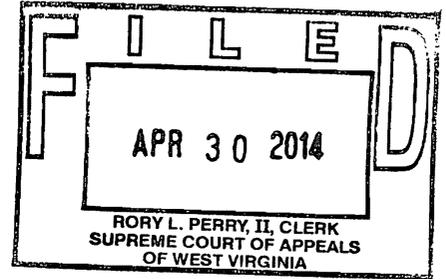


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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' Reply Brief

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Public Retirement Board**

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INTRODUCTION

The Response filed by VALIC reveals two salient points: First, because VALIC has no real response to the claim by Petitioners that the 1991 Contract between CPRB and VALIC allowed surrender of the annuity without charge, VALIC chooses to manufacture a procedural bar to this Court's review of the Circuit Court's failure to so declare. This is significant because it was this refusal to honor the provisions of the 1991 Contract that led to the necessity of entering into the 2008 Contract. Because the supposed procedural bar is illusory, VALIC has now conceded this assignment of error by failing to respond. Second, VALIC has presented a one-sided rendition of numerous disputed facts. The record establishes that, if Petitioners are not themselves entitled to summary judgment, disputed issues of fact mandate reversal of the orders granting summary judgment in favor of VALIC and a remand for trial.

STATEMENT OF THE CASE

Petitioners do not agree with VALIC's Statement of the Case. VALIC attempts to paint a wholly misleading picture of the proceedings in the case as well as the underlying factual basis for the dispute between the parties. There are two contracts involved in this dispute separated by seventeen years of history and practice. The 1991 Contract was the predicate for this dispute. When CPRB first demanded the surrender of the 1991 Contract for the withdrawing participants, VALIC refused and insisted upon the payment of an \$11 million surrender charge. (A.R. 205). Following the refusal by CPRB to pay the surrender charge, and VALIC's refusal to surrender the investments, it was VALIC, not CPRB, that insisted upon a new application and new contract in order to complete the transfer of the annuity funds to IMB. (A.R. 273-274). Had VALIC complied with CPRB's initial demand, the funds would have been transferred to CPRB

by check or wire, subject to a six month holding period, and deposited in the State Treasury in the same fashion as all surrenders had been handled during the course of seventeen years.

ARGUMENT

I. THE CIRCUIT COURT ERRED IN REFUSING TO FIND THAT THE 1991 CONTRACT ALLOWED FULL SURRENDER OF THE VALIC ANNUITY WITHOUT A FIVE YEAR DELAY OR SURRENDER CHARGE.

In response to this appeal, VALIC does not even attempt to contest Petitioners' arguments that the 1991 Contract allowed the full surrender of the VALIC Annuity without a five year delay or surrender charge. Rather than set forth a response to the contractual interpretation presented by Petitioners, VALIC offers the incredible argument that this Court can ignore Petitioners' first assignment of error in spite of the fact that it is explicitly contained in Petitioners' opening brief. VALIC's argument is that setting forth an assignment of error previously contained in the Notice of Appeal is somehow insufficient to constitute an appeal of the error. Resp't Br. at pp. 10-11. This contention is pure fantasy, not legal argument, and constitutes a waiver of VALIC's right to contest the substance of the assignment of error.

A. This Court can and should review the Circuit Court's failure to grant Petitioners' Summary Judgment Motion seeking an express declaration that the 1991 Contract explicitly permitted surrender without a five year delay or charge.

VALIC, with nothing more than a bare citation to the first page of Petitioners' Brief, incorrectly argues that Petitioners do not appeal the Circuit Court's denial of Petitioners' own motion for summary judgment. From this incorrect premise, VALIC argues that this Court must ignore the Petitioners' first assignment of error seeking a determination that the 1991 Contract permitted full surrender of the annuity without a five year delay or charge. VALIC misstates both the applicable law and the procedural posture of the case. This Court should

reject VALIC's attempt to hide the fact that it has no defense to the claim that the 1991 Contract permitted full surrender of the annuity without a five year delay or charge.

