

## SUPREME COURT OF APPEALS OF WEST VIRGINIA

# The West Virginia Investment Management Board v. The Variable Annuity Life Insurance Company

W. Va. Investment Management Board · No. No. 17-0486 · Decided June 5, 2018

### SUMMARY

Justice Davis concurred in the affirmance of a Business Court arbitration decision involving annuity contracts. The concurrence addresses whether the presiding judge could also serve as a resolution judge and whether the same person could mediate and arbitrate the dispute, concluding that any procedural objections were waived because the parties agreed to the arrangements.

### CASE DETAILS

|                       |                                                                                                                                                                                       |
|-----------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| COURT                 | Supreme Court of Appeals of West Virginia                                                                                                                                             |
| WRITING FOR THE COURT | Davis, J.                                                                                                                                                                             |
| JURISDICTION          | West Virginia                                                                                                                                                                         |
| DECIDED               | June 5, 2018                                                                                                                                                                          |
| DOCKET                | No. 17-0486                                                                                                                                                                           |
| DISPOSITION           | affirmed                                                                                                                                                                              |
| PROCEDURAL POSTURE    | Petitioners appealed the final decision of a three-judge Business Court arbitration panel, and the Supreme Court of Appeals affirmed that decision. Judge Davis concurred separately. |
| PRECEDENTIAL VALUE    | concurring opinion; limited independently                                                                                                                                             |
| PARTIES               | The West Virginia Investment Management Board v. The Variable Annuity Life Insurance Company                                                                                          |

### TOPICS

arbitration mediation waiver appellate procedure civil procedure

### PRACTICE AREAS

arbitration mediation insurance contracts commercial litigation civil procedure  
appellate procedure

### QUESTIONS PRESENTED

1. Whether it was a procedural error for the Business Court presiding judge also to serve as the resolution judge in the same case.
2. Whether a resolution judge may serve as both mediator and arbitrator in the same case.
3. Whether the parties waived any procedural objection by agreeing to or acquiescing in the challenged arrangements.

## HOLDINGS

1. The arrangement was not contemplated by the West Virginia Trial Court Rules and constituted a serious procedural error, but the parties waived the error by agreeing to and acquiescing in the arrangement.
2. Rule 29.08(h) permits the parties and the resolution judge to agree to alternative dispute resolution that may include mediation followed by arbitration, and any procedural objection was waived because the parties consented to the arrangement.

## KEY QUOTATIONS

*“This language unquestionably implies that the positions of presiding judge and resolution judge should not be filled by the same person in the same case.”* (at 1)

*“A litigant may not silently acquiesce to an alleged error, or actively contribute to such error, and then raise that error as a reason for reversal on appeal.”* (at 1-2)

*“The mediation process encourages candid disclosures, including disclosures of confidential information, to a mediator.”* (at 3-4)

## FACTUAL BACKGROUND

The parties entered into annuity contracts and submitted their dispute to a three-judge Business Court arbitration panel. The presiding judge also acted as a resolution judge for mediation and served on the arbitration panel. The parties agreed to those arrangements and were informed before mediation not to disclose information they did not want considered during arbitration.

## PROCEDURAL HISTORY

A Business Court arbitration panel concluded that the Variable Annuity Life Insurance Company did not violate the parties' annuity contracts. The majority affirmed the panel's decision, and Judge Davis concurred while addressing alleged procedural errors involving the presiding judge's dual role and the resolution judge's mediation and arbitration roles.

## DISPOSITION

affirmed

## CASES CITED

- *Maples v. W. Virginia Department of Commerce, Division of Parks & Recreation*, 197 W. Va. 318, 475 S.E.2d 410 (1996)
- *Hopkins v. DC Chapman Ventures, Inc.*, 228 W. Va. 213, 719 S.E.2d 381 (2011)
- *State v. Miller*, 194 W. Va. 3, 18, 459 S.E.2d 114, 129 (1995)
- *State v. Crabtree*, 198 W. Va. 620, 631, 482 S.E.2d 605, 616 (1996)
- *In re Cartwright*, 104 S.W.3d 706, 714 (Tex. App. 2003)
- *Panama Canal Commission v. Federal Labor Relations Authority*, 867 F.2d 905, 906 (5th Cir. 1989)
- *U.S. ex rel. TGK Enterprises, Inc. v. Clayco, Inc.*, 978 F. Supp. 2d 540, 547 (E.D.N.C. 2013)
- *Soc'y of Lloyd's v. Moore*, No. 1:06-CV-286, 2006 WL 3167735, at \*1 (S.D. Ohio Nov. 1, 2006)
- *U.S. Steel Mining Co. v. Wilson Downhole Services*, No. 2:00CV1758, 2006 WL 2869535, at \*1 (W.D. Pa. Oct. 5, 2006)
- *Votre v. Maisano-Votre*, No. FA124017418S, 2015 WL 2473188, at \*1 (Conn. Super. Ct. May 4, 2015)
- *Town of Clinton v. Geological Services Corp.*, No. 04-0462A, 2006 WL 3246464, at \*1 (Mass. Super. Nov. 8, 2006)