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August 13, 2015
BY EMAIL AND BY U.S. MAIL

Anthony Martin, Regulation Coordinator
California Public Employees' Retirement System
P.O. Box 942702
Sacramento, CA 94229-2702

Re: Proposed Regulation 555.5 – Formal Request for Public Hearing

Dear Mr. Martin:

I will be attending and speaking at the public hearing has been scheduled for August 18, 2015, at 9:00 am in the CalPERS auditorium concerning CalPERS' rulemaking process regarding proposed Regulation 555.5.

On June 19, 2015, you previously received my 61-page written comments about the proposed Regulation 555.5, together with attachments consisting of copies of relevant case law on the subject. I have timely provided CalPERS, its Board of Administration, and the Finance and Administration Committee, with ample reasons for why the proposed Regulation 555.5 is inappropriate, contrary to existing law, and should not be adopted.

If CalPERS goes forward with the proposed Regulation 555.5 as currently drafted, I expect that CalPERS will summarize and respond to my comments in CalPERS' Final Statement of Reasons pursuant to *Government Code* section 11346.9. I also expect that CalPERS will submit the Final Statement of Reasons, together with a full copy of my June 19, 2015 comments and any other matters developed in the rulemaking process, to the Office of Administrative Law for its consideration.

New Matter for Finance and Administration Committee Consideration

Although the period for public comments has ended, I want to bring to your attention to the fact that on July 15, 2015, the California Supreme Court granted review of the Fourth District Court of Appeal's decision in *Flethez v. San Bernardino Cnty. Employees Ret. Ass.*, (2015) 189 Cal.Rptr.3d 823.

It would be inappropriate for CalPERS to move forward on proposed Regulation 555.5 (which is based in part on a recital of *Weber* as addressed in *Flethez*) at least until after the Supreme Court issues a final opinion on *Flethez*.

In *Flethez*, the Supreme Court is reviewing whether and to what extent a retirement system owes interest under *Civil Code* section 3287(a) on payments of disability and industrial

Anthony Martin, Regulation Coordinator
California Public Employees' Retirement System
August 13, 2015
Page 2

disability benefits in the time period before the disability "eligibility" was determined. The outcome could have important implications for CalPERS' proposed Regulation 555.5.

The Supreme Court granted review of *Flethez* after Regulation 555.5 was proposed and after the end of the public comments period.

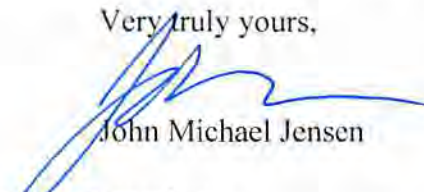
Flethez explicitly cites *Weber v. Board of Retirement* (1998) 62 Cal.App.4th 1440 which is one of the cases specifically referenced in the language of the proposed Regulation 555.5, and the Supreme Court's review of *Flethez* could significantly impact existing case law and therefore the proposed Regulation.

I am attaching copies of the Court of Appeal opinion in *Flethez*, the *Petition for Review* filed by counsel for plaintiff Frank Flethez, the Supreme Court's *Summary of Cases Accepted and Related Actions During Week of July 13, 2015*. Please make sure these are brought to the attention of the Finance and Administration Committee prior to the August 18, 2015 hearing.

I believe that in light of the Supreme Court's grant of review and the fact that the Court's decision could have fundamental impact on the calculation of *Civil Code* section 3287(a) interest for recipients of disability and industrial disability retirement benefits, CalPERS should postpone any action on proposed Regulation 555.5 until after the Supreme Court acts.

Should you have any questions or need clarification, please do not hesitate to contact me.

Very truly yours,


John Michael Jensen

JMJ:gm

cc: CalPERS' Finance & Administration Committee
c/o CalPERS Executive Office

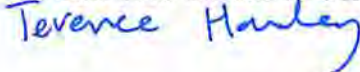


Exhibit 1

236 Cal.App.4th 65
Review Granted
(Cal.Const. art. 6, s 12; Cal. Rules of Court, Rules 8.1105 and 8.1110)
Court of Appeal,
Fourth District, Division 1, California.

Frank FLETHEZ, Plaintiff and Respondent,

v.

SAN BERNARDINO COUNTY EMPLOYEES RETIREMENT ASSOCIATION, Defendant and Appellant.

Do66959 | Filed April 22, 2015

Synopsis

Background: Former county employee filed a petition for writ of mandamus seeking retroactive disability retirement. The Superior Court, San Bernardino County, No. CIVDS1212542, David Cohn, J., granted petition and awarded prejudgment interest. County employees' retirement association appealed.

[Holding:] The Court of Appeal, McDonald, J., held that trial court could not award prejudgment interest on retroactive disability benefits for a period before employee proved his right to the benefits.

Affirmed in part, reversed in part, and remanded for further proceedings.

West Headnotes (7)

[1] **Counties** ⇌ Pensions and benefits

The burden of proof is on a county employees' retirement association member applying for disability retirement benefits to show he or she is permanently incapacitated as a result of performing his or her job duties. Cal. Gov't Code §§ 31724, 31725.