Procedurally, both VALIC and the Petitioners filed motions for summary judgment. (A.R. 93, 99) (Petitioners' Motion and Memorandum); (A.R. 1365, 1370, 2627, 2632) (VALIC's Motions and Memoranda). Petitioners' Motion explicitly sought summary judgment declaring that "VALIC's refusal to allow a full and unrestricted withdrawal of the funds when requested first by CPRB, and then later by IMB, was in violation of the contracts between VALIC and CPRB." Motion for Summary Judgment at ¶ 8 (A.R. 95). The Circuit Court, in adopting verbatim the proposed orders tendered by VALIC's counsel, did not expressly deny or address Petitioners' request for a declaration of their unrestricted rights to surrender under the 1991 Contract. However, the Circuit Court did make a number of findings inconsistent with Petitioners' claims. See CPRB Order at Findings of Fact ¶¶ 9-10 (A.R. 1916-1917) (finding that the 1991 Contract contained withdrawal restrictions); IMB Order at Finding of Fact ¶ 9 (A.R. 2906) (same); CPRB Order at Finding of Fact ¶ 22 (A.R. 2919) (2008 Contract contained withdrawal restriction identical to restriction in 1991 Contract); IMB Order at Findings of Fact ¶¶ 15-16 (A.R. 2907-2908) (same); *id.* at ¶¶ 9-15 (A.R. 2906-2907) (finding that withdrawal restrictions precluded requested immediate surrender of annuity).

On November 18, 2013, Petitioners filed their Notice of Appeal in this Court. It explicitly assigned as error the Circuit Court's failure to declare under the 1991 Contract that "CPRB had a right to request and obtain a full, unrestricted withdrawal of the funds held by VALIC." Notice of Appeal, Extra Sheets, Assignment of Error No. 2. Consistent with the Notice, Petitioners' opening brief challenges the Circuit Court's failure to make the requested

declaratory judgment in a number of places.¹ Indeed, Petitioners' Brief concluded: "Petitioners, [CPRB and IMB] respectfully request that this Court find that the Circuit Court erred in refusing to grant Petitioners' Motions for Summary Judgment." Pets. Br. at p. 40.

The procedural rules and decisions of this Court establish that the multiple references in Petitioners' Brief are sufficient to bring the error in refusing to grant Petitioners' requested declaratory judgment before this Court in this appeal. In *Tudor's Biscuit World of America v. Critchley*, 229 W. Va. 396, 402, n. 8, 729 S.E.2d 231, 237, n. 8 (2012) (per curiam), this Court held:

"Critchley contends that Tudor's failed to specifically assign as error the circuit court's conclusion that Tudor's motion was not filed within a reasonable time. Rule 10(c)(3) of the Revised Rules of Appellate Procedure states that "[t]he statement of the assignments of error will be deemed to include every subsidiary question fairly comprised therein." Moreover, this Court has stated its practice to "liberally construe briefs in determining issues presented for review[.]"¹ *State v. LaRock*, 196 W. Va. 294, 302, 470 S.E.2d 613, 621 (1996).

Finally, VALIC argues that this Court should compound the Circuit Court's error by refusing to consider the error on appeal precisely because the Circuit Court **refused** to do so. Resp't Br. at p. 11 (citing *Meadows v. Wal-Mart Stores, Inc.*, 207 W. Va. 203, 219, 530 S.E.2d 676, 692 (1999)). *Meadows*, however, supports review here as the Court found that review was appropriate when, like here, the issue was raised below. 207 W. Va. at 219. The Circuit Court's conclusory rejection of an issue clearly raised below is sufficient to allow this Court to review it.

¹ See Pets. Br. at pp. 8-9 (noting "The Court should have granted summary judgment in favor of the Petitioners, but failed to do so."); *id.* at p. 11 (noting that Circuit Court wrongly failed to declare Petitioners' rights under the 1991 Contract as the Contract is still operative for thousands of employees still in the defined contribution plan); *id.* at p. 14 ("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."); *id.* at p. 20 ("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.").

