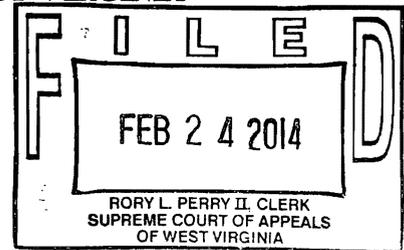


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET No. 13-1193



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

Appeal from Final Orders of the Circuit
Court of Kanawha County (09-C-2104)

v.)

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

Petitioners' Brief

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ASSIGNMENTS OF ERROR

- I. Contrary to the Circuit Court's Order, the 1991 Annuity Contract allowed the full surrender of the VALIC annuity without a five year delay or surrender charge.
- II. Contrary to the Circuit Court's Order, the 2008 Annuity Contract allowed the full surrender of the VALIC annuity without a five year delay or surrender charge.
- III. The Circuit Court erred in concluding that the Endorsement was applicable to surrender of the annuities requested by IMB and CPRB.
- IV. The Circuit Court erred in concluding that neither CPRB nor IMB had standing to seek a declaratory judgment under the 1991 and 2008 Contracts, and that their dispute with VALIC did not present an actual and justiciable controversy.
- V. In granting summary judgment, the Circuit Court erred by resolving and then relying on disputed issues of fact.

STATEMENT OF THE CASE

Petitioners and Plaintiffs below, The West Virginia Investment Management Board (IMB) and The West Virginia Consolidated Public Retirement Board (CPRB), appeal two Final Orders of the Circuit Court of Kanawha County, granting summary judgment against each of them in favor of Respondent and Defendant below, The Variable Annuity Life Insurance Company (VALIC) in a declaratory judgment and breach of contract case.

In 1941, the West Virginia Legislature created a retirement system for teachers and other school service personnel called the State Teachers Retirement System (TRS). W. Va. Code § 18-7A-1, *et seq.* Employees of public schools throughout the State were required to join TRS. W. Va. Code § 18-7A-13. Originally a defined contribution retirement system, in 1970 TRS became a defined benefit plan. As a result of funding concerns, in 1990, the West Virginia Legislature created a second retirement system for employees of public schools, the Teachers' Defined Contribution Retirement System (TDC). W. Va. Code § 18-7B-1, *et seq.* The

Legislature required all public school employees hired after July 1, 1991, to join TDC, and closed TRS to new employees. W. Va. Code § 18-7B-7(a).

CPRB was created in 1991 as well. It was established as the public agency of the State of West Virginia responsible for administering a number of public employee retirement plans in the State, including TRS and TDC. W. Va. Code § 5-10D-1. CPRB is designated by statute as the trustee for each of these plans. *Id.* at § 5-10D-1(g). IMB is a public body corporate, also created by state law, which serves as the principal investment management organization for the State of West Virginia for long-term assets, including those of the State's defined benefit retirement plans, the Workers' Compensation and Pneumoconiosis funds and others. W. Va. Code §§ 12-6-1a, 12-6-3(a). Because IMB is the statutory trustee for investment purposes for the State's defined benefit retirement plans, state law requires CPRB to transfer all funds received for the benefit of these plans, including TRS, to IMB for investment. W. Va. Code § 5-10D-1(f)(1). Together, CPRB and IMB are responsible for the administration and management of the State's defined benefit retirement plans.

One of CPRB's first tasks in 1991 as a new agency was to make investment options available so that members of the TDC could choose how to invest their employer and employee contributions within the plan. *See* W. Va. Code §§ 18-7B-6 (requiring CPRB to contract with private pension, insurance, annuity, mutual fund or other companies) and 18-7B-9 and 18-7B-10 (providing for mandatory employer and employee contributions to the fund). The initial investment choices authorized for TDC members were the Merrill Lynch Bond Fund, the Federated Common Stock Fund, and the Vanguard Money Market Fund. (A.R. 128).¹ In mid-

¹ References to the Appendix Record - the contents of which were agreed to by the parties - are set forth as "A.R. ____."

1991, CPRB issued a Request for Proposal (RFP) soliciting a fourth investment option for members of TDC, an individually-allocated fixed annuity product. (A.R. 122-141). VALIC, a Texas insurance company and a subsidiary of AIG, submitted a proposal and was ultimately selected by CPRB. (A.R. 142-203, 215-217). Additional investment options have been added over the years. (A.R. 989-999).

The RFP solicited bids for products without surrender charges or charges for any transfers from one TDC investment option to another. (A.R. 128). VALIC's Proposal, which offered a guaranteed 4.5% rate of return, conformed with these requirements, stating, both in a cover letter and the full Proposal itself, that there would be no surrender charges or charges on transfers. (A.R. 142, 160, 162, 167). VALIC's Proposal did, however, impose one restriction on certain transfers by active TDC participants--participants' transfers out of the VALIC account and into a TDC money market fund or TDC guaranteed investment contract (GIC) fund were limited to 20% of the participant's account balance per year. (A.R. 160, 162, 167). A Letter of Understanding, duly signed by representatives of both CPRB and VALIC, reinforced this point by stating that "VALIC will allow a participant to withdraw his or her investments at any time without penalty, subject to the twenty percent annual limitation if funds withdrawn are to be deposited into money market fund or income fund which consist [sic] of guaranteed investment contracts." (A.R. 185).

The annuity policy itself also addressed these provisions. VALIC's standard form policy for group fixed annuity with individual allocations, "Form GFA-582," provided that the TDC was the "Contract Owner," and designated members of the TDC as "Participants." (A.R. 186, 188, 191). The original GFA-582 form itself imposed a 7% surrender charge on Participants' accounts, and did not address transfers by participants to other investment options

within the same plan. (A.R. 188-203). However, an Endorsement to the Contract drafted by VALIC, made changes to the standard terms of the GFA-582, so that the policy would conform with CPRB's RFP, VALIC's Proposal and the Letter of Understanding. (A.R. 197, 1364).

The Endorsement, which referred to the TDC Plan as the "West Virginia Optional Retirement Program" or "ORP," deleted the standard form contract provision imposing surrender charges. (A.R. 197). The Endorsement reiterated the restriction on transfers by Participants in the TDC from their VALIC account to a money market fund, but provided that the restriction would not apply if "[t]he Surrender Value remaining would be less than \$500, or; [if t]he withdrawal is for transfer to the funding entity for the West Virginia ORP Common Stock Fund or the West Virginia ORP Bond Fund," the only two investment options in TDC at that time which were not a money market fund or GIC. (A.R. 128, 197). The Endorsement made no change to Section 6.08 of VALIC's standard contract, which allowed VALIC to defer any partial or total surrender for up to a maximum of six months. (A.R. 192, 196-197).

The parties agree that the Contract between CPRB and VALIC (hereinafter, the "1991 Contract") consisted of CPRB's RFP, VALIC's Proposal, the October 15, 1991 Letter of Understanding and the GFA-582 annuity policy issued to CPRB, as amended by the Endorsement. (A.R. 122-203, 224-226). The RFP, VALIC's Proposal and the October 15, 1991 Letter of Understanding specifically stated that the 1991 Contract would be subject to the laws of West Virginia, and that the CPRB would be "solely responsible for rendering decisions in matters of interpretation on all terms and conditions in accordance with the laws of the State of West Virginia." (A.R. 129, 172, 185).

Following a sales campaign by VALIC sales persons, more than 66% of the teachers chose to invest some or all of their contributions in the VALIC fixed annuity. By 2008, more than one third of the TDC Plan's assets were held in the VALIC annuity, and many TDC members' accounts were generally insufficient to support a meaningful retirement. (A.R. 219-220, 891). To address this problem, in 2008, the West Virginia Legislature enacted W. Va. Code § 18-7D-1, *et seq.*, which permitted current TDC members to elect to voluntarily transfer their membership and assets to TRS. H.B. 101, 2008 Leg., 1st Extraordinary Sess. (W. Va. 2008).

The transfer was contingent on the results of an election in which at least 65% of actively contributing TDC members had to affirmatively elect to make the transfer. W. Va. Code §§ 18-7D-1(a)(5), 18-7D-3(b), 18-7D-5(a), (d) and 18-7D-7(b). This election was held in April and May 2008 and more than 78% of actively contributing TDC members (approximately 15,000 individuals) (holding VALIC investments of \$250 million) affirmatively elected to transfer. (A.R. 876, 1679); W. Va. Code § 18-7D-7(h). The legislation contemplated that this influx of members into TRS would be funded, in large part, by the assets held in TDC, in trust, for the transferring members, and directed the CPRB to "transfer the members and all properties held in the [TDC]'s Trust Fund for those members who affirmatively elected to do so ... to the [TRS]," effective July 1, 2008. W. Va. Code § 18-7D-5(a) (emphasis added), 18-7D-7(b)(1). For those teachers not electing to transfer (approximately 5,000) their investments in VALIC remained in place under the original 1991 Contract. (A.R. 383).