Cases that cite this headnote

[2] **Counties** ⇌ Pensions and benefits

A county retirement board is required to administer the retirement system in a manner to best provide benefits to the participants of the plan; it cannot fulfill this mandate unless it investigates applications and pays benefits only to those members who are eligible for them. Cal. Gov't Code §§ 31725, 31725.7, 31725.8.

Cases that cite this headnote

[3] **Counties** ⇌ Pensions and benefits

A county retirement board, not the employer, has the constitutional and statutory duty to manage the retirement fund and to determine whether the fund is obligated to pay benefits to any particular applicant. Cal. Gov't Code §§ 31725, 31725.7, 31725.8.

Cases that cite this headnote

[4] Interest ⇌ Labor relations and employment

Amounts recoverable as wrongfully withheld payments of salary or pensions are “damages” within meaning of statute providing that every person who is entitled to recover damages certain, or capable of being made certain by calculation, and right to recover which is vested in him upon a particular date, is entitled also to recover interest thereon from that day, and interest is recoverable on each salary or pension payment from date it fell due. Cal. Civ. Code § 3287(a).

Cases that cite this headnote

[5] Interest ⇌ Labor relations and employment

To recover interest under statute providing that every person who is entitled to recover damages certain, or capable of being made certain by calculation, and right to recover which is vested in the person upon a particular date, is entitled also to recover interest thereon from that day in a mandamus action to recover disability retirement benefits from a county employees' retirement association, the claimant must show: (1) an underlying monetary obligation, (2) damages which are certain or capable of being made certain by calculation, and (3) a right to recovery that vests on a particular day. Cal. Civ. Code § 3287(a).

Cases that cite this headnote

[6] Interest ⇌ Labor relations and employment

Trial court could not award former county employee prejudgment interest on his retroactive disability benefits for a period after his last day of receiving regular compensation but before he proved his right to recover retroactive disability retirement payments, since during that period payment of the benefits was not yet due and employee's right to recover those payments was not yet vested. Cal. Civ. Code § 3287(a); Cal. Gov't Code §§ 31721(a), 31724.

Cases that cite this headnote

[7] Counties ⇌ Pensions and benefits

Under County Employees Retirement Law (CERL), it is not until the retiring member establishes his or her entitlement to retroactive benefit payments that the right to such payments becomes vested; prior to such proof, the retiring member's right to such retroactive benefit payments is merely inchoate. Cal. Civ. Code § 3287(a); Cal. Gov't Code § 31724.

See 1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, § 888 et seq.

Cases that cite this headnote

****277 APPEAL** from a judgment of the Superior Court of San Bernardino County, David Cohn, Judge. Affirmed in part; reversed in part and remanded for further proceedings.(Super. Ct. No. CIVDS1212542)

Attorneys and Law Firms

Arias & Lockwood and Christopher D. Lockwood, for Defendant and Appellant.

Faunce, Singer & Oatman, Mark Ellis Singer and Edward L. Faunce, for Plaintiff and Respondent.

Opinion

McDONALD, J.

*68 On February 1, 2000, following his last day of work as an employee of San Bernardino County (County), Frank Flethez underwent surgery for a work-related spinal injury he suffered in 1998. In 2008, he filed an application with the San Bernardino County Employees Retirement Association (SBCERA) for work-related disability retirement benefits. SBCERA granted his request for disability benefits, beginning as of 2008, but did not grant him retroactive benefits for the period before the date of his application. Flethez filed a petition for writ of mandamus seeking retroactive disability retirement benefits beginning July 15, 2000. The trial court issued a judgment granting his petition and awarding him Civil Code section 3287, subdivision (a),¹ (§ 3287(a)) prejudgment interest on the retroactive benefits to which the judgment provided he was entitled. On appeal, SBCERA contends the trial court erred by awarding Flethez section 3287(a) prejudgment interest on his retroactive benefits beginning July 15, 2000, because SBCERA could not have granted those benefits until he filed an application for disability retirement and submitted evidence showing his entitlement to those benefits in 2008. Based on our interpretation of section 3287(a) and consideration of relevant case law and the facts in this case as discussed below, we conclude the trial court erred by awarding Flethez prejudgment interest on his retroactive disability benefits before payments of those benefits were due and before his right to recover those payments became vested under section 3287(a).

*69 FACTUAL AND PROCEDURAL BACKGROUND

In 1990, Flethez became an employee of County. He worked as an equipment operator from 1991 until 2000. In 1998, he was injured while performing his job duties. After his last day of work on January 28, 2000, he underwent spinal surgery for that 1998 injury. He underwent additional surgeries in 2001 and 2002 and received physical therapy through 2004.

