ARIZONA COURT OF APPEALS

DIVISION ONE

ARIZONA STATE UNIVERSITY ex rel. ARIZONA BOARD OF REGENTS, a body corporate, Plaintiff/Appellant, v. ARIZONA STATE RETIREMENT SYSTEM, a body corporate, Defendant/Appellee.	Court of Appeals Division One No. 1 CA-CV 16-0239 Maricopa County Superior Court No. LC2012-000689-001

PLAINTIFF/APPELLANT'S COMBINED OPENING BRIEF AND APPENDIX

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Statutes

Other Authorities

INTRODUCTION*

This appeal arises from this Court's remand in *Arizona State Univ. v. Arizona State Ret. Sys.*, 237 Ariz. 246 (App. 2015). In that case, the University contended that "the Arizona State Retirement System[] was required to follow the rulemaking procedure set forth in Arizona's Administrative Procedure Act before enforcing a policy under which it charged Plaintiff/Appellant, Arizona State University, for an actuarial unfunded liability reportedly arising when 17 University employees retired." *Arizona State Univ.*, 237 Ariz. at 247, ¶ 1. The Court agreed with the University, and reversed and remanded with instructions for the superior court "to enter an order directing the System to refund $1,149,103 to the University, with interest thereon if and as authorized by law—an issue the superior court should address on remand." *Id.* at 254, ¶ 33.

On remand, the parties (primarily) disputed the applicable interest rate. Both sides agreed, however, that if interest was available then

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* Selected record items cited are included in the Appendix attached to the end of this brief, cited by page numbers (e.g., APP031), which also match the PDF page numbers and function as clickable links. Other record items are cited with "IR-" followed by the record number from the electronic index of record.

Arizona's general interest statute, A.R.S. § 44-1201, governed the rate. The System contended that the prime plus 1% rate set forth in A.R.S. § 44-1201(B) (then 4.25%) applied. The University contended that the 10% rate set forth in A.R.S. § 44-1201(A) applied because (1) that rate applies to ***any*** "indebtedness," and (2) the Supreme Court has broadly construed "indebtedness" to mean "'something (as an amount of money) that is owed'." *See Metzler v. BCI Coca–Cola Bottling Co. of L.A.*, 235 Ariz. 141, 146 ¶ 19 (2014) (citation omitted).

The superior court (McClennen, J.), however, ordered the System to pay the lower rate without any explanation or analysis, and in doing so erred. Accordingly, and for the reasons set forth below, the Court should reverse and remand, with instructions for the superior court to award the University 10% interest on the money the System owed the University.

STATEMENT OF FACTS AND CASE

I. The Parties' initial dispute over the System's attempt to charge the University $1,149,103 for an alleged "actuarial unfunded liability."

The Court's prior opinion in this case sets forth the facts relevant to the Parties' initial dispute, which are summarized below. *See Arizona State Univ.*, 237 Ariz. at 247-50, ¶¶ 2-13.

A. In 2011, the System unlawfully collected $1,149,103 from the University.

"In 2011, the University offered one year's salary as an incentive payment to eligible employees if they agreed to retire that year." *Id.* at 249, ¶ 9. After seventeen members accepted the offer, the System sent the University a bill for $1,149,103, (*id.*), pursuant to a "policy" it had adopted, and threatened to assess the University "interest on the balance at a rate of eight percent (8%) until the amount is paid in full," [APP080]. Believing the System lacked the authority to assess this charge, the University paid the charge on March 15, 2012, but retained its right to appeal (i.e., it paid the charge under protest). *See Arizona State Univ.*, 237 Ariz. at 249, ¶ 9. Because the System in fact had no legal authority to assess the charge, the System at that time owed the University the full amount it had collected.

B. The University sought a refund of the unlawful charge.

The University appealed the System's charge to its Board. The University argued that the charge was void because the System failed to follow the rulemaking procedure set forth in Arizona's Administrative Procedure Act before enforcing the "policy" under which it charged the University. The University also argued that although the System

purported to charge the University for an actuarial unfunded liability it claimed resulted from the 17 University employees who accepted the University's offer, the University demonstrated that its incentive program did not create any such liability.

In particular, the University presented evidence showing that its "termination incentive program did not . . . cause more members to retire than the System had projected based on its assumptions." *Id.* at 249-50, ¶ 10.[1] Pursuant to both theories, the University asked the System to refund the charge. An administrative law judge, however, ruled in the System's favor, and the Board (largely) adopted that recommendation. *Id.* at 250, ¶ 13. Without addressing the University's arguments, the superior

[1] The System's methodology did not account for whether or not an incentive program caused more retirements to occur than the number the System assumed would have occurred without an incentive program. Thus even if an employer offered something as nominal as a plaque to everyone who agreed to retire in a given year, the System would assume that the incentive caused everyone who retired that year to do so, and charge on the basis of that flawed assumption. The University demonstrated the flaw with the System's methodology through numerous examples, which the System could not explain. *See* Opening Brief at 47-66 *Arizona State Univ. v. Arizona State Ret. Sys.*, No. 1 CA-CV 14-0083 (filed Apr. 22, 2014); Reply Brief at 7-17, *id.* (filed Aug. 29, 2014).

court (McClennen, J.) affirmed the Board's determination, and the University appealed. [APP062-63.]

C. The Court of Appeals agreed with the University, and held the System must refund the amount it owed the University with interest to be addressed on remand.

On appeal, this Court "agree[d]" with the University that "the Policy is a rule within the meaning of the APA and, therefore, because the System adopted it without following the rulemaking procedure provided in the APA, it is void." *Arizona State Univ.*, 237 Ariz. at 250 ¶ 14. It held the charge was "improper," and that "the System was not entitled to charge the University. . . ." *Id.* at 248, ¶ 1, 254, ¶ 32.

Having resolved the case on that basis, the Court did not reach the University's alternative argument concerning the lack of any liability to the System. *Id.* at 250, ¶ 14 n.5. The Court then remanded to the superior court for it "to enter an order directing the System to refund $1,149,103 to the University. . . ." *Id.* at 254, ¶ 33. The Court further held that interest is "an issue the superior court should address on remand." *Id.* The System then filed a petition for review, which the Supreme Court denied. [APP061.]

II. The Parties' current dispute over the interest due the University.

A. The System refunded the unlawful charge plus interest at 4.25%, rather than the required 10% interest.

On November 6, 2015, after the University prevailed, the System paid the University $1,327,190.35 (the amount it calculated it owed the University with 4.25% prejudgment interest). The University, however, maintained that under A.R.S. § 44-1201(A), the System owed the University 10% interest, which thereby made the amount due $1,568,446.89. From the University's perspective, the System thus still owed the University $241,256.54 (with interest continuing to accrue on that balance). *See Flood Control Dist. v. Paloma Inv. Ltd. P'ship*, 237 Ariz. 322, 328 ¶ 25 (App. 2015) ("Under the 'United States Rule,' absent an agreement or statute to the contrary, partial payments of a debt are to be applied 'first to unpaid interest due and thereafter to the principal debt.'") (citation omitted).

B. The University moved for entry of judgment with 10% prejudgment interest.

In light of this dispute, and consistent with the Court's directive that prejudgment interest is "an issue the superior court should address on remand," *Arizona State Univ.*, 237 Ariz. at 254, ¶ 33, the University filed a

motion for entry of judgment with 10% postjudgment interest. [APP064-98.]

In its response, and although it had already paid the lower interest rate on the refund, it then opposed any award of prejudgment interest. [APP101.] The System did not dispute that A.R.S. § 44-1201 determined the interest rate if the court awarded prejudgment interest, but it argued that the lower 4.25% rate (which it had already paid) applied. [APP101-04.]

With respect to the University's entitlement to interest, the System contended that the refund amount was not a liquidated sum. [APP101.] Although the University had sought only one form and amount of relief under both of its theories—a "refund [of] the **entire amount** of the ASRS invoice to ASU . . . ." [IR-1 at 6 (emphasis added)]—the System contended that "[t]he Court used its discretion on what refund amount it required the ASRS to return to ASU," and thus "the amount ordered in the judgment was not an exact known amount prior to the judgment." [APP101.] The System further contended that even though it had use of the University's money, it was not unjustly enriched. As for the applicable rate, the System cited *Metzler* and argued that like "prejudgment interest under Rule 68(g) . . . the requirement for the ASRS to return ASU's payment depended

on a judgment for its existence." [APP102.] In other words, the System maintained that unless and until the University prevailed, the System did not owe any money to the University (just as in any other case where the parties dispute whether an amount is owed). The University replied, explaining that the charge was liquidated, and that the System's analogy to Rule 68(g) made no sense because the debt owed did not depend on any judgment for its existence. [APP109-23.]

C. The superior court awarded the System 4.25% interest without addressing the University's arguments.

Without argument, the superior court issued a signed minute entry titled "HIGHER COURT RULING/REMAND." [APP062-63.] The order directed the System to do what it had already done: refund the initial charge plus 4.25% interest from the date of the charge (March 15, 2012) to the date of the refund (November 6, 2015). [APP062.] Although the superior court provided no explanation, it necessarily granted the University's motion in part (by awarding prejudgment interest over the System's objection) and denied it in part (by awarding prejudgment interest at 4.25% rather than the requested 10%). The superior court also necessarily rejected the System's contention that it need not pay the

University any interest. *Cf. Bud Antle, Inc. v. Gregory*, 7 Ariz. App. 291, 292 (1968) ("the trial court made no findings of fact or conclusions of law, and none were requested, so we must assume the lower court made all necessary findings of fact essential to support the judgment."). The signed minute entry stated "to the extent any party considers this order to be a judgment, it is entered pursuant to Rule 54(c)." [APP063.]

The University filed a timely notice of appeal on April 1, 2016. [IR-59.] This Court has jurisdiction under A.R.S. § 12-2101(A).[2]

ISSUE ON APPEAL

Under A.R.S. § 44-1201(A), prejudgment interest on an "indebtedness" accrues at a rate of 10%. The Arizona Supreme Court has construed "indebtedness" under the statute to mean "'something (as an amount of money) that is owed'." *Metzler*, 235 Ariz. at 146, ¶ 19 (citation omitted). After the System collected the money from the University to

[2] Before filing the notice of appeal, the parties (through counsel) jointly contacted the superior court's chambers. The University orally requested that the superior court issue an amended minute entry that would (1) note the motion pending before the court, and (2) explicitly state that the superior court was granting that motion in part and denying that motion in part. The superior court's judicial assistant informed counsel that the superior court would not issue anything further.

which the System was not entitled, did the System owe the University that money, and thus become indebted to the University under A.R.S. § 44-1201(A)?[3]

STANDARD OF REVIEW

Issues concerning the award of prejudgment interest involve matters of law, which this Court reviews de novo. *See, e.g., Alta Vista Plaza, Ltd. v. Insulation Specialists Co.*, 186 Ariz. 81, 82 (App. 1995); *see also Mejak v. Granville*, 212 Ariz. 555, 556 (2006) ("Issues of statutory interpretation are purely legal issues, which we review de novo.").

The Court "interpret[s] statutes to give effect to the legislature's intent, looking first to the statutory language itself." *Baker v. Univ. Physicians Healthcare*, 231 Ariz. 379, 383, ¶ 8 (2013). "When the language is

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[3] Because the System did not file a cross appeal, it may not challenge on appeal the University's entitlement to interest under A.R.S. § 44-1201. *See Maricopa County v. Corp. Comm'n of Ariz.*, 79 Ariz. 307, 310 (1955) ("In the absence of a cross-appeal the appellee can defend only as to the items allowed below and cannot present rejected claims."); *A M Leasing, Ltd. v. Baker*, 163 Ariz. 194, 195-96 (App. 1989) (although the appellee also contended that the trial court judgment "be expanded on appeal to compensate him for the full amount of his charges," he could not do so because he "failed to cross-appeal from the judgment" and thus "cannot seek to enlarge his rights under the judgment . . . ."). The parties' dispute on appeal therefore is limited to the applicable interest rate.

clear and unambiguous, and thus subject to only one reasonable meaning," the Court "appl[ies] the language without using other means of statutory construction." *Id.* "If, however, the language is ambiguous," the Court "consider[s] the statute's context; its . . . subject matter, and historical background; its effects and consequences; and its spirit and purpose.'" *Id.* (citation omitted).

ARGUMENT

I. The superior court erred by not awarding the University 10% interest under A.R.S. § 44-1201(A).

"Under Arizona law, prejudgment interest on a liquidated claim is a matter of right and not a matter of discretion." *Employer's Mut. Cas. Co. v. McKeon*, 170 Ariz. 75, 78 (App. 1991). A prevailing party is entitled to such interest "even if interest is not specifically requested in the complaint." *Id.* (citations omitted). Furthermore, absent some more specific statute or a contractual provision, A.R.S. § 44-1201 provides the prejudgment interest rate. *See* A.R.S. § 44-1201 (setting forth the prejudgment interest generally applicable "unless a different rate is contracted for in writing" or "[u]nless specifically provided for in statute . . . .").

Although the superior court correctly awarded the University interest under A.R.S. § 44-1201, it used the incorrect rate. The plain text and history of A.R.S. § 44-1201 demonstrate that the 10% prejudgment interest rate applies to **any** indebtedness. Furthermore, the System unquestionably became indebted to the University when it collected the University's money because it was "not entitled to charge the University for the 17 retirements . . . ." *Arizona State Univ.*, 237 Ariz. at 254, ¶ 32. This Court should therefore reverse.

A. Under A.R.S. § 44-1201(A) a party is entitled to 10% interest on any "indebtedness."

1. A.R.S. § 44-1201(A)'s plain language provides for 10% prejudgment interest on any indebtedness.

Under A.R.S. § 44-1201 (and absent some other rate set forth in a statute or contract), a party is entitled to 10% prejudgment interest "on any loan, indebtedness or other obligation," and the lesser of 10% or prime plus 1% in connection with other liquidated amounts:

> § 44-1201. Rate of interest for loan or indebtedness; interest on judgments
>
> A. **Interest on any loan, indebtedness or other obligation shall be at the rate of ten per cent per annum, unless a different rate is contracted for in writing**, in which event any rate of interest may be agreed to. Interest on any judgment that is based on a written agreement evidencing a loan,

> indebtedness or obligation that bears a rate of interest not in excess of the maximum permitted by law shall be at the rate of interest provided in the agreement and shall be specified in the judgment.
>
> B. **Unless specifically provided for in statute or a different rate is contracted for in writing, interest on any judgment shall be at the lesser of ten per cent per annum or at a rate per annum that is equal to one per cent plus the prime rate** as published by the board of governors of the federal reserve system in statistical release H.15 or any publication that may supersede it on the date that the judgment is entered. The judgment shall state the applicable interest rate and it shall not change after it is entered.
>
> C. Interest on a judgment on a condemnation proceeding, including interest that is payable pursuant to § 12-1123, subsection B, shall be payable as follows:
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> * * * *
>
> F. **If awarded, prejudgment interest shall be at the rate described in subsection A or B of this section**.

A.R.S. § 44-1201 (2011) (emphases added) [copy attached at APP032].

Although neither subsection (A) nor (B) explicitly says "prejudgment" interest, subsection (A) applies to "any loan, indebtedness or other obligation," and subsection (F) explains that "prejudgment interest shall be at the rate described in subsection A or B of this section." Combining these three subsections (and setting aside the condemnation proceeding provisions and other statutory or contractual provisions), the statute thus specifies two potential rates for prejudgment interest: (1) 10%

on any loan, indebtedness or other obligation, and (2) prime plus 1% for everything else. *Cf. Metzler*, 235 Ariz. at 144-46, ¶¶ 13-19 (determining whether the 10% rate applies by analyzing whether Rule 68(g) interest qualifies as an "obligation"); *see also Design Trend Int'l Interiors, Ltd. v. Cathay Enterprises, Inc.*, 103 F. Supp. 3d 1051, 1058 (D. Ariz. 2015) (explaining that "[t]he first sentence of subsection (A) already states that the prejudgment interest rate is 10% per annum, unless a different rate is agreed in writing " and subsection (F) merely clarifies the rate does not change if a judgment is subsequently entered on the loan, indebtedness, or obligation).

2. A.R.S. § 44-1201's legislative history confirms the 10% rate applies to any "indebtedness."

The legislative history of A.R.S. § 44-1201 confirms that its current plain language means what it says: "Interest on any loan, indebtedness or other obligation shall be at the rate of ten per cent per annum . . . ." A.R.S. § 44-1201(A). The prior version of A.R.S. § 44-1201 "provided for a 10% per annum interest rate on any loans, indebtedness, judgments, or other obligations." *Metzler*, 235 Ariz. at 145, ¶ 14. In particular, the statute specified the same general rate (10%) for prejudgment and postjudgment

interest, likewise included a special rate for condemnation proceedings, and clarified that higher agreed-upon rates would be enforced if not unlawful:

> A. **Interest on any loan, indebtedness, judgment or other obligation shall be at the rate of ten per cent per annum**, unless a different rate is contracted for in writing, in which event any rate of interest may be agreed to.
>
> B. Interest on a judgment on a condemnation proceeding, including interest which is payable pursuant to § 12-1123, subsection B, shall be payable as follows:
>
> * * *
>
> C. A judgment given on an agreement bearing a higher rate not in excess of the maximum permitted by law shall bear the rate of interest provided in the agreement, and it shall be specified in the judgment.

A.R.S. § 44–1201 (1989) (as amended in 1997) (emphasis added) [copy attached at APP055]. Accordingly, before the amendment in "2011, § 44–1201 did not differentiate between judgments and other obligations, or between prejudgment and postjudgment interest on judgments." *Metzler*, 235 Ariz. at 145, ¶ 14; *see also Design Trend*, 103 F. Supp. 3d at 1057 ("Under former A.R.S. § 44–1201, an agreed legal rate of interest governed both prejudgment and postjudgment. Otherwise, 10% was the rate on judgments and for interest owing even without entry of a judgment.").

In 2011, the Legislature amended § 44–1201. *See* 2011 Ariz. Legis. Serv. Ch. 99 (S.B. 1212) [copy attached at APP033-52; *see* APP050-51]. Before final passage, a committee adopted an amendment that would have "[l]imit[ed] the amount of interest on all loans, indebtedness, judgments or other obligations." Arizona Senate Fact Sheet, S.B. 1212, 50th Leg., 1st Reg. Sess. (Apr. 13, 2011) [copy attached at APP053-54]. The House of Representatives, however, "[r]estore[d] [the] language requiring interest on all loans, indebtedness or other obligations at the rate of ten percent per year." *Id*. That version passed, and became the law. *See id*.

Accordingly, as the Arizona Supreme Court has explained, the net effect of the 2011 amendment with respect to interest was to "uncoupl[e] 'judgments' from 'loans, indebtedness, or other obligations' so as to 'limit' the interest applicable to **judgments**." *Metzler*, 235 Ariz. at 145, ¶ 15 (*quoting* Arizona Senate Fact Sheet, S.B. 1212, 50th Leg., 1st Reg. Sess. (Apr. 13, 2011)) [APP053-54] (emphasis added). But the amendment left intact (and unaltered) the language setting forth 10% prejudgment rate "on any loan, indebtedness or other obligation . . . ." A.R.S. § 44-1201(A); *see also Design Trend*, 103 F. Supp. 3d at 1058 (showing the changes the 2011 amendment made to the statutory text). The amendment thus ultimately

did not change Arizona's existing 10% prejudgment interest rate rule. *See also Metzler*, 235 Ariz. at 145, ¶ 15 (noting that the amendment limited the interest rate applicable to judgments and left the 10% rate intact to "loans, indebtedness, or other obligations"); *Design Trend*, 103 F. Supp. 3d at 1058 (setting forth the interest rate taxonomy under the amended statute and explaining that in a case involving "[a]ny 'loan, indebtedness or other obligation' (except a judgment) without an agreed interest rate—10% applies. § 44–1201(A) (first clause of first sentence).").

B. The System's refund amount is an "indebtedness" because it is a liquidated amount of money the System owed the University.

The only remaining question, then, is whether the System was indebted to the University. In *Metzler*, looking to *Webster's* dictionary, the Supreme Court explained that "an indebtedness" under § 44-1201(A) "is 'something (as an amount of money) that is owed.'" 235 Ariz. at 146, ¶ 19 (quoting *Webster's Ninth New Collegiate Dictionary* 612, 700 (1983)). *Black's Law Dictionary* similarly defines "indebtedness" first as "[t]he quality, state, or condition of owing money." *See Black's Law Dictionary* 885 (10th ed. 2014). Although the System disagreed that it owed the University this money, once it collected the University's money it nevertheless "owed" the

University "an amount of money." *Metzler*, 235 Ariz. at 146, ¶ 19 (citation omitted). Or, as *Black's Law Dictionary* puts it, the System was in "[t]he quality, state, or condition of owing money" to the University, i.e., it was indebted to the University. *See Black's* at 885.

Indeed, this case is no different from one involving an improper charge from a merchant. Such an improper charge would be liquidated (as in this case), and subject to the 10% prejudgment interest rate even if the merchant (incorrectly) believed it could overcharge.

II. The System's justification for not paying 10% interest does not withstand scrutiny.

The superior court did not explain why it declined to award the University 10% interest, but it presumably found the System's interest rate argument convincing. Citing *Metzler*, the System argued that it was never "indebted" to the University because its refund obligation did not arise until this Court held the System was not entitled to charge the University.[4] But the System's contention that "the requirement for the ASRS to return

[4] As noted in Statement of the Facts and Case § II.B. the System also opposed the University's request for 10% interest on the ground that the refund amount was not liquidated, but the superior court rejected that argument, and the System has not appealed that issue.

ASU's payment depended on a judgment for its existence," [APP102] is incorrect and rests on misconstruing *Metzler*.

Decisively, the System's refund obligation arose from the fact that it collected money from the University without any lawful authority to do so. Indeed, applying the existing law to the facts of this case, this Court made clear that "the System was not entitled to charge the University for the 17 retirements," *Arizona State Univ.*, 237 Ariz. at 254, ¶ 32, and thus it collected monies from the University that it never should have collected in the first place. In other words, the charge was "improper." *Id.* at 248, ¶ 1. For this reason, the System's contention below that "[t]here was no legal obligation for the ASRS to pay ASU any amount until the Arizona Court of Appeals issued its decision in May 2015," is false. [APP102.]

The truth is, the System's refund obligation "depended" on the judgment only in the sense that the System denied liability—just as in every other case where a party (incorrectly) denies liability. But "[a] good faith dispute over liability will not defeat a recovery of prejudgment interest on a liquidated claim." *Fleming v. Pima County*, 141 Ariz. 149, 155 (1984); *see also Banner Realty, Inc. v. Turek*, 113 Ariz. 62, 64 (1976) ("Uncertainty as to liability does not bar recovery of prejudgment interest

on a liquidated claim."). Indeed, if the law were otherwise it would create a perverse incentive for parties to dispute liability in order to obtain a lower interest rate.

Unsurprisingly, *Metzler* did not stand decades of settled law on its head. In *Metzler*, the Supreme Court considered "whether prejudgment interest awarded as a sanction pursuant to Arizona Rule of Civil Procedure 68(g) is interest on an 'obligation' under A.R.S. § 44–1201(A) or 'interest on a[ ] judgment' under § 44–1201(B)." *Meltzer*, 235 Ariz. at 143, ¶ 1. *Metzler* held that such a sanction "is interest on a judgment and, therefore," subject to the "4.25% under subsection (B), rather than 10% under subsection (A)." *Id*.

In reaching that conclusion, the Court explained that, unlike a contractual "obligation" (where prejudgment interest is available even if liability is denied), prejudgment interest under Rule 68(g) "is a sanction that is linked to, and dependent on, entry of a 'judgment' **that is more favorable to the offeror than the offer made**." *Id*. at 145, ¶ 17 (emphasis added).

In other words, recovering the sanction is not simply a matter of obtaining a favorable judgment (which is true in any case where

prejudgment interest is available notwithstanding a liability dispute). It also requires obtaining a judgment "that is more favorable to the offeror than the offer made," *id.*—something that cannot be known until after entry of judgment. Indeed, if *Metzler* actually meant that a party could obtain a lower prejudgment interest rate merely by forcing a dispute to judgment, it would not have bothered with its analysis of how Rule 68 works. *Cf. Design Trend*, 103 F. Supp. 3d at 1060 ("Under the logic of *Metzler,* prejudgment interest on a *liquidated* claim—unlike interest that is neither owing nor quantifiable until entry of a judgment under Rule 68—is interest on an 'obligation' pursuant to § 44–1201(A) and thus accrues at the 10% rate of subsection (A).").

III. The Court should remand with instructions for the superior court to enter judgment in the form proposed by the University.

As explained above, the System paid the University $1,327,190.35 on November 6, 2015. But at that time the System owed the University $1,568,446.89, thereby leaving a balance due of $241,256.54 with interest accruing on the balance. *See Flood Control Dist.*, 237 Ariz. at 328 ¶ 25 ("absent an agreement or statute to the contrary, partial payments of a debt

are to be applied 'first to unpaid interest due and thereafter to the principal debt.'") (citation omitted).

Accordingly, in its remand order the Court should instruct the superior court to enter judgment in favor of the University and against the System for the balance due of $241,256.54, with prejudgment interest on that amount at 10% per annum from November 6, 2015 until the judgment is entered, and postjudgment interest running on the full judgment amount (principal and prejudgment interest) at the statutory rate until paid. *See Air Separation, Inc. v. Underwriters at Lloyd's of London*, 45 F.3d 288, 290–91 (9th Cir. 1995) (awarding postjudgment interest on all components of judgment, including prejudgment interest, when applying virtually identical federal statute (28 U.S.C. § 1961(a)).[5]

[5] This Court followed that decision as applied to Arizona law in an unpublished memorandum decision.

