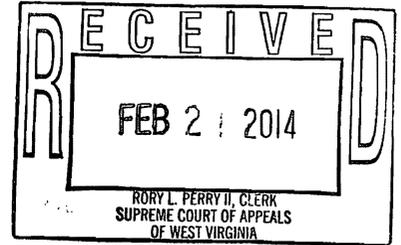


**BRIEF FILED
WITH MOTION**

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**Supreme Court Docket No. 13-1192
Civil Action No. 09-C-2104 (Circuit Court of Kanawha County)**

**THE WEST VIRGINIA INVESTMENT
MANAGEMENT BOARD, a public body
Corporate, and THE WEST VIRGINIA
CONSOLIDATED PUBLIC RETIREMENT
BOARD, a public agency,
Petitioners,**



v.

**THE VARIABLE ANNUITY LIFE INSURANCE
COMPANY, a Texas corporation,
Respondent**

**AMICUS CURIAE BRIEF FILED ON BEHALF OF THE WEST
VIRGINIA SCHOOL SERVICE PERSONNEL ASSOCIATION**

**THE AMICUS CURIAE BRIEF IS FILED IN SUPPORT THE PETITIONERS
AND SEEKS REVERSAL OF THE DECISION OF THE CIRCUIT COURT**

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STATEMENT OF THE IDENTITY OF THE AMICUS CURIAE

The West Virginia School Service Personnel Association, hereinafter referenced as WVSSPA, is an employees’ association which represents more than eight thousand school service employees of county boards of education in West Virginia. The WVSSPA has members who are employees of every county board of education, who are participating in the West Virginia Teachers Retirement System. Moreover, the WVSSPA has many members and former members who have retired from their employment with county boards of education since 2008 and are receiving pensions from the West Virginia Teachers Retirement System.

The WVSSPA is affiliated with the American Federation of Teachers- West Virginia, hereinafter referenced as AFT-WV. AFT-WV represents over sixteen thousand education employees in West Virginia. Nationally, the AFT represents 1.5 million pre-K through 12th-grade teachers, paraprofessionals and other school support employees, higher education faculty, nurses and other healthcare workers, and state and local government employees.

STATEMENT OF THE CASE

The amicus curiae believe that the Notice of Appeal and the forthcoming brief of Petitioners provide a more than adequate identification of the parties and the back drop of the current controversy.¹ The amicus curiae will not burden the court with a full restatement of the facts of the case, but will be content with the following brief recitation.

The West Virginia Public Consolidated Retirement Board (hereinafter WVCPRB), Petitioner, is a public agency of the State of West Virginia created by state statute to administer a number of public retirement plans in this State, including the West Virginia Teacher's Retirement System (hereinafter WVTRS) and West Virginia Teachers Defined Contribution (hereinafter WVTDC) system. WVCPRB is designated by state law as the trustee for these public retirement plans except with regard to investment of the funds of the State's defined benefit plans.

The West Virginia Investment Management Board (hereinafter WVIMB), Petitioner, is a public body corporate created by state statute to serve as the principal investment management organization for the State of West Virginia for long-term assets, and is responsible for the investment of all of the State's defined benefit retirement plans, the Workers' Compensation and Pneumoconiosis plans and miscellaneous other long-term assets of the State and its political subdivisions. Although WVIMB is responsible for investing the funds, it is ultimately required to transmit to the State Treasurer any funds requested to meet the obligations of the state government. WVIMB serves as the trustee with regard to the investment of the funds of all of the State's defined benefit public retirement plans, including WVTRS. Because WVIMB is the

¹ The undersigned, counsel for the West Virginia School Service Personnel Association, is the sole author of this brief. Counsel for a party did not author this brief in whole or in part. No monetary contribution was made by a party or any group or individual other than the amicus curiae to fund, in whole or in part the preparation of this brief.

trustee for investment purposes for these plans, state law requires WVCPRB to transfer all funds received for the WVTRS to the WVIMB for investment. WVIMB is charged with providing prudent fiscal administration, investment and management for the funds of WVTRS and other participant plans and funds.