Id. Moreover, the bar on reviewing nonjurisdictional questions is subject to an important qualification that when “this Court’s determination of one assignment of error results in a reversal of the ruling being reviewed, it is appropriate, in the interest of judicial economy, that we should pass upon the other assignments of error involving questions which likely will arise after remand.” *Sattler v. Bailey*, 184 W. Va. 212, 219, 400 S.E.2d 220, 227 (1990). For all of these reasons, review of Petitioners’ first assignment of error is appropriate.

B. VALIC has conceded that the 1991 Contract explicitly permitted surrender without a five year delay or charge.

After urging the Court not to review Petitioners’ first assignment of error, VALIC chooses not to respond to the substance of Petitioners’ argument. Under the applicable rules and decisions of this Court, VALIC has waived its right to contest the substance of the argument. W. Va. R. App. P. 10(d) (“If the respondent’s brief fails to respond to an assignment of error, the Court will assume that the respondent agrees with the petitioner’s view of the issue.”); *see also Perrine v. E.I. du Pont de Nemours and Co.*, 225 W. Va. 482, 598-99, 694 S.E.2d 815, 931-32 (2010) (finding waiver on appeal when party failed to contest argument raised by opponent).

II. FOR THE SAME REASONS THAT THE 1991 CONTRACT ALLOWED FULL SURRENDER, THE 2008 CONTRACT ALSO ALLOWED THE FULL SURRENDER OF THE VALIC ANNUITY WITHOUT A FIVE YEAR DELAY OR SURRENDER CHARGE.

A. The 2008 Contract is an insurance policy which should be interpreted under the rules governing interpretation of insurance policies.

VALIC does not dispute that the 2008 Contract is an insurance policy that should be construed and interpreted under the applicable rules governing such contracts. *See* Resp’t Br. at p. 20. Nor does VALIC contest that these applicable rules of construction or interpretation include the rule that 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.*; syl. pt. 5, *Mylan Labs., Inc. v. Am. Motorists Ins. Co.*, 226 W. Va. 307, 700 S.E.2d 518 (2010) (per curiam). VALIC argues that this is a rule of “last resort.” Resp’t Br. at p. 20 (citing two treatises). No decision of this Court has ever so minimized this rule; indeed as this Court has recently emphasized, “[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.” *Chafin ex rel. Estate of Bradley v. Farmers & Mechanics Mut. Ins. Co. of W.Va.*, 232 W. Va. 245, 751 S.E.2d 765, 769 (2013) (per curiam) (emphasis added) (quoting syl. pt. 4, *Nat’l Mut. Ins. Co. v. McMahon & Sons*, 177 W. Va. 734, 356 S.E.2d 488 (1987), *overruled on other grounds by Potesta v. U.S. Fid. & Guar., Co.*, 202 W. Va. 308, 504 S.E.2d 135 (1998)).

Similarly, VALIC does not contest that the Circuit Court was required to give effect to the entirety of the terms and conditions as set forth in the policy, including any endorsement, riders, or applications attached thereto. W. Va. Code § 33-6-30. Instead, in an attempt to minimize their import, VALIC improperly refers to the request for proposal and the bid documents as “extrinsic evidence.” Resp’t Br. at p. 20. These documents, which were expressly included in the Contract (A.R. 129), constitute contractual terms, not extrinsic evidence. W. Va. Code § 33-6-30.

Instead of contesting the rules, VALIC, like the Circuit Court before it, chooses to ignore these black letter rules of West Virginia insurance contract interpretation.

VALIC inconsistently argues that the documents that make up the 1991 Contract are irrelevant to the interpretation of the 2008 Contract. VALIC ignores the correspondence between the parties that establishes that the “new” Contract was understood by the parties to encompass the same terms and conditions as the original CPRB Contract. (A.R. 273-274).

Indeed, VALIC admits this in its response in this Court. Resp't Br. at p. 7. Thus, the documents making up the 1991 Contract and the prior history of its interpretation by the parties are relevant to the interpretation of the 2008 Contract.