CONCLUSION

The Court should reversed and remand with instructions to the superior court to enter judgment in the University's favor as set forth in Argument § III. The Court should also award the University costs under A.R.S. § 12-341.

RESPECTFULLY SUBMITTED this 30th day of June, 2016.

OSBORN MALEDON, P.A.

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APPENDIX TABLE OF CONTENTS*

*The Appendix page number matches the electronic PDF page number. Counsel has added emphasis to selected pages in this appendix using yellow highlighting to assist the Court with its review of the record. This Appendix complies with the bookmarking requirements of ARCAP 13(d)(3).

A.R.S. § 44-1201.
Rate of interest for loan or indebtedness; interest on judgments

Effective: July 20, 2011

A. Interest on any loan, indebtedness or other obligation shall be at the rate of ten per cent per annum, unless a different rate is contracted for in writing, in which event any rate of interest may be agreed to. Interest on any judgment that is based on a written agreement evidencing a loan, indebtedness or obligation that bears a rate of interest not in excess of the maximum permitted by law shall be at the rate of interest provided in the agreement and shall be specified in the judgment.

B. Unless specifically provided for in statute or a different rate is contracted for in writing, interest on any judgment shall be at the lesser of ten per cent per annum or at a rate per annum that is equal to one per cent plus the prime rate as published by the board of governors of the federal reserve system in statistical release H.15 or any publication that may supersede it on the date that the judgment is entered. The judgment shall state the applicable interest rate and it shall not change after it is entered.

C. Interest on a judgment on a condemnation proceeding, including interest that is payable pursuant to § 12-1123, subsection B, shall be payable as follows:

1. If instituted by a city or town, at the rate prescribed by § 9-409.

2. If instituted by a county, at the rate prescribed by § 11-269.04.

3. If instituted by the department of transportation, at the rate prescribed by § 28-7101.

4. If instituted by a county flood control district, a power district or an agricultural improvement district, at the rate prescribed by § 48-3628.

D. A court shall not award either of the following:

1. Prejudgment interest for any unliquidated, future, punitive or exemplary damages that are found by the trier of fact.

2. Interest for any future, punitive or exemplary damages that are found by the trier of fact.

E. For the purposes of subsection D of this section, “future damages” means damages that will be incurred after the date of the judgment and includes the costs of any injunctive or equitable relief that will be provided after the date of the judgment.

F. If awarded, prejudgment interest shall be at the rate described in subsection A or B of this section.

State of Arizona
Senate
Fiftieth Legislature
First Regular Session
2011

CHAPTER 99

SENATE BILL 1212

AN ACT

AMENDING SECTIONS 8-344 AND 12-352, ARIZONA REVISED STATUTES; AMENDING TITLE 12, CHAPTER 12, ARTICLE 1, ARIZONA REVISED STATUTES, BY ADDING SECTION 12-2108; AMENDING SECTIONS 13-805, 25-510, 32-2188, 32-2193.38, 32-2193.39, 36-3411 AND 38-809, ARIZONA REVISED STATUTES; AMENDING SECTION 38-849, ARIZONA REVISED STATUTES, AS AMENDED BY LAWS 2010, CHAPTER 118, SECTION 10; REPEALING SECTION 38-849, ARIZONA REVISED STATUTES, AS AMENDED BY LAWS 2010, CHAPTER 200, SECTION 45; AMENDING SECTIONS 38-897, 38-912 AND 44-1201, ARIZONA REVISED STATUTES; RELATING TO CRIMINAL AND CIVIL ACTIONS.

(TEXT OF BILL BEGINS ON NEXT PAGE)

Be it enacted by the Legislature of the State of Arizona:

Section 1. Section 8-344, Arizona Revised Statutes, is amended to read:

8-344. Restitution payments

A. If a juvenile is adjudicated delinquent, the court, after considering the nature of the offense and the age, physical and mental condition and earning capacity of the juvenile, shall order the juvenile to make full or partial restitution to the victim of the offense for which the juvenile was adjudicated delinquent or to the estate of the victim if the victim has died. The juvenile shall make restitution payments to the clerk of the court for disbursement to the victim or estate of the victim.

B. The court shall notify the victim or estate of the victim of the dispositional hearing. The court may consider a verified statement from the victim or estate of the victim concerning damages for lost wages, reasonable damages for injury to or loss of property and actual expenses of medical treatment for personal injury, excluding pain and suffering.

C. In ordering restitution pursuant to subsection A of this section, the court may order one or both of the juvenile's custodial parents to make restitution to the victim of the offense for which the juvenile was adjudicated delinquent or to the estate of the victim if the victim has died. The court shall determine the amount of restitution ordered pursuant to this subsection, except that the amount shall not exceed the liability limit established pursuant to section 12-661. The court may order a parent or juvenile who is ordered to pay restitution to satisfy the order in a lump sum or installment payments to the clerk of the court for disbursement to the victim or estate of the victim. If the court orders the juvenile's parents to make restitution pursuant to this subsection, the court shall order the juvenile to make either full or partial restitution, regardless of the juvenile's insufficient earning capacity. The court shall not consider the ability of the juvenile's parents to pay restitution before making a restitution order.

D. The juvenile court shall retain jurisdiction of the case after the juvenile attains eighteen years of age for the purpose of modifying the manner in which court ordered payments are to be made. After a juvenile attains eighteen years of age, the juvenile court shall enter the following:

1. A juvenile restitution order in favor of the state for the unpaid balance, if any, of any costs, fees, surcharges or monetary assessments imposed.

2. A juvenile restitution order in favor of each person entitled to restitution for the unpaid balance of any restitution ordered pursuant to this section.

E. The clerk of the court shall send a copy of the juvenile restitution order to each person who is entitled to restitution.

F. A juvenile restitution order may be recorded and enforced as any civil judgment, except that a juvenile restitution order does not require renewal pursuant to section 12-1611 or 12-1612. A juvenile restitution order

does not expire until paid in full. ENFORCEMENT OF A JUVENILE RESTITUTION ORDER BY ANY PERSON WHO IS ENTITLED TO RESTITUTION OR BY THE STATE INCLUDES THE COLLECTION OF INTEREST, WHICH ACCRUES AT A RATE OF TEN PER CENT PER ANNUM.

G. A juvenile restitution order is a criminal penalty for the purposes of a federal bankruptcy involving the juvenile.

Sec. 2. Section 12-352, Arizona Revised Statutes, is amended to read:

12-352. Medical malpractice judgments; payment of interest; definition

A. Notwithstanding any law to the contrary, in a contested action arising out of a medical malpractice claim the court shall award the payment of interest to the prevailing party at a rate that is equal to ~~three~~ ONE percentage ~~points~~ POINT above the federal postjudgment interest rate in effect on the date judgment is entered. Interest shall only accrue from and after the date judgment is entered until the judgment is paid. If the judgment is reversed or otherwise set aside, no interest shall be paid. The rate for calculating interest that accrues from and after the date judgment is entered shall be adjusted on June 30 and December 31 of each year to equal ~~three~~ ONE percentage ~~points~~ POINT above the federal postjudgment interest rate in effect on the date of adjustment until the judgment is paid. The interest rate specified for purposes of this section shall not exceed nine per cent. Interest shall accrue at each adjusted rate only until the next adjustment. The adjusted interest rate shall not be applied to any preceding six-month period.

B. For the purposes of this section, "federal postjudgment INTEREST rate" means the interest rate established for the federal court system pursuant to 28 United States Code section 1961, as amended.

Sec. 3. Title 12, chapter 12, article 1, Arizona Revised Statutes, is amended by adding section 12-2108, to read:

12-2108. Preservation of right to appeal judgment without execution

A. IF A PLAINTIFF IN ANY CIVIL ACTION OBTAINS A JUDGMENT UNDER ANY LEGAL THEORY, THE AMOUNT OF THE BOND THAT IS NECESSARY TO STAY EXECUTION DURING THE COURSE OF ALL APPEALS OR DISCRETIONARY REVIEWS OF THAT JUDGMENT BY ANY APPELLATE COURT SHALL BE SET AS THE LESSER OF THE FOLLOWING:

1. THE TOTAL AMOUNT OF DAMAGES AWARDED EXCLUDING PUNITIVE DAMAGES.
2. FIFTY PER CENT OF THE APPELLANT'S NET WORTH.
3. TWENTY-FIVE MILLION DOLLARS.

B. NOTWITHSTANDING SUBSECTION A, IF AN APPELLEE PROVES BY CLEAR AND CONVINCING EVIDENCE THAT AN APPELLANT IS INTENTIONALLY DISSIPATING ASSETS OUTSIDE THE ORDINARY COURSE OF BUSINESS TO AVOID PAYMENT OF A JUDGMENT, THE COURT MAY REQUIRE THE APPELLANT TO POST A BOND IN AN AMOUNT UP TO THE FULL AMOUNT OF THE JUDGMENT.

C. NOTWITHSTANDING SUBSECTION A, IF AN APPELLANT PROVES BY CLEAR AND CONVINCING EVIDENCE THAT THE APPELLANT IS LIKELY TO SUFFER SUBSTANTIAL ECONOMIC HARM IF REQUIRED TO POST BOND IN AN AMOUNT REQUIRED UNDER SUBSECTION

A, THE TRIAL COURT MAY LOWER THE BOND AMOUNT TO AN AMOUNT THAT WILL NOT CAUSE THE APPELLANT SUBSTANTIAL ECONOMIC HARM.

Sec. 4. Section 13-805, Arizona Revised Statutes, is amended to read:

13-805. Jurisdiction

A. The trial court shall retain jurisdiction of the case for purposes of modifying the manner in which court-ordered payments are made until paid in full or until the defendant's sentence expires. At the time the defendant completes the defendant's period of probation or the defendant's sentence, the court shall enter both:

1. A criminal restitution order in favor of the state for the unpaid balance, if any, of any fines, costs, incarceration costs, fees, surcharges or assessments imposed.

2. A criminal restitution order in favor of each person entitled to restitution for the unpaid balance of any restitution ordered.

B. The clerk of the court shall notify each person who is entitled to restitution of the criminal restitution order.

C. A criminal restitution order may be recorded and enforced as any civil judgment, except that a criminal restitution order does not require renewal pursuant to section 12-1611 or 12-1612. Enforcement of a criminal restitution order by any person who is entitled to restitution or by the state includes the collection of interest that accrues ~~pursuant to section 44-1201 in the same manner as any civil judgment~~ AT A RATE OF TEN PER CENT PER ANNUM. A criminal restitution order does not expire until paid in full.

D. A criminal restitution order is a criminal penalty for the purposes of a federal bankruptcy involving the defendant.

Sec. 5. Section 25-510, Arizona Revised Statutes, is amended to read:

25-510. Receiving and disbursing support and maintenance monies; arrearages; interest

A. The support payment clearinghouse established pursuant to section 46-441 shall receive and disburse all monies, including fees and costs, applicable to support and maintenance unless the court has ordered that support or maintenance be paid directly to the party entitled to receive the support or maintenance. Within two business days the clerk of the superior court shall transmit to the support payment clearinghouse any maintenance and support payments received by the clerk. Monies received by the support payment clearinghouse in cases not enforced by the state pursuant to title IV-D of the social security act shall be distributed in the following priority:

1. Current child support or current court ordered payments for the support of a family when combined with the child support obligation.

2. Current spousal maintenance.

3. The current monthly fee prescribed in subsection D of this section for handling support or spousal maintenance payments.

4. Past due support reduced to judgment and then to associated interest.

5. Past due spousal maintenance reduced to judgment and then to associated interest.

6. Past due support not reduced to judgment and then to associated interest.

7. Past due spousal maintenance not reduced to judgment and then to associated interest.

8. Past due amounts of the fee prescribed in subsection D of this section for handling support or spousal maintenance payments.

B. In any proceeding under this chapter regarding a duty of support, the records of payments maintained by the clerk or the support payment clearinghouse are prima facie evidence of all payments made and disbursed to the person or agency to whom the support payment is to be made and are rebuttable only by a specific evidentiary showing to the contrary.

C. At no cost to the clerk of the superior court, the department shall provide electronic access to all records of payments maintained by the support payment clearinghouse, and the clerk shall use this information to provide payment histories to all litigants, attorneys and interested persons and the court. For all non-title IV-D support cases, the clerk shall load new orders, modify order amounts, respond to payment inquiries, research payment related issues, release payments pursuant to orders of the court and update demographic and new employer information. The clerk shall forward orders of assignment to employers for non-title IV-D support orders. Within five business days the clerk shall provide to the department any new address, order of assignment or employment information the clerk receives regarding any support order. The information shall be provided as prescribed by the department of economic security in consultation with the administrative office of the courts.

D. The support payment clearinghouse shall receive a monthly fee for handling support and maintenance payments. The director, by rule, may establish this fee. The court shall order payment of the handling fee as part of the order for support or maintenance. The handling fee shall not be deducted from the support or maintenance portion of the payment.

E. In calculating support arrearages not reduced to a final written money judgment, interest accrues at the rate of ten per cent per annum ~~pursuant to section 44-1201,~~ beginning at the end of the month following the month in which the support payment is due, and interest accrues only on the principal and not on interest. A support arrearage reduced to a final written money judgment accrues interest at the rate of ten per cent per annum ~~pursuant to section 44-1201~~ and accrues interest only on the principal and not on interest.

F. Past support reduced to a final written money judgment before September 26, 2008 and pursuant to section 25-320, subsection C or section 25-809, subsection B accrues interest at the rate of ten per cent per annum ~~pursuant to section 44-1201~~ beginning on entry of the judgment by the court and accrues interest only on the principal and not on interest. Past support reduced to a final written money judgment beginning on September 26, 2008 and

pursuant to section 25-320, subsection C or section 25-809, subsection B does not accrue interest for any time period.

G. Any direct payments not paid through the clearinghouse or any equitable credits of principal or interest permitted by law and allowed by the court after a hearing shall be applied to support arrearages as directed in the court order. The court shall make specific findings in support of any payments or credits allowed. If the court order does not expressly state the dates the payments or credits are to be applied, the payments or credits shall be applied on the date of the entry of the order that allows the payments or credits. In a title IV-D case, if a court order does not indicate on its face that the state was either represented at or had notice of the hearing or proceeding where the payments or credits were determined, the court order shall not reduce any sum owed to the department or its agent without written approval of the department or its agent.

H. Any credit against support arrearages, other than by court order, shall be made only by written affidavit of direct payment or waiver of support arrearages signed by the person entitled to receive the support or by that person and the person ordered to make the support payment. The affidavit of direct payment or waiver of support arrearages shall be filed directly with the clerk of the court, who shall enter the information into the statewide case registry. Any credits against support arrearages shall be applied as of the dates contained in the affidavit or the date of the affidavit if no other date is specified in the affidavit. In a title IV-D case, the affidavit of direct payment or waiver of support arrearages shall not reduce any sum owed to the department or its agent without written approval of the department or its agent.

I. An arrearage calculator may be developed by a government agency using an automated transfer of data from the clearinghouse and the child support registry. The arrearage figure produced by this calculator is presumed to be the correct amount of the arrearage.

Sec. 6. Section 32-2188, Arizona Revised Statutes, is amended to read:

32-2188. Statute of limitations; service of summons; application for payment; insufficient monies; definition

A. An action for a judgment that subsequently results in an order for payment from the real estate recovery fund shall not be started later than five years from the accrual of the cause of action.

B. If an aggrieved person commences an action for a judgment that may result in an order for payment from the real estate recovery fund, and the defendant licensee cannot be served process personally in this state, the summons may be served by the alternative methods of service provided for by the Arizona rules of civil procedure, including service by publication. A judgment that complies with the provisions of this section and that was obtained after service by publication only applies to and is enforceable against the real estate recovery fund. The department may intervene in and defend any such action.

C. An aggrieved person may apply to the department for payment from the real estate recovery fund after the aggrieved person obtains a judgment against a real estate or cemetery broker or salesperson based on the licensee's act, representation, transaction or conduct in violation of this chapter or the rules adopted pursuant to this chapter. The claimant must file the original application, including appendices, within two years after the termination of all proceedings, reviews and appeals connected with the judgment. The commissioner, in the commissioner's sole discretion, may waive the two-year application deadline if the commissioner determines that the waiver best serves the public interest. Delivery of the application must be by personal service or by certified mail, return receipt requested.

D. The application must be within the limitations prescribed in section 32-2186 for the amount unpaid on the judgment that represents the claimant's actual and direct loss on the transaction.

E. The department shall prescribe and supply an application form that includes detailed instructions with respect to documentary evidence, pleadings, court rulings, the products of discovery in the underlying litigation and notice requirements to the judgment debtor under section 32-2188.01. The claimant must submit the claim on an application form supplied by the department. The application must include:

1. The claimant's name and address.

2. If the claimant is represented by an attorney, the attorney's name, business address and telephone number.

3. The judgment debtor's name and address or, if unknown, the names and addresses of persons who may know the judgment debtor's present location.

4. A detailed narrative statement of the facts explaining the allegations of the complaint on which the underlying judgment is based, with a copy of the contracts, receipts and other documents from the transaction, the last amended complaint, all existing recorded judgments, documentation of actual and direct out-of-pocket losses and any offsetting payment received and all collection efforts attempted.

5. The identification of the judgment, the amount of the claim and an explanation of its computation, including an itemized list of actual and compensatory damages awarded and claimed.

6. For the purpose of an application that is not based on a criminal restitution order, a statement by the claimant, signed under penalty of perjury, that the complaint on which the underlying judgment is based was prosecuted conscientiously and in good faith. For the purposes of this paragraph, "conscientiously and in good faith" means that all of the following apply:

(a) No party that was potentially liable to the claimant in the underlying transaction was intentionally and without good cause omitted from the complaint.

(b) No party named in the complaint who otherwise reasonably appeared capable of responding in damages was intentionally and without good cause dismissed from the complaint.

(c) The claimant employed no other procedural means contrary to the diligent prosecution of the complaint in order to seek to qualify for the recovery fund.

7. For the purpose of an application that is based on a criminal restitution order, all of the following statements by the claimant, signed under penalty of perjury:

(a) The claimant has not intentionally and without good cause failed to pursue any person potentially liable to the claimant in the underlying transaction other than a defendant who is the subject of a criminal restitution order.

(b) The claimant has not intentionally and without good cause failed to pursue in a civil action for damages all persons potentially liable to the claimant in the underlying transaction who otherwise reasonably appeared capable of responding in damages other than a defendant who is the subject of a criminal restitution order.

(c) The claimant employed no other procedural means contrary to the diligent prosecution of the complaint in order to seek to qualify for the recovery fund.

8. The following statements, signed under penalty of perjury, and information from the claimant:

(a) The claimant is not a spouse of the judgment debtor or a personal representative of the spouse.

(b) The claimant has complied with all of the requirements of this article.

(c) The judgment underlying the claim meets the requirements of this article.

(d) The claimant has recorded a certified copy of the superior court judgment or transcript of judgment pursuant to sections 33-961 and 33-962 in the county where the judgment was obtained and in the ~~county~~ COUNTIES where all judgment debtors reside and has provided a copy of the recorded judgment to the commissioner.

(e) The claimant has caused the judgment debtor to make discovery under oath, pursuant to section 12-1631, concerning the debtor's property.

(f) The claimant has caused a writ of execution to be issued on the judgment and the officer executing the writ has made a return showing either:

(i) That no personal or real property of the judgment debtor liable to be levied on in satisfaction of the judgment could be found, sold or applied.

(ii) That the amount realized on the sale of the property, or as much of the property that was found, under the execution was insufficient to satisfy the judgment.

(g) The claimant has caused a writ of garnishment to be issued to each known employer of the judgment debtor ascertained by the claimant, that each garnishee-defendant has complied with the respective writ and any judgment or order resulting from the writ and that the amount realized from all judgments against the garnishee-defendants was insufficient to satisfy the balance due on the judgment.

(h) The claimant has deducted the following amounts from the actual or compensatory damages awarded by the court:

(i) Any amount recovered or anticipated from the judgment debtor or debtors.

(ii) Any amount recovered through collection efforts undertaken pursuant to subdivisions (d) through (g) of this paragraph and including an itemized valuation of the assets discovered and amounts applied.

(iii) Any amount recovered or anticipated from bonding, insurance or title companies, including recovery of punitive damages.

(iv) Any amount recovered or anticipated from in-court or out-of-court settlements.

(v) Any amount of tax benefits accrued or taken as deductions on federal, state or local income tax returns.

F. If the claim is based on a judgment against a salesperson or broker and the claimant has not obtained a judgment against the salesperson's or broker's employing broker, if any, or has not diligently pursued the assets of the employing broker, the department shall deny the claim for failure to diligently pursue the assets of all other persons liable to the claimant in the transaction unless the claimant demonstrates, by clear and convincing evidence, that either:

1. The salesperson or broker was not employed by a broker at the time of the transaction.

2. The salesperson's or broker's employing broker would not have been liable to the claimant because the salesperson or broker acted outside the scope of employment in the transaction.

G. The commissioner, at the commissioner's sole discretion, may waive compliance with one or more of the requirements enumerated in subsection E, paragraph 8 or subsection F of this section if the claim is based on an award pursuant to a criminal restitution order or if the commissioner is satisfied that the claimant has taken all reasonable steps to collect the amount of the judgment or the unsatisfied part of the judgment from all judgment debtors but has been unable to collect.

H. If the commissioner finds it is likely that the total remaining liability of the recovery fund is insufficient to pay in full the valid claims of all aggrieved persons who may have claims against any one licensee, the commissioner may petition the court to initiate a proration proceeding. The court shall grant the petition and order a hearing to distribute the total remaining liability of the fund among the applicants in the ratio that their respective claims bear to the aggregate of the valid claims or in such other manner as the court deems equitable. The commissioner or any party may file a proposed plan for equitable distribution of the available monies. The distribution of monies shall be among the persons entitled to share them, without regard to the order of priority in which their respective judgments may have been obtained or their respective applications may have been filed. The court may require all applicants and prospective applicants against one licensee to be joined in one action, to the end that the respective rights of all the applicants to the recovery fund may be equitably adjudicated and settled. The court shall not include in the claims for proration the claim of any person who has not, within ninety days after the court has entered the order for proration, filed a complaint with the court, served the licensee and provided written notice of the claim to the commissioner. The liability of the fund on any application affected by a proration proceeding is based on the limits in effect on the date when the last application for payment is filed. The court may refuse to consider or award prorated recovery to any person who fails to expeditiously prosecute a claim against the licensee or promptly file an application for payment and submit supporting documentation as required by this article.

I. If the commissioner pays from the real estate recovery fund any amount in settlement of an applicant's claim or toward satisfaction of a judgment against a licensed broker, designated broker for a corporation or salesperson, the license of the broker, designated broker for a corporation or salesperson shall be automatically terminated upon the issuance of an order authorizing payment from the real estate recovery fund. A broker, designated broker for a corporation or salesperson is not eligible to receive a new license until the licensee has repaid in full, plus interest at the rate provided by section 44-1201~~, subsection A~~, the amount paid from the real estate recovery fund on the licensee's account and has provided evidence to the commissioner that the judgment has been fully satisfied.

J. If, at any time, the money deposited in the real estate recovery fund is insufficient to satisfy any duly authorized claim or portion of a claim, the commissioner shall, when sufficient money has been deposited in the real estate recovery fund, satisfy the unpaid claims or portions of claims, in the order that the claims or portions of claims were originally filed, plus accumulated interest at the rate of four per cent a year.

K. For the purposes of this section, "complaint" means the facts of the transaction on which the judgment is based.

Sec. 7. Section 32-2193.38, Arizona Revised Statutes, is amended to read:

32-2193.38. Final decision and order on claim; notice

A. The commissioner shall make a final written decision and order on a claim within ninety calendar days after the date the commissioner receives a completed application except in the following cases:

1. A proration hearing is pending under section 32-2193.34, subsection G.

2. An application is deficient or fails to comply substantially with the requirements of section 32-2193.34 or rules adopted pursuant to this article as determined pursuant to section 32-2193.36. The ninety day time period begins under this subsection on the date the department receives an application that is substantially complete.

3. The claimant agrees in writing to extend the time for making a decision.

B. If the commissioner fails to render a written decision and order on a claim within ninety calendar days or within an extended period of time provided under subsection A of this section, the claim is considered to be approved on the day following the final day for rendering the decision.

C. The commissioner shall give notice of a decision and order with respect to the claim to the claimant and to any judgment debtor who has filed a timely response to the claim pursuant to section 32-2193.35 as follows:

1. If the commissioner denies the application, the notice shall state that:

> The claimant's application has been denied and the claimant may pursue the application in court pursuant to section 32-2193.39, Arizona Revised Statutes.

2. If the commissioner approves a payment to the claimant from the condominium recovery fund, the commissioner shall give notice of the decision to the judgment debtor with a copy of the decision and order and shall advise the subdivider that the subdivider's public report will be automatically suspended, pending repayment to the fund, plus interest at the rate provided by section 44-1201~~, subsection A~~. This notice shall describe the subdivider's right to appeal the determination, if any, and shall state that failure by the judgment debtor to timely file a response constitutes a waiver of objection.