The Variable Annuity Life Insurance Company (hereinafter referenced as VALIC), Respondent, is a Texas corporation which has its principal place of business in Houston, Texas, and does business in West Virginia as a provider of retirement services and products such as annuities for use in retirement plans. VALIC provided one of the investment options for members of the WVTDC plan. Perceiving that some members of the WVTDC felt that they might not have sufficient funds to support their retirement, the West Virginia Legislature determined to give members of the WVTDC the opportunity, under certain conditions, to transfer to the WVTRS.²

If these conditions were met, as they were, then the WVCPRB was ordered to transfer to the WVIMB the funds of the members of the WVTDC who were transferring to the WVTRS.

Toward this end, West Virginia Code §18-7D-5(a) provides, in pertinent part, the following:

... the Consolidated Public Retirement Board shall transfer the members and all properties held in the Teachers' Defined Contribution Retirement System's Trust Fund in trust for those members who affirmatively elected to do so during that period to the State Teachers Retirement System, effective on the first day of July, two thousand eight ...

In addition, West Virginia Code §18-7D-7(b)(1) provides:

² West Virginia Code §18-7D-1(a)(2) & (5)

The Consolidated Public Retirement Board shall, for each member who affirmatively elected to transfer as provided in this section, transfer the assets held in the Teachers' Defined Contribution Retirement System's Trust Fund in trust for that member to the State Teachers Retirement System on the first day of July, two thousand eight.

Accordingly, when the legislative conditions were met, the WVCPRB demanded that VALIC surrender the funds of the former members of the WVTDC who were transferring to the WVTRS. VALIC refused the WVCPRB request, ultimately offering to surrender the funds over a five-year period. In an attempt to comply with the legislative mandates cited above, WVCPRB transferred part of its interest in the annuity contract with VALIC to the WVIMB on December 10, 2008. Then the WVIMB entered into annuity contract with VALIC identical to the contract between VALIC and the WVCPRB. The WVIMB then demanded surrender of the entire amount of funds. Again VALIC refused immediate surrender of the funds. Instead, VALIC surrendered the funds over a five-year period in accordance with VALIC's interpretation of the terms of the above-referenced contracts. (Petitioners interpreted the contracts and applicable law differently and contend that they were entitled to surrender of the full amount.)

ARGUMENT

The Petitioners have done an excellent job of presenting their legal arguments to concerning the composition and construction of the contract(s) at issue in the current case in the proceeding before the circuit court and we feel confident that they will do an excellent job in their forthcoming brief. We feel that we could add little, if anything, to their arguments to this Court concerning whether the refusal of the Respondent to immediately surrender approximately \$250 million dollars of the assets of West Virginia Teacher's Defined Contribution members

who elected to transfer to West Virginia Teachers Retirement System violated the contractual rights of the parties. However, Amicus Curiae would like to address the following questions:

(a) whether the intent of the transfer legislation, West Virginia Code §18-7D-5(a) and West Virginia Code §18-7D-7(b)(1), was frustrated by the refusal of Respondent to surrender said funds to the West Virginia Teachers Retirement System unconditionally by July 1, 2009;

(b) whether the circuit court should have given effect to the intent of the transfer legislation regardless of the terms of the contract.

Standard of Review

Legal issues are reviewed *de novo* and factual issues are reviewed on the clearly wrong standard of review. Appalachian Power Co. v. State Tax Dept., 466 S.E.2d 424 (W. Va. 1995); Burgess v. Porterfield, 469 S.E.2d 114 (W.Va. 1996). The question of whether the legislative intent was frustrated by VALIC's insistence that it surrender the funds of members of the WVTDC to the WVTRS over a five year period is a legal question. The question of whether the legislation must be given its intended effect regardless of the terms of the annuity contracts is also a legal question.

A. The intent of the legislature was to give the WVIMB control of the funds of the members transferring from WVTDC to WVTRS by July 1, 2008.

"The primary object in construing a statute is to ascertain and give effect to the intent of the Legislature." Syl. Pt. 1, Smith v. State Workmen's Compensation Com'r, 219 S.E.2d 361 (W. Va. 1975). "Where a particular construction of a statute would result in an absurdity, some other

reasonable construction, which will not produce such absurdity, will be made." Syl. pt. 2, Newhart v. Pennybacker, 200 S.E. 350 (W. Va. 1938).

The intent of the legislature that the funds of former members of the WVTDC be transferred to the WVIMB by July 1, 2008 is crystal clear. The real question is whether the intent of the legislature to give *control* of the investment of those funds by July 1, 2008 to the WVIMB. If that was the intent of the legislature, then the transaction on December 10, 2008 did not meet the requirements of the statute. This is true not only because of the delay of few months so much as the fact that the transaction did not grant WVIMB true *control* of the investment of the funds.