As early as March, when the State informed VALIC of the legislation and impending transfer of the invested funds to IMB, VALIC threatened to impose a surrender charge by withholding approximately \$11.5 million of the total surrender value of the investment. (A.R. 205, 222). VALIC eventually acknowledged that the Contract expressly

prohibited surrender charges, but then claimed that the Endorsement's restrictions on Participants' in-plan transfers would apply to the rollover to TRS. (A.R. 245-248).

At the end of June, when TDC's third party administrator (TPA) Great-West contacted VALIC to request the surrender of the transferring teachers' VALIC accounts, VALIC responded that only 20% could be withdrawn annually. (A.R. 207-209). VALIC provided Great-West and CPRB with a "Transition Information Form," prepared by VALIC specifically to address CPRB's request, which gave the CPRB only two options for 20% annual withdrawals: a "Five Year Equal Annual Installment Method" or a "Decreasing Balance Method." (A.R. 208-209, 2766). CPRB refused to sign this form. VALIC took the position that the Endorsement applied despite the fact that historically, it had permitted partial surrenders under the same contract on behalf of TDC members who were allowed to transfer their accounts to other CPRB-administered plans (TRS and PERS) pursuant to legislation enacted in 1995 and 2001. (A.R. 227-242).

On or about July 1, 2008, the transfer date mandated by the legislation, each of the other TDC investment providers liquidated the transferring teachers' assets without restriction or penalty in accordance with CPRB's instructions and released the assets for investment by IMB, while VALIC refused. (A.R. 619-620, 873-875). Approximately \$250 million of the assets of the roughly 15,000 TDC members who elected to transfer was withheld by VALIC from the TDC to TRS transfer. (A.R. 873-874).

To comply with the statutory mandate that the participants and their assets be transferred to TRS, the parties eventually agreed that VALIC would transfer the \$250 million from the 1991 Contract with CPRB to a "new" or substitute annuity contract with IMB (the

“2008 Contract”). (A.R. 272-317). CPRB, IMB and VALIC intended that IMB’s contract be identical to the 1991 Contract. (A.R. 273, 274). The 2008 Contract consisted of a GFA-582 annuity policy identical to that forming a part of the 1991 Contract, including the Endorsement, as well as a Letter of Understanding signed by IMB’s Executive Director and a VALIC Vice President. (A.R. 295-317). IMB then requested a full liquidation of the annuity under the substitute 2008 Contract, which VALIC again refused, relying upon the same Endorsement. (A.R. 249, 318-320). Having no other choice, because of VALIC’s continued refusal to surrender the funds, IMB began withdrawing the funds in 20% annual installment payments, from May 2009 and through May 2013. (A.R. 1098-1100).

VALIC’s refusal to release the funds in full meant that only 20% of the \$250 million was available for transfer to TRS for each of five years. The significance of this delayed payment plan was that IMB, as trustee of the TRS Trust, was unable to fully invest all of the funds in its TRS Investment Pool. During this ensuing five year time period, IMB and CPRB contend the TRS Plan lost net investment earnings of \$92 million, frustrating the intent of the Legislature to provide for a full and adequate retirement benefit for the public school employees in West Virginia. (A.R. 967-969).

Petitioners first brought this suit in 2009 as a declaratory judgment action, following VALIC’s refusal to surrender the funds to either CPRB or IMB, both trustees. Petitioners asked the Court to declare that they had the right to a full and unrestricted surrender of the transferring TDC members’ funds. VALIC immediately removed the case to Federal Court based on diversity of citizenship, but on July 26, 2010, the Federal District Court remanded the case to the Kanawha County Circuit Court. (A.R. 2548-2569). After remand, the parties amended their complaint to seek damages incurred by TRS as a result of VALIC’s

extended and continued refusal to timely release the funds once significant damages and loss of earnings were manifested. (A.R. 1-49). Discovery commenced and ultimately, cross-motions for summary judgment were filed by both CPRB/IMB and VALIC. (A.R. 93, 1365, 2627). On October 21, 2013, the Circuit Court, Judge Stucky, presiding, granted VALIC's motions for summary judgment against CPRB and IMB, respectively. (A.R. 2904-2924).

STANDARD OF REVIEW

The Circuit Court's two Orders on appeal are a grant of summary judgment in a declaratory judgment case. Also, the Circuit Court's Orders are based on its construction of the language in certain insurance policies. Therefore, this Court's standard of review in this case is *de novo*. See Syl. Pt. 3, *Cox v. Amick*, 195 W. Va. 608, 466 S.E.2d 459 (1995) (holding that "[a] circuit court's entry of a declaratory judgment is reviewed *de novo*."); Syl. pt. 2, *Riffe v. Home Finders Assocs., Inc.*, 205 W. Va. 216, 517 S.E.2d 313 (1999), (holding that "[t]he interpretation of an insurance contract, including the question of whether the contract is ambiguous, is a legal determination that, like a lower court's grant of summary judgment, shall be reviewed *de novo* on appeal.").

Petitioners respectfully request that this Court review this matter under a *de novo* standard and conclude that they had the right to surrender the VALIC annuity without a five-year delay or, alternatively, reverse the rulings and findings of the Circuit Court and remand the case to the Circuit Court for a jury trial on the disputed issues of material fact.

SUMMARY OF ARGUMENT

The Petitioners asked the Circuit Court in this declaratory judgment suit to interpret two fixed annuity contracts with VALIC and declare whether the terms of either or both

allowed surrender of the annuity without a five year delay or surrender charge. The Circuit Court failed to make any rulings with respect to the right of CPRB to surrender the 1991 Contract under Count I of the Amended Complaint. Rather, the Court held that VALIC had not “breached” the 1991 Contract and then summarily denied CPRB’s claim. The lower court apparently overlooked the distinct difference between whether the right to surrender existed, and whether that right had been properly exercised by CPRB or wrongfully denied by VALIC.

The 1991 Contract clearly gave CPRB the right to surrender. Specifically, a Letter of Understanding between the parties dated October 15, 1991, provided that TDC participants investing in the annuity could “withdraw their investments at any time without penalty.” Also, Section 6.08 of the annuity clearly allowed surrender, imposing only a maximum six month deferral of payment. The Circuit Court, without explanation, failed to apply these two key contract provisions.

On the other hand, the Circuit Court did declare the rights of IMB under the 2008 Contract, but erroneously concluded that the annuity did not permit IMB to surrender without waiting five years for the return of the invested funds. Without question, both the 1991 and 2008 Contracts permitted IMB and CPRB to surrender the funds on behalf of the TDC members who elected to transfer to TRS. The Court should have granted summary judgment in favor of the Petitioners, but failed to do so.

From the Circuit Court’s perspective, its determination adverse to the Petitioners depended entirely on the application of one provision found in both contracts: an Endorsement. The Circuit Court held that the Endorsement was unambiguous and was the only provision in either Contract that governed surrender. This determination was an error, as there were other

provisions of the Contract, referenced above, that not only governed surrender but which provided for full surrender within six months rather than five years. The Circuit Court unexplainably ignored these provisions. The Endorsement upon which the lower court relied was not even applicable to surrender, but rather, only applied to “in-plan” transfers inside the TDC Plan that individual TDC participants might make between the various investment options provided exclusively within the TDC Plan.

The Circuit Court’s analysis was also flawed because, even if the Endorsement applied, the Endorsement failed to address how it should apply in the context of the specific surrenders outside of the TDC Plan sought by the Petitioners and required by H.B. 101. The Endorsement is completely silent regarding surrenders associated with termination of in-plan participation, whether due to the plan transfer occurring here by statute or even more routine terminations by participants separated from service or moving from this State to another. The Endorsement also directly conflicts with other provisions in the Contracts that allow surrender. *See, e.g.*, Section 6.08 of the annuity. In addition to being an error as a matter of law, the Circuit Court’s unfounded reliance upon the Endorsement had the effect of precluding the Petitioners from presenting extrinsic evidence to a jury to aid in determining the correct application of the Contracts to the dispute between the parties.