Sec. 8. Section 32-2193.39, Arizona Revised Statutes, is amended to read:

32-2193.39. Claimant's right to appeal denial of claim; service of notice of appeal; response; failure to file response

A. A claimant whose application is denied pursuant to section 32-2193.38 may file, within six months after receiving notice of a denial of the claim, a verified application in the court in which judgment was entered in the claimant's favor for an order directing payment from the condominium recovery fund based on the grounds set forth in the claimant's application to the commissioner.

B. The claimant shall serve a copy of the verified application on the commissioner and on the judgment debtor and shall file a certificate or affidavit of service with the court. Service on the commissioner shall be made by certified mail addressed to the commissioner. Service on a judgment debtor shall be made pursuant to section 32-2193.35 and shall include notice that an application has been filed with the court for a claim against the condominium recovery fund that was previously denied by the commissioner.

C. The commissioner shall advise the subdivider that, if payment is awarded, the subdivider's public report will be automatically suspended, pending repayment to the fund, plus interest at the rate provided by section 44-1201~~, subsection A~~. The commissioner shall include a description of the subdivider's right to appear and defend the action and that failure by the judgment debtor to timely file a response constitutes a waiver of objection.

D. The commissioner and the judgment debtor each must file a written response within thirty calendar days after being served with the application pursuant to subsection B of this section. The court shall set the matter for hearing on the petition of the claimant. The court may grant a request of the commissioner for a continuance of up to thirty calendar days and, on a showing of good cause by any party, may continue the hearing for a time that the court considers appropriate.

E. At the hearing, the claimant must establish compliance with the requirements of section 32-2193.34.

F. If the judgment debtor fails to file a written response to the application, the commissioner may compromise or settle the claim at any time during the court proceedings and, on joint petition of the applicant and the commissioner, the court shall issue an order directing payment from the condominium recovery fund.

Sec. 9. Section 36-3411, Arizona Revised Statutes, is amended to read:

36-3411. Behavioral health services; timely reimbursement; penalties

A. The division shall ensure that behavioral health service providers are reimbursed within ninety days after the service provider submits a clean claim to a regional behavioral health authority.

B. Any contract issued by or on behalf of the division for the provision of behavioral health services shall include language outlining provisions for penalties for noncompliance with contract requirements.

C. If the regional behavioral health authority does not reimburse a provider as required by this section, the director shall subject the regional behavioral health authority to the penalty provisions prescribed in the contract which shall not exceed the interest charges prescribed in section 44-1201~~, subsection A~~. The director shall impose any financial penalties levied upon the regional behavioral health authority through a reduction in the amount of funds payable to the regional behavioral health authority for administrative expenses.

D. The ninety day deadline imposed by this section is suspended while a formal grievance regarding the legitimacy of a claim is pending.

E. The department or a regional behavioral health authority shall not pay claims for covered services that are initially submitted more than nine months after the date of the services for which payment is claimed or that are submitted as clean claims more than twelve months after the date of service for which payment is claimed. A person dissatisfied with the denial of a claim by the department or by the regional behavioral health authority has twelve months from the date of the service for which payment is claimed to institute a grievance against the department or regional behavioral health authority.

F. For claims paid by the department, either directly or through a third party payor, the director may impose a penalty on a regional behavioral health authority or a service provider who submits a claim to the department for payment more than one time after the same claim had been previously denied by the department without having attempted to address the reason given for the denial. The penalty imposed by the director shall not exceed the average cost incurred by the department for processing a claim and shall be levied upon the regional behavioral health authority or service provider through reducing any future payment or payments until the amount of the penalty has been paid.

G. This section does not apply to services provided by a hospital pursuant to section 36-2903.01, subsection G or H, or section 36-2904, subsection H or I.

Sec. 10. Section 38-809, Arizona Revised Statutes, is amended to read:

38-809. Correction of pension payment errors; assignments prohibited; civil liability; restitution or payment of fine; violation; classification; offset of benefits

A. If the plan has made pension payments based on incorrect information and a person or an estate has been paid more or less than the person or estate should have been paid, the board shall adjust future payments so that the proper amount is paid. The adjustment may be made in such a manner that the equivalent actuarial present value of the benefit to which the person or estate is correctly entitled is paid.

B. Notwithstanding any other statute, benefits, member contributions or court fees including interest earnings and all other credits payable under the plan are not subject in any manner to anticipation, alienation, sale, transfer, assignment, pledge, encumbrance, charge, garnishment, execution or levy of any kind, either voluntary or involuntary, before actually being received by the person entitled to the benefit, contribution, earning or credit under the terms of the plan, and any attempt to dispose of any right under the terms of the plan as proscribed in this subsection is void. The fund is not liable for or subject to the debts, contracts, liabilities, enlargements or torts of any person entitled to a benefit, contribution, earning or credit under the terms of the plan.

C. Nothing in this section exempts employee benefits of any kind from a writ of attachment, a writ of execution, a writ of garnishment and orders of assignment issued by a court of record as the result of a judgment for arrearages of child support or for child support debt.

D. A person who defrauds the plan or who takes, converts, steals or embezzles monies owned by or from the plan and who fails or refuses to return the monies to the plan on the board's written request is subject to a civil suit by the plan in the superior court in Maricopa county. On entry of an order finding the person has defrauded the plan or taken, converted, stolen or embezzled monies owned by or from the plan, the court shall enter an order against that person and for the plan awarding the plan all of its costs and expenses of any kind, including attorney fees, that were necessary to successfully prosecute the action. The court shall also grant the plan a judicial lien on all of the nonexempt property of the person against whom judgment is entered pursuant to this subsection in an amount equal to all amounts awarded to the plan, plus interest at the rate prescribed by section 44-1201~~, subsection A~~, until all amounts owed are paid to the plan.

E. If a member is convicted of, or discharged because of, theft, embezzlement, fraud or misappropriation of an employer's property or property under the control of the employer, the member is subject to restitution and fines imposed by a court of competent jurisdiction. The court may order the restitution or fines to be paid from any payments otherwise payable to the member from the plan.

F. A person who knowingly makes any false statement or who falsifies or permits to be falsified any record of the plan with an intent to defraud the plan is guilty of a class 1 misdemeanor. If any change or error in the records results in any member or beneficiary receiving from the plan more or less than the member or beneficiary would have been entitled to receive had the records been correct, the plan shall correct the error, and as far as practicable shall adjust the payments in such a manner that the actuarial equivalent of the benefit to which the member or beneficiary was correctly entitled to receive shall be paid. If a member is convicted of a crime pursuant to this subsection, the member is entitled to receive a lump sum payment of the member's accumulated contributions but forfeits any future compensation and benefits that would otherwise accrue to the member or the member's estate under this article.

G. Notwithstanding any other provision of this article, the board may offset against any benefits otherwise payable by the plan to an active or retired member or survivor any court ordered amounts awarded to the board and plan and assessed against the member or survivor.

Sec. 11. Section 38-849, Arizona Revised Statutes, as amended by Laws 2010, chapter 118, section 10, is amended to read:

38-849. Limitations on receiving pension; violation; classification; reemployment after severance; reinstatement of service credits; reemployment of retired or disabled member

A. If a member is convicted of, or discharged because of, theft, embezzlement, fraud or misappropriation of an employer's property or property under the control of the employer, the member shall be subject to restitution and fines imposed by a court of competent jurisdiction. The court may order the restitution or fines to be paid from any payments otherwise payable to the member from the retirement system.

B. A person who knowingly makes any false statement or who falsifies or permits to be falsified any record of the system with an intent to defraud the system is guilty of a class 6 felony. If any change or error in the records results in any member or beneficiary receiving from the system more or less than the member or beneficiary would have been entitled to receive had the records been correct, the local board shall correct such error, and as far as practicable shall adjust the payments in such manner that the actuarial equivalent of the benefit to which such member or beneficiary was correctly entitled shall be paid. If a member is convicted of a crime specified in this subsection the member shall be entitled to receive a lump sum payment of the member's accumulated contributions but forfeits any future compensation and benefits that would otherwise accrue to the member or the member's estate under this article.

C. If a member who received a severance refund on termination of employment, as provided in section 38-846.02, is subsequently reemployed by an employer, the member's prior service credits shall be cancelled and service shall be credited only from the date the member's most recent reemployment period commenced. However, if the former member's reemployment with the same employer occurred within two years after the former member's termination date, and, within ninety days after reemployment the former member signs a written election consenting to reimburse the fund within one year, the former member shall be required to redeposit the amount withdrawn at the time of the former member's separation from service, with interest thereon at the rate of nine per cent for each year compounded each year from the date of withdrawal to the date of repayment. On satisfaction of this obligation the member's prior service credits shall be reinstated.

D. If a retired member becomes employed in any capacity by the employer from which the member retired before sixty consecutive days after the member's date of retirement, the system shall not make pension payments to the retired member during the period of reemployment. If a retired member is reemployed by an employer, no contributions shall be made on the retired member's account, nor any service credited, during the period of the reemployment. Notwithstanding this subsection, if a retired member subsequently becomes employed in the same position by the employer from which

the member retired, the system shall not make pension payments to the retired member during the period of reemployment. On subsequent termination of employment by the retired member, the retired member is entitled to receive a pension based on the member's service and compensation before the date of the member's reemployment. If a member who retired under disability is reemployed by an employer as an employee, that member shall be treated as if the member had been on an uncompensated leave of absence during the period of the member's disability retirement and shall be a contributing member of the system. Within ten days after a retired member is reemployed by the employer from which the member retired, the employer shall advise the ~~fund manager~~ BOARD in writing as to whether the retired member has been reemployed in the same position from which the member retired. The ~~fund manager~~ BOARD shall review all reemployment determinations. If the ~~fund manager~~ BOARD is not provided the necessary information to make a reemployment determination, the ~~fund manager~~ BOARD shall suspend pension payments until information is received and a determination is made that the reemployment meets the requirements of this subsection. For the purposes of this subsection, "same position" means the member is in a position where the member performs substantially similar duties that were performed and exercises substantially similar authority that was exercised by the retired member before retirement.

E. A person who defrauds the system or who takes, converts, steals or embezzles monies owned by or from the system and who fails or refuses to return the monies to the system on the ~~fund manager's~~ BOARD'S written request is subject to civil suit by the system in the superior court in Maricopa county. On entry of an order finding the person has defrauded the system or taken, converted, stolen or embezzled monies owned by or from the system, the court shall enter an order against that person and for the system awarding the system all of its costs and expenses of any kind, including attorney fees, that were necessary to successfully prosecute the action. The court shall also grant the system a judicial lien on all of the nonexempt property of the person against whom judgment is entered pursuant to this subsection in an amount equal to all amounts awarded to the system, plus interest at the rate prescribed by section 44-1201~~, subsection A~~, until all amounts owed are paid to the system.

F. Notwithstanding any other provision of this article, the ~~fund manager~~ BOARD may offset against any benefits otherwise payable by the system to an active or retired member or survivor any court ordered amounts awarded to the ~~fund manager~~ BOARD and system and assessed against the member or survivor.

Sec. 12. Repeal

Section 38-849, Arizona Revised Statutes, as amended by Laws 2010, chapter 200, section 45, is repealed.

Sec. 13. Section 38-897, Arizona Revised Statutes, is amended to read:

38-897. Assignments prohibited; liability of fund

A. The right of an individual to a pension, to a refund of accumulated member contributions, to the pension itself or to any other right accrued or accruing to any individual, and the monies and assets of the retirement plan, are not subject to execution, garnishment, attachment, the operation of bankruptcy or insolvency law or other process of law except a qualified domestic relations order and are unassignable except as may be otherwise specifically provided.

B. Any attempt to anticipate, alienate, sell, transfer, assign, pledge, encumber, charge or otherwise dispose of any right provided in subsection A is void. The fund is not liable in any manner for or subject to the debts, contracts, liabilities, engagements or torts of any person entitled to these rights.

C. This section does not exempt employee benefits of any kind from a writ of attachment, a writ of execution, a writ of garnishment and orders of assignment issued by a court of record as the result of a judgment for arrearages of child support or for child support debt.

D. A person who defrauds the plan or who takes, converts, steals or embezzles monies owned by or from the plan and who fails or refuses to return the monies to the plan on the board's written request is subject to civil suit by the plan in the superior court in Maricopa county. On entry of an order finding the person has defrauded the plan or taken, converted, stolen or embezzled monies owned by or from the plan, the court shall enter an order against that person and for the plan awarding the plan all of its costs and expenses of any kind, including attorney fees, that were necessary to successfully prosecute the action. The court shall also grant the plan a judicial lien on all of the nonexempt property of the person against whom judgment is entered pursuant to this subsection in an amount equal to all amounts awarded to the plan, plus interest at the rate prescribed by section 44-1201~~, subsection A~~, until all amounts owed are paid to the plan.

E. Notwithstanding any other provision of this article, the board may offset against any benefits otherwise payable by the plan to an active or retired member or survivor any court ordered amounts awarded to the board and plan and assessed against the member or survivor.

Sec. 14. Section 38-912, Arizona Revised Statutes, is amended to read:

38-912. Civil liability; restitution or payment of fine; violation; classification; offset of benefits

A. A person who defrauds the plan or who takes, converts, steals or embezzles monies owned by or from the plan and who fails or refuses to return the monies to the plan on the board's written request is subject to civil suit by the plan in the superior court in Maricopa county. On entry of an order finding the person has defrauded the plan or taken, converted, stolen or embezzled monies owned by or from the plan, the court shall enter an order against that person and for the plan awarding the plan all of its costs and expenses of any kind, including attorney fees, that were necessary to

successfully prosecute the action. The court shall also grant the plan a judicial lien on all of the nonexempt property of the person against whom judgment is entered pursuant to this subsection in an amount equal to all amounts awarded to the plan, plus interest at the rate prescribed by section 44-1201~~, subsection A~~, until all amounts owed are paid to the plan.

B. If a member is convicted of, or discharged because of, theft, embezzlement, fraud or misappropriation of an employer's property or property under the control of the employer, the member is subject to restitution and fines imposed by a court of competent jurisdiction. The court may order the restitution or fines to be paid from any payments otherwise payable to the member from the plan.

C. A person who knowingly makes any false statement or who falsifies or permits to be falsified any record of the plan with an intent to defraud the plan is guilty of a class 6 felony. If any change or error in the records results in any member or beneficiary receiving from the plan more or less than the member or beneficiary would have been entitled to receive had the records been correct, the local board shall correct the error, and as far as practicable shall adjust the payments in a manner that the actuarial equivalent of the benefit to which the member or beneficiary was correctly entitled shall be paid. If a member is convicted of a crime pursuant to this subsection the member is entitled to receive a lump sum payment of the member's accumulated contributions but forfeits any future compensation and benefits that would otherwise accrue to the member or the member's estate under this article.

D. Notwithstanding any other provision of this article, the board may offset against any benefits otherwise payable by the plan to a member or survivor any court ordered amounts awarded to the board and plan and assessed against the member or survivor.

Sec. 15. Section 44-1201, Arizona Revised Statutes, is amended to read:

44-1201. Rate of interest for loan or indebtedness; interest on judgments

A. Interest on any loan, indebtedness~~, judgment~~ or other obligation shall be at the rate of ten per cent per annum, unless a different rate is contracted for in writing, in which event any rate of interest may be agreed to. INTEREST ON ANY JUDGMENT THAT IS BASED ON A WRITTEN AGREEMENT EVIDENCING A LOAN, INDEBTEDNESS OR OBLIGATION THAT BEARS A RATE OF INTEREST NOT IN EXCESS OF THE MAXIMUM PERMITTED BY LAW SHALL BE AT THE RATE OF INTEREST PROVIDED IN THE AGREEMENT AND SHALL BE SPECIFIED IN THE JUDGMENT.

B. UNLESS SPECIFICALLY PROVIDED FOR IN STATUTE OR A DIFFERENT RATE IS CONTRACTED FOR IN WRITING, INTEREST ON ANY JUDGMENT SHALL BE AT THE LESSER OF TEN PER CENT PER ANNUM OR AT A RATE PER ANNUM THAT IS EQUAL TO ONE PER CENT PLUS THE PRIME RATE AS PUBLISHED BY THE BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM IN STATISTICAL RELEASE H.15 OR ANY PUBLICATION THAT MAY SUPERSEDE IT ON THE DATE THAT THE JUDGMENT IS ENTERED. THE JUDGMENT SHALL

STATE THE APPLICABLE INTEREST RATE AND IT SHALL NOT CHANGE AFTER IT IS ENTERED.

~~B.~~ C. Interest on a judgment on a condemnation proceeding, including interest ~~which~~ THAT is payable pursuant to section 12-1123, subsection B, shall be payable as follows:

1. If instituted by a city or town, at the rate prescribed by section 9-409.

2. If instituted by a county, at the rate prescribed by section 11-269.04.

3. If instituted by the department of transportation, at the rate prescribed by section 28-7101.

4. If instituted by a county flood control district, a power district or an agricultural improvement district, at the rate prescribed by section 48-3628.

~~C. A judgment given on an agreement bearing a higher rate not in excess of the maximum permitted by law shall bear the rate of interest provided in the agreement, and it shall be specified in the judgment.~~

D. A COURT SHALL NOT AWARD EITHER OF THE FOLLOWING:

1. PREJUDGMENT INTEREST FOR ANY UNLIQUIDATED, FUTURE, PUNITIVE OR EXEMPLARY DAMAGES THAT ARE FOUND BY THE TRIER OF FACT.

2. INTEREST FOR ANY FUTURE, PUNITIVE OR EXEMPLARY DAMAGES THAT ARE FOUND BY THE TRIER OF FACT.

E. FOR THE PURPOSES OF SUBSECTION D OF THIS SECTION, "FUTURE DAMAGES" MEANS DAMAGES THAT WILL BE INCURRED AFTER THE DATE OF THE JUDGMENT AND INCLUDES THE COSTS OF ANY INJUNCTIVE OR EQUITABLE RELIEF THAT WILL BE PROVIDED AFTER THE DATE OF THE JUDGMENT.

F. IF AWARDED, PREJUDGMENT INTEREST SHALL BE AT THE RATE DESCRIBED IN SUBSECTION A OR B OF THIS SECTION.

Sec. 16. Findings and purpose

The legislature finds that:

1. Both across the nation and in Arizona, the size of damage awards in civil actions has escalated in recent years.

2. Under rule 7(a)(2), Arizona rules of civil appellate procedure, in order to stay the execution of the judgment while they appeal, defendants seeking to appeal an adverse judgment in Arizona are required to post a bond that normally equals the full amount of the judgment plus costs, interest and any damages that might be attributed to the stay pending appeal.

3. The existence of an overly large appeal bond infringes on the due process rights of appellants. Under such a system, defendants who are subject to overly large damage awards may simply be unable to post a bond to protect their assets and assert their appeal rights. They may be forced into bankruptcy or compelled to settle their case, thereby rendering the right to appeal nearly meaningless.

4. Limiting the bond requirement to the lesser of the value of the judgment, fifty per cent of the appellant's net worth or twenty-five million

dollars regardless of the value of the judgment would ensure that defendants can fully exercise their fundamental right to appeal.

5. Enacting a limit on the bond requirement to stay the execution of a judgment impacts the rights of appellants and is therefore a matter of substantive law that falls within the jurisdiction of the legislature.

Sec. 17. Applicability

A. Section 12-2108, Arizona Revised Statutes, as added by this act, applies to all actions that are pending on or that are filed on or after the effective date of this act.

B. Section 44-1201, Arizona Revised Statutes, as amended by this act, applies to all loans that are entered into, all debts and obligations that are incurred and all judgments that are entered on or after the effective date of this act.

APPROVED BY THE GOVERNOR APRIL 13, 2011.

FILED IN THE OFFICE OF THE SECRETARY OF STATE APRIL 13, 2011.

Go to Previous View Go to Table of Contents - Appendix

Assigned to CE AS ENACTED

ARIZONA STATE SENATE
Fiftieth Legislature, First Regular Session

FINAL AMENDED
FACT SHEET FOR S.B. 1212

civil appeal bonds; limits

Purpose

Restricts the amount of a bond that is necessary to stay execution during an appeal or discretionary review of a judgment in a civil action by an appellate court. Modifies interest rates on judgments and lowers the statutory medical malpractice interest rate.

Background

According to the Arizona Supreme Court's website, civil cases are, generally, legal disagreements between individuals, businesses, corporations or partnerships. Civil cases can involve disputes regarding a breach of contract, collection of debt, monetary compensation for personal injury or property damage and family law issues, such as divorce. The losing party in a civil case is able to appeal a judgment to the next level of the court.

The Arizona Rules of Civil Appellate Procedure, Rule 7, outlines how an appellant may stay on appeal in civil cases. Rule 7 dictates that when an appellant desires a stay on appeal, the appellant may obtain that stay by filing a *supersedeas* bond in the superior court before or after filing a notice of appeal. The superior court determines the amount of the bond *ex parte* upon submission of an affidavit from the appellant. Rule 7 stipulates that the bond amount "be conditioned for the satisfaction in full" of the judgment, as well as consider costs, interest, and any damages anticipated to result from the stay.

The fiscal impact of this legislation is unknown.

Provisions

1. Restricts the amount of a bond that is necessary to stay execution during an appeal or discretionary review of a judgment in a civil action by an appellate court to whichever amount is the *least*:
   a) the total amount of damages awarded, excluding punitive damages;
   b) 50 percent of the appellant's net worth; or
   c) $25 million.

2. Allows the court to require an appellant to post a bond in an amount up to the full amount of the judgment if an appellee proves by clear and convincing evidence that the appellant is intentionally dissipating assets outside the ordinary course of a business in order to avoid payment of that judgment.
3. Allows the trial court to lower the bond amount to an amount that will not cause an appellant substantial economic harm if the appellant proves by clear and convincing evidence that the appellant is likely to suffer substantial economic harm if required to post the bond.

4. Limits all interest on judgments to whichever amount is the *least*:
   a) 10 percent per year; or
   b) an amount equal to 3 percent plus the prime rate, as published by the Board of Governors of the Federal Reserve System in statistical release H.15 or any publication that may supersede it.

5. Requires interest on any judgment that is based on a written agreement evidencing a loan, indebtedness or obligation that is not in excess of the maximum interest rate to be at the rate of interest provided in the agreement. Requires that rate to be specified in the judgement.

6. Prohibits a court from awarding:
   a) prejudgment interest for any unliquidated, future, punitive or exemplary damages that are found by the *trier of fact*;
   b) interest for any future, punitive or exemplary damages that are found by the *trier of fact*.

7. Requires prejudgment interest to be at the statutory rate, if awarded.

8. Specifies that the collection of interest on enforcement of a juvenile restitution order accrues at a rate of 10

percent per year.

9. Maintains the interest rate on enforcement of a criminal restitution order at 10 percent per year.

10. Lowers the medical malpractice interest rate from three to one percent point above the federal post-judgment interest rate.

11. Contains statements on legislative findings and purpose.

12. Specifies that the provisions regarding *supersedeas* bonds apply to all actions that are pending or that are filed on or after the effective date. Specifies that the provisions regarding the limiting of loans, indebtedness, judgments or other obligations applies to all loans that are entered into, all debts and obligations incurred and all judgments that are entered on or after the effective date.

13. Defines *future damages*.

14. Contains technical and conforming changes.

15. Becomes effective on the general effective date.

Amendments Adopted by Committee

- Limits the amount of interest on all loans, indebtedness, judgments or other obligations.
- Allows a different interest rate, if contracted in writing. Prohibits a contracted interest rate from being more than 5 percent than the rate that is allowed in statute.
- Prohibits the court from awarding any *prejudgment interest* and from awarding any *interest* on specific items that are found by the *trier of fact*.
- Removes an emergency clause.

Amendments Adopted by House of Representatives

- Restores language requiring interest rates on all loans, indebtedness or other obligations at the rate of ten percent per year.
- Removes language that limited the amount of a contracted interest rate.
- Requires interest on any judgment that is based on a written agreement evidencing a loan, indebtedness or obligation that is not in excess of the maximum interest rate to be at the rate of interest provided in the agreement.
- Specifies the collection of interest on enforcement of a juvenile or criminal restitution order accrues at a rate of ten percent per year.
- Lowers the medical malpractice interest rate from three to one percent point above the federal post-judgment interest rate.

Senate Action			House Action		
CE	2/2/11	DPA 5-2-0-0	JUD	3/3/11	DPA 8-0-0-1-0-0
3rd Read	2/17/11	22-7-1-0-0	3rd Read	4/3/11	42-17-1-0-0
Final Read	4/7/11	18-10-2-0-0			

Signed by the Governor 4/13/11
Chapter 99

Prepared by Senate Research
April 21, 2011
JT/tf

ARTICLE 1. MISCELLANEOUS PROVISIONS RELATING TO LOANS

44-1201. Rate of interest for loan or indebtedness; interest on judgments

A. Interest on any loan, indebtedness, judgment or other obligation shall be at the rate of ten per cent per annum, unless a different rate is contracted for in writing, in which event any rate of interest may be agreed to. Interest on a judgment on a condemnation proceeding instituted by the department of transportation, including interest which is payable pursuant to section 12-1123, subsection B, shall be payable at the rates prescribed by section 28-7101.

