employees retirement system, bears a most stringent duty to abstain from giving inaccurate or misleading advice."* (*citing* Nevada Pub. Employees Retirement Bd. v. Byrne, 96 Nev. 276, 280, 607 P.2d 1351, 1353 (1980) and Crumpler v. Board of Admin. Employees' Retirement Sys., 32 Cal.App.3d 567, 582, 108 Cal.Rptr. 293, 304 (1973).

Thus, the crucial ruling of the TRS, as articulated by its Hearing Officer, that private sector fiduciary law does not apply to the TRS was plain legal "error of law" within the meaning of the applicable judicial review statute, especially in light of the enormity of the error, and was also "arbitrary and capricious."[15] The Circuit Court also failed to address the fiduciary duty of the TRS to inform the Appellants of the status of the loans.

The duty of the TRS extends to the failure to disclose information that should be disclosed. As stated by Justice Cardozo, "A beneficiary, about to plunge into ruinous course of dealing, may be betrayed by silence as well as by the spoken word." Globe Woolen Company v. Utica Gas & Electric Co., 224 N.Y. 483, 489, 121 N.E.378, 380 (1918). That formulation of fiduciary law has become commonplace trust law. Globe and its progeny discussed herein support, or are based on, §173 of the Restatement (Second) of Trusts, Comment (c1).[16] Those principles have been repeatedly applied in

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[15]This appeal is based upon §29A-5-4(g)(4) pertaining to "affected by other error of law" and (6) "arbitrary or capricious or characterized by an abuse of discretion or clearly unwarranted exercise of discretion...".

[16]Section 173 of the Restatement (Second) of Trusts, under Comment (d) requires trustees to inform their beneficiaries of unknown or unappreciated risks the beneficiaries are undertaking. Under Comment (d), the fiduciary has a

> "duty to communicate to the beneficiary material matters which threaten the interests of the beneficiary which he knows the beneficiary does not know and which the beneficiary needs to know for his protection in dealing with a third person with

the setting of employer-employee benefits, and in particular to the duties of those fiduciaries administering such benefits - specifically to inform beneficiaries of unknown or unappreciated risks they are undertaking or unknown opportunities that may be available.

Most of the cases discussed below rely upon section 173 of the Restatement. They have been applied in a variety of employer-employee fringe benefit questions to require a fiduciary to provide all, not just some, information necessary for the beneficiary to make informed decisions, even when, as here, no request for the highly pertinent information was ever made.

The TRS administers the loans in question here in a fiduciary capacity rather than as an ordinary commercial creditor, such as a bank. The TRS breached its fiduciary duty to the Appellants when it failed to warn them away from the financial disaster to which they were oblivious. From the failure to object to the discharge of the loans in 1987 to the decision sixteen years later in 2004 to recalculate the interest on the loans for the full sixteen years instead of five, and compounding the interest monthly on the loans, the TRS has placed the burden of its own mistakes and omissions on the Appellants, upsetting their reasonable expectations and plans on the verge of their retirement, without a word of warning from the managers of the TRS.

In the instant case, as in Globe Woolen and Eddy v. Colonial Life Insurance Co., 919 F.2d 447, 450-51 (D.C. Cir. 1990), "this duty to disclose and inform governs the case before us." The unifying issue in this case is the need to a balance contractual rights against equitable duties. By

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respect to his interests."

This rule has been repeatedly applied. The case discussed in this section rely upon that provision of the Restatement.

adopting its Hearing Officer's ruling rejecting *any* self-examination of fiduciary duties, the TRS and the Circuit Court has clearly denied the application of fiduciary and related equitable principles.

The Appellee TRS argues that it had no fiduciary duty to the Appellants, and that the cases cited herein regarding the duties of a trustee to beneficiaries are irrelevant because they are ERISA cases, and ERISA does not regulate government plans. While 29 U.S.C. § 1104 prescribes a "prudent man" standard and mandates that "a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries," the scope and particulars of that general duty are incorporated into the federal common law and are derived from the common law of trusts and agency. The principles discussed in the cases cited by the Appellants are based upon the common law of trusts, and those principles are equally applicable to government plans.[17] This Court has recognized the fiduciary duties of trustees of government benefit and pension plans.

