

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA  
BUSINESS COURT DIVISION

FILED

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CLERK OF COURT  
KANAWHA COUNTY CIRCUIT COURT

THE WEST VIRGINIA INVESTMENT  
MANAGEMENT BOARD, a public body  
corporate, and The West Virginia  
Consolidated Public Retirement  
Board, a public agency,  
Plaintiffs,

v.

THE VARIABLE ANNUITY LIFE  
INSURANCE COMPANY, a Texas  
corporation,  
Defendant.

Civil Action No. 09-C-2104  
Presiding Judge: Christopher C. Wilkes  
Resolution Judge: James J. Rowe

MEDIATION ORDER

Pursuant to Trial Court Rule 29.08(e), mediation in the above-styled case shall be conducted on Friday, May 22, 2015, beginning at 9:00 a.m., at the West Virginia State Bar Center in Northgate Business Park, 2000 Deitrick Boulevard, Charleston, and shall continue day to day thereafter at the sole discretion of the Resolution Judge.

Mediation shall be conducted by the undersigned Resolution Judge in accordance with the following procedures:

PRE-MEDIATION CONFERENCE CALL

1. Counsel shall schedule a conference call with the Resolution Judge to discuss any outstanding issues if needed prior to mediation.

REQUIRED PARTICIPANTS

2. The following persons are required to attend the mediation in person:
  - a) Corporate and legal entity representative for each party with full authority to enter into and sign a settlement agreement; and

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- b) Lead trial counsel for each party.

ABSENT GOOD CAUSE SHOWN, FAILURE OF ANY PERSON REQUIRED TO ATTEND MEDIATION IN PERSON SHALL SUBJECT THAT PERSON TO SANCTIONS, UP TO AND INCLUDING THE STRIKING OF PLEADINGS AND DISMISSAL. COUNSEL AND PARTY REPRESENTATIVES MUST ARRIVE AT MEDIATION NO LATER THAN 9:00 A.M. ON FRIDAY, MAY 22, 2015.

CONFIDENTIALITY

3. The contents of mediation statements and discussions, including any resolution or settlement, shall remain confidential, shall not be used in the present litigation nor any other litigation (whether presently pending or filed in the future), and shall not be construed as nor constitute an admission. Breach of this provision shall subject the violator to sanctions.

MEDIATION STATEMENTS

4. Mediation statements shall be delivered to the office of the Resolution Judge for receipt no later than 9:00 a.m. on Thursday, May 14, 2015. Mediation statements may be delivered via facsimile to (304) 647-6696.
5. Mediation statements are confidential. Mediation statements shall state on their face "CONFIDENTIAL MEDIATION STATEMENT." Mediation statements shall not be filed with the Clerk's office, circulated among the parties (unless they so desire) or provided to the Presiding Judge. Mediation statements shall not become a part of the record in this matter.
6. Mediation statements may be in memorandum or letter form and should contain the following information:

- a) Parties: Identify the party/parties represented, describe their relationship, if any, to each other, and by whom each party is represented, including the identity of all representatives who will be participating on behalf of the party/parties during the mediation.
- b) Factual and Procedural History of the Case: State theories of liability and a one-page itemization of damages claimed, both liquidated and special, as well as theories of defense and the party's position as to any damages claimed by the other party.
- c) Critical Deposition Testimony: Provide the deposition synopsis of any critical fact witness or expert witness, or, in the alternative, a summary of the testimony of such fact witness or expert witness.
- d) Summary of Applicable Law: Provide a table of applicable legal authorities, listing any relevant statutes, cases or legal standards.
- e) Strengths and Weaknesses of the Case: Provide an honest discussion of the strengths and weaknesses of the party's claims or defenses, and the likelihood of a verdict in favor of the party, an opinion as to the probable verdict range, and an opinion as to the range of settlement value.
- f) Settlement Efforts: Provide a brief discussion of prior settlement negotiations and discussions between the parties, including any outstanding demand made by the Plaintiffs to settle the litigation, any response by the Defendants to that demand, and an assessment as to why settlement has not been reached.
- g) Settlement Proposal: Provide the party's terms of settlement, including any proposed terms that may be non-monetary, as well as any suggestions regarding how the Resolution Judge may assist the parties in reaching a resolution.

h) Fees and Costs: List separately:

- i. Attorneys' fees and costs incurred to date;
- ii. Other fees and costs incurred to date;
- iii. A good faith estimate of additional other fees and costs to be incurred if this matter is not settled; and
- iv. A good faith estimate of other fees and costs to be incurred if this matter is not settled. Remember, this information is confidential and shall remain so.

MEMORIALIZATION OF SETTLEMENT

7. If the parties reach a resolution of their dispute, the Resolution Judge will ensure that it is memorialized before the mediation is deemed concluded.

EX PARTE CONTACTS

8. Before, during and after the scheduled mediation, the Resolution Judge may find it necessary or useful to communicate with one or more parties outside the presence of the other parties.

OBLIGATION OF GOOD FAITH PARTICIPATION

9. The required participants shall attend the entire mediation in person and shall be available and accessible throughout the mediation process. No party may be compelled by this Order, the Presiding Judge, or the Resolution Judge to settle a case involuntarily or against the party's judgment. However, the Resolution Judge expects the parties' full and good faith cooperation with the mediation process, and expects the participants to be prepared to participate fully, openly and knowledgeably in a mutual effort to examine and resolve issues. The Resolution Judge encourages all participants to keep an open mind in

order to reassess their previous positions and to find creative means for resolving the dispute.

Counsel are reminded of their obligation to read and comply with this Order. Counsel shall advise the Resolution Judge immediately of any problems regarding compliance with the Order, or if settlement is reached prior to scheduled mediation.

The Circuit Clerk shall forward copies of this Order to all counsel at their respective addresses of record; to the Honorable Christopher C. Wilkes, Presiding Judge, Berkeley County Judicial Center, Suite 4400, 380 W. South Street, Martinsburg, WV 25401; and to the Business Court Division Central Office, Berkeley County Judicial Center, Suite 2100, 380 W. South Street, Martinsburg, WV 25401.

IT IS SO ORDERED this 17<sup>th</sup> day of March, 2015.

Date: 3/23/15  
Certified copies sent to:  
☒ counsel of record  
☐ parties  
☐ other (please indicate) AM, BS, RD, WD, TH  
By: [Signature]  
☒ certified/first class mail  
☐ fax  
☐ hand delivery  
☐ interdepartmental  
☒ Other (describe how accomplished) By AD  
Deputy Circuit Clerk

[Signature]  
James J. Rowe, Resolution Judge  
Business Court Division