B. A judgment given on an agreement bearing a higher rate not in excess of the maximum permitted by law shall bear the rate of interest provided in the agreement, and it shall be specified in the judgment. 1997

(See Arizona Annotation Service)

44-1202. Forfeiture of all interest upon obligation involving interest exceeding the maximum amount set by contract

A person shall not directly or indirectly take or receive in money, goods or things in action, or in any other way, any greater sum or any greater value for the loan or forbearance of any money, goods or things in action, than the maximum permitted by law. Any person, contracting for, reserving or receiving, directly or indirectly, any greater sum of value shall, forfeit all interest. 1980

44-1203. Application to principal of payments made upon interest contracted in excess of the maximum permitted by law; judgment in action to recover obligation involving usurious interest limited to amount due on principal

Where a rate of interest greater than the maximum permitted by law is contracted for, reserved or received, directly or

Go to Table of Contents - Appendix

Electronic Index of Record
MAR Case # LC2012-000689-001

No.	Document Name	Filed Date
1.	COMPLAINT	Dec. 18, 2012
2.	CERTIFICATE ON COMPULSORY ARBITRATION	Dec. 18, 2012
3.	SUMMONS	Dec. 31, 2012
4.	ACCEPTANCE OF SERVICE	Dec. 31, 2012
5.	**ME: ORDER ENTERED BY COURT [01/02/2013]**	**Jan. 4, 2013**
6.	NOTICE OF ACTION	Jan. 8, 2013
7.	ARIZONA STATE RETIREMENT SYSTEM'S ANSWER TO COMPLAINT	Jan. 8, 2013
8.	ARIZONA STATE RETIREMENT SYSTEM'S CERTIFICATION OF RECORD ON REVIEW	Jan. 8, 2013
9.	**ME: ORDER ENTERED BY COURT [03/04/2013]**	**Mar. 5, 2013**
10.	(PART 1 OF 3) CERTIFICATION OF RECORD ON REVIEW RECORD OF ADMINISTRATIVE HEARING	Mar. 6, 2013
11.	(PART 2 OF 3) CERTIFICATION OF RECORD ON REVIEW RECORD OF ADMINISTRATIVE HEARING	Mar. 6, 2013
12.	(PART 3 OF 3) CERTIFICATION OF RECORD ON REVIEW RECORD OF ADMINISTRATIVE HEARING	Mar. 6, 2013
13.	MOTION TO EXTEND DEADLINE FOR OPENING BRIEF	Mar. 7, 2013
14.	PROPOSED ORDER RE MOTION TO EXTEND DEADLINE FOR OPENING BRIEF	Mar. 8, 2013
15.	**ME: EXT/TIME/FILING GRANTED [03/08/2013]**	**Mar. 11, 2013**
16.	NOTICE OF FILING ORIGINAL TRANSCRIPTS	Apr. 19, 2013
17.	PHOTOCOPY COVERSHEET OF REPORTERS TRANSCRIPT H.D. 06/19/2012	Apr. 19, 2013
18.	PHOTOCOPY COVERSHEET OF REPORTERS TRANSCRIPT H.D. 11/16/2012	Apr. 19, 2013
19.	APPENDIX TO OPENING BRIEF OF PLAINTIFF/APPELLANT ARIZONA BOARD OF REGENTS	Apr. 22, 2013
20.	OPENING BRIEF OF PLAINTIFF/APPELLANT ARIZONA BOARD OF REGENTS	Apr. 22, 2013
21.	RESPONSE BRIEF OF THE ARIZONA STATE RETIREMENT SYSTEM	Jun. 10, 2013

Electronic Index of Record
MAR Case # LC2012-000689-001

No.	Document Name	Filed Date
22.	STIPULATION TO EXTEND DEADLINE FOR REPLY BRIEF	Jun. 28, 2013
23.	**ME: ORDER SIGNED [07/02/2013]**	**Jul. 3, 2013**
24.	SUPERIOR COURT ORDER	Jul. 3, 2013
25.	REQUEST FOR ORAL ARGUMENT	Jul. 26, 2013
26.	REPLY BRIEF OF PLAINTIFF/APPELLANT ARIZONA BOARD OF REGENTS	Jul. 26, 2013
27.	SUPERIOR COURT ORDER	Jul. 26, 2013
28.	**ME: ORAL ARGUMENT SET [07/26/2013]**	**Jul. 29, 2013**
29.	**ME: MATTER UNDER ADVISEMENT [09/23/2013]**	**Sep. 24, 2013**
30.	**ME: RECORD APPEAL RULING/REMAND [11/22/2013]**	**Nov. 25, 2013**
31.	NOTICE OF APPEARANCE	Dec. 19, 2013
32.	NOTICE OF POSTING CASH BOND FOR COSTS ON APPEAL	Dec. 19, 2013
33.	NOTICE OF APPEAL	Dec. 19, 2013
34.	CIVIL APPEALS DOCKETING STATEMENT	Dec. 20, 2013
35.	NOTICE OF DEPOSIT WITH THE COURT	Dec. 20, 2013
36.	ORIGINAL TRANSCRIPT OF PROCEEDING H.D. JUNE 19, 2012	Apr. 19, 2013
37.	COURT OF APPEALS RECEIPT	Feb. 14, 2014
38.	ELECTRONIC INDEX OF RECORD	Feb. 14, 2014
39.	COURT OF APPEALS MEMORANDUM	Oct. 2, 2014
40.	ORIGINAL TRANSCRIPT OF REQUESTED PORTION OF RECORDED BOARD MEETING HD NOVEMBER 16, 2012	Apr. 19, 2013
41.	COURT OF APPEALS RECEIPT	Oct. 16, 2014
42.	AMENDED ELECTRONIC INDEX OF RECORD	Oct. 16, 2014
43.	COURT OF APPEALS RECEIPT	Oct. 21, 2014
44.	AMENDED ELECTRONIC INDEX OF RECORD	Mar. 23, 2015
45.	COURT OF APPEALS RECEIPT	Mar. 23, 2015
46.	COURT OF APPEALS LETTER DATED NOVEMBER 18, 2015	Nov. 20, 2015

Electronic Index of Record
MAR Case # LC2012-000689-001

No.	Document Name	Filed Date
47.	COURT OF APPEALS MANDATE	Nov. 20, 2015
48.	MOTION TO RELEASE BOND	Nov. 24, 2015
49.	ORDER RELEASING BOND	Nov. 24, 2015
50.	**ME: ORDER EXONERATING BOND [11/24/2015]**	**Nov. 25, 2015**
51.	PLAINTIFF'S MOTION FOR ENTRY OF JUDGMENT WITH PREJUDGMENT INTEREST	Dec. 7, 2015
52.	ARIZONA STATE RETIREMENT SYSTEM'S RESPONSE TO PLAINTIFF'S MOTION FOR ENTRY OF JUDGMENT	Dec. 23, 2015
53.	STIPULATION FOR EXTENSION OF TIME	Dec. 28, 2015
54.	SUPERIOR COURT ORDER	Jan. 4, 2016
55.	**ME: EXT/TIME/FILING GRANTED [01/04/2016]**	**Jan. 5, 2016**
56.	PLAINTIFF'S REPLY IN SUPPORT OF JUDGMENT WITH PREJUDGMENT INTEREST	Jan. 19, 2016
57.	NOTICE OF RELEASE OF DEPOSIT WITH THE COURT	Jan. 19, 2016
58.	**ME: HIGHER COURT RULING/REMAND [03/11/2016]**	**Mar. 14, 2016**
59.	NOTICE OF APPEAL	Apr. 1, 2016

APPEAL COUNT: 2

RE: CASE: 1 CA-CV 16-0239

DUE DATE: 04/29/2016

CAPTION: AZ STATE UNIVERSITY, ET AL VS AZ STATE RETIREMENT

EXHIBIT(S): NONE

LOCATION ONLY: NONE

SEALED DOCUMENT: NONE

Electronic Index of Record
MAR Case # LC2012-000689-001

DEPOSITION(S): NONE

TRANSCRIPT(S): ORIGINAL TRANSCRIPTS INCLUDED IN INDEX

COMPILED BY: slabaughk on May 3, 2016; [2.4-12334.47]
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CERTIFICATION: I, MICHAEL K. JEANES, Clerk of the Superior Court of Maricopa County, State of Arizona, do hereby certify that the above listed Index of Record, corresponding electronic documents, and items denoted to be transmitted manually constitute the record on appeal in the above-entitled action.

The bracketed [date] following the minute entry title is the date of the minute entry.

CONTACT INFO: Clerk of the Superior Court, Maricopa County, Appeals Unit, 601 W Jackson St, Phoenix, AZ 85003; 602-506-7775

RUTH WILLINGHAM
CLERK OF THE COURT

Court of Appeals
STATE OF ARIZONA
DIVISION ONE
STATE COURTS BUILDING
1501 WEST WASHINGTON STREET
PHOENIX ARIZONA 85007

Phone (602) 542-4821
Fax (602) 542-4833

November 18, 2015

Michael K Jeanes, Clerk
Maricopa County Superior Court
201 West Jefferson Street
Phoenix, Arizona 85003

Dear Mr. Jeanes:

RE: 1 CA-CV 14-0083

ASU v. AZ RETIREMENT
Maricopa County Superior Court
LC2012-000689-001

The following are enclosed in the above entitled and numbered cause:

Original MANDATE
Copy of OPINION

There are no physical record items to be returned to your Court.

RUTH WILLINGHAM, CLERK

By _____
Deputy Clerk

Enclosures (as noted)
cc (letter only):
Thomas L Hudson
Eric M Fraser
Lisa K Hudson
Jothi Beljan
Hon Crane McClennen, Judge

IN THE

Court of Appeals

STATE OF ARIZONA

DIVISION ONE

ARIZONA STATE UNIVERSITY ex rel. ARIZONA BOARD OF REGENTS, a body corporate,	Court of Appeals Division One No. 1 CA-CV 14-0083
Plaintiff/Appellant,	Maricopa County Superior Court
v.	No. LC2012-000689-001
ARIZONA STATE RETIREMENT SYSTEM, a body corporate,	
Defendant/Appellee.	

MANDATE

TO: The Maricopa County Superior Court and the Honorable Crane McClennen, Judge, in relation to Cause No. LC2012-000689-001.

This cause was brought before Division One of the Arizona Court of Appeals in the manner prescribed by law. This Court rendered its OPINION and it was filed on May 5, 2015.

The motion for reconsideration was denied and notice thereof was given on May 21, 2015. A petition for review was filed. The record was forwarded to the Arizona Supreme Court. By order, dated October 27, 2015, the Arizona Supreme Court denied the petition for review. Arizona Supreme Court No. CV-15-0153-PR.

NOW, THEREFORE, YOU ARE COMMANDED to conduct such proceedings as required to comply with the OPINION of this court; a copy of which is attached hereto.

COSTS $1517 (Appellant)

I, Ruth A. Willingham, Clerk of the Court of Appeals, Division One, hereby certify the attachment to be a full and accurate copy of the OPINION filed in this cause on May 5, 2015.

IN WITNESS WHEREOF, I hereunto set my hand and affix the official seal of the Arizona Court of Appeals, Division One, on November 18, 2015.

(SEAL)

RUTH WILLINGHAM, CLERK

By _____
Deputy Clerk

Michael K. Jeanes, Clerk of Court
*** Filed ***
03/14/2016 8:00 AM

Go to Table of Contents - Appendix

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2012-000689-001 DT 03/11/2016

THE HON. CRANE MCCLENNEN

CLERK OF THE COURT
J. Eaton
Deputy

ARIZONA STATE UNIVERSITY
ARIZONA BOARD OF REGENTS

LISA K HUDSON

v.

ARIZONA STATE RETIREMENT SYSTEM (001)

JOTHI BELJAN

OFFICE OF ADMINISTRATIVE HEARINGS
REMAND DESK-LCA-CCC

HIGHER COURT RULING / REMAND

On May 5, 2015, the Arizona Court of Appeals issued its opinion in this matter which contained the following language:

> For the foregoing reasons, we reverse the superior court's decision affirming the ruling of the System's board and remand to the superior court to enter an order directing the System to refund $1,149,103 to the University, with interest thereon if and as authorized by law–an issue the superior court should address on remand.

On November 6, 2015, the Arizona State Retirement System (ASRS) made payment to Arizona State University (ASU) in the amount of $1,327,190.35, which included a payment of $1,149,103.00 plus interest at 4.25 percent from March 15, 2012, (the date of ASU's payment to ASRS) to November 6, 2015, (the date of payment by ASRS to ASU). On November 18, 2015, the Arizona Court of Appeals issued its mandate.

IT IS THEREFORE ORDERED that ASRS shall refund $1,149,103.00 to ASU (which apparently was already done on November 6, 2015).

IT IS FURTHER ORDERED that ASRS shall pay interest at a rate of 4.25 percent from March 15, 2012, until November 6, 2015, (which apparently was already done on November 6, 2015).

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2012-000689-001 DT 03/11/2016

IT IS FURTHER ORDERED, to the extent any party considers this order to be a judgment, it is entered pursuant to Rule 54(c).

/s/ Crane McClennen
THE HON. CRANE MCCLENNEN
JUDGE OF THE SUPERIOR COURT

NOTICE: LC cases are not under the e-file system. As a result, when a party files a document, the system does not generate a courtesy copy for the Judge. Therefore, you will have to deliver to the Judge a conformed courtesy copy of any filings.

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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

Arizona State University, ex rel. Arizona Board of Regents, a body corporate,

Plaintiff,

vs.

Arizona State Retirement System, a body corporate,

Defendant.

No. LC2012-000689-001 DT

PLAINTIFF'S MOTION FOR ENTRY OF JUDGMENT WITH PREJUDGMENT INTEREST

(Assigned to the Hon. Crane McClennen)

For the reasons set forth below, Plaintiff Arizona State University requests the Court to enter judgment in favor of the University and against Defendant Arizona State Retirement System with prejudgment interest as set forth in the proposed form of judgment accompanying this Motion.

On March 15, 2012, the System collected, under protest, $1,149,103.00 from the University in connection with a charge the System purportedly assessed against the University

under A.R.S. § 38-749. When the System assessed this charge, it told the University that it would charge the University interest if the University failed to pay the charge within ninety days. The Court of Appeals has now held that the System had no authority to assess this charge. *See Ariz. State Univ. v. Ariz. State Ret. Sys.*, 237 Ariz. 246 (App. 2015) (attached hereto as Exhibit 1). The Court of Appeals has accordingly remanded this case to this Court to enter an order directing the System to refund the unlawful charge to the University, with the legally required interest:

> For the foregoing reasons, we reverse the superior court's decision affirming the ruling of the System's board and remand to the superior court to enter an order directing the System to refund $1,149,103 to the University, with interest thereon if and as authorized by law—an issue the superior court should address on remand.

[Ex. 1 ¶ 33.]

Although the Parties agree that the System owes the University prejudgment interest on the overcharge, they disagree about the applicable interest rate. The System contends that it need only pay 4.25% interest under A.R.S. § 44-1201(B)—a provision that applies to liquidated amounts that do not qualify as a loan, indebtedness, or other obligation. The refund amount, however, qualifies as an "indebtedness" under A.R.S. § 44-1201(A) because the overcharge "is 'something (as an amount of money) that is owed'" to the University, and the amount was liquidated before the litigation. *See Metzler v. BCI Coca–Cola Bottling Co. of L.A.*, 235 Ariz. 141, 146 ¶ 19 (2014) (citation omitted). Accordingly, and for the reasons set forth below, the University asks the Court to enter an order directing the System to pay the 10% interest owed.

MEMORANDUM OF POINTS AND AUTHORITIES

I. Pertinent Background.

A. The Parties' dispute over a $1,149.103.00 charge by the System.

"In 2011, the University offered one year's salary as an incentive payment to eligible employees if they agreed to retire that year." [Ex. 1 ¶ 9.] After seventeen members accepted the offer, the System sent the University a bill for $1,149,103, (*id.*), and threatened that if the

University failed to pay the charge within 90 days, the System "will assess interest on the balance at a rate of eight percent (8%) until the amount is paid in full." [Ex. 2.] Believing the System lacked the authority to assess this charge, the University paid it under protest on March 15, 2012, and proceeded to challenge the charge. [*See* Ex. 1.] Because the System in fact had no legal authority to assess the charge, the System owed the University the full amount the University paid under protest.

In May 2015, the Court of Appeals held that the System failed "to follow the rulemaking procedure set forth in Arizona's Administrative Procedure Act before" assessing the charge. [Ex. 1 ¶ 1.] Accordingly, the Court of Appeals held that the System must "refund the improper charge, with interest thereon if and as authorized by law." [Ex. 1 ¶ 1.] The System then filed a petition for review, which the Supreme Court denied on October 27, 2015. [*See* Ex. 3.]

After the Supreme Court denied review, the University asked the System to pay the overcharge with 10% prejudgment interest as set forth in A.R.S. § 44-1201(A). That statute, a copy of which is attached as Exhibit 4, provides that "***[i]nterest on any loan, indebtedness or other obligation shall be at the rate of ten per cent per annum***, unless a different rate is contracted for in writing . . . ." A.R.S. § 44-1201(A) (emphasis added). The System acknowledged that it owed prejudgment interest, but maintained that it need only pay 4.25% interest under A.R.S. § 44-1201(B). That provision applies if and only if the liquidated sum in dispute does not qualify as a loan, indebtedness, or other obligation. *See Metzler*, 235 Ariz. at 145, ¶ 15 (noting the change in 2011 that led to this result); *see also Design Trend Int'l Interiors, Ltd. v. Cathay Enters., Inc.*, ___ F. Supp. 3d ___, 2015 WL 1186209, at *4 (D. Ariz. 2015) (opinion by Judge Wake setting forth a thorough analysis of how the post-2011 version of A.R.S. § 44-1201 works, a copy of which is attached as Exhibit 5).

B. The System's November 6, 2015 payment to the University.

On November 6, 2015 the System paid the University $1,327,190.35 (the amount it calculated it owed the University with 4.25% prejudgment interest). But under A.R.S. § 44-1201(A), the System owed the University $1,568,446.89 as of that date, thereby leaving a balance of $241,256.54 due to the University. *See Flood Control Dist. v. Paloma Inv. Ltd. P'ship*, 237 Ariz. 322, ¶ 25 (App. 2015) ("Under the 'United States Rule,' absent an agreement or statute to the contrary, partial payments of a debt are to be applied 'first to unpaid interest due and thereafter to the principal debt.'") (citation omitted).

II. The University is entitled to prejudgment interest at the rate of ten percent.

A. The System owed the University a liquidated amount—$1,149,103.00.

"Under Arizona law, prejudgment interest on a liquidated claim is a matter of right and not a matter of discretion." *Employer's Mut. Cas. Co. v. McKeon*, 170 Ariz. 75, 78 (App. 1991). A prevailing party is entitled to such interest "even if interest is not specifically requested in the complaint." *Id.* (citations omitted). Absent some more specific statute governing the interest rate, the rate is determined under A.R.S. § 44-1201. In this case, it is undisputed that the University's claim was liquidated, that no more specific statute governs the interest rate, and that the University is entitled to interest under A.R.S. § 44-1201.

B. The overcharge is an "indebtedness" because it is a liquidated amount of money the system owed the University.

As for the rate, the University is entitled to 10% prejudgment interest if the system is "indebted" to the University. A.R.S. § 44-1201(A) ("Interest on any loan, indebtedness or other obligation shall be at the rate of ten per cent per annum, unless a different rate is contracted for in writing . . . ."). Contrary to the System's contention, it is indebted to the University.

In *Metzler*, looking to *Webster's* dictionary, the Supreme Court explained that "an indebtedness" under § 44-1201(A) "is 'something (as an amount of money) that is owed.'" 235

Ariz. at 146 ¶ 19 (quoting *Webster's Ninth New Collegiate Dictionary* 612, 700 (1983)). *Black's Law Dictionary* similarly defines "indebtedness" first as "[t]he condition or state of owing money." *See Black's Law Dictionary* 836 (9th ed. 2009). Although the System disputed that it owed the University this money, the fact is that once it collected the unlawful charge it was in "[t]he condition or state of owing money" to the University, i.e., it was indebted to the University. *Id.* Indeed, this case is no different from one involving an improper charge from a merchant. Such an improper charge would be liquidated (as in this case), and subject to the 10% prejudgment interest rate even if the merchant (incorrectly) believed it could overcharge.

III. Conclusion.

Because the System made a payment to the University on November 6, 2015, the Court should, for the above reasons, enter judgment in favor of the University and against the System for the $241,256.54 remaining indebtedness, with prejudgment interest at 10% running on the $1,149,103.00 indebtedness from March 15, 2012 through November 6, 2015, and prejudgment interest at 10% running on the $241,256.54 indebtedness from November 6, 2015 through the date of judgment, as set forth in the proposed form of judgment that accompanies this Motion. The judgment should also accrue 4.25% post-judgment interested until paid.

DATED this 7th day of December, 2015.

OSBORN MALEDON, P.A.

By _____

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Original filed this 7th day of December, 2015, with Clerk, Maricopa County Superior Court and copy sent via hand delivery to:

Hon. Crane McClennen
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COPY of the foregoing mailed this 7th day of December, 2015, to:

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EXHIBIT 1

237 Ariz. 246
Court of Appeals of Arizona,
Division 1.

ARIZONA STATE UNIVERSITY ex rel. ARIZONA BOARD OF REGENTS, a body corporate, Plaintiff/Appellant,
v.
ARIZONA STATE RETIREMENT SYSTEM, a body corporate, Defendant/Appellee.

No. 1 CA–CV 14–0083. | May 5, 2015.

Synopsis

Background: State university sought judicial review of ALJ's and board of state retirement system's determination that system was not required to follow rulemaking procedure before enforcing a policy under which it charged university for an actuarial unfunded retirement liability. The Superior Court, Maricopa County, Crane McClennen, J., upheld the board's determination. University appealed.

Holdings: The Court of Appeals, Norris, J., held that:

[1] policy was a rule within the Administrative Procedure Act (APA);

[2] system was required to engage in APA's rulemaking procedure;

[3] requiring system to engage in APA rulemaking procedure would not cause system to breach its fiduciary duties;

[4] system was subject to APA; and

[5] policy was invalid.

Reversed and remanded.

West Headnotes (7)

[1] **Administrative Law and Procedure**
Administrative construction
Administrative Law and Procedure
Deference to agency in general
Administrative Law and Procedure
Legislative questions; rule-making

Whether agency was required to follow rulemaking procedures is reviewed de novo, but the reviewing court grants deference to the agency's interpretation of statutes and its own regulations.

Cases that cite this headnote

[2] **Administrative Law and Procedure**
Nature and Scope
Administrative Law and Procedure
Proceedings for Adoption

Barring any exemptions, an agency statement is a rule, subject to the Administrative Procedure Act's (APA) rulemaking procedure, if it, first, is generally applicable, and, second, implements, interprets, or prescribes law or policy, or describes the procedure or practice requirements of an agency. A.R.S. § 41–1001(19).

Cases that cite this headnote

[3] **States**
Funds and contributions

State retirement system's policy on employer early termination incentive programs, designed to determine when an incentive program resulted in an actuarial unfunded liability and how to calculate the amount of the liability within meaning of statute, was a "rule" within the Administrative Procedure Act (APA); system applied policy to all applicable employers after it was adopted, system adopted the policy to implement the statute, and policy interpreted the statute that did not set forth the complex calculations to be made or how the reimbursement requirement was to be determined, which required system discretion to

answer. A.R.S. §§ 38–749(A), 41–1001(19).

Cases that cite this headnote

[4] **States**
Funds and contributions

State retirement system was required to engage in Administrative Procedure Act's (APA) rulemaking procedures before enforcing policy on employer early termination incentive programs, resulting in charging state university for actuarial unfunded liability; APA unambiguously stated that rulemaking procedures applied to all agencies unless expressly exempted, and system was not exempted in the APA or in the early termination incentive program statute. A.R.S. §§ 38–749, 41–1002(A), 41–1005, 41–1030(A).

Cases that cite this headnote

[5] **States**
Funds and contributions

State retirement system would not breach its fiduciary duty to the retirement trust and its beneficiaries under the state constitution if required to comply with Administrative Procedure Act's (APA) rulemaking procedures, including public comment period, to adopt policy on employer early termination incentive programs, which resulted in charging state university for actuarial unfunded liability; rulemaking procedures were neutral to the interests of the trust and its beneficiaries, and rulemaking procedures did not require system to blindly heed any and every suggestion it received from public comments. A.R.S. Const. Art. 29, § 1(A); A.R.S. §§ 41–1023, 41–1024.

Cases that cite this headnote

[6] **States**
Funds and contributions

State retirement system, which implemented policy on employer early termination incentive programs requiring state university to reimburse system for actuarial unfunded liability, was an agency subject to the Administrative Procedure Act (APA), even though system served a fiduciary and not a regulatory function, where APA's definition of "agency" made no exception for agency's performing fiduciary function, legislature granted system authority to adopt, amend, or repeal rules like an agency, and system's decision affected all of its members whether state political subdivisions or not. A.R.S. § 38–714(E)(4).

Cases that cite this headnote

[7] **States**
Funds and contributions

State retirement system's policy on employer early termination incentive programs, which was adopted without regard to Administrative Procedure Act's (APA) rulemaking procedures and was designed to determine when an incentive program resulted in an actuarial unfunded liability and how to calculate the amount of the liability within meaning of statute, was invalid, and therefore system was not entitled to charge state university for reimbursement under the policy; system's policy was a rule under the APA, and rules made and approved without substantial compliance with the APA were invalid. A.R.S. §§ 38–749(A), 41–1030(A).

Cases that cite this headnote

Attorneys and Law Firms

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Office of General Counsel, Arizona State University By Lisa K. Hudson, Tempe, Co–Counsel for

Plaintiff/Appellant.

Arizona Attorney General's Office By Jothi Beljan, Phoenix, Counsel for Defendant/Appellee.

Judge PATRICIA K. NORRIS delivered the opinion of the Court, in which Presiding Judge MARGARET H. DOWNIE and Judge RANDALL M. HOWE joined.