Since the trustees are both creditors and fiduciaries, they must, unlike a creditor, act with the highest care and consideration of the beneficiaries instead of simply ignoring the debts for as long as 16 years and then demanding unconscionable interest payments.[18] Section 173 of the Restatement

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[17]Eddy and most of the following cases brought under ERISA, apply the common law of trusts; because ERISA does not spell out the specifics of fiduciary duties and courts have ruled that fiduciary duties "... include duties derived from common law trust principles." Eddy, 919 F.2d at 751. "The duty to disclose material information is the core of a fiduciary's responsibility, animating the common law of trust long before the enactment of ERISA." 919 F.2d at 750. Therefore, the cases herein apply and develop common law, not statutory ERISA law. Varity v. Howe, 516 U.S. 489, 506 (1996), recognized that the common law trust principles applied with regard to ERISA fiduciary obligations "bearing in mind the special nature and purposes of employee benefit plans." Berlin v. Michigan Bell Telephone Co., 858 F.2d 1154 (6th Cir. 1988).

[18]The Swart memo was written for internal use of the TRS and not to inform beneficiaries of what was in their best interest. To TRS staff members, whatever the beneficiary did - pay the loan or have the amount of the debt offset against his or her contribution - really made no difference. But to the beneficiary, it could make a substantial difference, when the beneficiaries are approaching retirement and are suddenly confronted with notice of a debt on a loan that they reasonably believed

has been applied in numerous employee benefit settings. The failure of an employer to disclose its real plans for the company at the point it is offering some of the employees seemingly attractive severance packages has been held a breech of the duty to inform beneficiaries.[19] Likewise, the failure to fully describe all of the relevant benefits available is a breach of the duty, even though the fiduciary is only asked about one particular benefit.[20] Overly technical or narrow answers which do not respond to the real need of the employee breach the same duty to inform.[21]

The common law duty to notify beneficiaries of the information they need to make informed decisions was applied to situations where a benefits counselor responded incompletely to questions which were inartful or simply incomplete. The ignorance of the employee regarding the questions to ask heightens the duty of the fiduciary to see that the employees are informed.[22]

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were discharged, in an amount four or five times the amount they owed at the time of their bankruptcies, which they are required to pay or lose part of their pension. The Swart memo demonstrates that the TRS position was known to the managers of the TRS as early as 1990, but there is no evidence that position was ever communicated to the Appellants for another 13 years. The failure to communicate the TRS position that the loans were still active was a breach of fiduciary duty.

[19]Lix v. Edwards, 147 Cal. Rpt. 294, 299-300 (Ct. Appeals 1978); Erion v. Timken Co., 368 N.E.2d 312, 313 (Ohio Ct. App., 1976). (Although a company does not have a duty to explain "every conceivable legal ramification of the pension plan to its employees, certainly the more obvious and pertinent points should have been brought to the attention of the employees without the requirement of a specific question on the subject by the employee.")

[20]Likewise, the trustees were estopped from terminating the employee-plaintiff benefits because the trustees had breached their fiduciary duty to provide timely written notice to the employees of any adverse consequences regarding the transferor of the assets of the employer, which had funded the benefit plan, to a new company.

[21]Eddy, 919 F.2d at 751 ("[T]he same ignorance that precipitates the need for answers often limits the ability to ask precisely the right question.")

[22]Another illustration of the duty to inform beneficiaries is the duty of an employer- fiduciary to give sufficient notice of shutting down the company to allow the employees reasonable time to

Trust fund fiduciaries were found to have breached their fiduciary duties under §173 to warn a union member that undertaking certain types of employment, for example serving as captain of a non-union ship, would result in a forfeiture of all pension benefits.[23] An employer was found to have breached his fiduciary duty by failing to inform the husband-employee that, had he waited an additional seven days to retire, his wife would have been eligible for a survivor death benefit.[24]

Eddy v. Colonial Life Insurance Co., 919 F.2d 447, 450-51 (D.C. Cir.1990), involved a retiring employee, who was suffering from AIDS, being misinformed as to his rights to convert his health insurance. Instead of using the word "continue" when asking the employer's benefit advisor about an extension of his health insurance, the sick employee (who was obviously in need of medical benefits) used the technically incorrect term when he referred to "convert[ing]" his employment-based coverage to an individual policy. Relying on the advice provided by the personnel department that

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shop for new benefits. Martinez v. District 1199, National Union of Hospital Employees, 280 F.Supp.2d 342, 348 (D.N.J. 2003).