The Circuit Court also concluded, without legal authority, that both CPRB and IMB failed to have the requisite standing, as trustees, to seek a declaration of rights with respect to both Contracts. By statute, both CPRB and IMB are trustees of the TRS Plan. Pursuant to statute, both have standing under West Virginia law to seek a determination of the rights of the TRS members whose investments VALIC would not timely surrender, and to pursue damages on behalf of the TRS Plan. The Circuit Court refused to recognize any standing by CPRB under the

2008 Contract, or IMB under the 1991 Contract. The significance of this standing issue was that IMB was unable to make a claim for damages for VALIC's refusal to surrender the 1991 Contract and, similarly, CPRB was unable to claim damages for VALIC's failure to surrender the 2008 Contract. While this might seem merely procedural, it served the purpose of allowing the Circuit Court to avoid direct rulings on the very claims that had been submitted to it for resolution by the Amended Complaint.

More importantly, however, by avoiding any ruling on CPRB's right to surrender the 1991 Contract, the Circuit Court ignored a fundamental fact that the 1991 Contract with VALIC continues in force to this day, under which at least several thousand West Virginia public school employees continue to invest. CPRB absolutely had a right to obtain a declaration from the Court as to its own rights, now and into the future, as a signatory to the 1991 Contract and as the trustee of both the TDC and TRS Plans.

The Circuit Court also erroneously held that VALIC had not breached either the 1991 Contract or the 2008 Contract since it found that the suit presented no actual or justiciable controversy. The applicable law, as well as the record, clearly established the opposite: on December 18, 2008, IMB demanded a full written surrender, which was immediately denied by VALIC, in writing. Accordingly, summary judgment on this basis was wholly improper. Worse, however, the Circuit Court's decision that VALIC had not breached the 1991 contract was based on disputed questions of fact: that CPRB had not made a claim or demand for release of the funds, and that VALIC had not refused any such demand. It is wholly inexplicable that if the funds had not been demanded and denied, then why was there a lawsuit, contested by VALIC, to obtain the release of the funds? Evidence submitted in opposition to VALIC's summary judgment motion showed that VALIC repeatedly denied CPRB's demands with at least

one demand denied in writing. CPRB's fact witnesses testified in depositions that multiple requests for surrender were made and denied. Documents and exhibits disclosed in discovery and submitted in opposition to VALIC's motion also corroborate these disputed positions.

The Circuit Court's decision that VALIC had not breached the 2008 Contract by refusing to surrender the funds was also based on a factual determination that IMB was attempting to withdraw funds from the annuity for transfer to another "funding entity." The phrase, "funding entity" was not defined in either Contract, but was a phrase inserted in the Endorsement, drafted by VALIC, without any clear meaning except in the 1991 historical context. Whether the TRS Plan, IMB or any of IMB's asset pools were, in fact, another "funding entity" could not possibly be resolved by reference to the four corners of either Contract or the Endorsement. It was clear error for the Circuit Court to answer this mixed question of law and fact based on the record before the Court. By doing so, the Circuit Court in effect rejected extrinsic proof of the intent of the parties to the Contracts.

Nothing in the Endorsement was clear or unambiguous on this issue and thus material evidence showing that VALIC's Endorsement was meant to apply only to "in-plan" transfers by individual participants created questions of fact. Similarly, evidence that, in the past, in 1995 and 2001, full and unrestricted surrenders were processed for participants transferring from TDC to TRS was also not considered or explained.

Finally, the Circuit Court's conclusion, as a matter of law, that the Petitioners incurred no damages was also in error. The Petitioners claimed damages of \$92 million in the form of "lost investment income" to the TRS Plan. IMB claimed that, had the funds been surrendered by VALIC, IMB could have invested the funds and earned a greater return than

4.5%. Its investment record since 2008 bears out this projection. Therefore, whether the TRS Plan suffered an investment loss as damages and, if so, the amount of any such damages raised disputed questions of fact that should have been determined by a jury, rather than determined by the Court on summary judgment.

Based on all of the foregoing to be discussed in detail *infra*, the Final Orders of the Circuit Court of Kanawha County should be reversed and set aside. Summary judgment should have been entered in favor of IMB and CPRB on their Cross-Motions for Summary Judgment rather than on VALIC's Motion which rested upon ambiguities and disputed questions of material fact.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioners request a Rule 20 oral argument pursuant to Revised Rule of Appellate Procedure 20(a)(2). It is respectfully submitted that the interpretation and application of the 1991 and 2008 Annuity Contracts at issue and the substantial amount of damages at issue in the case qualify this case as involving issues of fundamental public importance. In addition, the holdings of the lower court which failed to recognize the standing of the CPRB and IMB to seek a declaration regarding public pension plan investments for which each were trustees, also raises significant questions of public importance. Following briefing and argument Petitioners believe that the appropriate disposition of this case would be a signed opinion reversing the summary judgment orders entered by the Circuit Court.

ARGUMENT

I. CONTRARY TO THE CIRCUIT COURT'S ORDER, THE 1991 ANNUITY CONTRACT ALLOWED THE FULL SURRENDER OF THE VALIC ANNUITY WITHOUT A FIVE YEAR DELAY OR SURRENDER CHARGE.

When the initial complaint was filed by CPRB and IMB, it contained one Count which sought a declaratory ruling on the issue of whether CPRB or IMB was entitled to the immediate surrender of the participants' funds invested with VALIC under either or both of the 1991 or 2008 Contracts. Later, after removal to and remand from the federal district court, CPRB and IMB amended the complaint to add a second Count for damages. The Circuit Court permitted the amendment.

Apparently in the eyes of the Circuit Court, the \$92 million damage claim eclipsed the declaratory judgment claim, resulting in a final ruling that virtually ignored the initial purpose of the suit, which was to seek a determination under Count I of whether either CPRB or IMB was entitled to the immediate surrender of the VALIC investments. The lower court, regardless of whether damages were proved or recoverable, should have issued a ruling or determination that the funds were subject to an immediate surrender by the participants. Rather than do so, the Circuit Court dodged the issue.

The Annuity Contract is an insurance policy, and should have been construed and interpreted by the Circuit Court as such. A fixed annuity contract is subject to the rules of construction and interpretation that apply to insurance contracts. The well-established law of this country is that, while variable and deferred annuities operate as securities and must comply with federal securities regulations, fixed annuity contracts can operate as insurance contracts and therefore, are exempt from certain federal regulations. *See, SEC. and Exch. Comm'n v. Variable Annuity Life Ins. Co. of Am.*, 359 U.S. 65 (1999) ("SEC P"); *see also SEC. and Exch. Comm'n v.*

United Benefit Life Ins. Co., 387 U.S. 202 (1967) (“*SEC II*”). The distinction between annuities as securities and annuities as insurance hinges on whether there is a “guarantee that at least some fraction of the benefits will be payable in fixed amounts.” *SEC I*, 359 U.S. at 71. “In a conventional annuity where a fixed amount of benefits is stipulated, . . . the insurer is acting, in a role similar to that of a savings institution.” *SEC II*, 387 U.S. at 207-08. However, in a variable or deferred annuity contract, “the insurer promises to serve as an investment agency and allow the policyholder to share in its investment experience” rather than operate as a savings institution. *Id.* Therefore, whereas variable or deferred annuity contracts are considered securities, fixed annuity contracts are considered insurance contracts.

There is no question that VALIC, part of the AIG family of companies, is an insurer. Moreover, based on *SEC I* and *SEC II*, the VALIC Fixed Annuity Contract is an insurance contract because it promises a fixed amount payable over a given time. Therefore, the VALIC Fixed Annuity Contract is subject to interpretation as an insurance contract.

Under West Virginia law, “[a] valid written instrument which expresses the intent of the parties in plain and unambiguous language is not subject to judicial construction or interpretation but will be applied and enforced according to such intent.” Syl. pt. 5, *Certain Underwriters At Lloyd’s, London, Subscribing to Policy No. B0711 v. PinnOak Res., LLC*, 223 W. Va. 336, 674 S.E.2d 197 (2008) (per curiam) (internal quotations removed). Generally, “[l]anguage in an insurance policy should be given its plain, ordinary meaning.” Syl. pt. 1, *Mylan Labs., Inc. v. Am. Motorists Ins. Co.*, 226 W. Va. 307, 700 S.E.2d 518 (2010) (per curiam). However, any ambiguities in a contract are to be construed against the drafter; specifically, in the insurance context, ambiguities are to be construed against the insurance company, which in this case is VALIC. *Id.* at syl. pt. 5; *see also id.* at 314 (doctrine that

ambiguous terms in insurance contracts are to be strictly construed against the insurance company and in favor of the insured is “well settled law in West Virginia”).