It is clear that the legislature did not feel it financially feasible to guarantee benefits to a new group of employees unless sixty-five per cent of the eligible employees made the move to the WVTRS.³ It is unimaginable that the legislature would have thought it only financially feasible to allow the switch of members of the WVTDC to the WVTRS if over half of the employees to commit to the move without also intending that these employees bring all of their funds into the pool. As repeatedly stated by the Petitioners, these transferred assets were intended to fund the move.

Let us be frank. The state of West Virginia undertook a large commitment by allowing members of the WVTDC to transfer to the WVTRS. The state needed all the money it could get to help it shoulder these future burdens. Understandably, VALIC wished to retain the funds as long as possible in order to make a profit from the investment of those funds. The state of West Virginia counted on control of the investment of those funds and on being able to earn more return than it received from VALIC under the annuity contract. VALIC surely would not have

³ West Virginia Code §18-7D-1(a)(5)

refused to surrender the funds unless it foresaw that it would earn more from the investment of the funds than it paid out under the annuity contract.

B. The intent of the legislature should have been given effect regardless of the terms of the annuity contracts.

The Petitioners contend that they were entitled to the surrender of the entire amount of funds of the members transferring from WVTDC to WVTRS under the applicable annuity contracts with VALIC. If Petitioners are correct in this assertion, then the following argument need not be addressed. However, the circuit court held to the contrary, i.e., that VALIC was entitled to surrender the funds in question over a five-year period. Assuming for the sake of argument that the circuit court is correct, the question arises whether the terms of the contract prevail over the statute.

The West Virginia Legislature has an undoubted power and authority to provide the terms of retirement plans for its employees and those of its political subdivisions and to make changes where warranted. This Court has held:

The realization and protection of public employees' pension property rights is a constitutional obligation of the State. The State cannot divest the plan participants of their rights except by due process, although prospective modifications which do not run afoul of the federal or State impairment clauses are possible. Syllabus Point 18, Dadisman v. Moore, 384 S.E.2d 816 (W. Va. 1988).

The only conceivable objection to giving effect to West Virginia Code §18-7D-5(a) and West Virginia Code §18-7D-7(b)(1) is that the enactment of these sections violates Article I, Section 10, Clause 1 of the United States Constitution. This clause provides that, "no State shall

... pass any ... Law impairing the Obligation of Contracts[.]” In interpreting this clause, the West Virginia Supreme Court of Appeals has made it clear that, “...the Contract Clause prohibits the passage of a statute or law which impairs the obligation of an existing contract.” Collins v. City of Bridgeport, 525 S.E.2d 658 (W. Va.1999)

The fact that the contract(s) in question involve an agency of the state of West Virginia does not remove application of the contract clause. National Educ. Ass'n-Rhode Island by Scigulinsky v. Retirement Bd. of Rhode Island Employees' Ret. Sys., 890 F. Supp. 1143, 1151 (D.R.I. 1995). To the contrary, the fact that the state is a party in the contract results in a more stringent examination of the Contract Clause than would laws regulating contractual relationships between private parties. State ex rel. West Virginia Reg'l Jail & Corr. Facility Auth. v. West Virginia Inv. Mgmt. Bd., 508 S.E.2d 130 (W. Va. 1998); (Davis, C.J., dissenting) (quoting Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 98 S. Ct. 2716, 57 L. Ed. 2d 727 [1978]).

The test for whether a statute violates the Contract clause is a three-part test. It is generally identified as the Energy Reserves test. Shell v. Metropolitan Life Ins. Co., 380 S.E.2d 183 (W. Va. 1989). In applying this test, the first step is to determine if the statutory enactment substantially impairs the contractual relationship. Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 98 S. Ct. 2716, 57 L. Ed. 2d 727 (1978). If the impairment is held to be substantial, it must then be determined whether there is a significant and legitimate public purpose behind the law. Energy Reserves Group, Inc. v. Kansas Power & Light Co., 459 U.S. 400, 103 S. Ct. 697, 74 L. Ed. 2d 569 (1983). Finally, if a legitimate public purpose is demonstrated, we must determine whether the adjustment of the rights and responsibilities of contracting parties is based upon reasonable conditions and is of a character appropriate to the public purpose justifying the

law. United States Trust Co. v. New Jersey, 431 U.S. 1, 22, 97 S. Ct. 1505, 1518, 52 L. Ed. 2d 92 (1977).