[23]Chambless v. Masters Mates & Pilots Pension, 571 F.Supp. 1430, 1454 (S.D.N.Y. 1983) (material question as to whether pension fund trustee took sufficient steps to inform ship captain of amendments to pension plan which would cause forfeiture of a significant portion of his pension if he worked on a non-union vessel); Hudson v. General Dynamics Corp., 118 F.Supp.2d 226, 247 (D,CN. 2000) (fiduciary was under obligation to communicate facts material to the beneficiary that fiduciary knew the beneficiary did not know and that beneficiary needed to know for his protection making certain elections concerning retirement incentives).

[24]Becker v. Eastman Kodak Company, 120 F.3d 5 (2d Cir. 1997) (in view of ill health of employee who died eighteen months after retiring, the company retirement planner should have advised the decedent as to the possibility of a lump sum retirement instead of limiting discussion to whether to retire or elect long-term disability); Bixler v. Central Pennsylvania Teamsters Health and Retirement Fund, 12 F.3d 1296, 1300 (3d Cir. 1993) (trustee and other plan fiduciaries have *"not only a negative duty not to misinform, but also an affirmative duty to inform when the trustee knows that silence might be harmful."*) (emphasis added); Krohn v. Huron Memorial Hospital, 173 F.3d 542 (6th Cir.1999), also held that when the employee asked about one type of long-term benefits, the fiduciary representative was under a duty to disclose all material facts regarding his coverage options.

he had no rights to "convert" his insurance policy, when, in fact, he could have continued the policy, the employee resigned without exercising his COBRA conversion right. Resigning without exercising his COBRA rights to purchase health insurance cost the former employee tens of thousands of dollars in medical expenses for care of his AIDS case.

Applying "common-law trust principles" the D.C. Circuit ruled that once the company was aware of the employee's predicament, which occurred in that case when the employee asked the question about "converting" his benefits, the Company had a fiduciary duty to do more than simply not misinform, it had an *affirmative obligation "not only to inform a beneficiary of new and relevant information as it arises, but also to advise him of circumstances that threaten interests relevant to the relationship.* For example, a fiduciary bears an affirmative duty to inform a beneficiary of the fiduciary's knowledge of prejudicial acts by an employer - such as the failure of an employer to contribute to an employee benefit fund as required ..." 919 F.2d at 751.[25] The employer benefit fiduciary has "an affirmative duty to inform - to provide complete and correct material information on [the retiring employees] status and options." 919 F.2d at 751.

The D.C. Circuit refused to hold the employee responsible for failing to ask the precise question because his question had made his predicament clear. "A fiduciary has a duty not only to inform a beneficiary of new and relevant information as it arises, but also to advise him of circumstances that threatened interests relevant to the relationship."

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[25]The following cases, requiring employers to *self-report benefit contribution delinquencies directly to their own employees,* illustrate the extent of the development of disclosure of the duty to provide employees with the needed facts. Rosen v. Hotel & Restaurant Employees, 637 F.2d 592, 600 (3d Cir.), cert. denied 454 US 898 (1981); McNeese v. Health Plan Marketing, Inc., 647 F.2d. 981, 986; Professional Helicopter Pilots Assn v. Denison, 804 F.Supp. 1347, 1452 (M.D. Ala. 1992); Dellacava v. Painters Pension Fund, 851 F.2d 22, 27 (2d Cir.1988).