Notably, “a court should read policy provisions to avoid ambiguities and not torture the language to create them.” *Payne v. Weston*, 195 W. Va. 502, 507, 466 S.E.2d 161, 166 (1995). Lastly, an insurance contract “shall be construed according to the entirety of its terms and conditions as set forth in the policy,” including any endorsement, riders or applications attached thereto. W. Va. Code § 33-6-30. In refusing to find that that the 1991 Contract permitted the full surrender of the fixed annuity without delay or surrender charge, the Circuit Court ignored these established rules and the contractual provisions of the 1991 Contract.

A. The Contract Documents Explicitly Permitted Surrender Without a Five Year Delay or Charge.

The 1991 Annuity Contract was entered into following a bid process that consisted of an RFP from the CPRB and a submitted and subsequently accepted proposal from VALIC. (A.R. 122-203). As is common in the context of government contracts, both the RFP and the proposal submitted by VALIC were incorporated as part of the Contract. (A.R. 129) (stating that: “[t]he Request for Proposal and the accepted proposal will be incorporated into the contract.”). The RFP specified that “[t]he Consolidated Public Retirement Board is solely responsible for rendering decisions in matters of interpretation on all terms and conditions in accordance with the laws of the State of West Virginia.” *Id.* Both the RFP and VALIC’s Proposal authorized the surrender requested by the CPRB.

First, the RFP specifically provided that “[e]ach participant will choose his/her investment options from options that the Board will provide. Each participant may invest in one or more of these funds [referenced above] ... and they may change options at the end of each

quarter as well as changes in their current balance. There shall be no charge or surrender charge of any transfer from one account to another.” (A.R. 128) (emphasis added). VALIC’s Proposal in response to the RFP incorporated these provisions stating: “[a]n employee may reallocate any percentage of his/her contribution to another option without restriction.” (A.R. 160). Leaving no doubt, VALIC further explained that “a participant may transfer 100% of his/her V-PLAN account balance to the Common Stock Fund or the Bond Fund at the end of each quarter.” *Id.* Finally, the VALIC proposal clearly provided that no charges would be imposed for these transfers. *Id.* (“There is no surrender charge associated with this contract and there is no charge for the transfer provisions described above.”)

The only restriction imposed on surrender was described in Section 6.08, of the Annuity, captioned *Deferment of Withdrawal*, which provides that “VALIC may defer payment of any partial or total surrender. Any such deferral shall not exceed six months from the receipt at VALIC’s Home Office of the surrender form. Interest shall be paid at a rate determined by VALIC if payment is deferred for thirty (30) days or more.” (A.R. 196). Thus, in the event of surrender of the Annuity (as contrasted with a transfer by a participant to another investment option within the TDC) VALIC could delay the payment of the surrender value of the Contract for up to six months, but no more. Upon entering the Contract, on October 15, 1991, the parties also signed a Letter of Understanding, made a part of the Contract, which confirmed that “VALIC will allow a participant to withdraw his or her investments at any time without penalty, subject to the twenty percent annual limitation if funds withdrawn are to be deposited into money market fund or income fund which consist of guaranteed investment contracts.” (A.R. 185).

Under the clear provisions of the 1991 Contract there are no restrictions on surrender beyond the six months permitted by Section 6.08 of the Contract. VALIC’s misplaced

reliance on the provisions of the Endorsement, and its interpretation of the Endorsement is contrary to the Letter of Understanding, the Request for Proposal and VALIC's own proposal, as well as the text of the Annuity itself.

The 1991 Annuity Policy was drafted by VALIC. As such, under this Court's clear precedents, the Court should construe the language of the provision in favor of the insured, the CPRB as trustee for the transferring TDC participants, and against VALIC, the drafter. *See* Syl. pt. 5, *Mylan Labs. Inc.*, 226 W. Va. 307. That the Circuit Court refused to do so is clear error requiring reversal.

B. Prior To 2008, VALIC Consistently Permitted Immediate Surrender Without Charge.

VALIC has, in the past, permitted the same type of surrender contemplated by the Legislature and the CPRB in 2008. For example, in 1995, the Legislature created a window for a group of participants to transfer from the TDC Plan to the TRS Plan. H.B. 2600, 1995 Leg., Reg. Sess. (W. Va. 1995); (A.R. 227-231). That year a TDC-participating employer was also moved into the Public Employee Retirement System (PERS). (A.R. 232-234). VALIC fully complied with the Contract language in an appropriate fashion. VALIC's response at that time was memorialized in an internal VALIC memorandum dated August 3, 1995, which stated that VALIC needed "to surrender all of these accounts (approximately 336) and send the proceeds (one check) along with a breakdown to the [CPRB]." (A.R. 232). This course of conduct is exactly what VALIC should have done in this case. Similarly, in 2001, the Legislature passed Senate Bill 711, which once again allowed certain members of the TDC Plan to re-enter the TRS Plan. S.B. 711, 2001 Leg., Reg. Sess. (W. Va. 2001) (A.R. 235-242). Again, VALIC treated

this legislation as a full surrender and paid out the cash value of the surrendered accounts so the Participants' assets could be transferred to the TRS Plan as permitted by the Legislature. *Id.*

Unlike the previous Legislative opportunities created in 1995 and 2001 when "windows" for transferring to the TRS were opened by the Legislature and VALIC processed routine surrenders, on this occasion VALIC refused. On March 14, 2008, two days before the passage of H.B. 101, former Governor Manchin invited VALIC and AIG representatives to a meeting in Charleston at the State Capitol to advise VALIC of the pendency of H.B. 101, and to ask how VALIC would respond to the Legislation if passed. (A.R. 219-221). One of VALIC's representatives, Senior Vice President and General Counsel Jim Coppedge, advised the Governor and the CPRB staff, as well as other Legislative leaders present at the meeting, that VALIC intended to assess a surrender charge of \$11.5 million if the legislation passed. (A.R. 244-248). VALIC's response was a complete misrepresentation of the Contract between CPRB and VALIC - the Endorsement had deleted Section 3.02 of the Annuity, which provided for surrender charges, and instead stated unequivocally that "[t]here will be no surrender charges under this Contract." (A.R. 197).

VALIC reiterated its position in an e-mail from Coppedge to Anne Lambright, then-Executive Director of the CPRB, on March 17, 2008. In that e-mail, Coppedge wrote:

I still need to retrieve some files from off-site storage, but I believe the answer to your question regarding surrender restrictions is as follows: I believe, but need to verify, that the applicable surrender charge that would apply in the event that all assets were cashed out in the same year would be \$11.5 Million.

(A.R. 205). Eventually VALIC admitted that there were no surrender charges under the Contract, but advised the CPRB that, in lieu of the surrender charges that it had proposed, it

would impose a five year withdrawal restriction. (A.R. 207-211). When CPRB's third-party administrator Great-West contacted VALIC to begin the process of the withdrawal, VALIC responded to the request by reasserting the five-year restriction. (A.R. 207-211, 2766). Similar to the misrepresented surrender charge, there was no factual or contractual basis for imposing a five year withdrawal restriction upon the surrender. Nonetheless, unlike the previous Legislative opportunities created in 1995 and 2001 when "windows" for transferring to the TRS were opened by the Legislature and VALIC processed routine surrenders, on this occasion VALIC refused.

As a "Plan B," CPRB attempted to liquidate the transferring teachers' VALIC funds by transferring the funds into the TDC Bond Fund. (A.R. 244, 419-423, 610-620). VALIC had not offered this option when it claimed the Endorsement applied, but was forced to do so when CPRB's then-Executive Director pointed out this alternative. (A.R. 419-423). VALIC begrudgingly conceded that, if its position was that the Endorsement applied, these exceptions must apply also. Ultimately, for reasons still unknown to the parties to this litigation, in mid-July 2008, the Bond Fund administrators would not accept the transfer. (A.R. 271, 419-423, 610-620). Thus, the July 1, 2008, date required by H.B. 101 by which "all properties" were to be transferred from the accounts of transferring TDC members into TRS came and went, without VALIC releasing the funds.