As VALIC recognizes (Resp't Br. at p. 15) when the language of an insurance policy provision is reasonably susceptible of two different meanings, it is ambiguous. Syl. pt. 1, *Prete v. Merchants Prop. Ins. Co.*, 159 W. Va. 508, 223 S.E.2d 441 (1976). Looking at the Contract documents as a whole, at the very least, Petitioners present plausible interpretations that surrender without a five year withdrawal period was permitted. Moreover, these interpretations are consistent with the parties' conduct during the course of the parties' relationship when previous requests for surrenders were paid immediately. *See* Pets. Br. at pp. 18-19, 25-26.

VALIC argues that these previous surrenders are insufficient to constitute an intentional waiver.² In doing so VALIC misstates the argument. Whether or not this prior conduct amounts to a waiver, Petitioners' argument is that this Court can look to the parties' custom and usage to construe any ambiguous provisions. Syl. pt. 5, *Cotiga Dev. Co. v. United 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..."). Finally, The Chadwick Group, which reviewed the Contract in 2004, concluded that the Contract was ambiguous on several points and failed to address other points. (A.R. 446). The report concluded, specifically, that the termination provisions of the Contract were unclear since the original Contract document primarily addressed participants' rights to surrender. (A.R.

²VALIC does not contest that the 1995 surrender of 168 accounts would have triggered the Endorsement under its interpretation. Resp't Br. at p. 30. VALIC does argue that the Endorsement was not triggered in 2001 because the parties had supposedly agreed by that time to treat the annuity as unallocated and determine the application of the Endorsement on a group level. This supposed amendment to the annuity was based on a request to CPRB's third-party administrator which VALIC never established was agreed to in writing by CPRB as required by the 1991 Contract. (A.R. 457-460).

447). This evidence is sufficient to rebut the Circuit Court’s determination that the Contract was clear.

B. The Endorsement, which appears in both Contracts in identical form, was only intended to apply to transfers between TDC investment options while surrenders seeking distributions out of the TDC Plan were governed by the six month period in Section 6.08 of both Contracts.

Both the 1991 and 2008 Contracts contain an identical endorsement entitled the “West Virginia Optional Retirement Program Endorsement” (the “Endorsement”). VALIC and the Circuit Court rely on a misapplication of the Endorsement to the surrender requested by Petitioners.

The terms of the Contract documents and the various Letters of Understanding make it clear that the Endorsement was historically intended to apply only to internal transfers from one TDC investment option to another TDC investment option. The October 15, 1991 Letter of Understanding provided 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). 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).

VALIC attempts to interpret the Endorsement in a vacuum, ignoring the other documents that make up the Contracts. When the Endorsement is read together with the RFP and October 15, 1991 Letter of Understanding, it is clear that the original intent was to allow participants to move their assets in and out of the VALIC Annuity to other TDC investment

options at any time with the only penalty or restriction being that transfers to a money market fund or GIC were restricted. (A.R. 128, 185).

Simply put, the Endorsement is not applicable to the surrender demanded by CPRB and subsequently reiterated by IMB in December 2008. The endorsement does not apply unless there is a “withdrawal for transfer to another funding entity.” In 1991 when the Endorsement was first written and attached to the 1991 Contract, the only “funding entities” known to the parties were those established by the CPRB in the TDC Plan. Although TRS existed, there was no hint of any intention by any witness that somehow TRS was a “funding entity” to which the Endorsement applied.

VALIC ignores the fact that the very language of the Endorsement makes it inapplicable to the surrender requested by the Petitioners. This is not because Petitioners characterize “surrender” as something different from “withdrawal.” Rather it is, as VALIC admits, because the Endorsement is limited to and applicable to only “a withdrawal for transfer to another funding entity.” (A.R. 197) (emphasis added). The structure of the Endorsement makes it clear that this language was intended to apply to transfers between the funds “inside” the TDC plan. Transfers to the stock fund or bond were permitted without limit. Transfers in excess of 20% of the value of the annuity to a money market fund were not permitted. Surrenders for transfers outside the plan were only subject to the provisions in Section 6.08 which permits VALIC to retain the funds for a period of time no longer than six months.