In Glaziers Local 252 Annuity Fund v. Newbridge Securities, Inc., 93 F.3d 1171, 1181 (1996), the Third Circuit explained the breadth of the duty:

> We have never held that a request is a condition precedent to such a duty [to inform] regardless of the circumstances known to the fiduciary. Contrary, it is clear that circumstances known to the fiduciary can give rise to this affirmative obligation *even absent a request by the beneficiary.* "The duty to disclose material information is the core of the fiduciary's responsibility." *Indeed, absent such information, the beneficiary may have no reason to suspect that it should make inquiry into what may appear to be a routine matter.*[26] (emphasis added)

The common thread running through all of the above cases is that in the employee benefits setting, the fiduciaries who run the benefit plan must do more than avoid making misrepresentations and giving an incorrect answer only when asked. The Swart memorandum establishes that the ranking administrator of the TRS was aware of the bankruptcy issue and that the TRS had decided no later than 1990 that it would take the position that pension loans were not dischargeable in bankruptcy. However, the TRS made no effort to identify and notify potentially affected participants in the TRS who had previously filed for bankruptcy that the TRS considered their loans not discharged and accumulating compound interest until 2003, thirteen years later. Indeed not until approximately 2001, when Richard (Kit) Francis was hired by the TRS to inform newly filed bankruptcy cases that a loan debt was not part of the bankruptcy estate and could not be discharged, or 2004, when the warning was included in the "Loan Procedures" document, was the TRS position regarding bankruptcy

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[26]In Newbridge, the investment advisor firm to a benefit fund failed to advise the benefit fund that one of its brokers, with whom the benefit fund had extensive dealings, had left the firm under a cloud. In Anweiler the employee was not advised as to all the aspects of the repayment of an overpayment of benefits and, unknowingly, came out on the short end of the deal. Anweiler v. American Electric Power Service Corp., 3 F.3d 986, 991 (7th Cir 1993) held:

> Fiduciaries must also communicate material facts affecting the interests of beneficiaries. This duty exists when a beneficiary asked fiduciaries for information, and even when he or she does not. (Emphasis added)

effectively communicated to new loan recipients or members filing bankruptcies. Prior to that time, the TRS, contrary to its fiduciary duty as recognized by the 1988 decision in Dadisman, received notifications of bankruptcy cases involving loans and did nothing to inform bankruptcy filers that the TRS "loans" were not dischargeable. At a minimum the TRS, especially since the debts were listed and the TRS was notified, should have opposed the discharge, resumed payroll deductions when the routine bankruptcies were closed, or at least sent a letter advising the debtor or his counsel that there was an issue about the pension loans.

Instead, the TRS never lifted a finger. When the Appellants reasonably believed they owed nothing, they should have been advised of the reality -- more than once if necessary -- that, indeed, they still had debts and the interest was accruing. Certainly, when the beneficiary is placing his benefits in jeopardy, as specifically was the case in Chambliss, the fiduciary must speak up. Unknown to the Appellants, they were engaged in a "ruinous course of dealing" and were "betrayed" by the "silence" of the TRS as much as if the "by the spoken word." Eddy, 919 at 751, citing Globe, 224 N.Y. at 489.

Especially given the ongoing, long-term nature of the member-TRS relationship, the fact of the automatic stay is no reason to leave a beneficiary uninformed by failing to resume collection once the stay is lifted or at least informing him of the fund's intent to do so.[27]

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[27]Most simple bankruptcies like those of the Appellants take only four or five months from beginning to end. See table at p. 7 above, columns 4 and 5. Thus, the automatic stay was not a real problem. A simple phone call to the Bankruptcy Clerk's office could have confirmed the closure of a case. Contrary to the argument of the TRS that the burden was on the beneficiaries to re-initiate the payroll deduction method, §18-7A-34(a)(5) makes the payroll deduction mandatory and gives the TRS the option of ordering the local school boards to make the deductions.

C. The TRS Breached Its Fiduciary Duty By Retroactively Imposing Previously Undisclosed Interest Claims Calculated and Compounded Over Sixteen Years.

Even if unintended, the retroactive creation of an interest obligation is a breach of the general standard of care of the trustee. Dadisman held that the "Trustee "must exercise due care, diligence and skill in administering the trust." Dadisman, 181 W. Va. at 779, 384 S.E.2d at 826.