The Circuit Court failed to address in its Orders whether, based on the language of the 1991 Contract and the past custom and usage, the Petitioners were entitled to a declaratory judgment that the 1991 Contract permitted a full surrender of funds, without delay other than the six month deferment provided by Section 6.08 of the Annuity Policy. The Petitioners

respectfully request that the Court hold that the 1991 Contract provided for such a surrender, and that VALIC wrongfully denied the CPRB's request for such a surrender.

II. CONTRARY TO THE CIRCUIT COURT'S ORDER, THE 2008 ANNUITY CONTRACT ALLOWED THE FULL SURRENDER OF THE VALIC ANNUITY WITHOUT A FIVE YEAR DELAY OR SURRENDER CHARGE.

Following VALIC's refusal to release the funds and the failure of the attempted bond fund transfer, and in light of the Legislative mandate to transfer "all properties" to TRS as of July 1, 2008, CPRB requested transfer of the ownership of the VALIC annuity to IMB. (A.R. 272-273). VALIC agreed but insisted that a "new" application and a "new" annuity contract with the same terms and conditions be entered into by and between VALIC and the IMB. By email dated September 25, 2008, Coppedge wrote Lambright and Craig Slaughter, Executive Director of the IMB, that:

VALIC is willing to issue a new fixed annuity contract to CPRB for purposes of the TRS plan that is materially similar (i.e. form, endorsements, rates and terms) to the contract issued to the CPRB for the TDCP. In doing so, VALIC relies on CPRB representations that it has full authority to do so under applicable laws, regulations, and the plans. VALIC, of course, cannot and does not provide you, the CPRB, and its representatives tax or legal advice in connection with this transaction and the tax qualified status of each plan.

(A.R. 274).

Ultimately, IMB agreed to enter into this "new" annuity contract with VALIC and, on November 6, 2008, completed a Master Application with VALIC and executed a "new" annuity contract with VALIC for the purpose of transferring ownership of the annuity from CPRB to IMB pursuant to the Legislative mandate. (A.R. 295-314). To be sure, if VALIC had allowed the surrender when first sought by CPRB, there would have been no reason for a "new"

contract to transfer ownership. The “new” contract was understood by the parties to encompass the same terms and conditions as the original CPRB Contract. (A.R. 273-274). On December 10, 2008, the sum of \$248,345,458.77 was transferred on the accounting records of the State of West Virginia from the name of the CPRB under Contract # 25005 to the name of the IMB pursuant to the new Contract # 69562. (A.R. 315). Notwithstanding this paper ledger entry, all money invested on behalf of the TDC members, who had by now joined TRS, was still held by VALIC. Technically, this procedure may have partially satisfied the conditions of H.B. 101, but it did not result in the transfer of any cash out of the Annuity Contract for investment by IMB.

Thereafter, on December 18, 2008, IMB through Slaughter wrote Coppedge and requested “the withdrawal of all funds held under the contract [69562] on or before December 31, 2008.” (A.R. 249-250). VALIC again refused this surrender request claiming that the same provisions under the original Contract precluded VALIC from making a lump sum payment of the cash surrender value. (A.R. 318-320).

Specifically, Coppedge, in a January 12, 2009, letter to Slaughter justifying the refusal to pay the surrender value, advised that the “contract contains a transfer restriction which states that ‘in case of a withdrawal for transfer to another funding entity only 20% of the Surrender Value may be withdrawn once a year.’” (A.R. 318-320). It was not until May 2009 that VALIC permitted any withdrawal of the funds, agreeing only to do so if IMB completed and submitted the same Transition Information Form VALIC previously provided to CPRB, and which CPRB rejected.

Eventually the full surrender value was paid out by VALIC over a five year time period. Partial payments of 20% were made by VALIC in May 2009, 2010, 2011, 2012 and

2013. As a result, the TRS Plan lost the investment value of the \$250 million, which it could have invested for the benefit of West Virginia public employees had the payments been made as requested by the Governor and the CPRB in March 2008.

Like the 1991 Contract, the 2008 Annuity Contract's terms also contradict VALIC's position. It is clear that there was never any surrender charges or waiting period under this Contract, with one exception--both the 1991 Annuity Contract and the 2008 Annuity Contract provide in Section 6.08 that "VALIC may defer payment of any partial or total surrender. Any such deferral shall not exceed six months from the receipt, at VALIC's Home Office, of the surrender form." (A.R. 196, 304). Unquestionably, IMB made a demand for surrender, delivered to VALIC and VALIC again took the position that IMB had to wait five years (NOT six months) in order to receive the funds. There were no other surrender restrictions under this Contract. The plain meaning of the Annuity Contract is that VALIC could hold the funds for a time period not in excess of six months following a request for surrender. Instead, it held the funds for five years. The Annuity Contract should be enforced by this Court in favor of the CPRB and IMB, and summary judgment should have been awarded by the Circuit Court on Count I of the Amended Complaint in favor of the IMB and the CPRB.

III. THE CIRCUIT COURT ERRED IN CONCLUDING THAT THE ENDORSEMENT WAS APPLICABLE TO SURRENDER OF THE ANNUITIES REQUESTED BY IMB AND CPRB.

In 2008, after trying to impose surrender charges on the withdrawal but learning that the 1991 Contract prohibited them, VALIC unilaterally insisted upon a five year withdrawal restriction relying upon the Endorsement. (A.R. 205, 222, 245-248). As noted above, this had never happened in the past 17 years under the 1991 Contract. Prior to 2008, VALIC permitted immediate surrenders of the Annuity Contract without charge or delay.

Both the 1991 and 2008 Annuity Contracts contain an identical endorsement entitled the “West Virginia Optional Retirement Program Endorsement” (the “Endorsement”). The Endorsement is a 1991 amendment to Section 2.03 of VALIC’s original 1991 base Annuity Contract. (A.R. 197, 311). The Endorsement deleted Section 3.02 of the base Annuity Contract, which imposed surrender charges for partial or total surrenders, and instead specifically provides that “[t]here will be no surrender charges under this Contract.” *Id.* The Endorsement also permitted “transfers” by a “Participant” from one investment to another so long as the “transfer” was not to a money market fund. *Id.*

Thus, procedural and questions of fact aside, reduced to its essence, this case comes down to one issue - does the Endorsement apply to transfers outside the TDC Plan to another plan altogether? Did the original signatories to the 1991 Contract intend that the Contract restrict transfers out of the plan, or did they intend that the Endorsement restrict only in-plan transfers by the individual participants? If the answer to this issue is not clear, then the Endorsement is ambiguous. If ambiguous, then the Circuit Court’s findings were error and extrinsic evidence should have been heard to resolve this critical issue.

Petitioners’ position is that the Endorsement does not apply. As noted above, the Letter of Understanding dated October 15, 1991 acknowledged that this provision was intended to apply only to internal transfers from one TDC investment option to another TDC investment option: “VALIC will allow a participant to withdraw his or her investments at any time without penalty, subject to the twenty percent annual limitation if funds withdrawn are to be deposited into money market fund or income fund which consist of guaranteed investment contracts.” (A.R. 185). The Endorsement did not restrict a full or partial surrender of the invested funds as sought by the Petitioners. A full or partial surrender is subject only to the deferment provision found in

Section 6.08 of each Contract, which allows VALIC to defer payment of any partial or total surrender for a period of only up to six months. (A.R. 196, 304).

The original intent of the 1991 Contract, as evidenced by the RFP and October 15, 1991 Letter of Understanding, was that individual Participants (the teachers and school service employees) could move their assets in and out of the VALIC Annuity to other TDC investment options at any time without penalty or restriction provided that a transfer to a money market fund or GIC was restricted. (A.R. 128, 185). Since TDC is a 401(k)-style plan in which individual Participants decide how to invest their contributions and must be permitted to make changes, unrestricted movement between investments was a key element of the contract. *See* W. Va. Code § 18-7B-1, *et seq.* VALIC made its understanding clear in its Proposal: it would only impose internal transfer restrictions on transfers to the money market or GIC investment options within TDC; no surrender fees or other restrictions were proposed. (A.R. 142, 160, 162). In fact, VALIC's Proposal even described scenarios in which employees terminated their participation in the TDC Plan and received a full refund of their contributions and investments with VALIC, with no surrender charge or five year restriction. (A.R. 156, 159, 162).

