

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

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

Plaintiffs,

v.

Civil Action No.

09-C-2104

Stucky

THE VARIABLE ANNUITY LIFE
INSURANCE COMPANY, a Texas
corporation,

Defendant.

Complaint for Declaratory Relief

Nature of Action

1. This is a suit by the West Virginia Investment Management Board (WVIMB) and the West Virginia Consolidated Public Retirement Board (WVCPRB) to obtain a declaration that the defendant, The Variable Annuity Life Insurance Company (VALIC), must surrender, upon demand by WVIMB and WVCPRB and without penalty or other restriction, public money consisting of the investments of members of the West Virginia Teachers' Defined Contribution Retirement System (WVTDC), as well as former members of WVTDC which are now held in trust for the West Virginia State Teachers Retirement System (WVTRS).

Parties

2. Defendant VALIC is a Texas corporation which has its principal place of business in Houston, Texas, and does business in West Virginia as a provider of retirement services and products such as annuities for use in retirement plans.

3. Plaintiff WVCPRB is a public agency of the State of West Virginia created by state statute to administer a number of public retirement plans in this State, including WVTRS and WVTDC. W. VA. CODE § 5-10-D-1. WVCPRB is designated by state law as the trustee for these public retirement plans, except with regard to investment of the funds of the State's defined benefit plans. W. VA. CODE § 5-10D-1(g).

4. Plaintiff WVIMB is a public body corporate created by state statute to serve as the principal investment management organization for the State of West Virginia for long-term assets, and is responsible for the investment of all of the State's defined benefit retirement plans, the Workers' Compensation and Pneumoconiosis plans and miscellaneous other long-term assets of the State and its political subdivisions. W. VA. CODE § 12-6-1a. Although WVIMB is responsible for investing the funds, it is ultimately required to transmit to the State Treasurer any funds requested to meet the obligations of the state government. W. VA. CODE § 12-6-5(20).

5. WVIMB serves as the trustee with regard to the investment of the funds of all of the State's defined benefit public retirement plans, including WVTRS. W. VA. CODE § 12-6-3(a). Because WVIMB is the trustee for investment purposes for these plans, state law requires WVCPRB to transfer all funds received for the benefit of WVTRS to WVIMB for investment. W. VA. CODE § 5-10-D-1(f)(1). WVIMB is charged with providing "prudent fiscal

administration, investment and management for the funds of" WVTRS and other participant plans and funds. W. VA. CODE § 12-6-3(a).

Jurisdiction and Venue

6. Under the Uniform Declaratory Judgments Act, W. VA. CODE § 55-13-1, *et seq.*, the circuit courts of this State have the power to declare rights, status and other legal relations whether or not further relief is or could be claimed.

7. Venue in Kanawha County is appropriate pursuant to W. VA. CODE §§ 56-1-1(a)(2) and (6) because VALIC does business in Kanawha County, and because the seat of state government is located within Kanawha County.

Count I (Declaratory Relief)

8. Plaintiffs incorporate by reference paragraphs 1 through 7 of this Complaint as if fully restated herein.

9. In 1941, the West Virginia Legislature created a retirement system for teachers and other school service personnel called the West Virginia State Teachers Retirement System (WVTRS). W. VA. CODE § 18-7A-1, *et seq.* Although originally a defined contribution retirement system, WVTRS became a defined benefit plan in 1970.

10. In 1990, the West Virginia Legislature created a second retirement system for teachers and school service personnel, the Teachers' Defined Contribution Retirement System (WVTDC) to address concerns about TRS funding. W. VA. CODE § 18-7B-1, *et seq.* On July 1, 1991, the Legislature closed WVTRS to new employees and required all new employees

to join WVTDC. WVTRS members were also permitted to move into WVTDC if they so desired.

11. In October 1991, WVCPRB entered into a VALIC Group Fixed Annuity Contract, form GFA-582, Annuity Contract 25005 (attached hereto as Exhibit A and incorporated by reference) permitting VALIC to offer a fixed annuity investment option to members of WVTDC. Annuity Contract 25005 guaranteed a minimum rate of return for WVTDC members of 4.5%.

12. VALIC's sales personnel marketed and sold this investment option to WVTDC members, which consisted of public school teachers, administrators and school service personnel.

13. Many WVTDC members elected to invest some or all of their retirement funds with VALIC and directed WVCPRB to transfer to VALIC some or all of the mandatory employee contributions of 4.5% of each member's salary and the employer's 7.5% contribution.

14. Despite representations made by VALIC to teachers, administrators and school service personnel, the value of VALIC's fixed annuity investments were generally not sufficient to support retirement for WVTDC members.

15. In 2008, the West Virginia Legislature, recognizing that many WVTDC members' investments would not be sufficient for retirement, and finding that many desired to join a defined benefit system, enacted W. VA. CODE § 18-7D-1, *et seq.*, permitting WVTDC members to elect to voluntarily transfer their membership and assets to WVTRS.

16. The legislation made the ability of WVTDC members to transfer contingent on the results of an election, in which at least 65% of actively contributing WVTDC members had to affirmatively elect to transfer. W. VA. CODE §§ 18-7D-1(a)(5), 18-7D-3(b), 18-7D-5(a), (d) and 18-7D-7(b). An election period was held and more than 78% percent of actively contributing WVTDC members affirmatively elected to transfer.