The reason that only two funds (stock and bond fund) were listed as exceptions was that at the time the 1991 Contract was drafted, these funds were the only investment options existing which were not a money market fund or a GIC. (A.R. 197). Over the years, many other investments were authorized by CPRB and participants easily and historically 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). The clear purpose of the Endorsement was a limited restriction on individual participant transfers between the VALIC product and other similar (or competing) investments. Surrenders of participants' entire account values were routinely permitted as participants left their employment, moved to another state, or otherwise elected not to participate in the TDC any longer. (A.R. 232-242, 2770).

VALIC argues that no provision in the 2008 Contract gave IMB or CPRB the right to make unrestricted withdrawals. Section 6.08 clearly provides for surrender with a waiting period of only six months. Moreover, this Court has previously affirmed a circuit court's holding that an annuity contract did not prohibit or penalize a contract owner from withdrawing the money invested under a group annuity contract. *Stonewall Jackson Mem. Hosp. Co. v. Am. United Life Ins. Co.*, 206 W. Va. 458, 525 S.E.2d 649 (1999). At issue in that case was a Master Group Annuity Contract allowing a hospital to provide insurance annuities as investment options for their pension plans. The original contract contained no provision explicitly prohibiting the Hospital from terminating its participation in the contract and withdrawing the money contributed towards the purchase of annuities. *Id.* at 460-61. The insurer argued, however, as does VALIC here, that under the original contract there was no provision explicitly allowing the Hospital to withdraw its pension contributions. This Court held that it was "implicit in this contract that the [Hospital] could withdraw or transfer the funds held by AUL..." *Id.* at 462. The Court also found there was no merit to the insurer's arguments that the Hospital had no right to withdraw its annuity under the contract. *Id.* at 462-63. Therefore, since surrender is expressly permitted by Section 6.08 of both the 1991 and 2008 Contracts and because there is no provision that prohibits contract owners from withdrawing the contributions to the annuity, as in *Stonewall*,

the Endorsement is not applicable to either CPRB's or IMB's demand for surrender of the investment funds.

VALIC also continues to assert that the December 10, 2008 Letter of Understanding makes the Endorsement applicable to IMB by converting all references in the Contract, including those in the Endorsement, from "Participant" to "IMB." Each time VALIC has made this argument, VALIC omits key language from part of the Letter. The Letter states that "References to participant rights in the Annuity Contract shall be deemed to mean rights vested in WVIMB, to the extent applicable and consistent with the purposes for which the Annuity Contract is held." (A.R. 316) (emphasis added).

- C. Assuming, *arguendo*, that the restrictions and exceptions contained in the Endorsement and addressed by VALIC in its Response are applicable to the surrenders, CPRB and IMB are still entitled to full surrender.**

VALIC continues the arguments it made below that the transfer restriction in the Endorsement was necessary to prevent disruption of its investment portfolio it used to provide the fixed rate of return under the annuity.³ Resp't Br. at pp. 27-28. VALIC ignores the fact that the Endorsement permits unlimited transfers to the "funding entity" for the stock or bond fund which would cause the same alleged disruption to its investments that would be caused by the surrenders requested here. For the same reasons, the opinion of its expert that these provisions are common in the industry, Resp't Br. at p. 27, is similarly not determinative in the context of these annuities which admittedly allowed unlimited transfers to other funds. In essence VALIC and the Petitioners agreed – surrenders would be subject to the six-month restriction in Section

³VALIC has not argued that it was unable to provide the funds within the six months provided under Section 6.08. Discovery established that at the end of 2008 VALIC had \$1.7 billion in cash on hand. (A.R. 2604).

6.08 and inside transfers would be unrestricted unless a participant was moving the funds to similar investment vehicles which were competitors to VALIC.