Let us assume, for the sake of argument only, that the annuity contracts in this case permit VALIC to surrender the funds over a five year period and that this contractual right conflicts with the statutory mandate. Let us then apply the Energy Reserves test to the current case.

The first part of the Energy Reserves test concerns whether or not the statute substantially impairs the contractual right. In Shell v. Metropolitan Life Ins. Co., 380 S.E.2d 183 (W. Va. 1989), this Court stated:

... the severity of the impairment measures the height of the hurdle the state legislation must clear. Minimal alteration of contractual obligations may end the inquiry at its first stage.

Obviously, the purpose of prevents a full and immediate withdrawal or transfer of funds invested in an annuity is to prevent nimble investors from jumping into the guaranteed 4.7% annuity plan when market conditions indicate that a return from another type of investment is likely to be less than 4.7% and jumping out of the plan when the market situation makes a return of higher than 4.7% more likely in another type of investment. Permitting this type of activity would compromise VALIC's ability to make a profit.

Petitioners allege large damages from the inability to invest the funds in question on the theory that they could have earned a higher rate of return than 4.7%. Presumably, had VALIC surrendered the funds upon demand; it would have not had the opportunity to make a profit from the investment of these funds resulting in a return in excess of 4.7%. Accordingly, it would seem

that the legislation would have had a significant impact on VALIC's contractual rights.

However, this is only the first prong of the test. With this threshold crossed, we must go to the second and third parts of the test.

Clearly providing for an adequate retirement for school employees is a significant and legitimate purpose. Dadisman v. Moore, 384 S.E.2d 816 (W. Va. 1988). It would also seem evident that the State of West Virginia has a legitimate interest in obtaining the funding necessary for providing an adequate retirement for the school employees. Accordingly, the existence of a legitimate public purpose is self-evident.

This leads to the final question, i.e., whether the legitimate purpose of the law is reasonably accomplished by mandating a quick transfer of all funds in question to the *control* of the WVIMB. Again, this seems self-evident. The State of West Virginia committed to guarantee an adequate retirement for school employees. That guarantee was undertaken immediately upon the conditions of the transfer being fulfilled for the employees who elected to transfer to the WVTRS. The transfer of the resources to fund that transfer should not be delayed and stretched out over a five year period. The acceptance by the state of West Virginia of the responsibility of providing for the retirement of the transferring members and the transfer of those members funds should coincide as nearly as possible.

As for whether the character of the action is appropriate, we need only note that it would seem particularly appropriate that the funds invested by former members of the WVTDC be transferred to the WVTRS, which is the system that will be paying the retirement pensions of these members. It is natural that the funds invested for retirement go to the system that will provide the retirement pension.

Consequently, giving effect to the legislative intention in the current case does not violate the Contracts Clause of the United States Constitution. Failing to give effect to the intention of the legislature will have tragic consequences. Essentially, the profit earned by VALIC as a result of surrendering the funds over a five-year period rather than immediately represent a loss to either the taxpayers of West Virginia in general or the retired school employees. Either the state of West Virginia will have to make good that loss through taxes or the retired school employees will not receive the same level of benefits that they would have received had VALIC immediately surrendered the funds. The West Virginia School Service Personnel Association, on behalf of its many past and present members who have or will retire under the WVTRS, urge this Court should give effect to that legislative intent, reverse the decision of the circuit court, and award damages to Petitioners.

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CERTIFICATE OF SERVICE

I, John Everett Roush, Esq., counsel for West Virginia School Service Personnel Association, certify that I have served a the original and ten true copies of the foregoing “Amicus Curiae Brief Filed On Behalf of The West Virginia School Service Personnel Association” on the following by hand-delivery on this the 21st day of February 2014, to:

Rory L. Perry, II, Clerk of the Court
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Further I, John Everett Roush, Esq., counsel for West Virginia School Service Personnel Association, hereby certify that I have served a true copy of the foregoing “Amicus Curiae Brief Filed on Behalf of The West Virginia School Service Personnel Association” on the following by placing the same in a correctly addressed envelope, First Class postage prepaid, in the United States Mails, or by electronic mail, on this the 21st day of February 2014, to:

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