17. The transfer legislation mandated that WVCPRB transfer the assets of electing WVTDC members to WVTRS:

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

W. VA. CODE § 18-7D-5(a).

18. W. VA. CODE § 18-7D-7(b)(1) also provided that WVCPRB "shall, for each member who affirmatively elected to transfer ..., transfer the assets held in the Teachers' Defined Contribution Retirement System's Trust Fund in trust for that member to the State Teachers Retirement System on the first day of July, two thousand eight," and for certain other members, on the first day of August, two thousand eight.

19. The transfer legislation provided that this large influx of members into the WVTRS plan would be funded by the immediate transfer of those members' assets into WVTRS and by supplemental payments by transferring members to make up for the difference in employee contributions required by the two systems (WVTRS members contribute 6% of their salaries, as opposed to the 4.5% contributed by WVTDC members).

20. Because WVIMB serves as the trustee for the investment of WVTRS funds, whereas WVCPRB serves as the trustee for the investment of WVTDC funds, this required a transfer of all assets of transferring members from WVCPRB to WVIMB.

21. At the time of the July 1, 2008 transfer, approximately \$250 million dollars of the assets of WVTDC members who elected to transfer to WVTRS was held by VALIC.

22. Upon learning of the impending transfer and the need for the withdrawal of the funds from its fixed annuities and the transfer of these funds to WVIMB, VALIC threatened to impose a surrender charge of approximately \$11 million dollars on the transfer of the funds.

23. VALIC eventually acknowledged that Annuity Contract 25005 prohibited surrender charges, since Section 3.02 of the contract providing for a surrender charge was expressly deleted by an Endorsement which had always been a part of the contract.

24. Confronted with VALIC's refusal to surrender the public funds, and as the trustee of these funds for investment purposes, WVIMB submitted inquiries to VALIC to determine how the money of these public employees was invested. VALIC responded with information which was insufficient to allow WVIMB to fully and efficiently evaluate the potential risks or benefits of allowing these public funds to remain invested with VALIC.

25. On December 10, 2008, WVCPRB transferred part of its interest in Annuity Contract 25005 to WVIMB, to fulfill the mandates of the transfer legislation, and VALIC and WVIMB entered into Annuity Contract 69562, the terms of which were identical to

Annuity Contract 25005. A copy of this contract is attached hereto as Exhibit B and incorporated by reference.

26. On December 18, 2008, WVIMB, as the trustee of the WVTRS plan for investment purposes, requested the return of all funds held under Annuity Contract 69562. A copy of the December 18, 2008 demand letter is attached hereto as Exhibit C and incorporated by reference.

27. VALIC refused to allow WVIMB to withdraw the funds. Instead, VALIC claimed that WVIMB's right to withdraw the money it held in trust for public employees was restricted to two methods requiring the withdrawal to occur over a total of five years, pursuant to one of two methods:

a. the Five Year Equal Annual Installment Method, whereby WVIMB could only withdraw the entire amount by withdrawing 20% per year for five years; or

b. the Decreasing Balance Method, whereby WVIMB could only withdraw one-fifth of the balance the first year, one-fourth of the remaining balance the second year, one-third of the remaining balance the third year, one-half of the remaining balance the fourth year, and the entire remaining balance during the fifth year.

28. Section 2.03 of the Annuity Contracts provide that if the assets held by VALIC are transferred to another funding entity for the plan, then there are no restrictions on transfer or surrender; therefore, VALIC should have returned all of the funds held for WVTRS upon demand by WVIMB, without restriction.

29. In addition to the funds held by VALIC for WVTRS members who were previously members of WVTDC, VALIC holds funds for WVTDC members who elected not to transfer to WVTRS. WVCPRB remains the trustee of these funds, which total approximately \$60 million dollars.

30. While the parties have never agreed about the right of WVIMB and WVCPRB to transfer these investments out of VALIC, in April 2009, VALIC did permit the withdrawal of 20% of the funds held under Annuity Contract 69562, which has been transferred to WVIMB.

31. On that date, or before, WVIMB should have been permitted to withdraw the entire balance of the funds invested with VALIC on behalf of former WVTDC members, but VALIC has refused to transfer the balance of the funds despite repeated demands.

32. There is a real and actual dispute about the requirements of the written agreement governing WVIMB's request for withdrawal of the funds held by VALIC. VALIC claims that the Annuity Contracts prohibit WVIMB from withdrawing the full amount of the funds at once. WVIMB and WVCPRB, who are statutorily vested with the prudent administration of the plan and investment of its funds, believe they are entitled to the withdrawal of the full amount of the funds upon demand.

WHEREFORE, WVCPRB and WVIMB respectfully demand:

a. That 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;

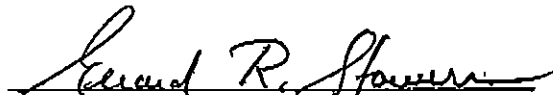
b. Or, in the event the Court decides that WVCPRB and WVIMB are not entitled to the immediate withdrawal of all such funds, that the Court declare that WVCPRB and WVIMB are entitled to transparency and full disclosure regarding the investments and assets underlying the fixed annuities, on demand by WVIMB and WVCPRB;

c. That WVCPRB and WVIMB be awarded their costs, expenses and reasonable attorneys' fees incurred herein; and,

d. That the Court award such other and further relief as this Court deems just and proper and to which plaintiffs may be entitled.

THE WEST VIRGINIA INVESTMENT
MANAGEMENT BOARD and THE
WEST VIRGINIA CONSOLIDATED
PUBLIC RETIREMENT BOARD

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