VALIC also argues that because IMB requested transfer of the funds by wire to IMB's Short Term Fixed Income Pool rather than by certified check, that somehow this turns the transaction into a "transfer to another funding entity" for purposes of the Endorsement. VALIC Resp't Br. at p. 21. IMB's Short Term Fixed Income Pool is not "another funding entity" within any reasonable interpretation of the Endorsement nor a part of the TDC. Nor is the pool a money market fund in any meaningful sense of the word. This pool is managed by IMB and designed to receive cash and maintain liquidity – it is not a funding entity for the TDC or any plan investment, including TRS. (A.R. 2064). IMB uses the pool as an intra-month receptacle for monies destined for longer term investments made at the end of each month. The short term pool is open every day, while the other investments are only available periodically. VALIC does not contest the fact that the pool is not a money market fund or a GIC. Finally, VALIC fails to address the structural problem with its argument – once the Petitioners requested the surrender outside the plan, VALIC lost standing to complain about the destination of the funds. If VALIC's argument is correct, a request for the funds by check would not have been subject to the Endorsement. The fact that IMB requested that the funds be transferred by wire to a particular account designed to receive cash cannot transform the requested surrender governed by Section 6.08 into a transfer to "another funding entity" governed by the Endorsement.

VALIC also argues 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. Resp't Br. at p. 22. The Endorsement's Section (B)(1) explicitly removes the 20% restriction on withdrawals for

transfers to another funding entity if the “Surrender Value remaining would be less than \$500.” (A.R. 954) (emphasis added). VALIC argues that this exception only applies when the Surrender Value is less than \$500 at the time of the request. *Id.* VALIC’s interpretation improperly renders the word “remaining” meaningless. *See* 11 Williston on Contracts § 32:5 (4th ed.) (in interpreting a contract, “every word, phrase or term of a contract must be given effect”). If VALIC’s interpretation of the intent of the Endorsement is correct, the language of the Endorsement would have only excepted transfers where the “Surrender Value is less than \$500.00.” The plain ordinary meaning of the use of the combination of the past tense participle “would” and the word “remaining” clearly indicates that the exception applies to requests that would leave less than \$500.00 in the VALIC account. Syl. pt. 1, *Soliva v. Shand, Morahan & Co., Inc.*, 176 W. Va. 430, 345 S.E.2d 33 (1986), *overruled, in part, on other grounds by Nat’l Mut. Ins. Co. v. McMahan & Sons*, 177 W. Va. 734, 356 S.E.2d 488 (1987) (“Language in an insurance policy should be given its plain, ordinary meaning.”). At the very least, this provision is an ambiguous one that should be construed against VALIC as its drafter.

Contrary to VALIC’s arguments, this interpretation does not render the Endorsement meaningless. By its own terms the Endorsement is not designed to restrict all transfers. That its terms exclude from the Endorsement withdrawals of substantially all of the funds is no more remarkable than the exception for transfers to the stock and bond fund. Simply put, when the Endorsement’s transfer restriction applies, it applies to limited types and amounts of withdrawals.

III. THE CIRCUIT COURT ERRED IN CONCLUDING THAT NEITHER THE CPRB NOR THE 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.

VALIC does not contest that both the CPRB and the IMB are statutorily designated as trustees for the TRS plan. *See* W. Va. Code § 5-10D-1(g); W. Va. Code § 12-6-1a(f); W. Va. Code § 12-6-3(a). Nor does it contest that, 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); W. Va. Code § 18-7A-3a. Instead, VALIC attempts to cabin CPRB and IMB's roles as trustees in a restrictive fashion to contest IMB's standing with respect to the 1991 Contract and CPRB's standing with respect to the 2008 Contract.