Historically, apparently from at least 1987 through May of 2003 (when the Appellants were sent letters demanding payment, interest was only charged on the original amount of the loan for the five-years period specified as the limit in the statute, with interest beyond that amount treated as unowed "phantom interest." That practice undoubtedly contributed to the failure of the TRS to warn its affected debtor-members of accumulating debt. This system prevailed until December of 2003, when the TRS changed its practice and recalculated and compounded interest for the entire sixteen year period, then notified the Appellants of recalculated debts four times or more the size of the original loans. Whether or not the five-year limit on interest was correct, it had been the practice and should have been abandoned only after notice.

Due to the delay of the fiduciaries in performing their mandatory duty to "exercise due care, diligence and skill and in administering the trust," the beneficiary should not be required, especially at the cost of retirement security, to pay for the failures of the fiduciary.

The fact is that the TRS decided in late 2003 to impose sixteen or more years interest retroactively on Corbett and Clay, who had no idea that the TRS considered their bankruptcy discharges worthless until 2003.[28] Retroactive application of the changed interest schedule, creating an after-the-fact debt of unmanageable size after seventeen years of silence is unconscionable. That

[28]Further, the interest in the final calculations is compounded monthly.

is especially the case where the affected beneficiaries are at or approaching retirement, having relied upon the potential retirement income reflected in the annual statements they received from the TRS, statements which gave no indication of a massive and unexpected liability which would require either a substantial cash payment or a reduction in their retirement benefits.

II. EQUITABLE ESTOPPEL IS APPROPRIATE IN THIS CASE UNDER EXISTING LAW.

The TRS' finding that principles of equitable estoppel cannot be applied against a state agency, including the TRS, is mistaken. The ruling of the TRS, adopting the Recommended Decision of the Hearing Officer, stating that "equitable estoppel can never be applied against the state agency" does not accurately reflect the law of this state.

Equitable estoppel has previously been applied by our this Court, albeit in a different context, to a public pension. The Board of Trustees of the Police Officers Pension and Relief Fund of the City of Wheeling v. Carenbauer, 567 S.E.2d 612, 211 W.Va. 602 (2002), held, on the basis of reliance/equitable estoppel, that pension rights of public pension plan members, who had substantially relied to their detriment upon their entitlement to those rights, cannot be detrimentally altered to any extent, and any alterations to keep the trust fund solvent must be directed to the infusion of additional money.[29] See also, Booth v. Sims, 193 W.Va. 323, 327, 456 S.E.2d 167, 181 (1994). The Carenbauer case is precedent for applying the principles of equitable estoppel generally to state agencies and specifically to state pension funds.

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[29]In the context of this case, the Court defined "detrimentally alter" to mean the legislature cannot reduce existing benefits (including such things as medical coverage) of the pension plan or raise the contribution level without giving employees sufficient money to pay higher contributions

Although the Court has limited the application of equitable estoppel to state government,[30] the court has applied equitable estoppel to situations where the governmental actors are in particular positions of trust.

In Flanigan v. WVPERS, 176 W.Va. 330, 342 S.E.2d 414 (1986), a magistrate received inaccurate information from an authorized agent of PERS which caused him to be erroneously excluded from participation in PERS. This Court corrected the error relying upon the rule of construction found in West Virginia Code § 5-10-3a and the Byrne decision of the Nevada Supreme Court.[31] Quoting Byrne,[32] this court stressed that a "governmental body, charged with as important a function as the administration of a public employees retirement system, bears a most stringent duty to abstain from giving inaccurate or misleading advice."

This Court recently held in Hudkins v. State Consolidated Retirement Board, 220 W.Va. 275, 647 S.E.2d 711 (2007), that "the general rule that equitable estoppel does not apply against a

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[30]Crawley v. Board of Trustees of Firemen's Pension Fund of Beckley, 138 W.Va. 571, 584, 76 S.E.2d 683, 689 (1953). Crawley involved a city worker who had carelessly damaged property. The Court was concerned that some "ill-advised action by a former municipal authority would hinder and hamper governmental functions; and may be contrary to the public interest in many cases. 138 W.Va. at 138, 76 S.E.2d at 690. As harsh as the result in Samsell v. State Line Dev. Co., 154 W.Va. 48, 174 S.E.2d 318 (W.Va. 1970) may be, it involved a long-term business deal and relatively sophisticated businessmen using a lease of government properties to privately mine coal. When a business uses legal devices such as leases or contracts or knowingly takes on legal risks of complicated arrangements, the refusal to apply equitable estoppel makes some sense. But, the situation at hand is entirely different.