OPINION

NORRIS, Judge:

¶ 1 The dispositive question in this appeal is whether Defendant/Appellee, the Arizona State Retirement System, was required to follow the rulemaking procedure set forth in Arizona's Administrative Procedure Act before enforcing a policy under which it charged Plaintiff/Appellant, Arizona State University, for an actuarial unfunded liability reportedly arising when 17 University employees retired. We hold that it was, and because the System failed to follow the rulemaking *222 procedure, the policy is invalid. Accordingly, we reverse and remand to the superior court for entry of an order directing the System to refund the improper charge, with interest thereon if and as authorized by law.

FACTS AND PROCEDURAL BACKGROUND

¶ 2 The System administers a trust fund which provides retirement and disability benefits in the form of periodic, or lump sum, pension payments to eligible employees of the state and participating political subdivision employers. Ariz.Rev.Stat. ("A.R.S.") §§ 38–711(13), –712, –727, –729, –757, –758, –760, –762 to –764 (2015).[1] The employees, known as "members," may also elect to receive one of several health insurance supplemental benefits. A.R.S. §§ 38–711(23), –783 (2015). Member and employer contributions fund the trust, along with interest on fund assets and investment returns. A.R.S. §§ 38–718, –735 to –737 (2015). To monitor the trust's financial health, the System compares the assets it has accumulated to pay for members' earned benefits with the liabilities it owes for those benefits. *See* A.R.S. § 38–737(A). When liabilities owed for past service exceed assets accumulated to pay those liabilities, an unfunded actuarial accrued liability exists.

¶ 3 Each year, the System's actuary determines the contribution rates necessary to fund the System's present and future obligations to its members plus payments on any amortized unfunded actuarial accrued liability. A.R.S. §§ 38–736, –737. In determining the contribution rates, the actuary relies on assumptions about members' expected benefit elections, payroll growth, retirement rates, mortality rates, interest rates, and investment returns. The System conducts empirical studies every five years to improve its assumptions. *See* A.R.S. § 38–714(G) (2015).

¶ 4 The System may incur an actuarial unfunded liability when an employer offers incentives to encourage its employee-members to retire. For example, when an employer increases a member's salary beyond System expectations in exchange for a promise to retire, that member's monthly pension, calculated using the increased salary, *see* A.R.S. § 38–711(5)(ii)(b), –757 to –759 (2015), may likely exceed the amount the System expected to pay out to that member, thus resulting in an unfunded liability.[2] A termination incentive program may also result in an unfunded liability by causing members to retire and collect benefits sooner and for longer than the System expected.

¶ 5 To address the financial impact of termination incentive programs, *see* Amended Senate Fact Sheet, H.B.2052, 46 Leg., 2d Reg. Sess. (March 11, 2004), in 2004 the Legislature enacted A.R.S. § 38–749 (2015). 2004 Ariz. Sess. Laws, ch. 106, § 1 (2d Reg.Sess.). Under this statute, "[i]f a termination incentive program that is offered by an employer results in an actuarial unfunded liability" to the System, the employer must pay the System "the amount of the unfunded liability." A.R.S. § 38–749(A). The statute directs the System to "determine the amount of the unfunded liability in consultation with its actuary." *Id.*[3]

*223 ¶ 6 Although A.R.S. § 38–749 refers to an "actuarial unfunded liability," the statute does not explain how to determine when a termination incentive program results in an actuarial unfunded liability or how to calculate "the amount of the unfunded liability." To answer these questions, the System's executive staff discussed the statute with the System's actuary. They considered two methods of calculating the unfunded liability, one which would discount the charge to employers by the amount of additional benefits a member would have received if he or she had continued working instead of retiring and one which would not provide employers with this discount. As a result of these discussions, the System's executive staff adopted the first method and directed the System's actuary to draft the System's "Policy on Employer Early

Termination Incentive Programs" to memorialize how the System would implement A.R.S. § 38–749.

¶ 7 The Policy requires employers to notify the System of all members who participate in a termination incentive program and to disclose their demographic and salary information, as well as their benefits elections. Using this information, the System's actuary calculates the present value, under System actuarial assumptions, of the member's future benefits as if he or she had not retired ("active liability") and the present value, under System actuarial assumptions, of the member's future benefits taking into account his or her actual retirement date and actual benefit elections ("retired liability").

¶ 8 Under the Policy, when retired liability exceeds active liability, an unfunded liability results from the member's participation in the termination incentive program, and the employer is liable for the difference. When, however, a member's active liability exceeds his or her retired liability, the employer will receive credit. If credits exceed liabilities, the employer does not receive reimbursement; there is merely no charge. The System has applied the Policy consistently to all System employers.

¶ 9 In 2011, the University offered one year's salary as an incentive payment to eligible employees if they agreed to retire that year. Seventeen System members accepted the University's offer.[4] Applying the Policy, the System determined the University's termination incentive program resulted in an unfunded liability of $1,149,103, which it then charged to the University. The University paid the charge, but appealed it, arguing the System had, first, adopted a rule without following the rulemaking procedure provided by Arizona's Administrative Procedure Act ("APA"), codified at A.R.S. §§ 41–1001 to –1092 (2013 & Supp.2014); and, second, charged the University for retirements that did not result in an actuarial unfunded liability.

¶ 10 At a hearing before the Office of Administrative Hearings, the University's actuarial expert and the System's actuary agreed that "actuarial standards of practice are not detailed enough to give us specific direction about how to interpret a term like unfunded liability." The University's expert offered an alternative method of calculating actuarial unfunded liability, consistent, in her opinion, with generally accepted actuarial standards, the System's actuarial assumptions, and A.R.S. § 38–749. Based on that method, she testified the University's termination *224 incentive program did not result in any unfunded liability because it did not cause more members to retire than the System had projected based on its assumptions.

¶ 11 The University's expert also testified the System should not charge employers for unfunded liability resulting from members' benefits elections because whether a member elects the benefit option predicted by the System's assumptions or a more expensive option has nothing to do with that member's participation in a termination incentive program. She pointed out the System charged the University for one member's health benefit election, even though, under System assumptions, the member had a 100% chance of retiring that year; and, thus, his retirement was not the result of a termination incentive program.

¶ 12 The System's actuary and the System's Assistant Director of External Affairs also acknowledged that A.R.S. § 38–749 does not explain how to determine whether a termination incentive program results in an actuarial unfunded liability or how to calculate that unfunded liability. The System's actuary testified that the other method of calculating unfunded liability he had discussed with executive staff before they adopted the Policy, see *supra* ¶ 6, is consistent with A.R.S. § 38–749, the System's actuarial assumptions, and generally accepted actuarial standards. He explained the System had, however, "interpreted" the term "unfunded liability" in the manner reflected in the Policy because it was "less onerous for employers."

¶ 13 The administrative law judge ruled in favor of the System, finding the University had failed to show the System's "methodology for calculating unfunded liability resulting from a[ ] ... termination incentive program ... [was] unreasonable, or an abuse of discretion, or contrary to law." The administrative law judge also found that because A.R.S. § 38–749 did not require the System to adopt a rule before implementing the Policy, it was not required to do so. The System's board accepted the administrative law judge's findings of fact and conclusions of law with immaterial alterations, and the University filed an action for judicial review in the superior court. *See* A.R.S. § 12–905 (2003). The superior court upheld the board's determination, and this appeal followed.

DISCUSSION

I. The Policy is a Rule

[1] ¶ 14 On appeal, the University argues the Policy is a rule within the meaning of the APA and, therefore,

because the System adopted it without following the rulemaking procedure provided in the APA, it is void. Reviewing this issue de novo, but granting deference to the System's interpretation of statutes and its own regulations, *see Carondelet Health Servs., Inc. v. Ariz. Health Care Cost Containment Sys. Admin.*, 182 Ariz. 221, 226, 895 P.2d 133, 138 (App.1994), we agree with the University.[5]

¶ 15 The APA defines "rule" as:

> an agency statement of general applicability that implements, interprets or prescribes law or policy, or describes the procedure or practice requirements of an agency. Rule includes prescribing fees or the amendment or repeal of a prior rule but does not include intraagency memoranda that are not delegation agreements.

A.R.S. § 41–1001(19) (Supp.2014).

[2] [3] ¶ 16 Thus, barring any exemptions, an agency statement is a rule, subject to the APA's rulemaking procedure, if it, first, is generally applicable, and, second, implements, interprets or prescribes law or policy, or describes the procedure or practice requirements of an agency. At the administrative hearing, the System acknowledged it had applied the Policy consistently to all System employers since its adoption, and, thus, the Policy satisfies the general applicability requirement. *See Carondelet*, 182 Ariz. at 227, 895 P.2d at 139 (agency admission that "its methodology is generally applied to all hospitals" satisfies general applicability element).

*225 ¶ 17 The Policy also satisfies the second requirement. As discussed, the System adopted the Policy to implement A.R.S. § 38–749. The ordinary meaning of the word "implement" is "[t]o put into practical effect; carry out." American Heritage Dictionary 880 (4th ed.2006); *see Stout v. Taylor*, 233 Ariz. 275, 278, ¶ 12, 311 P.3d 1088, 1091 (App.2013) (court may refer to established and widely used dictionaries to determine ordinary meaning of word). By charging employers under the Policy for an unfunded liability which results from termination incentive programs, the System has put A.R.S. § 38–749 into practical effect. *See* A.R.S. § 41–1001(19); *Carondelet*, 182 Ariz. at 227, 895 P.2d at 139 (agency methodology was a rule because, among other reasons, it implemented a session law).

¶ 18 Further, the Policy interprets A.R.S. § 38–749. The plain language of the statute leaves open questions such as: how to determine if a termination incentive program "results in an actuarial unfunded liability"; how to calculate the amount of an unfunded liability; and whether to charge employers if members elect more expensive benefit options than the System assumed, even though these elections may not, strictly speaking, be the result of a termination incentive program. *Cf. Sw. Ambulance, Inc. v. Ariz. Dep't of Health Servs.*, 183 Ariz. 258, 261, 902 P.2d 1362, 1365 (App.1995), *superseded by statute*, 1998 Ariz. Sess. Laws, ch. 57, § 39 (2d Reg.Sess.) (ambulance services rate schedules were rules because they specified "how a fraction of an hour is to be charged, how mileage is to be charged, the assessment of charges for the transport of multiple patients, what constitutes a minimum charge, [and] when the rate for advanced life support may be charged").

¶ 19 Like the hospital reimbursement methodology at issue in *Carondelet*, the Policy involves a "complex calculation with subjective components whose inclusion, or even definition, have a significant effect" on the amount the System charges employers. *See* 182 Ariz. at 227, 895 P.2d at 139. And, like the session law at issue in *Carondelet*, the governing statute here, A.R.S. § 38–749, "does not set forth the calculations to be made and leaves much" to the System's discretion. *See id.* at 227–28, 895 P.2d at 139–40. *Carondelet* involved a session law which directed the Arizona Health Care Cost Containment System ("AHCCCS") to adjust its hospital reimbursement multipliers based on new six-month charges and volume reports. *Id.* at 224, 895 P.2d at 136. We held the methodology AHCCCS adopted to implement the session law was a rule because, among other reasons, the session law did "not set forth the calculations to be made" and did not direct "how the amount of reimbursement [was to] be determined." *Id.* at 228, 895 P.2d at 140. Similarly, A.R.S. § 38–749 directs the System to make a calculation, but it does not specify how the calculation is to be made. In other words, to implement A.R.S. § 38–749, one must first interpret it.

¶ 20 Despite the foregoing, the System contends the Policy does not implement or interpret A.R.S. § 38–749, arguing the statute is self-executing and leaves no room for agency discretion. According to the System, unlike the challenged policies in *Carondelet* and *Southwest Ambulance*, the Policy here does not involve "subjective" judgments and merely applies "the same actuarial assumptions used to operate the entire defined-benefit plan and the same calculation used to calculate the plan's liability."

¶ 21 The evidence presented at the administrative hearing

squarely contradicts this position. As discussed, the System's actuary and Assistant Director of External Affairs both conceded A.R.S. § 38–749 does not explain how the amount of an unfunded liability should be calculated. Both the University's actuarial expert and the System's actuary offered alternative methods of calculating the amount of an unfunded liability that they testified were consistent with A.R.S. § 38–749, the System's actuarial assumptions, and generally applicable actuarial standards of practice. In fact, the System's actuary testified the System considered two methods of making the calculation, and it selected the calculation that appears in the Policy not because it was more consistent with A.R.S. § 38–749 or the System's actuarial assumptions, but because it was "less onerous for employers." Thus, to carry out its mandate ***226** under A.R.S. § 38–749, the System was required to exercise judgment and discretion in crafting the Policy, and it, in fact, did so. *See Carondelet,* 182 Ariz. at 228–29, 895 P.2d at 140–41 (session law not self-executing because it left matters to agency's discretion and did not direct any one particular course of action).

¶ 22 Accordingly, the Policy was a rule within the meaning of the APA.

II. In the Absence of an Exemption, an Agency Must Comply with the APA

¶ 23 The System argues that even if the Policy is a rule, it was not required to comply with the APA because the Legislature did not expressly require rulemaking in A.R.S. § 38–749. Although we agree A.R.S. § 38–749 says nothing about rulemaking, the statute's silence does not exempt the System from the APA's rulemaking procedure.

[4] ¶ 24 The rulemaking procedure of the APA "appl[ies] to all agencies and all proceedings not expressly exempted." A.R.S. § 41–1002(A) (2013); *see Carondelet,* 182 Ariz. at 228, 895 P.2d at 140 (rejecting argument that from legislative silence one can infer "the legislature never envisioned the need for an explanatory rule"). Neither A.R.S. § 38–749 nor the APA, *see* A.R.S. § 41–1005 (Supp.2014), exempt the System from rulemaking; therefore, rulemaking is required before the Policy can be given effect. *See* A.R.S. § 41–1030(A) (2013).

¶ 25 The System contends *Carondelet* does not support the proposition that rulemaking is required when the Legislature is silent on the question. The System attempts to distinguish *Carondelet* by arguing that the policy at issue in that case implemented a session law which incorporated by reference a prior statute which expressly called for rulemaking. 182 Ariz. at 228, 895 P.2d at 140. The *Carondelet* court, however, merely used this fact to "bolster[ ]" its conclusion after it had resolved the issue under A.R.S. § 41–1002(A). *Id.*

¶ 26 Invoking the principle of *expressio unius est exclusio alterius*—a canon of statutory construction that when statutes set forth a requirement in one provision but not in another, a court should assume the absence of the provision was intentional—the System further argues the Legislature intended to exempt it from rulemaking because it expressly required the System to engage in rulemaking in other statutes, A.R.S. §§ 38–735, 755, 764 (2015). *See generally Ezell v. Quon,* 224 Ariz. 532, 541, ¶ 41, 233 P.3d 645, 654 (App.2010) (discussing this canon of construction).

¶ 27 When the Legislature's intent is clear, however, interpretative canons of construction are inapplicable. Section 41–1002 provides that in the absence of an express exemption, agencies must comply with the APA, and we cannot ignore this unambiguous language in favor of a secondary principle of statutory interpretation. *See Forsythe v. Paschal,* 34 Ariz. 380, 383, 271 P. 865, 866 (1928) (*expressio unius* should not be applied to contradict "general context" of statute and "public policy of the state"); *Microchip Tech. Inc. v. State,* 230 Ariz. 303, 306–07, ¶ 12, 283 P.3d 34, 37–38 (App.2012) (because text of statute was clear, resort to principle of *expressio unius* was unnecessary (citing *Sw. Iron & Steel Indus., Inc. v. State,* 123 Ariz. 78, 79–80, 597 P.2d 981, 982–83 (1979) ("The doctrine of 'expressio unius' is not to be applied where its application contradicts the general meaning of the statute or state public policy."))).

III. Compliance with the APA Would Not Require the System to Breach its Fiduciary Duties

[5] ¶ 28 The System also argues that allowing "employer input on unfunded liability calculations" through rulemaking procedure, *see* A.R.S. § 41–1023 (2013), would require it to breach its fiduciary duty to the trust and its beneficiaries under the Arizona Constitution. *See* Ariz. Const. art. XXIX, § 1(A) ("Public retirement systems shall be funded with contributions and investment earnings using actuarial methods and assumptions that are consistent with generally accepted actuarial standards."). In support of this argument, the System cites two California cases, which, for purposes of this appeal, do little more than establish that a state retirement system's fiduciary and contractual duties to its beneficiaries sometimes trump legislative and municipal priorities. ***227** *City of Sacramento v. Pub. Emps. Ret.*

Sys., 229 Cal.App.3d 1470, 280 Cal.Rptr. 847, 860–61 (1991) (retirement system's interpretation of federal labor statutes which tended to increase city's contributions to system did not violate California constitutional provision that system minimize employer contributions because, in part, to do so would require system to favor employers over beneficiaries to whom it owes a fiduciary duty); *Valdes v. Cory*, 139 Cal.App.3d 773, 189 Cal.Rptr. 212, 221–24 (1983) (legislation suspending employer contributions to state retirement system violated beneficiaries' vested contractual rights to retirement benefits). Here, however, we are not faced with a situation in which a legislative enactment conflicts with the System's fiduciary duties to the trust and its beneficiaries; the question is simply whether the System must comply with the APA's rulemaking procedure—a question which is neutral to the interests of the trust and its beneficiaries.

¶ 29 Moreover, merely following rulemaking procedure would not cause the System to breach its fiduciary duties. *Cf. Carondelet*, 182 Ariz. at 229, 895 P.2d at 141 (rejecting argument that forcing agency to comply with APA would "tie [its] hands" and not allow it to fulfill its statutory mandate). The APA requires an agency to provide meaningful opportunity for public comment on and discussion of proposed rules. A.R.S. § 41–1023(B), (C). The APA does not, however, require an agency to blindly heed any and every suggestion it receives. Rather, the APA merely requires an agency to "consider" public comments before making a rule, A.R.S. § 41–1024(C) (2013), and the agency remains free to "use its own experience, technical competence, specialized knowledge and judgment in the making of a rule." *Id.* at (D).

IV. The System is an Agency Subject to the APA

[6] ¶ 30 The System next argues it is exempt from the APA because it is not a "regulatory state agenc[y]"—in the sense of regulating the general public or any particular industry—and instead it is a state agency that serves a fiduciary function.[6] As defined by the APA, however, " '[a]gency' means any board, commission, department, officer or other administrative unit of this state...." A.R.S. § 41–1001(1). The APA's definition of "agency" makes no exception for agencies that perform fiduciary as opposed to more traditional regulatory functions. Indeed, consistent with the System's status as an agency subject to the APA, the Legislature specifically granted the System authority to "[a]dopt, amend or repeal rules for the administration of the plan" and "this article"—a reference to the statutory article that includes A.R.S. § 38–749. A.R.S. § 38–714(E)(4) (2015).

¶ 31 The System further argues that forcing it to comply with the APA under the circumstances here would be "absurd" because the APA was not intended to protect the rights of "one division of state government," the University, from the actions of another, the System. The foregoing definition of "agency," however, makes no exception for agencies whose decisions affect the rights of divisions and political subdivisions of the state. *See* A.R.S. § 41–1001(1). Accordingly, we have held that rules promulgated without following the rulemaking procedure of the APA are unenforceable against political subdivisions of the state. *See, e.g., Cochise Cnty. v. Ariz. Health Care Cost Containment Sys.*, 170 Ariz. 443, 445, 825 P.2d 968, 970 (App.1991). Furthermore, the System's decision to adopt the Policy affects all System members and all System employers—which, as a factual matter, may include state political subdivisions and their subordinate "entities" in addition to divisions of the state. A.R.S. § 38–711(13).

V. The System's Failure to Comply with the APA Renders the Policy Invalid

[7] ¶ 32 "A rule is invalid unless it is made and approved in substantial compliance ***228** with [the APA], unless otherwise provided by law." A.R.S. § 41–1030(A); *accord Sw. Ambulance*, 183 Ariz. at 262, 902 P.2d at 1366; *Cochise Cnty.*, 170 Ariz. at 445, 825 P.2d at 970. As discussed, the Policy is a rule, and the System adopted it without "substantial compliance" with the rulemaking procedure of the APA. Accordingly, the Policy is invalid, and the System was not entitled to charge the University for the 17 retirements. *See, e.g., Carondelet*, 182 Ariz. at 229–30, 895 P.2d at 141–42 (agency ordered to compensate hospitals that received reduced reimbursement under policy adopted outside of APA).

CONCLUSION

¶ 33 For the foregoing reasons, we reverse the superior court's decision affirming the ruling of the System's board and remand to the superior court to enter an order directing the System to refund $1,149,103 to the University, with interest thereon if and as authorized by law—an issue the superior court should address on remand. Contingent upon its compliance with Arizona Rule of Civil Appellate Procedure 21, we award the University its taxable costs on appeal pursuant to A.R.S. § 12–341 (2003).

All Citations

Ariz. Adv. Rep. 12

237 Ariz. 246, 349 P.3d 220, 318 Ed. Law Rep. 507, 712

Footnotes

1 Although the Arizona Legislature amended certain statutes cited in this opinion after the events giving rise to the dispute between the parties, these revisions are immaterial to our resolution of this appeal. Thus, we refer to the current version of these and all other statutes cited in this opinion.

2 Like the parties, their witnesses, and A.R.S. § 38–749 (2015), we use the term "actuarial unfunded liability" interchangeably with "unfunded liability."

3 A.R.S. § 38–749, in full, provides:

> A. If a termination incentive program that is offered by an employer results in an actuarial unfunded liability to [the System], the employer shall pay to [the System] the amount of the unfunded liability. [The System] shall determine the amount of the unfunded liability in consultation with its actuary.
> B. An employer shall notify [the System] if the employer plans to implement a termination incentive program that may affect [System] funding.
> C. If [the System] determines that an employer has implemented a termination incentive program that results in an actuarial unfunded liability to [the System], [the System] shall assess the cost of the unfunded liability to that employer. If the employer does not remit full payment of all monies due within ninety days after being notified by [the System] of the amount due, the unpaid amount accrues interest until the amount is paid in full. The interest rate is the interest rate assumption that is approved by the board for actuarial equivalency for the period in question to the date payment is received.
> D. For the purposes of this section, "termination incentive program":
> 1. Means a total increase in compensation of thirty per cent or more that is given to a member in any one or more years before termination that are used to calculate the member's average monthly compensation if that increase in compensation is used to calculate the member's retirement benefit and that increase in compensation is not attributed to a promotion.
> 2. Means anything of value, including any monies, credited service or points that the employer provides to or on behalf of a member that is conditioned on the member's termination except for payments to an employee for accrued vacation, sick leave or compensatory time unless the payment is enhanced beyond the employer's customary payment.

4 This incentive payment was not compensation for the purpose of calculating the members' retirement benefits. *See generally* A.R.S. § 38–711(5)(ii)(b), –757 to –759.

5 The University also argues the System's method of determining whether a termination incentive program "results" in actuarial unfunded liability and calculating the amount of that liability is contrary to law and arbitrary and capricious. Given our resolution of the rulemaking issue, we do not need to address this argument.

6 Relying on *Canyon Ambulatory Surgery Ctr. v. SCF Ariz.*, the System argues the APA "governs only those agencies that perform governmental functions," 225 Ariz. 414, 419, ¶ 19, 239 P.3d 733, 738 (App.2010), and, thus, the APA does not apply to the System insofar as it serves a fiduciary function. The statement from *Canyon Ambulatory* the System quotes, however, was a recitation of the ground on which the superior court resolved that case. *Id.* This court declined to affirm on the issue of whether the State Compensation Fund "is a state agency subject to the APA" and instead decided the case on the basis that the policy at issue there was not a rule. *Id.* at 419–20, ¶¶ 19, 21, 239 P.3d at 738–39.

End of Document

EXHIBIT 2

ARIZONA STATE RETIREMENT SYSTEM

3300 NORTH CENTRAL AVENUE • PO BOX 33910 • PHOENIX, AZ 85067-3910 • PHONE (602) 240-2000
7660 EAST BROADWAY BOULEVARD • SUITE 108 • TUCSON, AZ 85710-3776 • PHONE (520) 239-3100
TOLL FREE OUTSIDE METRO PHOENIX AND TUCSON 1 (800) 621-3778
EMAIL ADDRESS: ASKMAC@AZASRS.GOV • WEB ADDRESS: WWW.AZASRS.GOV

Paul Matson
Director

December 19, 2011

Arizona State University
Sheree Barron
Human Resources Manager
P.O. Box 875612
Tempe, Arizona 85287-1403

Dear Ms. Barron:

Attached is an invoice that reflects the actuarially-determined unfunded liability of the University's retirement incentive program to the Arizona State Retirement System.

Under the provisions of A.R.S. § 38-749, the actual invoiced cost is assessed upon termination of the employee under the provisions of the incentive program you provided to us. We have determined the total unfunded liability for the participating employees to be $1,149,103.

The unfunded liability is the result of an incentive offer that either includes an increase in compensation or causes the member to retire earlier than he would have normally. The ASRS calculates the value of the pension with the incentive offer and the value without an incentive offer. If there is a difference, the ASRS assesses the additional cost to the employer.

Payment is due within 90 days of the invoice. If not paid in full within that time, the ASRS will assess interest on the balance at a rate of eight percent (8%) until the amount is paid in full.

Payment may be mailed to: Arizona State Retirement System
Attn: Accounts Receivable
P.O. Box 33910
Phoenix, AZ 85067-3910

It is your responsibility to advise the ASRS if terms of the incentive program have changed or been canceled. Should you have any questions, please feel free to contact me at 602-240-2093 or markm@azasrs.gov.