Moreover, VALIC does not contest the fact that 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. Instead, it argues that there has been no showing that the State would not make up any shortfall in payment. VALIC cites no authority that such a strict showing of standing is required; indeed, the argument is inconsistent with the relaxed showing of standing required for public contracts. *See Latimer v. Shobe*, 162 W. Va. 779, 786, 253 S.E.2d 54, 59 (1979). The argument is also inconsistent with the prior holdings of this Court recognizing the CPRB's fiduciary duty to "monitor and evaluate the fiscal and actuarial soundness of the trust funds for which the Board is responsible," and to act "in an informed, proactive and independent manner to perform" this duty, "including initiating court proceedings if

necessary.” See, e.g., *State ex rel. W. Va. Deputy Sheriffs’ Ass’n, Inc. v. Sims*, 204 W. Va. 442, 448, 513 S.E.2d 669, 675 (1998).

In the end, this Court need not actually resolve this standing issue. Even if this Court makes the doubtful assumption that VALIC is correct on standing, there is no question that CPRB has standing to enforce the 1991 Contract and that IMB has standing to enforce the 2008 Contract.

B. The CPRB and IMB have both suffered damages as a result of VALIC’s breach of the Contracts.

VALIC continues in its argument that CPRB has allegedly suffered no damages with respect to the breach of the 1991 Contract. First, CPRB’s damages under the 1991 Contract were clearly alleged in Count II of the Amended Complaint. (A.R. 82). Next, VALIC’s argument that CPRB has no damages 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 Contracts.

Petitioners’ 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 Plan resulting from VALIC’s refusal to timely release the funds upon request. In discovery, CPRB identified its expert report as containing the facts supporting CPRB’s damages claim. (A.R. 1584, 1600). VALIC admits as much. Resp’t Br. at p. 35.

VALIC argues that because the alleged breaches of the 1991 and 2008 Contracts occurred at different times, the damages cannot be the same. First, it is important to note that it was the breach of the 1991 Contract that led to the 2008 Contract. While VALIC points out the

market losses in the latter half of 2008 were substantial, under Section 6.08, VALIC had six months from the date of demand to pay the requested surrender. Finally, the most that can be said for VALIC's position is that the damages from the 1991 Contract are "not as high as Petitioners' expert calculated." Resp't Br. at p. 36. This is far different than saying that there are no damages from the breach of the 1991 Contract as a matter of law. While VALIC is free to attempt to persuade a jury that the damages from the breaches of the two agreements are different, it has not met its burden of establishing that there are no damages from the 1991 Contract as a matter of law.

C. The Petitioners' request for declaratory relief presented an actual and justiciable controversy.

VALIC defends the Circuit Court's 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). VALIC, however, does not contest that 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). Nor does VALIC contest that CPRB still has a contract with VALIC (Contract # 25005) through which more than 3,000 of the 5,000 public employees remaining in TDC Plan continue to invest. (A.R. 383). Instead, VALIC argues that because it has never denied the request of an individual teacher for a surrender of the employee's funds invested in the 1991 Contract, that there is no controversy relying on this Court's opinion in *State Farm Mut. Auto. Ins. Co. v. Schatken*, 230 W. Va. 201, 211, 737 S.E.2d 229, 239 (2012).

Schatken, however, is distinguishable. Unlike State Farm's conduct, VALIC has expressly taken the position that participants were restricted from requesting surrenders by the

Endorsement. *Cf. Schatken, supra* (noting that State Farm indicated the provision at issue did not apply and would not be invoked). Also unlike *Schatken*, the claim was expressly raised in the pleadings and in fact was a critical part of the underlying suit seeking a determination of the parties' respective rights under the Endorsement. (A.R. 1-9, 74-84). VALIC argues that it has never denied an individual participant the right to surrender, but it does not forswear its alleged right to do so under its interpretation of the Endorsement.

Finally, there is no question that there is a justiciable dispute between CPRB and VALIC over the Endorsement as it relates to the 1991 Contract. VALIC does not contest that the Circuit Court improperly dodged it by concluding that there was no "breach" of the 1991 Contract because CPRB had no damages under the 1991 Contract.