[31]Nevada Public Employees Retirement Board v. Byrne, 96 Nev. 276, 280, 607 P.2d 1351, 1353 (1980) (emphasis added).

[32]Byrne provided relief under the doctrine of equitable estoppel and held that the Retirement Board in Nevada did have the power to correct "an error or inequity." The second case cited by this Court is Crumpler v. Board of Administration Emp. Retire. Sys., 32 Cal.App 3d 567, 108 Cal. Rptr. 293, 304 (1973). Flannigan, 176 W.Va. At 335, 342 S.E.2d at 419.

governmental agency is not without exceptions." The Court held that an estoppel may be raised against the government only when

> - the injury to the public interest if the government is estopped is out weighed by the injury to the plaintiff's personal interest or the injustice that would arise if the government is not estopped.
>
> - raising the estoppel prevents manifest or grave injustice.
>
> - raising the estoppel will not defeat a strong public interest or the operation of public policy.
>
> - the exercise of government functions is not impaired or interfered with.
>
> - circumstances make it highly inequitable or oppressive not to estop the government.
>
> - the government's conduct works a serious injury and the public's interest will not be harmed by the imposition of estoppel.

The Court found those elements present in Hudkins, where the plaintiff was told by a Board employee that she was eligible to claim service credit for her unused sick leave, and she relied on that advice in resigning her employment, only to be told when she retired two years later that the information she was provided was wrong. The same elements are present here. The Appellants were led to believe by the TRS' conduct at the time of their bankruptcies that their loans had been discharged.[33] The TRS failed to tell them otherwise, although the TRS had made that determination no later than 1990, but failed to disclose it for another 13 years. As a result, the Appellants incurred substantial interest obligations which they had no idea were being incurred, to their detriment. Like the plaintiff in Hudkins, *when* they learned otherwise, they had already incurred four times the amount

[33]Estoppel is appropriate where there is either false representations *or* a concealment of material facts. Stuart v. Lake Washington Realty Company, 154 W.Va. 48, 174 S.E.2d 318 (1970).

of the original obligation, a debt that they would have dealt with long before if the TRS position had been disclosed to them earlier. Those circumstances make it highly inequitable not to estop the TRS.

Indeed, this case is arguably a more egregious situation than Hudkins. This was not just mistaken advice handed out to a participant by an employee of the TRS, as in Hudkins, but a series of acts, omissions, and failures by senior managers of the TRS over a period of sixteen years.

III. APPLICATION OF THE DOCTRINE OF LACHES IS APPROPRIATE IN THIS CASE IN VIEW OF THE TRS' SIXTEEN YEAR DELAY IN ASSERTING ITS CLAIMS

The Trustees of the TRS cannot sit by idly on their hands without at least sending the Appellants statements of what is owed and restarting the anticipated statutory payroll deduction payment procedure. The TRS slept on its rights for more than sixteen years, when it could have reinstated the mandatory payroll deductions at any time after the bankruptcy discharges in 1987, or could have used other means to collect the alleged debt, including suing on the notes. It even failed to advise the Appellants that the loan obligations continued to exist and were gathering interest compounded monthly. Consequently, the TRS should not be able to collect more than what was owed at the time of the bankruptcy case.

CONCLUSION

The Appellants respectfully submit that the decision of the Circuit Court of Kanawha County was erroneous and should be reversed. The Appellants should be allowed to repay the debts, consistent with their longstanding proposals to pay the principal and only the interest which would have accumulated had they been advised at the time that their debts had not been discharged.

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CERTIFICATE OF SERVICE

I hereby certify that copies of the Brief of Appellants James G. Clay and Michael R. Corbett were served upon all parties to this appeal on June 26, 2009, as follows:

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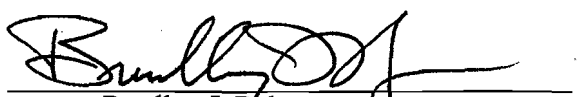

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