Sincerely,

Mark Muraoka
Employer Liaison

Enclosure; Invoice dated

Cc: Patrick M. Klein, ASRS, Assistant Director, External Affairs Division
Michele Briggs, ASRS, Employer Relations Manager

ARIZONA STATE RETIREMENT SYSTEM

3300 NORTH CENTRAL AVENUE • PO BOX 33910 • PHOENIX, AZ 85067-3910 • PHONE (602) 240-2000
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TOLL FREE OUTSIDE METRO PHOENIX AND TUCSON 1 (800) 621-3778
EMAIL ADDRESS: ASKMAC@AZASRS.GOV • WEB ADDRESS: WWW.AZASRS.GOV

Paul Matson
Director

INVOICE – A.R.S. § 38-749 EMPLOYER TERMINATION INCENTIVE PROGRAM

Invoice Date – December 19, 2011

Employer –Arizona State University

Invoice Amount Due to ASRS - $1,149,103.00

Due Date – March 18, 2012 (Interest at 8% on unpaid balances begins on March 19, 2012.)

Employee Detail:

Employee	**Unfunded Liability**
Biekert, Russell	$1,622.00
Butler, Jay	$111,559.00
Cardelle-Elawar, Maria	$12,332.00
Croft, Lee	$59,163.00
Davis, Frank	$86,819.00
Deserpa, Allan	$77,335.00
Garcia, Eugene	-$11,759.00
Golen, Steven	$149,455.00
Hall, John	$148,103.00
Hefner, Stephen	$54,741.00
Irwin, Leslie	$7,353.00
Montenegro, Leonard	$22,329.00
Palais, Joseph	$1,747.00
Sandler, Irwin	$318,362.00
Smith, Louis	$36,710.00
Teye, Victor	$52,716.00
Zeng, Guoliang	$20,516.00
Total	**$1,149,103.00**

EXHIBIT 3

SCOTT BALES
CHIEF JUSTICE

JANET JOHNSON
CLERK OF THE COURT

Supreme Court

STATE OF ARIZONA
ARIZONA STATE COURTS BUILDING
1501 WEST WASHINGTON STREET, SUITE 402
PHOENIX, ARIZONA 85007-3231

TELEPHONE: (602) 452-3396

October 27, 2015

RE: ASU ex rel AZ BOARD OF REGENTS v ASRS
Arizona Supreme Court No. CV-15-0153-PR
Court of Appeals, Division One No. 1 CA-CV 14-0083
Maricopa County Superior Court No. LC2012-000689-001

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on October 27, 2015, in regard to the above-referenced cause:

ORDERED: Petition for Review = DENIED.

Janet Johnson, Clerk

TO:
Thomas L Hudson
Eric M Fraser
Lisa K Hudson
Jothi Beljan
Ruth Willingham
kd

EXHIBIT 4

Arizona Revised Statutes Annotated
Title 44. Trade and Commerce
Chapter 9. Trade Practices Generally (Refs & Annos)
Article 1. Miscellaneous Provisions Relating to Loans (Refs & Annos)

A.R.S. § 44-1201

§ 44-1201. Rate of interest for loan or indebtedness; interest on judgments

Effective: July 20, 2011

Currentness

A. Interest on any loan, indebtedness or other obligation shall be at the rate of ten per cent per annum, unless a different rate is contracted for in writing, in which event any rate of interest may be agreed to. Interest on any judgment that is based on a written agreement evidencing a loan, indebtedness or obligation that bears a rate of interest not in excess of the maximum permitted by law shall be at the rate of interest provided in the agreement and shall be specified in the judgment.

B. Unless specifically provided for in statute or a different rate is contracted for in writing, interest on any judgment shall be at the lesser of ten per cent per annum or at a rate per annum that is equal to one per cent plus the prime rate as published by the board of governors of the federal reserve system in statistical release H.15 or any publication that may supersede it on the date that the judgment is entered. The judgment shall state the applicable interest rate and it shall not change after it is entered.

C. Interest on a judgment on a condemnation proceeding, including interest that is payable pursuant to § 12-1123, subsection B, shall be payable as follows:

1. If instituted by a city or town, at the rate prescribed by § 9-409.

2. If instituted by a county, at the rate prescribed by § 11-269.04.

3. If instituted by the department of transportation, at the rate prescribed by § 28-7101.

4. If instituted by a county flood control district, a power district or an agricultural improvement district, at the rate prescribed by § 48-3628.

D. A court shall not award either of the following:

1. Prejudgment interest for any unliquidated, future, punitive or exemplary damages that are found by the trier of fact.

2. Interest for any future, punitive or exemplary damages that are found by the trier of fact.

E. For the purposes of subsection D of this section, "future damages" means damages that will be incurred after the date of the judgment and includes the costs of any injunctive or equitable relief that will be provided after the date of the judgment.

F. If awarded, prejudgment interest shall be at the rate described in subsection A or B of this section.

EXHIBIT 5

2015 WL 1186209

Editor's Note: Additions are indicated by Text and deletions by ~~Text~~.

Only the Westlaw citation is currently available.

United States District Court,
D. Arizona.

DESIGN TREND INTERNATIONAL INTERIORS, LTD., an Arizona corporation, Appellant,
v.
CATHAY ENTERPRISES, INC., an Arizona corporation, Appellee.

No. CV–10–01079–PHX–NVW. | Signed March 16, 2015.

Synopsis

Background: Remodeling contractor appealed from bankruptcy court's final judgment in adversary proceeding against hotel operators, finding that operators were excused from further obligations under construction contract. The District Court, Neil V. Wake, J., 2011 WL 1135887, reversed, and, 2012 WL 727258, entered revised judgment in favor of contractor for principal sum of $169,025.22 and granted contractor's motions for prejudgment interest and attorneys' fees, and operators appealed. The Court of Appeals, 566 Fed.Appx. 590, affirmed principal damages award, but reversed and remanded calculations of prejudgment interest and attorneys' fees. Following remand, contractor moved for entry of final judgment.

Holdings: The District Court, Neil V. Wake, J., held that:

[1] amendment to Arizona statute providing rate for pre-judgment interest did not apply;

[2] awarding post-judgment interest at federal rate of 0.25% per annum was appropriate;

[3] Arizona law's pre-judgment interest rate of 10% continued until entry of final judgment on remand;

[4] attorneys' fees award appropriately included invoices from contractor's attorneys in operators' bankruptcy case;

[5] contractor could recover fees stemming from defense of third-party subcontractors' claims;

[6] contractor could recover fees related to drafting of papers that contractor decided not to file; and

[7] state-law factors favored attorneys' fees award.

Motion granted.

Attorneys and Law Firms

Tyler Quinn Swensen, Dennis Ira Wilenchik, Wilenchik & Bartness PC, Phoenix, AZ, for Appellant.

Devin Sreecharana, Daniel P. Collins, Philip G. May, May Potenza Baran & Gillespie PC, Phoenix, AZ, for Appellee.

ORDER

NEIL V. WAKE, District Judge.

***1** Before the court are questions of prejudgment interest and attorneys' fees. Plaintiff/Appellant Design Trend International Interiors, Ltd. ("Design Trend") was previously awarded damages of $169,025.22, with prejudgment interest at the Arizona statutory rate of 10% and postjudgment interest at the federal statutory rate of 0.26%. (Doc. 93.) Attorneys' fees were awarded in the amount requested of $382,966.44, plus taxable costs of $10,203.93. *Design Trend Int'l Interiors, Ltd. v. Cathay Enters.*, No. CV 10–01079–PHX–NVW, 2012 WL 727258, at *7, 2012 U.S. Dist. LEXIS 29045, at *17 (D.Ariz. Mar. 6, 2012).

Judgment was originally entered on March 29, 2011, but the court concluded on reconsideration that it had erred in overlooking prejudgment interest and that Defendant/Appellee Cathay Enterprises, Inc. ("Cathay") was entitled to additional findings on some claimed offsets that the Bankruptcy Court had not addressed. In light of the nearly ten years this dispute had already been in litigation, this court withdrew the reference of the adversary proceeding to make those additional findings here. (Doc. 69 at 8.) The March 29, 2011 judgment was vacated in light of the need to change the award, and a corrected judgment was entered on March 6, 2012. (Doc. 93.) The corrected judgment was backdated to the date of the original judgment, March 29, 2011, so no party would

suffer from the fortuity that the original judgment was vacated and replaced. (Doc. 92, 93.) But this court did not explain its reason for making the second judgment *nunc pro tunc.*

The Court of Appeals affirmed the principal damage award but reversed and remanded the calculations of prejudgment interest and attorneys' fees. This court "erred in using the equitable remedy of *nunc pro tunc* to backdate its order for the purpose of calculating prejudgment interest." (Doc. 113–1 at 4.) In accordance with the mandate of the Court of Appeals, this court now addresses the rate of prejudgment interest to apply up to the date of a final judgment, not the *nunc pro tunc* date of the original judgment. Under Arizona statute, Design Trend is entitled to interest at 10% per annum on that liquidated obligation until judgment.

Because the Court of Appeals reversed and remanded the judgment of March 6, 2012, the question arises whether the prejudgment interest rate stops on the date of that former final judgment or continues until entry of a new final judgment on remand. The Bankruptcy Court recently shed light on this question when it ruled, at Cathay's urging, that the March 6, 2012 judgment is not final in any part and nothing may yet be paid under it. Consistent with that decision and with principles of judgment interest independent of that ruling, in the specific circumstances of this case it is more equitable for the prejudgment interest rate to continue until entry of a final judgment on remand.

The Court of Appeals also remanded for "further explanation and, if necessary, recalculation" of the award of attorneys' fees because this court "did not give enough information to determine whether the attorneys' fees award was reasonable" and failed to indicate that it "excluded fees that could be attributed to work performed during the bankruptcy proceedings unrelated to the contract dispute." (Doc. 113–1 at 4–5.) This court now addresses in more detail why it awards attorneys' fees in its discretion under state law and why all the attorneys' fees directly incurred in the bankruptcy case are intertwined with the contract claim and therefore awardable.

***2** Judgment will be entered in favor of Design Trend against Cathay in the amounts of: $169,025.22 for damages; $199,218.22 for prejudgment interest at the rate of 10% per annum from June 5, 2003, until March 16, 2015; $381,936.14 for attorneys' fees; $10,203.93 for taxable costs; and postjudgment interest on all those amounts at the federal rate of 0.25% from March 16, 2015, until paid.

The award for attorneys' fees and taxable costs exceeds the damages and interest, but that is to be expected when a dogged defense through fourteen years of litigation ends in adjudication on the merits, not capitulation. The prejudgment simple interest at 10% per annum equates to only 6.83% compound interest. The effective interest rate on the cost to Design Trend is much lower, probably under 4%, because there is no prejudgment interest on the attorneys' fees and taxable costs incurred over many years. In this commercial dispute between sophisticated parties, these are modest and foreseeable consequences of playing hard and losing.

I. PREJUDGMENT INTEREST

A. Summary

The question presented is whether, under a 2011 amendment to Arizona Revised Statutes § 44–1201, a party owing a liquidated sum, on which 10% interest accrues until entry of judgment, partially extinguishes that accrued interest obligation by not paying it. By forcing the creditor to sue and reduce his claim to judgment, does the debtor make the lower postjudgment interest rate apply backwards to oust part of the prejudgment interest previously accrued at 10%?

The answer is no. First, the language of the 2011 amendment leaves in place the 10% prejudgment interest rate on liquidated obligations without an agreed rate. The language falls far short of compelling a partial forfeiture of past interest. Second, if the "plain language" of the amendment did favor forfeiture—which it does not—that conclusion would be perverse. Even "plain language" in a statute does not compel an absurd result. Third, under the Applicability section of the Session Laws, the amendment "applies to all loans that are entered into, all debts and obligations that are incurred and all judgments that are entered on or after the effective date of this act." 2011 Ariz. Sess. Laws 99, § 17. The liquidated obligation in this case was incurred long before the effective date of the 2011 amendment. So even if that amendment in general purports to defeat accrued interest upon later entry of a judgment, Cathay's breach-of-contract debt is excluded.

B. The 2011 Amendment of A.R.S. § 44–1201 Leaves in Place Prejudgment Interest at 10% on Liquidated Obligations with No Agreed Rate of Interest

[1] Federal judgment creditors are entitled to interest "calculated from the date of the entry of the judgment, at a rate equal to the weekly average 1–year constant

maturity Treasury yield." 28 U.S.C. § 1961(a). The federal statute is silent on how much prejudgment interest, if any, should be provided in the judgment. "Substantive state law determines the rate of prejudgment interest in diversity actions." *Home Indem. Co. v. Lane Powell Moss & Miller,* 43 F.3d 1322, 1332 (9th Cir.1995) (citation omitted). This case is equivalent to a diversity case removed to federal court. (Doc. 92 at 6; *In re Banks,* 225 B.R. 738, 750 (Bankr.C.D.Cal.1998) ("The removed [adversary proceeding] is equivalent to a diversity action, as it is not brought under any aspect of federal law and is in this court only due to its relationship to the [core] bankruptcy.").) Design Trend is therefore entitled to prejudgment interest in the amount Arizona law provides for a liquidated obligation with no agreed rate of interest.

1. Statutory Text and History

***3** Before July 20, 2011, Arizona had a simple regime for interest on judgments and interest owing without entry of a judgment. Under former A.R.S. § 44–1201, an agreed legal rate of interest governed both prejudgment and postjudgment. Otherwise, 10% was the rate on judgments and for interest owing even without entry of a judgment. The statute said:

> A. Interest on any loan, indebtedness, judgment or other obligation shall be at the rate of ten per cent per annum, unless a different rate is contracted for in writing, in which event any rate of interest may be agreed to.
>
> ...
>
> C. A judgment given on an agreement bearing a higher rate not in excess of the maximum permitted by law shall bear the rate of interest provided in the agreement, and it shall be specified in the judgment.

A.R.S. § 44–1201 (2003 & Supp.2010); *see also Metzler v. BCI Coca–Cola Bottling Co. of L.A.,* 235 Ariz. 141, 145, 329 P.3d 1043, 1047 (2014) ("[F]rom 1992 to 2011, § 44–1201 did not differentiate between judgments and other obligations, or between prejudgment and post-judgment interest on judgments."). Judicial decisions added to the law of prejudgment interest in this sparse statute.

In 2011, the Legislature amended § 44–1201 to codify elements of case law and to make two changes (one of which, prohibition of interest on punitive damages, has no bearing on this case). For interest on any "loan, indebtedness or other obligation" except a judgment, the prior statutory language was left in place. If the parties have agreed to a rate, that rate governs; otherwise the rate is 10%. The other change was to reduce judgment interest in cases without an agreed rate, from the previous 10% to the lesser of 10% or 1% above the prime rate. This change sets a variable market rate for judgment interest, but capped at 10%, unless the parties have agreed to a different rate.

The 2011 amendment achieves this by adding some new language while leaving other language in place. The amended text of § 44–1201 is as follows (~~strikeout~~ shows deletions, underline shows additions):

> A. Interest on any loan, indebtedness ~~judgment~~ or other obligation shall be at the rate of ten per cent per annum, unless a different rate is contracted for in writing, in which event any rate of interest may be agreed to. Interest on any judgment that is based on a written agreement evidencing a loan, indebtedness or obligation that bears a rate of interest not in excess of the maximum permitted by law shall be at the rate of interest provided in the agreement and shall be specified in the judgment.
>
> B. Unless specifically provided for in statute or a different rate is contracted for in writing, interest on any judgment shall be at the lesser of ten per cent per annum or at a rate per annum that is equal to one per cent plus the prime rate as published by the board of governors of the federal reserve system in statistical release H.15 or any publication that may supersede it on the date that the judgment is entered. The judgment shall state the applicable interest rate and it shall not change after it is entered.
>
> ***4** ...
>
> D. A court shall not award either of the following:
>
> 1. Prejudgment interest for any unliquidated, future, punitive or exemplary damages that are found by the trier of fact.
>
> 2. Interest for any future, punitive or exemplary damages that are found by the trier of fact.
>
> E. For the purposes of subsection D of this section, "future damages" means damages that will be incurred after the date of the judgment and includes the costs of any injunctive or equitable relief that will be provided after the date of the judgment.
>
> F. If awarded, prejudgment interest shall be at the rate described in subsection A or B of this section.

2011 Ariz. Sess. Laws 99, § 15. The new, underlined text in subsections (A) and (B) states the rate for postjudgment interest under Arizona law: either an agreed rate or, failing that, the lower of 10% or the prime rate plus 1%. Subsection (A) sets the interest rate at 10% on obligations other than judgments, unless a different rate is agreed.

2. Subsection (F) Affirms Subsection (A)'s Rate for Prejudgment Interest on Obligations Without an Agreed Rate

Under the new A.R.S. § 44–1201(F), any prejudgment interest awarded "shall be at the rate described in subsection A or B of this section." The first sentence of subsection (A) already states that the prejudgment interest rate is 10% per annum, unless a different rate is agreed in writing. Subsection (F) restates that a later judgment on an interest obligation that the first sentence of subsection (A) imposes before entry of any judgment shall be at the same rate already accrued before entry of a judgment. This is the meaning of the plain language and of common sense.

The taxonomy of interest-bearing obligations stated in A.R.S. § 44–1201(A) and (B) supports this reading. As amended, the text divides those obligations into four categories:

> 1. Any "loan, indebtedness or other obligation" (except a judgment) without an agreed interest rate—10% applies. § 44–1201(A) (first clause of first sentence).
>
> 2. Any "loan, indebtedness or other obligation" with an interest rate agreed in writing—the agreed rate applies. § 44–1201(A) (second clause of first sentence).
>
> 3. Any "judgment that is based on a written agreement" with an agreed interest rate—the agreed rate applies. § 44–1201(A) (second sentence).
>
> 4. "[A]ny judgment" without a rate agreed in writing—the lesser of 10% or 1% above prime applies. § 44–1201(B).

Of these four categories, the first fits interest accruing on Cathay's indebtedness to Design Trend before entry of judgment. The fourth category fits a judgment entered on Design Trend's claim unless the federal statute governs the rate accruing after judgment. When subsection (F) says "prejudgment interest shall be at the rate described in subsection A or B of this section," it can only mean the interest rate that fits *by the terms of subsection (A) or (B).*

*5 According to Cathay, if a liquidated obligation with no agreed rate is unpaid and eventually reduced to judgment, subsection (F) retroactively reduces the 10% rate after the prejudgment interest has already accrued. Cathay's view is that "pre-judgment interest must be calculated based upon one of the alternative rates described in the added portion of subsection A"—that is, subsection (A)'s second sentence—"or B as amended." (Doc. 115 at 4.) "Pre-judgment interest," Cathay argues, "must be either based upon a written agreement (subsection A), or the prime rate plus one percent (1%) (subsection B)." (*Id.*) Cathay contends that by prescribing "the rate described in subsection A or B," subsection (F) actually instructs courts to ignore the express direction in subsection (A) that "[i]nterest on *any* loan, indebtedness or other obligation *shall* be at the rate of ten per cent per annum...." § 44–1201(A) (emphasis added). Cathay would rewrite subsection (F) to adopt for prejudgment interest the "rate described in subsection B *and not the rate described in subsection A.*" (Emphasis added.) This is bare assertion in defiance of statutory text. The plain language of the amended statute leaves in place for prejudgment interest exactly what Cathay says the Legislature repealed.

Arizona case authority consones to the reading that "interest on any judgment" in subsections (A) and (B) means only interest owing because of a judgment. The term does not apply to interest owing even in the absence of a judgment. By contrast, the words "indebtedness" and "other obligation" in subsection (A) encompass a wide range of legal duties beyond those dependent upon existence of a judgment.

In *Metzler,* the Arizona Supreme Court decided whether "the rate for prejudgment interest awarded pursuant to Rule 68(g) is governed by § 44–1201(A) [at 10%] or § 44–1201(B) [at 1% above prime rate]." 235 Ariz. at 144, 329 P.3d at 1046. Rule 68(g) of the Arizona Rules of Civil Procedure provides that if a party "rejects an offer [of judgment] and does not later obtain a more favorable judgment ... the offeree must pay, as a sanction ... prejudgment interest on unliquidated claims to accrue from the date of the offer." Ariz. R. Civ. P. 68(g). (Sanctions under the Arizona offer-of-judgment rule are more robust than those under Federal Rule of Civil Procedure 68.)

The *Metzler* court found the term "obligation" ambiguous, as it could refer to a broad "legal or moral duty" or to a narrower "formal, binding agreement ... to pay a certain

amount or to do a certain thing for a particular person or set of persons." 235 Ariz. at 145, 329 P.3d at 1047 (citations and internal quotation marks omitted). The court applied *ejusdem generis,* the canon of statutory interpretation that "general words [that] follow the enumeration of particular classes of persons or things should be interpreted as applicable only to the persons or things of the same general nature or class." *Id.* (alteration in original) (citation and internal quotation marks omitted). The court concluded that an "obligation" covered by § 44–1201(A) must be similar in nature to a "loan" or "indebtedness." *Id.* at 145–46, 329 P.3d at 1047–48. Specifically, a § 441201(A) "obligation," unlike Rule 68 prejudgment interest as a sanction, does not "depend[ ] on a judgment for its existence." *See id.* at 146, 329 P.3d at 1048. "What would otherwise be an unliquidated claim on which no prejudgment interest is owed," if imposed as a Rule 68 sanction "becomes liquidated, memorialized, and enforceable only when judgment is entered." *Id.* As a result, Rule 68 prejudgment interest is "interest on a judgment," rather than interest on a "loan, indebtedness or other obligation." *Id.* Hence, the lower rate of § 44–1201(B) for interest "on any judgment" applies to prejudgment interest imposed after judgment as a sanction under Rule 68(g). *Id.* Under the logic of *Metzler,* prejudgment interest on a *liquidated* claim—unlike interest that is neither owing nor quantifiable until entry of a judgment under Rule 68—is interest on an "obligation" pursuant to § 44–1201(A) and thus accrues at the 10% rate of subsection (A).

*6 [2] In summary, the plain language of A.R.S. § 44–1201(A) is that interest on a liquidated obligation without an agreed rate accrues before judgment at 10% per annum. Subsection (F) confirms that past accrual upon reduction to judgment when it says that "prejudgment interest shall be at the rate described in subsection A or B of this section." A.R.S. § 44–1201(F).

3. Cathay's Interpretation of the Statute Yields an Absurd Result

[3] [4] [5] [6] In determining meaning, one looks to the language of the statute. "When construing statutes, we begin with the language of the statute itself because we expect it to be the best and most reliable index of a statute's meaning." *Canyon Ambulatory Surgery Ctr. v. SCF Ariz.,* 225 Ariz. 414, 420, 239 P.3d 733, 739 (Ct.App.2010) (citation and internal quotation marks omitted). "If the statute's language is clear, it controls unless an absurdity or constitutional violation results. But if the text is ambiguous, we also consider the statute's context; its ... subject matter, and historical background; its effects and consequences; and its spirit and purpose, as well as other applicable canons of statutory construction. We seek to harmonize, whenever possible, related statutory and rule provisions." *Metzler,* 235 Ariz. at 144–45, 329 P.3d at 1046–47 (alteration in original) (citations and internal quotation marks omitted).

The plain language of the statute is the opposite of Cathay's proffered meaning. But if the plain language somehow said what Cathay wants, the "effects and consequences" of that interpretation would be too perverse to be imputed to the Legislature. Cathay's position—that subsection (F) imposes subsection (B)' s lower postjudgment rate on accrued interest for which subsection (A) expressly sets a higher rate—would reward a recalcitrant debtor with a windfall for refusing to pay, forcing litigation, and causing entry of judgment. The Legislature could set a prejudgment interest rate of 1% above prime. But it would be unjust and nonsensical for the Legislature to create an interest obligation and then destroy it by entry of a judgment enforcing it. That is exactly the kind of absurd result that even plain language need not yield. *See id.*

C. The Applicability Section of the Session Laws Excludes Obligations Already Incurred from the 2011 Amendment

[7] Whatever the effect of the 2011 amendment of A.R.S. § 44–1201 in general, it does not apply in this case. The Applicability section of the 2011 amendment states:

> Section 44–1201, Arizona Revised Statutes, as amended by this act, applies to all loans that are entered into, all debts and obligations that are incurred and all judgments that are entered on or after the effective date of this act.

2011 Ariz. Sess. Laws 99, § 17(B). The amended interest provisions do not apply to any obligation incurred before the amendment. Cathay's obligation to Design Trend was incurred by 2003, eight years before the revision of § 44–1201. That obligation is therefore governed by the old § 44–1201, which indisputably mandated prejudgment interest at 10%.

*7 The provision in § 17(B) that the new § 44–1201 applies to judgments entered on or after the date of amendment cannot repeal the preceding words protecting interest on "all loans that are entered into, all debts and

obligations that are incurred" before the effective date. The manifest purpose of § 17(B) is to vindicate obligations and interest incurred before the 2011 amendment. That purpose would fail if interest on a loan, debt, or obligation already in breach were impaired by the enactment in 2011.

Design Trend is therefore entitled to principal damages of $169,025.22, with prejudgment interest at 10% per annum from June 5, 2003.