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

VALIC's brief is replete with conclusory statements that present only one side of multiple disputed facts. By ignoring disputed facts, VALIC improperly defends the summary judgment. Since the factual record set forth by VALIC was hardly undisputed or even in VALIC's favor on these points, summary judgment should be reversed.

Anne Lambright in her deposition expressly disputed VALIC's claim that no demand was ever made:

"Q. ...Was there ever any sort of written order or directive given to VALIC to withdraw the funds from the 1991 contract?

A. The Governor did it...." Lambright Depo., 46:1-4. (A.R. 245).

VALIC's argument that no demand was made is also contradicted by the fact that its own General Counsel, Coppedge, denied the surrender in writing. (A.R. 207-214). Coppedge, in writing on June 26, 2008, responded to one such demand:

“I am writing to follow up on a request that we received from Great West late last week to transfer \$237 Million in assets from the VALIC Group Fixed Annuity Contract offered through the Plan, contract form GFA-582, as amended.” (A.R. 207).

Moreover, IMB made an explicit written demand for surrender in December 2008. (A.R. 249-250). VALIC does not contest this event.

The Circuit Court's decision that VALIC had not breached the 2008 Contract was also based on other 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). VALIC does not contest the fact that “funding entity” is not defined in either Contract or the Endorsement. If this vague term is not construed against VALIC, 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 which should have been decided by a jury.

The issue of whether the Endorsement was intended to apply only to in-plan transfers was another issue that, if not resolved in Petitioners' favor as a matter of law, at the very least creates a factual dispute. VALIC claims the Endorsement “replaces” the Contract's provision for surrender charge with a restriction on the timing of those withdrawals. The Endorsement itself actually contains three separate provisions, with no indication that they are related: a “deletion” of the Surrender Charge provision; an “addition” of a provision imposing restriction on “withdrawals for transfers to another funding entity,” to a provision defining the Surrender Value; and a third provision “replacing” Section 5.03 of the Contract regarding

beneficiary designations. (A.R. 1616, 1622). The Endorsement does not “replace” or “amend” the right of the Contract Owner or any Participant to obtain a full surrender under Section 6.08; rather, it created a special rule imposing timing restrictions on certain (though not all) in-plan withdrawals for transfer to other TDC options. The meaning and effect of the Endorsement is a disputed question of material fact.

VALIC also contends that IMB made repeated assurances that it would not liquidate the assets in the Contract. Resp’t Br. at pp. 7-8. VALIC misleads the Court with these arguments by attributing its own statements to IMB, and misrepresenting the context in which they were made. The “assurances” VALIC claims were made were actually statements VALIC itself made in emails that it understood that the creation of the new Contract in and of itself would not constitute a liquidation - but there were never any representations by IMB or CPRB that IMB would never liquidate the Contract. (A.R. 830-833). The Contract itself gave IMB the right to do so (the only dispute being whether it allowed full surrender upon demand, or surrender only in five yearly installment payments). Moreover, an investment which could never be liquidated would be of no use to IMB or any other investor - the purpose of any investment being to ultimately generate a reasonable return.

Petitioners also strongly dispute VALIC’s contention that the 1991 Contract was amended to convert the rights and obligations of individual “Participants” in the Contract to the rights and obligations of the TDC as a whole. Whether the 1991 Contract was amended or not, and if so, the terms of the amendment, is a question of fact. While the Contract in Section 6.05 requires all amendments to be in writing, VALIC has never produced written documents adopting any amendment to make the Contract unallocated, much less to replace all references to “Participants” with the “Contract Owner.” (A.R. 445, 457-460).

CONCLUSION

Petitioners, IMB and CPRB, 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
Public Retirement Board

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CERTIFICATE OF SERVICE

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

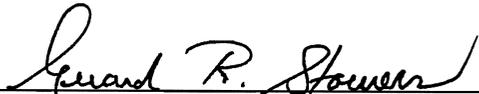
Petitioners' Reply Brief to be served upon:

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by placing the same in the regular United States Mail, postage prepaid, on this 30th day of April 2014.



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