At the time the original Contract was drafted the only available investments in the TDC Plan were the stock fund, bond fund and a money market fund, though the CPRB informed bidders in the RFP that it was also considering offering a GIC option. (A.R. 128). Thus, VALIC imposed its restriction in the Endorsement, listing as exceptions the only investment options existing at the time which were not a money market fund or GIC. (A.R. 197). Over the years many other investments were authorized by the CPRB and participants easily moved their funds from one investment to another, with the only restriction being movement from VALIC to the TDC money market fund or GIC. (A.R. 989-999). When the Legislature in 1995 and 2001

created windows for participants to transfer from the TDC to the TRS, VALIC promptly permitted those transfers consistent with the 1991 Contract, and made no claim that the Endorsement applied. (A.R. 227-242).

The Endorsement provides:

A. Except as provided in (B), in the case of a withdrawal for transfer to another funding entity only 20% of the Surrender Value may be withdrawn once a year. (Emphasis added).

* * *

B. The 20% a year restriction of this section does not apply if:

- (1) The Surrender Value remaining would be less than \$500, or;
- (2) The withdrawal is for transfer to the funding entity for West Virginia ORP Common Stock Fund or the West Virginia ORP Bond Fund.

(A.R. 197). (Emphasis added).

Comparing the language of the Endorsement, in the context of the RFP, VALIC's Proposal and the Contract as a whole, to the surrenders requested by the IMB and the CPRB, it is clear that the Endorsement is not applicable. Initially, the first condition is not satisfied--this is not the case of a withdrawal for transfer to another funding entity. Funding entities are the investments into which participants in the TDC Plan were permitted to invest, such as the Merrill Lynch Bond Fund. Second, part B freely allows transfers to the Stock Fund and the Bond Fund--two "funding entities" within the TDC Plan. In contrast, this case is about the State of West Virginia assuming ownership of the investments and transferring those investments to the TRS Plan. In essence, the 1991 and 2008 Annuity Contracts distinguish between transfers "inside the TDC Plan" to which the Endorsement applies, and surrenders "outside the TDC Plan" to which the Endorsement's restriction does not apply. The Circuit Court erroneously applied the

Endorsement to “outside transfers” at VALIC’s urging, despite the fact that the only provision in either Annuity Contract that restricts outside transfers is Section 6.08 which permits VALIC to retain the funds for a period of time no longer than six months.

VALIC argued below that the transfer restriction in the Endorsement was designed to prevent disruption of the investment portfolio it used to provide the fixed rate of return under the annuity. (A.R. 325). The fact that the Endorsement permits unlimited transfers to the funding entity for the ORP Common Stock Fund or the ORP Bond Fund establishes that this cannot be the purpose of the provision. The same alleged disruption to its investments that would be caused by the surrenders requested here would also occur if permitted by an inside transfer to the common stock or bond fund. Thus, VALIC cannot support its interpretation of the Endorsement based on its supposed desire to prevent disruption of its portfolio as it acknowledges its interpretation allows the same disruption for the excepted insider transfers.

The Endorsement, and its exceptions, were relevant only in the context of the TDC Plan. IMB as the Contract owner of the 2008 Annuity Contract, and CPRB as the Contract owner of the 1991 Contract, had the absolute right to make a full surrender of the Contract and receive payment in full from VALIC within a period of six months. By ignoring Section 6.08 of the base Annuity Contract, the Circuit Court erroneously concluded that “the Endorsement was the only provision of the 2008 Contract that governed withdrawal and transfer of funds from 2008 Contract.” (A.R. 2910).

The Circuit Court also attempted to justify application of the Endorsement by concluding that the attempted surrender of the Annuity Contract was in effect a transfer of funds to IMB’s “Short Term Fixed Income Pool, an investment pool that is structured as a money

market fund and funds the TRS--that is 'another funding entity' for purposes of the Endorsement." (A.R. 2911). This is but another example of attempting to shoehorn the Endorsement's application "outside of the plan" which was clearly not the intent of the parties to the original Contract.

Structurally, the installment payments made by VALIC to IMB from 2009 to 2013 were each, "partial surrenders" and not investment transfers. Once the funds were surrendered to IMB by VALIC, VALIC lost any standing it might have had to attempt to label the effect of the ultimate surrender. Even by analogy, the TRS Short Term Fixed Income Pool cannot be said to be the type of fund which the Endorsement sought to restrict. The Endorsement was designed solely to restrict transfers from the VALIC annuity to a money market fund or a guaranteed investment contract by individual teachers. (A.R. 197). As a cash pool, the TRS Short Term Fixed Income Pool is neither; it is a pool managed by IMB and designed to receive cash and maintain liquidity to "meet the daily disbursements requested by the participant plans and to invest any contributions until the time the money is transferred to other asset classes without sustaining capital losses and while earning a small return above inflation." (A.R. 2064). VALIC argued that the TRS Short Term Fixed Income Pool should be treated as a money market fund because a 2008 IMB Annual Report describes the fund as being "structured as a money market fund." *Id.* This characterization does not support any finding that the TRS Short Term Fixed Income Pool was actually a money market fund. The lower court mistakenly got caught up in attempting to analyze exceptions to exceptions to reconcile application of the Endorsement to out of plan transfers, rather than finding that it was altogether inapplicable.

There are other examples of the lower court's misinterpretation of the Endorsement. In its Order the lower court concludes that "the second exception to the

Endorsement permitting withdrawals where the ‘Surrender Value remaining would be less than \$500’ did not apply because the Surrender Value was more than \$248 million.” (A.R. 2911). The Endorsement’s first exception (B)(1) to the 20% restriction on withdrawals for transfers to another funding entity applies if the “Surrender Value remaining would be less than \$500.” (A.R. 311). The lower court describes this as an exception for transfers in which “the full Surrender Value is less than \$500.” (A.R. 2911). Again, this is a misinterpretation of the clear contract language, which is to allow a full, unrestricted withdrawal for transfer to another funding entity if the amount remaining in the VALIC investment is less than \$500. If, assuming *arguendo*, that this Court were to hold that the Endorsement applied to IMB’s request for surrender, then this provision would clearly allow the full surrender of 100% of the funds as demanded in the December 18, 2008 letter, inasmuch as less than \$500 would have remained in the VALIC investment.

An ambiguous contract must be construed against its drafter, and the parties’ actual custom and usage must be considered. *Mylan Labs. Inc.*, 226 W. Va. at 314 (“If a court determines that a policy provision is ambiguous, ‘[i]t is well settled law in West Virginia that ambiguous terms in insurance contracts are to be strictly construed against the insurance company and in favor of the insured.’”); Syl. pt. 5, *Cotiga Dev. Co. v. U. Fuel Gas Co.*, 147 W. Va. 484, 128 S.E.2d 626 (1963) (“Evidence of usage or custom may be considered in the construction of language of a written instrument which is uncertain or ambiguous...”). Because the Endorsement was drafted by VALIC, its provisions must be construed against VALIC, and in favor of Petitioners. Moreover, as discussed above, VALIC never sought to apply the Endorsement’s provisions to prior surrenders by TDC participants or the CPRB; thus, it should

not now be permitted to take the position that the restrictions apply, contrary to its own past actions.

IV. THE CIRCUIT COURT ERRED IN CONCLUDING THAT NEITHER CPRB NOR IMB HAD STANDING TO SEEK A DECLARATORY JUDGMENT UNDER THE 1991 AND 2008 CONTRACTS, AND THAT THEIR DISPUTE WITH VALIC DID NOT PRESENT AN ACTUAL AND JUSTICIABLE CONTROVERSY.

A. The CPRB and IMB Had Standing to Seek a Declaratory Judgment Under Both of The 1991 and 2008 Contracts.

Both the CPRB and the IMB are statutorily designated as trustees for the TRS Plan. W. Va. Code § 5-10D-1(g) (“... all assets of the public retirement plans set forth in subsection (a) of this section shall be held in trust. The Consolidated Public Retirement Board is a trustee for all public retirement plans, except with regard to the investment of funds...”); W. Va. Code § 12-6-1a(f) (“the West Virginia Investment Management Board may act as trustee of the irrevocable trusts created by this article and to manage and invest other state funds.”); W. Va. Code § 12-6-3(a) (“The [IMB] is created as a public body corporate and established to provide prudent fiscal administration, investment and management for the funds of the participant plans and any other funds managed by the board.”). Thus, although separate legal entities, in this case CPRB and IMB are acting on behalf of the same beneficiaries: the public employees participating in TRS, and the State as a whole. W. Va. Code § 12-6-1a(f) (“the West Virginia Investment Management Board ... is acting in all respects for the benefit of the state’s public employees and ultimately the citizens of the state.”); W. Va. Code § 18-7A-3a (“the [CPRB] shall administer [TRS] to fulfill this intent for the exclusive benefit of the members and their beneficiaries.”); *see also* (A.R. 2561 (Memorandum Opinion and Order Granting Plaintiffs’ Motion to Remand, noting, among other things, that “recovery by the Investment Management Board from VALIC would inure to the benefit of the State.”)).