II. POSTJUDGMENT INTEREST IS AT THE FEDERAL RATE

[8] [9] Federal postjudgment interest is governed by 28 U.S.C. § 1961(a) "at a rate equal to the weekly average 1–year constant maturity Treasury yield." But an "exception to § 1961 exists when the parties contractually agree to waive its application." *Fid. Fed. Bank, FSB v. Durga Ma Corp.,* 387 F.3d 1021, 1023 (9th Cir.2004) (citing *Citicorp Real Estate, Inc. v. Smith,* 155 F.3d 1097, 1107–08 (9th Cir.1998)). If a contract "indicates a mutual intent by the parties to have pre- and post-judgment interest calculated at the contract interest rate," then the contract rate applies. *Citicorp,* 155 F.3d at 1108. Other circuits concur. *Westinghouse Credit Corp. v. D'Urso,* 371 F.3d 96, 101 (2d Cir.2004); *Kanawha–Gauley Coal & Coke Co. v. Pittston Minerals Grp., Inc.,* 501 Fed.Appx. 247, 254 (4th Cir.2012); *Hymel v. UNC, Inc.,* 994 F.2d 260, 266 (5th Cir.1993); *Cent. States, Se. & Sw. Areas Pension Fund v. Bomar Nat'l, Inc.,* 253 F.3d 1011, 1020 (7th Cir.2001); *In re Riebesell,* 586 F.3d 782, 794 (10th Cir.2009).

However, courts are divided on how much specificity is needed to waive § 1961. *Compare Westinghouse Credit Corp.,* 371 F.3d at 101–02 (finding agreed interest rates insufficient to waive § 1961 rate), *and In re Riebesell,* 586 F.3d at 794–95 (same), *with Andrews v. Triple R Distrib., LLC,* No. CV 4:12–00346–TUC–RCC (HCE), 2013 WL 1177834, at *6, 2013 U.S. Dist. LEXIS 39480, at *15 (D.Ariz. Feb. 28, 2013) (holding agreed rate sufficient).

[10] The parties' contract states, "Payments due and unpaid under the Contract shall bear interest from the date payment is due at the rate stated below, or in the absence thereof, at the legal rate prevailing from time to time at the place where the Project is located." (Doc. 131–1 at 5.) The parties inserted no specific rate in the space provided. This contractual language adopts the Arizona legal rate of 10% for prejudgment interest on liquidated obligations with no agreed rate.

[11] In a supplemental reply brief on remand, Design Trend asserts for the first time that the Arizona postjudgment interest rate at 4.25% may also apply "beyond" the time of a final judgment. (Doc. 131 at 2 n. 2.) But "arguments made in passing and inadequately briefed are waived." *Halicki Films, LLC v. Sanderson Sales & Mktg.,* 547 F.3d 1213, 1230 (9th Cir.2008). This court need not decide this issue, to which Design Trend has given scant attention and on which courts are divided. *See LaTour v. Citigroup Global Mkts., Inc.,* No. 11cv1167–LAB (RBB), 2012 WL 909319, at *1, 2012 U.S. Dist. LEXIS 35976, at *4 (S.D.Cal. Mar. 16, 2012) ("deem[ing] any arguments arising from the application of state law standards waived" under the *Halicki Films* standard).

***8** Accordingly, postjudgment interest will be awarded at the federal rate, now 0.25% per annum, until paid. "[T]he accrued prejudgment interest is included in the total award that is subject to postjudgment interest" at that rate. 20A James Wm. Moore et al., Moore's Federal Practice § 337.15 (3d ed.2014); *see also Air Separation, Inc. v. Underwriters at Lloyd's of London,* 45 F.3d 288, 291 (9th Cir.1994).

III. THE PREJUDGMENT INTEREST RATE CONTINUES UNTIL ENTRY OF FINAL JUDGMENT ON REMAND

[12] The parties dispute whether the court should enter "a new, final judgment" (Doc. 131 at 6) or merely "modify or amend" (Doc. 130 at 5) the judgment previously entered on March 6, 2012. A new judgment must be entered for Design Trend to collect the principal, interest, and attorneys' fees to which it is entitled following remand, as 75% of the previous judgment—attorneys' fees and interest—was reversed and remanded. Whether the new judgment is cast as a replacement judgment or as a revision of the prior judgment, the real disagreement is over the date on which accumulation of interest at the prejudgment rate ceases and the postjudgment rate begins, as the rate is higher for the first. Cathay believes March 6, 2012, is the proper date; Design Trend says it is the date of judgment on remand pursuant to this order. The form of the judgment has some bearing on the dispute but is not conclusive.

Cathay cites to *Planned Parenthood of the Columbia/Willamette Inc. v. American Coalition of Life Activities,* 518 F.3d 1013 (9th Cir.2008), for the point that, following remand, when the "legal and evidentiary basis of an award is ... preserved, post-judgment interest is ordinarily computed from the date of [the judgment's] initial entry." 518 F.3d at 1018 (alteration in original) (citations and internal quotation marks omitted). It is not apparent how this general principle would apply to the

March 6, 2012 judgment. The "legal and evidentiary basis" of Design Trend's award could not be ascertained with certainty until remand, as three-quarters of the original judgment was reversed and remanded.

[13] [14] [15] In any event, it is also true that "determining from which judgment interest should run requires an inquiry into the nature of the initial judgment, the action of the appellate court, the subsequent events upon remand, and the relationship between the first judgment and the modified judgment." *Guam Soc'y of Obstetricians & Gynecologists v. Ada,* 100 F.3d 691, 702 (9th Cir.1996) (citations and internal quotation marks omitted). The standard is a flexible one that takes account of a variety of circumstances. Foremost among these is the "equitable purpose behind § 1961 ... to ensure [ ] that the plaintiff is further compensated for being deprived of the monetary value of the loss from the date of ascertainment of damages until payment by defendant." *AT & T v. United Computer Sys.,* 98 F.3d 1206, 1209 (9th Cir.1996) (brackets in original) (citation and internal quotation marks omitted). Where "the prevailing party would be 'further compensated' by calculating postjudgment interest from the date of the prior judgment," that prior judgment should mark the dividing line between pre- and postjudgment interest. *See id.* But where "the postjudgment interest rate is *less* than the prejudgment interest rate, and it is the losing party who asks that postjudgment interest begin at the time of the initial judgment, while the prevailing party seeks to have postjudgment interest run from the date of the later judgment," equitable principles favor the date of the later judgment. *See id.* at 1210–11 (emphasis in original).

***9** In this case, "the award of prejudgment interest under state law" until entry of judgment on remand "more fully compensates [Design Trend] for the loss of use of its money due to the delay occasioned by [Cathay's] actions." *Id.* at 1211. Cathay delayed payment through fourteen years of litigation. "Any other result would penalize the prevailing party, and in certain circumstances might also encourage losing parties to instigate postjudgment litigation so they can reap the benefits of a low interest rate." *Id.*

[16] Even if the court lacked power to find the equitable date for interest on remand, Cathay would be judicially estopped from saying postjudgment interest should run from March 6, 2012. On December 31, 2014, Design Trend moved in the Bankruptcy Court to release from Cathay's reserve fund the $179,229.15 in damages and costs affirmed in the mandate. Cathay objected, arguing that "Design Trend does not have a complete and enforceable final judgment" on which to collect. (Doc. 128–2 at 3.) That amount was "only part of a potential judgment on remand, the contents and basis of which are presently unknown," Cathay wrote in its opposition brief. (*Id.* at 4.) At oral argument, Cathay reiterated that Design Trend "didn't have a final judgment" in this court. (Doc. 130–1 at 11.) The Bankruptcy Court agreed and denied release of the funds. (*See id.* at 11–13.) Having kept the use of $179,229.15 by claiming there is no final judgment, Cathay may not now say the opposite to avoid paying interest while it had those funds. Judicial estoppel forbids saying something in court to get a benefit after having gotten a different benefit in court by having said the opposite. *Ah Quin v. Cnty. of Kauai DOT,* 733 F.3d 267, 270 (9th Cir.2013) ("[J]udicial estoppel is an equitable doctrine invoked by a court at its discretion. [I]ts purpose is to protect the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment." (alterations in original) (citation and internal quotation marks omitted)).

Prejudgment interest at 10% per annum will continue to the March 16, 2015 date of judgment on remand, with postjudgment interest thereafter on the entire award at the federal rate of 0.25% per annum.

IV. ATTORNEYS' FEES

[17] Under Arizona law, in "any contested action arising out of a contract, express or implied, the court may award the successful party reasonable attorney's fees." A.R.S. § 12–341.01(A). "The trial judge ... has broad discretion in fixing the amount of the fee provided that 'such award may not exceed the amount paid or agreed to be paid.' " *Associated Indem. Corp. v. Warner,* 143 Ariz. 567, 570, 694 P.2d 1181, 1184 (1985) (quoting A.R.S. § 12–341.01(B)). Among the factors to consider are (1) the "merits of the claim or defense presented by the unsuccessful party," (2) whether the "litigation could have been avoided or settled and the successful party's efforts were completely superfluous in achieving the result," (3) whether "[a]ssessing fees against the unsuccessful party would cause an extreme hardship," (4) whether the "successful party did not prevail with respect to all of the relief sought," (5) "the novelty of the legal question presented," (6) "whether such claim or defense had previously been adjudicated in this jurisdiction," and (7) "whether the award in any particular case would discourage other parties with tenable claims or defenses from litigating or defending legitimate contract issues for fear of incurring liability for substantial amounts of attorney's fees." *Id.*

***10** [18] In "determining reasonable attorneys' fees in

commercial litigation," the "beginning point ... of a reasonable fee is the ... the actual billing rate which the lawyer charged in the particular matter.... Unlike public-rights litigation ... in corporate and commercial litigation between fee-paying clients, there is no need to determine the reasonable hourly rate prevailing in the community for similar work because the rate charged by the lawyer to the client is the best indication of what is reasonable under the circumstances of the particular case." *Schweiger v. China Doll Rest., Inc.,* 138 Ariz. 183, 186–88, 673 P.2d 927, 930–32 (Ct.App.1983). While the agreed billing rate is not conclusive, there is no showing here that the agreed rates were too high, and the court finds the agreed rates and paid fees to be reasonable. Accordingly, the remaining considerations as to the amount of the award are four challenged categories of fees.

A. Fees Related to Bankruptcy

Cathay contests fees for work done by Jaburg & Wilk, which Design Trend retained in Cathay's bankruptcy case. It makes two objections: first, that those fees are "unsupported by any fee invoices or alternative task-based itemization"; and second, that fees incurred for the bankruptcy proceeding are unrelated to the contract claim. (Doc. 115 at 6–7.)

1. Admissibility of the records

[19] Cathay moved to strike Design Trend's Reply (Doc. 116) on the ground that it impermissibly attached Jaburg & Wilk's fee invoices. The parties were ordered to brief "whether the additional billing records may be added and considered on remand." (Doc. 121 at 1.) The invoices were emailed to Cathay's counsel prior to Design Trend's filing the original motion for attorneys' fees in 2011, but they were inadvertently left out of the attachments to the fee motion itself. That oversight does not prejudice Cathay when the invoices were received in fact. Nor is there any prejudice to Cathay in considering those invoices now, even if they had not been received before.

[20] [21] Cathay argues that the Jaburg & Wilk invoices may not be considered because the Court of Appeals' mandate did not direct this court to do so. (Doc. 125 at 6.) To the contrary, the mandate expressly authorized "recalculation" of the fee award. (Doc. 113–1 at 5.) "On remand for further proceedings after decision by an appellate court, the trial court must proceed in accordance with the mandate and the law of the case as established on appeal. The mandate is controlling as to all matters within its compass, but leaves to the district court any issue not expressly or impliedly disposed of on appeal." *Stevens v. F/V Bonnie Doon,* 731 F.2d 1433, 1435 (9th Cir.1984) (per curiam) (citations omitted).

Cathay relies on *Stevens,* which concerned a collision at sea. The Ninth Circuit had previously "remanded for further proceedings to determine what the costs of repairs were and directed exclusion of repair costs resulting from deterioration." "On remand the district court held a further hearing on damages and heard expert testimony presented by [the vessel's owner] to establish the cost of repair." The district court increased the amount of damages proximately caused by the collision. The defendants contended that holding another hearing exceeded the scope of the remand. The Ninth Circuit affirmed the new award, holding that because the "mandate ... did not forbid taking new evidence on the question of damages ... it was no abuse of discretion for the court ... to take new evidence on the costs of repairs" instead of basing the newfound cost of repairs "on an analysis of its prior award." *Id.* at 1436. *Stevens* rejects the proposition for which Cathay cites it. The Jaburg & Wilk invoices are properly considered.

2. Value of fees

*11 [22] Cathay argues the Jaburg & Wilk invoices do not establish the reasonableness of the bankruptcy attorneys' fees because "Arizona law prohibits non-task based billing." (Doc. 115 at 6.) This overstates the law. Arizona courts are skeptical about "block-billing," that is, a lawyer's "recording of only half-hour or one-hour increments and his practice of grouping tasks together in a block so that time spent on each task cannot be reviewed for its reasonableness." *See Sleeth v. Sleeth,* 226 Ariz. 171, 178, 244 P.3d 1169, 1177 (Ct.App.2010). But *Sleeth* ultimately held only that a court should "consider whether each entry of block-billing provides sufficient detail to support an award for that entry." *Id.*

[23] Here, Jaburg & Wilk's invoices provide enough detail to conclude that the services were reasonable and compensable. (*See generally* Doc. 116–2.) Even in its Supplemental Brief (Doc. 125), filed after Design Trend supplied the Jaburg & Wilk invoices again, Cathay has not challenged any particular entries as lacking sufficient detail. Instead, Cathay offers only a conclusory allegation that "J & W did not attempt to distinguish or itemize tasks." (Doc. 125 at 9.) The Jaburg & Wilk fees are reasonable and will be awarded in the amounts billed.

[24] [25] [26] Cathay also challenges Jaburg & Wilk's fees and $15,553.00 in Wilenchik & Bartness fees on the ground they were incurred in bankruptcy proceedings unrelated to the contract action. Assuming without deciding that a bankruptcy proceeding is not itself a "contested action" for purposes of A.R.S. § 12–341.01(A), this adversary proceeding is, as it was when in state court before it was removed to bankruptcy court. Nevertheless, "when two claims are so intertwined as to be indistinguishable, a court has discretion to award attorney fees under § 12–341.01 even though the fees attributable to one of the causes of action would not be recoverable under this statute." *Zeagler v. Buckley,* 223 Ariz. 37, 39, 219 P.3d 247, 249 (Ct.App.2009) (citations omitted). Under this flexible and fact-dependent doctrine, fees may be awarded for work done in bankruptcy where "the bankruptcy proceeding was substantially intertwined with [a] contract dispute." *Id.* (citation omitted). For example, when "claims are so interrelated that identical or substantially overlapping discovery would occur, there is no sound reason to deny recovery of such legal fees." *Id.*

This contract action was "substantially intertwined" with Cathay's bankruptcy proceeding. Indeed, it was the only reason for the bankruptcy. Cathay filed the bankruptcy the day before a jury trial on the breach-of-contract claim was set to begin. Design Trend had a majority of the claims, excluding disputed insider claims. If, as Cathay contended, its principal shareholder had a senior $4 million lien on the hotel, Design Trend would have been left with an empty judgment. Defeating Cathay's bankruptcy strategy was essential to vindicating Design Trend's contract claim.

***12** Design Trend did avoid Cathay's strategy to divert all the value in its estate to its shareholder. That resulted in a surplus estate. All creditors were paid and $750,000.00 was reserved for Design Trend's claim. Having examined the factual record in detail, the court finds as a fact that the fees Design Trend's attorneys incurred in the Bankruptcy Court were intertwined with and necessary to prosecution of the contract claim against Cathay. *Cf. Zeagler,* 223 Ariz. at 39, 219 P.3d at 249 ("The trial court [is] in the best position to understand the relationship between the bankruptcy litigation and the contract dispute." (citations omitted)). Accordingly, the fee award against Cathay will include the $102,785.00 in bankruptcy attorneys' fees.

B. Fees Related to Registrar Proceedings

Cathay challenges $1,030.30 in time entries for services in Arizona Registrar of Contractors administrative proceedings. Design Trend said at oral argument that it did not mean to claim fees for Registrar proceedings, and rather than litigate over the classification of that minor amount, it withdraws that $1,030.30.

C. Fees Related to Third–Party Claims

[27] Design Trend had pay-when-paid clauses with its subcontractors. It was sued by subcontractors who were unpaid because Design Trend was unpaid. In one of those actions, subcontractor Hawkeye sued Cathay, Huang, and Design Trend in Superior Court, prompting Design Trend to file counterclaims and cross-claims. That case was later consolidated with another action brought against Cathay by a third party and removed to the Bankruptcy Court in September 2004. Cathay now challenges $7,448.25 in "fees incurred in third-party proceedings," including "fees associated with settlement discussions between [Design Trend] and subcontractor Hawkeye, pleadings by Hawkeye, and/or pleadings between Hawkeye and Cathay." (Doc. 115 at 11.)

Contrary to Cathay's contention, the holding of *Fulton Homes Corp. v. BBP Concrete,* 214 Ariz. 566, 569, 155 P.3d 1090, 1093 (Ct.App.2007)—that "the parties must actually be 'adverse' " for fees under § 12–341.01—does not preclude fees directly occasioned by another party in the same action between the directly adverse parties. The test is whether those fees are "intertwined" with the contest between the contracting parties. Cathay's wrongful non-payment of Design Trend drew Hawkeye and others into this litigation. Defending against those additional parties was inextricably intertwined with prosecuting Design Trend's contract claim against Cathay in the same consolidated action.

D. Fees Related to Unfiled Papers

[28] Cathay challenges $2,904.50 in fees for drafting papers that Design Trend decided not to file. There is no automatic exclusion of services for drafting documents not ultimately filed. Rather, the test is whether the work was reasonable. Lawyers reasonably explore ideas and strategies that they decide not to pursue. Sometimes only writing will show whether a paper merits filing. Sometimes events make the filing unnecessary. There is no showing that the $2,904.50 for work on papers not filed was unreasonable.

***13** The strategy being investigated was liability of Cathay's principal, Mr. Huang. In October 2001, Cathay recorded a deed of trust giving Huang a $4 million lien on that hotel. Cathay and Design Trend were by this time

already in a dispute about Cathay's failure to pay Design Trend for work on the hotel. (*See* Doc. 29 at 2–3.) Design Trend argued that Cathay's sale of the hotel in bankruptcy was an attempt to "materially advance its sole shareholder's personal interests to the derogation of ... the interests of creditors." *In re Cathay Enters., Inc.*, No. 2:04–bk–15766–PHX–RTB, Doc. 124 at 4 (Bankr.D.Ariz. Nov. 9, 2006). Design Trend withdrew its objection to Cathay's sale of the hotel in November 2006 after Cathay agreed to set aside $750,000 for Design Trend's claims. *Id.* at 5. It was reasonable to investigate Huang's liability, which ceased to matter once Cathay agreed to that reserve.

E. Review of Discretionary Factors for Awarding Fees

[29] The factors identified in *Associated Indem. Corp. v. Warner*, 143 Ariz. 567, 694 P.2d 1181 (1985), confirm this court's discretion in awarding Design Trend its reasonable attorneys' fees. The "merits of the ... defense presented by" Cathay proved insubstantial, though costly and time-consuming. *Id.* at 570, 694 P.2d at 1184. Notwithstanding Design Trend's delay, Cathay repeatedly demanded that Design Trend complete performance, which it did. By electing completion rather than termination and damages, Cathay waived Design Trend's breach as a basis to refuse payment. These facts did not present a "novel[ ] ... legal question." The claims and defenses had "previously been adjudicated in this jurisdiction" under well-settled principles of Arizona construction law. Awarding Design Trend its fees will not "discourage other parties with tenable ... defenses from ... defending legitimate contract issues for fear of incurring liability for substantial amounts of attorney's fees." Design Trend prevailed on most of its claims except some offsets. "Assessing fees against the unsuccessful party" will not "cause an extreme hardship." The funds to pay the award are in Cathay's estate.

The strongest consideration in this case is whether the "litigation could have been avoided or settled and the successful party's efforts were completely superfluous in achieving the result." *Id.* Cathay has fought with determination for fourteen years to avoid paying for work done. Indeed, this claim could have been adjudicated and quantified in the Superior Court trial in 2004, had Cathay filed its bankruptcy after the verdict rather than the day before the trial. It then could have had all the protections of bankruptcy concerning management and liquidation of its asset, the hotel. Cathay's unrelenting defense made this litigation unavoidable and increased the expense greatly.

The circumstances of this case powerfully satisfy the court's discretion to award fees "to mitigate the burden of the expense of litigation to establish a just claim or a just defense." A.R.S. § 12–341.01(B). Failure to award fees would leave Design Trend better off had it never come to court. It would reward the strategy of multiplying proceedings to make meritorious litigation futile.

***14** Design Trend will be awarded $381,936.14 in attorneys' fees, including attorneys' non-taxable expenses, which are customarily and reasonably listed separately from the hourly rate value of professional services. Attorneys' fees incurred on remand may be claimed pursuant to Rule 54(d)(2), Federal Rules of Civil Procedure, and Local Rule 54.2.

IT IS THEREFORE ORDERED that Design Trend's Amended Motion for Entry of Final Judgment (Doc. 114) is granted in the amounts stated below.

IT IS FURTHER ORDERED that the Clerk vacate the Judgment (Doc. 93) entered March 6, 2012, and enter judgment pursuant to mandate and to this order in favor of Design Trend International Interiors, Ltd., against Cathay Enterprises, Inc., for:

(1) $169,025.22 in damages,

(2) $199,218.22 in prejudgment interest thereon at the rate of 10% per annum from June 5, 2003, until March 16, 2015,

(3) $381,936.14 in attorneys' fees,

(4) $10,203.93 in taxable costs, and

(5) postjudgment interest on those amounts, which total $760,383.51, at the federal rate of 0.25% per annum from March 16, 2015, until paid.

The Clerk shall terminate this case.

All Citations

--- F.Supp.3d ----, 2015 WL 1186209

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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

ARIZONA STATE UNIVERSITY, ex rel. Arizona Board of Regents,

Plaintiff,

v.

ARIZONA STATE RETIREMENT SYSTEM,

Defendant.

Case No. LC2012-000689-001DT

ARIZONA STATE RETIREMENT SYSTEM'S RESPONSE TO PLAINTIFF'S MOTION FOR ENTRY OF JUDGMENT

(Assigned to the Honorable Crane McClennen)

I. Introduction

Defendant Arizona State Retirement System ("ASRS"), by and through undersigned counsel, hereby responds to Plaintiff Arizona State University's ("ASU") Motion for Entry of Judgment with Prejudgment Interest. The ASRS opposes ASU's request for ten percent (10%) interest on the judgment because the court ordered ASRS return of ASU's payment resulting from the lack of administrative rule is not a loan, indebtedness or other obligation. Additionally, the ASRS disputes ASU's categorization of the payment as a liquidated sum.

II. Factual Background

As required by A.R.S. § 38-749, the ASRS issued an invoice dated December 19, 2011 to ASU in the amount of $1,149,103.00. ASU Motion, Exhibit 2. Section 38-749 requires the ASRS to charge an employer the unfunded liability created by the employer's termination incentive program to the ASRS trust fund. The ASRS invoice stated that payment was due within ninety days and then the ASRS would assess interest at eight percent (8%) on the unpaid balance. The ASRS included that information because A.R.S. § 38-749(C) states:

> If ASRS determines that an employer has implemented a termination incentive program that results in an actuarial unfunded liability to ASRS, ASRS shall assess the cost of the unfunded liability to that employer. If the employer does not remit full payment of all monies due within ninety days after being notified by ASRS of the amount due, the unpaid amount accrues interest until the amount is paid in full. The interest rate is the interest rate assumption that is approved by the board for actuarial equivalency for the period in question to the date payment is received.

In March 2012, ASU paid $1,149,103 to the ASRS and retained its right to appeal as opposed to ASU's description that the ASRS "collected" the amount "under protest." ASU Motion 1:25 – 2:1. The Administrative Law Judge Decision, Finding of Fact No. 4 states, "ASU paid the invoice, but reserved its right to appeal and has done so, seeking a full refund plus interest."

In May 2015, the Arizona Court of Appeals ruled in favor of ASU and remanded this case to this Court for an order directing the ASRS to refund the $1,149,103 payment to ASU "with interest thereon if and as authorized by law – an issue the superior court should address on remand." *Ariz. State Univ. v. Ariz. State Ret. Sys.*, 237 Ariz. 246, ¶ 33 (App. 2015). After the Arizona Supreme Court denied the ASRS Petition for Review, ASRS made payment to ASU on November 6, 2015 in the amount of $1,327,190.35 which included ASU's $1,149,103 payment to ASRS and 4.25% interest from March 15,

2012, the date of ASU's payment to the ASRS, to November 6, 2015, the date of payment by ASRS to ASU. As a fiduciary to the ASRS trust fund, the ASRS made the principal and interest payment to ASU in November 2015 to stop potential additional interest from accruing awaiting this Court's order. A.R.S. § 38-714(C).

III. The Court Ordered Refund of the ASU Payment was not a Liquidated Amount.

The amount ordered by the Arizona Court of Appeals is not conclusively a liquated claim and therefore not automatically entitled to prejudgment interest. A claim is liquidated if the evidence makes it possible to compute the amount with exactness without reliance upon opinion or discretion. *Stenz v. Indus. Comm'n of Arizona*, 237 Ariz. 481, 483, ¶ 7 (2015). The University made two arguments throughout the administrative appeals process, a factual argument challenging the ASRS actuarial calculation of the unfunded liability caused by ASU's termination incentive program and a legal argument that the ASRS could not enforce A.R.S. § 38-749 without an administrative rule. Although the Arizona Court of Appeals ruled in favor of ASU based on the lack of an ASRS administrative rule and ordered that the entire payment be returned, the Court could have ruled in favor of ASU on the basis of either ASU's factual argument or legal argument and ordered a partial return of the ASU payment. The Court used its discretion on what refund amount it required the ASRS to return to ASU. Therefore, the amount ordered in the judgment was not an exact known amount prior to the judgment.