Count I of Plaintiffs' Amended Complaint was brought pursuant to the Declaratory Judgments Act, under which "[a]ny person interested under a ... written contract ... may have determined any question of construction or validity arising under the ... contract ... and obtain a declaration of rights, status or other legal relations thereunder." W. Va. Code § 55-13-2. However, "[f]or standing under the Declaratory Judgments Act, it is not essential that a party have a personal legal right or interest." Syl. pt. 2, *Shobe v. Latimer*, 162 W. Va. 779, 253 S.E.2d 54 (1979). Moreover, when dealing with a contract implicating the public interest, the scope of parties that have standing under the Declaratory Judgments Act is actually larger than with respect to a dispute between private persons. *See id.* at 786-87 (explaining that the considerations underlying the general rule that only parties to a contract or direct third-party beneficiaries have standing were not controlling in the case of a contract involving government entities). This Court has also recognized that organizations may have representational standing on behalf of members, even if the organization itself has not suffered an injury. Syl. pts. 3 and 4, *Affiliated Constr. Trades Found. v. W. Va. Dept. of Transp.*, 227 W. Va. 653, 713 S.E.2d 809 (2011).

VALIC argued below in its Motion for Summary Judgment against CPRB that "[o]nly parties to a contract and third party beneficiaries of a contract have standing to sue to enforce it." (A.R. 2653). VALIC ultimately argued that CPRB had no standing under the 2008 Contract and IMB had no standing under the 1991 Contract, tacitly conceding that only CPRB had standing under the 1991 Contract and only IMB had standing under the 2008 Contract. The Circuit Court in its Orders agreed with VALIC's argument.

The Circuit Court's Order concludes that "CPRB does not have a significant or substantial interest in IMB's ability to withdraw funds from the 2008 Contract because IMB, not

CPRB, is the trustee for investment of the funds held in the TRS.” (A.R. 2923). The Order also concludes that “CPRB’s status as a trustee of the TRS is insufficient to give CPRB standing because CPRB’s role as trustee is limited to processing payments to TRS members and beneficiaries. *Id.* The Circuit Court also erroneously concluded that “CPRB, therefore, does not have standing to enforce the 1991 [sic 2008] Contract.” *Id.* By finely slicing and separating the “standing” argument under each disputed Contract, the lower court and VALIC overlook that both CPRB and IMB are trustees for TRS, and therefore are the legal representatives of the third party beneficiaries and participants in each of the Contracts.

Thus, CPRB, as a trustee for the TRS Plan, unquestionably has standing to bring an action on behalf of the trust or its beneficiaries under a contract, regardless of whether it is a party to the contract. *See, e.g.*, Restatement (Third) of Trusts, § 107(1) (“A trustee may maintain a proceeding against a third party on behalf of the trust and its beneficiaries.”). In fact, “[a]s holder of the title to trust property ..., and as the representative of the trust and its beneficiaries, the trustee is normally the appropriate person to bring (and to decide whether to bring) an action against a third party on behalf of the trust.”). *Id.*; *see also* W. Va. Code § 5-10D-1(d) (“The Consolidated Public Retirement Board has all the powers, duties, responsibilities and liabilities of ... the Teachers Retirement System ...”); W. Va. Code § 12-6-5(2) (granting the Investment Management Board “all powers necessary or appropriate ... to carry out and effectuate its corporate purposes, including, but not limited to, the power to: ... sue and be sued.”); W. Va. Code § 18-7A-4 (“The retirement board shall have the right to sue and be sued, plead and be impleaded, contract and be contracted with ...”). CPRB is absolutely an “interested person” under the 2008 Contract between IMB and VALIC, and, therefore, it has standing under the Declaratory Judgments Act to bring this claim. As a trustee for the third-party beneficiaries of

the Contract, the former TDC members whose assets were held by VALIC under the Contract, CPRB's position satisfies even the "general" rule VALIC relied upon in its Motion for Summary Judgment.

Moreover, CPRB's ability to carry out its statutorily mandated duties is directly dependent on the performance of the TRS investments managed by IMB. *See* W. Va. Code § 5-10D-1(f)(1); W. Va. Code § 12-6-5(20); W. Va. Code §§ 18-7A-14 through 18-7A-19. Therefore, the damages suffered by the TRS Plan as a result of VALIC's breach of both the 1991 and the 2008 Contracts has a direct impact on CPRB's functions. This is sufficient to give CPRB the type of substantial and significant interest in the Contracts that VALIC claims is required to show standing. *See Shobe*, 162 W. Va. at 786 (noting, in that case, that the plaintiffs were "not unrelated, intermeddling third-parties seeking to enforce a private contract having no impact on their interests.").

Similarly, IMB has standing under both the 1991 and 2008 Annuity Contracts to bring a Declaratory Judgment Action. If the Circuit Court had determined that CPRB had the right to demand the immediate surrender of the 1991 Annuity Contract, there would have been no reason or necessity for the 2008 Annuity Contract to have been created between IMB and VALIC. The reason for the 2008 Annuity Contract was as an accommodation to VALIC because VALIC would not release the funds to the CPRB. Had the reverse been true, there never would have been a 2008 Contract.

B. The CPRB and IMB Have Suffered Damages as a Result of VALIC's Breach of Both Contracts.

The CPRB has clearly alleged and established damages under the 1991 and 2008 Contracts as alleged in Count II of the Amended Complaint. VALIC argues that CPRB has no

damages by claiming that Plaintiffs' expert failed to calculate damages on behalf of CPRB. VALIC's position ignores that CPRB is acting in this action not only on its own behalf, but on behalf of the TRS Plan and the members whose funds were held by VALIC pursuant to both of the Annuity Contracts. In fact, CPRB itself has no independent claim to the funds held in trust for TRS, nor does IMB--the damages claimed in this lawsuit, *i.e.*, loss of investment income, would clearly be trust assets belonging to TRS. *See, e.g.*, Restatement (Third) of Trusts, § 107, *Comment e.*

The Plaintiffs' Amended Complaint alleges that VALIC's breach of both Annuity Contracts caused damages to the TRS Plan and, more specifically, to the thousands of public employees participating in the plan, and the State itself. (A.R. 82). As a result of VALIC's refusal to release the funds invested by the TDC members who elected to join TRS, and the corresponding inability of IMB to invest such accounts as it does all other TRS investments, the Petitioners claim that the TRS Plan lost \$92.8 million (expressed in present value) in investment earnings. (A.R. 967-969). It is clear that Plaintiffs' expert report supports the damages claimed by both CPRB and IMB on behalf of the TRS Plan. (A.R. 967-969, 1484-1485, 2709-2712). Moreover, it is also clear that the damages for the breach under either the 1991 or the 2008 Contract are the same: the loss of investment income incurred by the TRS fund, as described in Plaintiffs' expert report, resulting from VALIC's refusal to release the funds upon request.

That CPRB was not responsible for actually investing the funds makes no difference. CPRB has authority to act on behalf of TRS and its members, as well as the State of West Virginia, who are the beneficiaries of the TRS trust, and who were harmed directly by VALIC's breach of the 1991 and 2008 Contracts. The damages alleged in Count II of Plaintiffs' Amended Complaint are described in Plaintiffs' expert report as such: lost investment earnings

in the TRS trust. In discovery, CPRB identified that report as containing the facts supporting CPRB's damages claim. (A.R. 1584, 1600). CPRB and IMB absolutely have standing to make a claim for lost investment income on behalf of TRS members and beneficiaries under the 2008 Contract. The judgment of the Circuit Court was error as a matter of law.

C. The Petitioners' Request for Declaratory Relief Presented an Actual and Justiciable Controversy.

The Circuit Court also erred when it concluded in its Order that "there is no actual, justiciable controversy between VALIC and CPRB related to the 1991 Contract because CPRB has not invoked, and VALIC has not denied, any right or breached any obligation under the 1991 Contract." (A.R. 2921). Aside from the question of whether there was a factual dispute in the record, regarding VALIC's breach of contract in Count II of the Amended Complaint, CPRB and IMB both asked the Circuit Court in Count I of their Amended Complaint to declare whether CPRB was entitled to the immediate surrender of the funds in the VALIC annuity. (A.R. 76-81). Both the Circuit Court and VALIC appear to have ignored this critical part of the underlying lawsuit. Moreover, CPRB still has a contract with VALIC (Contract # 25005) through which more than 3,000 of the 5,000 public employees remaining in the TDC Plan continue to invest. (A.R. 383). A critical part of the underlying suit was to seek a determination whether under the 1991 Contract CPRB was entitled, pursuant to the terms of the 1991 Contract, to the immediate surrender of the Contract and the return of the invested funds. (A.R. 1-9, 74-84).

The Circuit Court never ruled on this central issue, instead dodging it by concluding that there was no "breach" of the 1991 Contract because CPRB had no damages under the 1991 Contract. Both determinations were contrary to the law and facts in the case.

First, the lower court ignored Count I of the Amended Complaint seeking a declaration on the issue of the immediate surrender of the annuity. The whole purpose of Count I of the Amended Complaint was to seek a determination of whether immediate release of the funds was allowed by the 1991 Contract. In fact, had the Circuit Court made such a determination, there would not have even been any 2008 Contract because the funds would have been released and immediately deposited into the TRS trust for investment by IMB.

At VALIC's urging, the Circuit Court diverted its attention from Count I of the Amended Complaint and proceeded to determine if CPRB had incurred any damages. The court was wrong on this issue as well. In determining whether CPRB had any damages, the lower court concluded that to recover damages, "there must also be an injury." (A.R. 2921). In support of this statement, the lower court improperly concluded that this was so because, "plaintiff's expert has not calculated damages related to the 1991 Contract, and IMB has not otherwise claimed resulting from the 1991 Contract." (A.R. 2922). This finding is clear error. As noted above, Petitioners' expert clearly opined that the damages were incurred by the TRS Plan, of which both the CPRB and IMB were trustees. VALIC's efforts to twist and dance around the separate Contracts combined with the standing issue, while ignoring Count I of the Amended Complaint, has led to an erroneous decision by the Circuit Court based on an incomplete analysis of the pleadings, the applicable law and the facts submitted in opposition to VALIC's motion by the petitioners. The Circuit Court's decision should be reversed.

V. IN GRANTING SUMMARY JUDGMENT, THE CIRCUIT COURT ERRED BY RESOLVING AND THEN RELYING ON DISPUTED ISSUES OF FACT.

Rule 56 is clear: summary judgment is appropriate only if there "is no genuine issue as to any material fact." W. Va. R. Civ. P. 56(c). As this Court concluded:

The circuit court's function at the summary judgment stage is not to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial. Consequently, we must draw any permissible inference from the underlying facts in the most favorable light to the party opposing the motion. In assessing the factual record, we must grant the nonmoving party the benefit of inferences, as credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge. Summary judgment should be denied even where there is no dispute as to the evidentiary facts in the case but only as to the conclusions to be drawn therefrom.

Williams v. Precision Coil, Inc., 194 W. Va. 52, 59, 459 S.E.2d 329, 36 (1995) (citations and internal quotations omitted). In this case, the Circuit Court violated the standard set forth in *Williams* and based its summary judgment on factual findings that were in fact disputed.

In finding that VALIC had not breached the 1991 Contract, the Circuit Court made several factual findings that were clearly disputed. The court found that that CPRB had not made a claim or demand for release of the funds and that VALIC had not refused any such demand. (A.R. 2917-2920). The factual record set forth above was hardly undisputed or even in VALIC's favor on these points.

The enactment of H.B. 101 constituted the first formal demand made by the State. Even prior to the law's March 16, 2008, enactment, however, the State had already notified VALIC that legislation was pending which, if passed, would require the full surrender of a number of TDC members' VALIC accounts. (A.R. 2716-2717, 2719 (Lambright Depo., 45:8-46:16, 53:8-53:24)). As CPRB's then-Executive Director Lambright testified, VALIC, having first learned of this legislation while it was pending before the Legislature, was informed immediately by CPRB once it was enacted and the effect it had on the VALIC investment, including the dollar amount of the surrender being requested and the number of participants

involved. (A.R. 1760-1761, 2720-2723, 2728, 2749-2750 (March 2008 E-mails; Lambright Depo., 54:19-57:10, 66:14-66:24; Coppedge Depo., 29:6-29:15, 35:17-35:22).

Indeed, VALIC denied at least one of CPRB's claims for surrender in writing. (A.R. 207-214). Months after VALIC first learned of the legislation, and once the dollar amount for the transfer was determined by CPRB's actuaries, CPRB's TPA, Great-West, acting on behalf of the TDC Plan, then made another demand that VALIC surrender the investments in full. At that time VALIC's own agents admitted in writing that VALIC received what it perceived to be a demand to liquidate the VALIC investments in full. (A.R. 207-209). Moreover, IMB made a written demand for surrender in December 2008. (A.R. 249-250). Finally, the Complaint in this case demanded "[t]hat the Court declare that WVCPRB and WVIMB are entitled to the withdrawal of the full amount of the public money held by VALIC for members of WVTRS and WVTDC, upon demand and without restriction[.]" (A.R. 8).

The Circuit Court's decision that VALIC had not breached the 2008 Contract was also based on disputed "facts:" that the transfer to IMB constituted a withdraw for transfer to another "funding entity" under the Endorsement, and that the IMB Short-Term Fixed Income Pool to which the cash was transferred was a money market account. (A.R. 2911). Petitioners contend that, as a matter of law, the Endorsement does not apply to surrenders; however, even if this Court accepts the Circuit Court's contrary conclusion, reversal of the Circuit Court's Order is appropriate because the question of whether IMB or any of its asset pools were another "funding entity" to which the Endorsement restricted transfers clearly presents a disputed question of material fact. The term is not defined in the Endorsement and the testimony and other documents forming the record establish sufficient evidence that the parties did not intend to

restrict transfers that were not competing with the VALIC annuity. (*See, e.g.,* A.R. 185). These issues should have been decided by a jury.

The Circuit Court also incorrectly determined that the Contracts were, as a matter of law, clear and unambiguous regarding the issue of surrender, and, therefore, failed to consider extrinsic proof of the intent of the parties to the Contracts to be considered. (A.R. 2910). As previously discussed, the CPRB's RFP, VALIC's Proposal and other documents generated both at the time the 1991 Contract was created and throughout its existence, indicate that VALIC's Endorsement was meant to apply only to in-plan investment changes by individual participants. This key evidence was not considered by the Circuit Court. Similarly, evidence that, in the past, VALIC permitted full and unrestricted surrenders for other transfers by participants from TDC to other plans was also not considered. Even if this Court rejects Petitioners' arguments that as a matter of law the Endorsement does not apply to the requested surrenders, key issues of material fact remain regarding the provisions within the Endorsement which are, at the very least, ambiguous.

Finally, the Circuit Court's rulings determining the Petitioners had no damages were also in error because they were based on findings of fact by the court which should have been determined by a jury. As noted in the facts above, the Petitioners claimed damages in the form of lost investment income to the TRS Plan. In concluding that CPRB and IMB had no damages under either Contract, the Circuit Court relied on disputed factual findings: that the Petitioners had no damages because the damages claimed by the CPRB and the IMB under the Contracts were not the same. (A.R. 2912, 2922). Fact witnesses testified and an expert witness determined that the TRS Trust suffered losses directly as a result of VALIC's conduct. (A.R. 967-969 (Coffman Expert Report), 1484-1485 (Lambright Depo., 280:16-281:10), 2709-2712

(Coffman Depo., 87:16-88:17, 89:6-90:11)). Whether either, both or none of the Petitioners suffered damages and, if so, whether the damages were the same, and the amount of any such damages are disputed questions of fact that should have been determined by a jury, rather than determined by the court on summary judgment.

CONCLUSION

Petitioners, The West Virginia Investment Management Board and The West Virginia Consolidated Public Retirement Board, respectfully request that this Court find that the Circuit Court erred in refusing to grant Petitioners' Motions for Summary Judgment or, alternatively, reverse the rulings and findings set forth in the October 21, 2013, Orders of the Circuit Court of Kanawha County in all respects, and remand the case to the Circuit Court for a jury trial on the disputed issues of material fact apparent from the record. If reversed, the Petitioners also request that this matter be referred to the Business Court for further development.

Respectfully Submitted,
The West Virginia Investment Management
Board and The West Virginia Consolidated
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CERTIFICATE OF SERVICE

I, Gerard R. Stowers, do hereby certify that I have caused a copy of the foregoing

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