IV. The Applicable Interest Rate for the Judgment if Interest is Awarded is the Prime Rate plus One Percent.

In determining what rate of interest the ASRS should pay on the $1,149,103 refund amount to ASU, A.R.S. § 44-1201 directs what interest rate should be applied. Paragraphs A and B of Section 44-1201 distinguish between two categories of payment,

first, loans, indebtedness and other obligations and second, judgments. The first category of payment, loans, indebtedness and other obligations, commands an annual interest rate of ten percent (10%) unless a different rate is contracted for in writing. A.R.S. § 44-1201(A). The court ordered refund in this case is not a loan or indebtedness. The Arizona Supreme Court wrote in *Metzler v. BCI Coca-Cola Bottling Co. of Los Angeles, Inc.* 235 Ariz. 141, 146, ¶ 19 (2014) quoting *Webster's Ninth New Collegiate Dictionary* 612, 700 (1983), "A loan is commonly understood as 'money lent at interest,' and an indebtedness is 'something (as an amount of money) that is owed.'" In distinguishing prejudgment interest under Rule 68(g) from loans and indebtedness, the Court noted the difference is that prejudgment interest "depends on a judgment for its existence." *Metzler*, 235 Ariz. at 146. The same is true in this case; the requirement for the ASRS to return ASU's payment depended on a judgment for its existence.

There was no legal obligation for the ASRS to pay ASU any amount until the Arizona Court of Appeals issued its decision in May 2015. The only obligation to pay prior to the Court's decision was a statutory obligation under A.R.S. § 38-749 of employer ASU to pay the ASRS an unfunded liability amount as determined by the ASRS in consultation with its actuary. Although "obligation" could be incorrectly interpreted broadly, the Arizona Supreme Court stated in *Metzler* that the term "other obligation" in A.R.S. § 44-1201(A) "is most appropriately interpreted to apply only to things of the same nature or class as 'loan' and 'indebtedness,' the terms that precede it." *Id.* at 145-46. The Court concluded that prejudgment interest is not an "other obligation" for purposes of A.R.S. § 44-1201(A). *Id.* Similarly, because the court ordered ASRS payment was not a loan or indebtedness, the ASRS payment cannot be considered an "other obligation" because the ASRS refund payment is not in the class of loans or indebtedness.

The second category of payment, judgments, receives interest at the *lesser* rate of ten percent (10%) annually or at a rate per annum that is equal to one percent (1%) plus the prime rate as published by the board of governors of the federal reserve system unless there is an interest rate specifically provided for in statute or a different rate is contracted for in writing. Because the original ASRS invoice and the resulting ASU payment was addressed in statute, A.R.S. § 38-749, there was no interest rate contracted for in writing. There is also no ASRS statute that specifically provides an interest rate for a court ordered refund of an employer payment to the ASRS. The payment owed by the ASRS to ASU results solely from the Arizona Court of Appeals ruling in May 2015. The interest rate that should be applied to the ASRS refund payment is the lesser of ten percent (10%) or the prime rate plus one percent. In 2015, the prime rate plus one percent is clearly less than ten percent. The prime rate was 3.25% at the time of ASRS's refund payment to ASU on November 6, 2015, and the prime rate increased to 3.5% effective December 17, 2015. The prime rate plus one percent is the rate that should be applied to the judgment if interest is awarded.

V. The Applicable Interest Rate for Prejudgment Interest if Awarded is the Prime Rate plus One Percent.

Arizona Revised Statute 44-1201 also addresses what interest rate should be applied if prejudgment interest is awarded. Paragraph F states, "If awarded, prejudgment interest shall be at the rate described in subsection A or B of this section." Because the court ordered ASRS refund payment is solely a result of the Arizona Court of Appeals judgment, the rate described in subsection B of A.R.S. § 44-1201, the lesser of ten percent (10%) or the prime rate plus one percent, applies if prejudgment interest is award.

The University cites *Design Trend Int'l Interiors, Ltd. v. Cathay Enters., Inc.*, __ F. Supp. 3d __, 2015 WL 1186209 (D. Ariz. 2015) in support of its request that the Court

award prejudgment interest at the rate of ten percent (10%). There are several reasons that this case is not relevant. First, the decision is a federal district court opinion which is not legal precedent for federal or state courts. Second, the *Design Trend* analysis of A.R.S. § 44-1201 is a federal decision on a state law issue which does not bind Arizona state courts. *Dube v. Likins*, 216 Ariz. 406, 417, ¶ 37 (App. 2007); *MacCollum v. Perkinson*, 185 Ariz. 179, 184 (App. 1996). In fact, the Arizona Supreme Court has provided contrary and binding legal precedence on analyzing A.R.S. § 44-1201, holding that the applicable rate for prejudgment interest is the prime rate plus one percent based on A.R.S. § 44-1201(B). *Metzler,* 235 Ariz. at 147, ¶ 26.

Third, the *Design Trend* analysis ignores a cardinal principle of statutory interpretation. Each word, phrase, clause and sentence of a statute must be given meaning so that no part will be void, inert, redundant or trivial. *Williams v. Thude*, 188 Ariz. 257, 259 (1997); *City of Phoenix v. Yates*, 69 Ariz. 68, 72 (1949). On the issue of prejudgment interest, the *Design Trend* opinion automatically defaults to the ten percent (10%) rate in A.R.S. § 44-1201(A) for liquidated obligations without an agreed rate failing to give meaning to the phrase "in subsection A or B" in A.R.S. § 44-1201(F).

Fourth, the underlying facts in the *Design Trend* case were that there was an indebtedness between a creditor remodeling contractor and a debtor hotel operator under a construction contract. Therefore, the interest rate of ten percent (10%) in A.R.S. § 44-1201(A) and (F) was applicable for awarding prejudgment interest for an indebtedness despite the court's confusing analysis of prejudgment interest under A.R.S. § 44-1201 in its opinion.

VI. There was no Unjust Enrichment to the ASRS.

In deciding whether to award prejudgment interest and what interest rate to apply to the judgment, the Court should consider that there was no unjust enrichment to the

ASRS. In general, prejudgment interest serves to compensate a plaintiff for the loss of use of money and prevent a defendant from being unjustly enriched. *La Paz Cnty. v. Yuma Cnty*, 153 Ariz. 162, 168, 735 P.2d 772, 778 (1987). Prejudgment interest also provides the defendant an incentive to pay. See e.g., *AMX Enterprises, L.L.P. v. Master Realty Corp.*, 283 S.W.3d 506, 512 (Tex. App. 2009) (Prejudgment interest serves two purposes. First, it compensates a claimant for lost use of the money dues as damages during the lapse of time between the accrual of the claim and the date of judgment. . . . Second, it encourages settlement and removes incentives for delay.").

Those circumstances do not exist in this case. First, both parties are agencies of the State of Arizona government. A.R.S. §§ 15-1601, 38-714. There was and remains little to no concern that the ASRS would not return ASU's payment if a court ordered the ASRS to do so. Second, the ASRS is a pension fund that exists for the exclusive benefit of its members. Ariz. Const. art. XXIX, § 1. Any investment returns that the ASRS may have earned on the ASU $1,149,103 payment from March 15, 2012 to November 6, 2015 benefits the ASRS employer and employee membership by adding assets and decreasing liabilities in the ASRS trust fund which directly lowers future contribution rates. This benefit extends to ASU, an employer member in the ASRS. A.R.S. § 38-711(13)(a).

Third, the ASRS was required by statute to charge ASU the unfunded liability created by the ASU termination incentive program. It had no choice in the matter and had no power to give money back. The ASRS should not be charged interest on money it legally could not pay. Interest only begins to accrue when there is a legal obligation to pay. *DKI Corp./Sylvan Pools v. Industrial Comm'n*, 173 Ariz. 535, 537 (1993).

The ASRS obeyed the statutory command in A.R.S. § 38-749 when it invoiced ASU. The purpose of the statute is to require an employer to pay the liability created by its voluntarily adopted program and to prevent that liability being paid by the entire

ASRS employer and employee membership through the annual ASRS retirement contribution rate in A.R.S. §§ 38-735, -736, and -737. The unrefuted testimony of the ASRS actuary is that the ASU program did create a liability to the ASRS trust fund in the amount of $1,149,103 *as measured by* ASRS actuarial assumptions. Hearing Transcript 134:4-22, 148:8 – 149:24. The Arizona Court of Appeals did not find there was no cost to the ASRS fund resulting from the ASU program. Instead, the Court ruled in favor of ASU for the hyper technical reason that the ASRS did not enact an administrative rule. As a result of the Court's decision, the cost of the ASU program will be absorbed as a general plan liability and paid by the ASRS employer and employee membership in the retirement contribution rate. Hearing Transcript 159:10-16, 170:22 – 171:25. Any interest awarded to ASU by this Court will be paid in the same manner, added as a plan liability which is paid through the annual retirement contribution rate.

VII. Conclusion

In conclusion, the ASRS requests the Court a) to find that the amount ordered by the Arizona Court of Appeals was not automatically a liquidated amount; b) to deny ASU's request for ten percent (10%) prejudgment interest because the judgment amount ordered by the Arizona Court of Appeals is not a loan, indebtedness or other obligation; c) to order interest at the prime rate plus one percent interest if interest is awarded; and

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d) to consider that there was no unjust enrichment to the ASRS when making the foregoing decisions regarding interest.

Submitted this 22nd day of December, 2015.

Mark Brnovich
Attorney General

Jothi Beljan

Jothi Beljan
Assistant Attorney General
Attorneys for Defendant
Arizona State Retirement System

ORIGINAL filed
this 22nd day of December, 2015:

Clerk of Court
Maricopa County Superior Court
101/201 West Jefferson
Phoenix AZ 85003-2205

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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

Arizona State University, ex rel. Arizona Board of Regents, a body corporate, Plaintiff, vs. Arizona State Retirement System, a body corporate, Defendant.	No. LC2012-000689-001 DT **PLAINTIFF'S REPLY IN SUPPORT OF MOTION FOR ENTRY OF JUDGMENT WITH PREJUDGMENT INTEREST** (Assigned to the Hon. Crane McClennen)

As explained in the Motion, the System must pay 10% prejudgment interest on the $1,149,103 it unlawfully collected from the University because that overcharge is a liquidated amount that qualifies as "indebtedness" under Arizona Revised Statutes ("A.R.S.") Section 44-1201(A). *See Metzler v. BCI Coca–Cola Bottling Co. of L.A.*, 235 Ariz. 141, 146 ¶ 19 (2014) ("an indebtedness is 'something (as an amount of money) that is owed'") (citation omitted). Simply put, the System had no legal authority to assess the charge, and thus it "owed" the University the full amount the University paid under protest. *See id.* In its Response, the

System concedes that A.R.S. § 44-1201 applies, yet it never directly confronts the Supreme Court's definition of "indebtedness" which requires 10% interest in this case. Instead, the System makes a number of arguments that are legally incorrect or miss the point. It says nothing that warrants denying the Motion.

I. The refund amount is a liquidated sum subject to prejudgment interest.

The System first contends (at 3) that because the University advanced an alternative theory that *might* have permitted the System to refund less than $1,149,103, the University's claim for the full refund was "not conclusively a liquated claim." Tellingly, the System cites no authority supporting its argument, and its argument suffers from several fatal flaws.

First, the System's argument misses the point because the claim upon which the University *prevailed*—the claim that the System had no authority to charge the University in the first place—was unquestionably a liquidated claim. Simply put, the full amount of the refund—which is what the University demanded—could easily be determined "with exactness, [and] without reliance upon opinion or discretion." *Alta Vista Plaza, Ltd. v. Insulation Specialists Co., Inc.*, 186 Ariz. 81, 82 (App. 1995) ("A claim is liquidated if the evidence furnishes data which, if believed, makes it possible to compute the amount with exactness, without reliance upon opinion or discretion.") (quotation omitted). Indeed, the amount the University sought exactly equaled the amount the system unlawfully colleeted: $1,149,103.

Consequently, the System's contention (at 3)—that "[t]he Court of Appeals used its discretion on what refund amount it required the ASRS to return to ASU"—is incorrect. Once the Court of Appeals (correctly) concluded that "the System was not entitled to charge the University for the 17 retirements," the Court of Appeals had no choice but to remand for an "order directing the System to refund $1,149,103 to the University." (Op. ¶¶ 32-33.) The refund amount arising from the University's claim for "money paid out" is thus a paradigm example of a liquidated claim. *Cf. In re Guardianship of Pacheco*, 219 Ariz. 421, 428, ¶ 38 (App. 2008) ("Examples of liquidated claims include 'claims upon promises to pay a fixed

sum, claims for money had and received, claims for money paid out, and claims for goods or services to be paid for at an agreed rate.'") (citation omitted); *see also Fleming v. Pima Cnty.*, 141 Ariz. 149, 155 (1984) (affirming trial court's award of 10% prejudgment interest against county that wrongfully withheld back pay because "[t]he amount of each of plaintiff's paychecks withheld from him as a result of his wrongful discharge could be computed with exactness . . . .").

Second, although the System contends that the claim would have been unliquidated had the University prevailed on its second theory, that contention overlooks that the University sought the exact same relief under both theories. As explained in the Opinion, the University advanced two arguments for why the System owed it the full amount of the refund. First, the University argued that the System had "adopted a rule without following the rulemaking procedure provided by Arizona's Administrative Procedure Act" (meaning the charge was unlawful and must be refunded). (Op. ¶ 9.). Second, the University argued that System "charged the University for retirements that did not result in an actuarial unfunded liability." (*Id.*) With respect to the second argument, the Opinion noted that the University's expert "testified the University's termination incentive program did not result in ***any*** unfunded liability because it did not cause more members to retire than the System had projected based on its assumptions." (Op. ¶ 10.) For this reason, in its Complaint, the University sought only one form and amount of relief: a "refund [of] the *entire amount* of the ASRS invoice to ASU . . . ." (*See* Complaint at 6 (emphasis added).[1] Likewise, before the Court of Appeals, the University requested only a full refund—"$1,149,103 plus interest." (*See* Opening Brief at 68, pertinent page attached hereto as Ex. 1.) The University never sought a partial refund, but instead sought the same liquidated amount under both theories: $1,149,103.

[1] Although the University requested 8% interest in the Complaint, as explained in the Motion (at 4), prejudgment interest is a matter of right under the statute, and need not be requested in the complaint.

Although ASRS could have advanced an argument against the University's alternative theory that theoretically might have resulted in the University receiving a refund for some but not all 17 retirees, that does not transform the University's claim into an unliquidated one. The refund amount for *each* of the 17 retirees was a known liquidated amount. (See Ex. 2, showing the System's overcharge for each retiree.) Moreover, Arizona law is settled that a "sum is still 'liquidated' . . . even though the adversary successfully challenges the amount and succeeds in reducing it." *Alta Vista Plaza*, 186 Ariz. at 83 (quotation omitted); *see also Paul R. Peterson Const., Inc. v. Ariz. State Carpenters Health & Welfare Trust Fund*, 179 Ariz. 474, 485 (App. 1994) ("the fact that the amount of damages claimed differs from the amount ultimately awarded does not preclude an award of prejudgment interest."); *Suciu v. AMFAC Distrib. Corp.*, 138 Ariz. 514, 521, 675 P.2d 1333, 1340 (App. 1983) (claim was liquidated even though plaintiff requested $20,000 and was only awarded $17,260 by the jury). The University's claim that the System "refund the entire amount of the ASRS invoice to ASU," (Complaint at 6) was a liquidated claim.

II. The overcharge qualifies as "indebtedness" under A.R.S. § 44-1201(A).

The Motion explained (at 4-5) the System was "indebted" to the University because it "owed" the University money, and therefore under A.R.S. § 44-1201(A) and *Metzler* it must pay the 10% prejudgment interest rate. Although the System does not and cannot explain why the overcharge does not fall squarely within the Supreme Court's definition of "indebtedness," the System, citing *Metzler*, nevertheless contends (at 4) that it was not indebted to the University. To support this argument, the System insists that "the requirement for the ASRS to return ASU's payment depended on a judgment for its existence." This argument is incorrect for myriad reasons, and rests on a misunderstanding of *Metzler*.

As a threshold matter, the System's refund obligation "depended" on the judgment only because the System denied its liability—just as in every other case where a party (incorrectly) denies liability. Although the System and the University disagreed about what the law

required, "[a] good faith dispute over liability will not defeat a recovery of prejudgment interest on a liquidated claim." *Fleming*, 141 Ariz. 149, 155, 685 P.2d 1301, 1307 (1984); *see also Banner Realty, Inc. v. Turek*, 113 Ariz. 62, 64 (1976) ("Uncertainty as to liability does not bar recovery of prejudgment interest on a liquidated claim.").

More fundamentally, the Court of Appeals made clear that the System's refund obligation arose from ***existing law***, not anything the Court of Appeals created, and thus was an was unlawful charge that should never have been collected in the first place. (*See* Op. ¶ 32 ("the System was not entitled to charge the University for the 17 retirements.").) For this reason, the System's contention (at 4) that "[t]here was no legal obligation for the ASRS to pay ASU any amount until the Arizona Court of Appeals issued its decision in May 2015" is false. (*See* also Resp. at 2 (incorrectly claiming the System was "required" to issue an invoice "in the amount of $1,149,103.00"); Resp. at 7 (falsely claiming "[i]t had no choice in the matter").)

Contrary to the System's contention, *Metzler* did not stand decades of settled law on its head by adopting a rule that allows a party to avoid prejudgment interest by contesting liability. In *Metzler*, the Court considered "whether prejudgment interest awarded as a sanction pursuant to Arizona Rule of Civil Procedure 68(g) is interest on an 'obligation' under A.R.S. § 44–1201(A) or 'interest on a[ ] judgment' under § 44–1201(B)." *Meltzer*, 235 Ariz. at 143 ¶ 1. It held that such a sanction "is interest on a judgment and, therefore," subject to the "4.25% under subsection (B), rather than 10% under subsection (A)." *Id.*

In reaching that conclusion, the Court explained that unlike a contractual "obligation," prejudgment interest under Rule 68(g) "is a sanction that is linked to, and dependent on, entry of a 'judgment' ***that is more favorable to the offeror than the offer made***." *Id.* at 145 ¶ 17 (emphasis added). In other words, recovering the sanction is not simply a matter of obtaining a favorable judgment (which is true in any case where prejudgment interest is available notwithstanding a liability dispute). It also requires obtaining a judgment "that is more favorable to the offeror than the offer made," *id.*—something that cannot be known until after

entry of judgment. Indeed, if *Metzler* actually meant that a party could avoid prejudgment interest by forcing a dispute to judgment, it would not have bothered distinguishing disputes involving loans, indebtedness, and obligations from the distinctly different Rule 68 context. *Metzler* thus provides no help to the System.

III. The ten percent interest rate set forth in A.R.S. § 44-1201(A) applies

In its Response (at 5), the System again incorrectly claims that its refund obligation "is solely a result of the Arizona Court of Appeals judgment," and therefore "the [lower interest] rate described in subsection B" applies. This argument fails for the reasons set forth in Section II above. The System charged the University in violation of existing law, not because of it.

The System (at 5-6) also takes issue with Judge Wake's opinion in *Design Trend Int'l Interiors, Ltd. v. Cathay Enters., Inc.*, 103 F. Supp. 3d 1051 (D. Ariz. 2015). Contrary to the System's suggestion, however, *Metzler* and *Design Trend* set forth the ***identical*** interpretation of A.R.S. § 44-1201. Both make clear that the 2011 amendment to A.R.S. § 44–1201 left intact the 10% prejudgment interest rate "on any loan, indebtedness or other obligation," A.R.S. § 44–1201 (2011). *See Metzler*, 235 Ariz. at 145 ¶ 15 (noting that the 2011 amendment "uncouple[ed] 'judgments' from 'loans, indebtedness, or other obligations' so as to 'limit' the interest applicable to judgments."); *see also Design Trend*, 103 F. Supp. 3d at 1058 (setting forth the interest rate taxonomy under the amended statute and explaining that in a case involving "[a]ny 'loan, indebtedness or other obligation' (except a judgment) without an agreed interest rate—10% applies. § 44–1201(A) (first clause of first sentence).") Judge Wake's opinion merely sets forth a lengthier analysis of the statute's history, and in doing so repeatedly cites *Metzler*. *See, e.g., Design Trend*, 103 F. Supp. 3d at 1059 (discussing *Metzler* at length). Tellingly, the System does not identify anything in *Design* that conflicts with *Metzler*.

IV. The System's remaining arguments provide no reason to not award prejudgment interest.

The System lastly urges the Court (at 6-7) to "consider that there was no unjust enrichment to the ASRS." But the System took and used the University's money at the University's expense, which is precisely the harm prejudgment interest seeks to rectify (as the System recognizes). (*See* Response at 7) ("prejudgment interest serves to compensate a plaintiff for the loss of use of money and prevent a defendant from being unjustly enriched.")

More fundamentally, the other considerations the System emphasizes are irrelevant because "prejudgment interest on a liquidated claim is ***a matter of right and not a matter of discretion*** . . .." *Emp'rs Mut. Cas. Co. v. McKeon*, 170 Ariz. 75, 78 (App. 1991) (emphasis added). Accordingly, the Court has no discretion to ignore A.R.S. § 44-1201's mandatory "shall" language; it must award the interest required by the statute.

In sum, the System concedes that A.R.S. § 44-1201 applies. Under that statute, the Court must award the University 10% prejudgment interest because the System, unlawfully charged the University $1,149,103.00, and in doing so became "indebted" to the University. Accordingly, the Court should sign the form of judgment lodged with the Motion.

DATED this 19th day of January, 2016.

OSBORN MALEDON, P.A.

By _____

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EXHIBITS

Index of Exhibits to

Plaintiff's Reply in Support of
Motion for Entry of Judgment with Prejudgment Interest

Exhibit 1	Plaintiff/Appellant's Opening Brief, Court of Appeals No. 1 CA-CV 14-0083, excerpts
Exhibit 2	ASU Exhibit 10 (Administrative Hearing) – Segal Spreadsheet to ASU Exhibit List from Administrative Hearing

EXHIBIT 1

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

ARIZONA STATE UNIVERSITY ex rel. ARIZONA BOARD OF REGENTS, a body corporate, Plaintiff/Appellant, v. ARIZONA STATE RETIREMENT SYSTEM, a body corporate, Defendant/Appellee.	Court of Appeals Division One No. 1 CA-CV 14-0083 Maricopa County Superior Court No. LC2012-000689-001

PLAINTIFF/APPELLANT'S OPENING BRIEF

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CONCLUSION

For these reasons, this Court should vacate the judgment of the superior court, vacate ASRS's actions, and order that ASRS refund to ASU $1,149,103 plus interest.

RESPECTFULLY SUBMITTED this 22nd day of April, 2014.

OSBORN MALEDON, P.A.

By: /s/ Thomas L. Hudson
Thomas L. Hudson
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EXHIBIT 2

Go to Previous View

Go to Table of Contents - Appendix

Last	First Name	Age	Elapsed Service	Active Pension Liability	Retired Pension Liability	Pension Cost	Active Health Supplement Liability	Retired Health Supplement Liability	Health Supplement Cost	Total Cost
Biekert	Russell	72.31	11.99	160,495	158,360	(2,135)	6,262	10,020	3,757	1,622
Butler	Jay	65.49	38.99	926,781	1,037,073	110,292	6,620	7,887	1,267	111,559
Cardelle-Elawar	Maria	73.07	23.61	421,936	432,487	10,551	7,283	9,064	1,781	12,332
Croft	Lee	64.65	37.87	628,735	682,370	53,636	7,090	12,617	5,527	59,163
Davis	Frank	65.86	37.59	628,860	709,220	80,359	6,620	13,080	6,460	86,819
DeSerpa	Allan	66.30	32.80	697,493	771,663	74,170	6,620	9,785	3,165	77,335
Garcia	Eugene	65.07	15.19	635,517	620,814	(14,703)	7,143	10,087	2,944	(11,759)
Golen	Steven	63.41	33.95	1,136,117	1,279,130	143,013	7,739	14,181	6,442	149,455
Hall	John	69.00	37.87	1,020,031	1,163,660	143,629	6,231	10,705	4,474	148,103
Hefner	Stephen	63.85	37.99	505,780	554,469	48,689	7,375	13,427	6,052	54,741
Irwin	Leslie	65.65	15.87	206,790	211,062	4,272	6,704	9,785	3,081	7,353
Montenegro	Leonard	60.53	24.99	407,126	425,395	18,269	8,846	12,906	4,060	22,329
Palais	Joseph	75.28	46.87	1,308,779	1,308,779	0	7,516	9,263	1,747	1,747
Sandler	Irwin	66.80	40.87	1,822,552	2,134,488	311,936	6,452	12,878	6,426	318,362
Smith	Louis	73.33	39.87	554,557	590,121	35,564	6,860	8,006	1,146	36,710
Teye	Victor	62.03	26.87	717,156	763,616	46,460	8,522	14,778	6,256	52,716
Zeng	Guoliang	67.43	17.85	448,514	468,128	19,614	7,191	8,093	902	20,516
				12,227,219	13,310,835	1,083,616	121,074	186,562	65,487	1,149,103