**278 On June 12, 2008, Flethez filed an application with SBCERA for disability retirement benefits, but it was rejected for omission of a signed medical records authorization. On July 16, 2009, he filed a complete application, including a signed medical records authorization and a supporting physician's report. On August 5, 2010, based on its staff's recommendation, SBCERA granted Flethez's application for disability retirement benefits, effective as of the date of his initial application in 2008. Flethez requested a formal administrative hearing limited to the issue of the appropriate starting date for his retirement benefits. On December 15, 2011, the administrative hearing was held and the hearing officer subsequently issued proposed findings of fact, conclusions of law, and a recommended decision. On October 4, 2012, SBCERA adopted the hearing officer's proposed decision and maintained the effective date of June 12, 2008, for the beginning of Flethez's disability retirement benefits.

Flethez filed the instant petition for writ of mandamus pursuant to Code of Civil Procedure section 1094.5, seeking a writ ordering SBCERA to set aside its decision and grant him service-connected disability retirement benefits effective as of July 15, 2000, with interest at the legal rate on all retroactive amounts. On November 21, 2013, the trial court entered a judgment granting Flethez's petition, stating that a peremptory writ of mandate had been issued by the court commanding SBCERA to grant him service-connected disability retirement benefits retroactive to July 15, 2000, the day after the last day he received regular compensation pursuant to Government Code section 31724. The judgment also ordered "payment of interest at the legal rate on all retroactive amounts. Those interest payments total \$132,865.37." SBCERA timely filed a notice of appeal "limited to the issue of interest."

DISCUSSION

I

Standard of Review

The interpretation of a statute is a question of law that an appellate court determines de novo independently of the trial court's interpretation. (*70 *Regents of University of California v. Superior Court* (1999) 20 Cal.4th 509, 531, 85 Cal.Rptr.2d 257, 976 P.2d 808; *Riehl v. Hauck* (2014) 224 Cal.App.4th 695, 699, 168 Cal.Rptr.3d 795.) Furthermore, the application of a statute to undisputed facts is also reviewed de novo. (*Aryeh v. Canon Business Solutions, Inc.* (2013) 55 Cal.4th 1185, 1191, 151 Cal.Rptr.3d 827, 292 P.3d 871; *Cuiellette v. City of Los Angeles* (2011) 194 Cal.App.4th 757, 765, 123 Cal.Rptr.3d 562.)

"The rules governing statutory construction are well settled. We begin with the fundamental premise that the objective of statutory interpretation is to ascertain and effectuate legislative intent. [Citations.] 'In determining intent, we look first to the language of the statute, giving effect to its "plain meaning." ' [Citations.] Although we may properly rely on extrinsic aids, we should first turn to the words of the statute to determine the intent of the Legislature. [Citation.] Where the words of the statute are clear, we may not add to or alter them to accomplish a purpose that does not appear on the face of the statute or from its legislative history." (*Burden v. Snowden* (1992) 2 Cal.4th 556, 562, 7 Cal.Rptr.2d 531, 828 P.2d 672.)

II

Disability Retirement Benefits for County Employees under CERL

The retirement benefits for county employees are generally set forth in the **279 County Employees Retirement Law of 1937 (Gov. Code, §§ 31450 et seq.) (CERL). County employees may be entitled to disability retirement benefits regardless of their age if they have become permanently incapacitated as a result of injury or disease substantially arising out of and in the course of their employment. (Gov. Code, §§ 31720, 31720.1.)

To obtain disability retirement benefits, a county employee (or his or her employer, the retirement board, or another person on his or her behalf) must file an application for disability retirement benefits. (Gov. Code, § 31721, subd. (a) ["A member may be retired for disability upon the application of the member...."].) An application for disability retirement benefits "shall be made while the member [i.e., employee who is part of a county retirement system] is in service, within four months after his or her discontinuance of service, within four months after the expiration of any period during which a presumption is extended beyond his or her discontinuance of service, or while, from the date of discontinuance of service to the time of the application, he or she is continuously physically or mentally incapacitated to perform his or her duties." (Gov. Code, § 31722.) The county retirement board [e.g., SBCERA] "may require such proof, including a medical examination at the *71 expense of the member, as it deems necessary or the board upon its own motion may order a medical examination to determine the existence of the disability." (Gov. Code, § 31723.)

[1] Importantly for this case, Government Code section 31724 provides:

"If the proof received, including any medical examination, shows to the satisfaction of the board that the member is permanently incapacitated physically or mentally for the performance of his [or her] duties in the service, it shall retire him [or her] effective on the expiration date of any leave of absence with compensation to which he [or she] shall become entitled ... or effective on the occasion of the member's consent to retirement prior to the expiration of such leave of absence with compensation. His [or her] *disability retirement allowance shall be effective as of the date such application is filed with the board*, but not earlier than the day following the last day for which he [or she] received regular compensation....

"When it has been demonstrated to the satisfaction of the board that the filing of the member's application was delayed by administrative oversight or by inability to ascertain the permanency of the member's incapacity until after the date following

the day for which the member last received regular compensation, such date will be deemed to be the date the application was filed.” (Italics added.)

The retirement board shall determine whether the member is permanently incapacitated for the performance of his or her job duties. (Gov. Code, § 31725.) The burden of proof is on the member applying for disability retirement benefits to show he or she is permanently incapacitated as a result of performing his or her job duties. (*Masters v. San Bernardino County Employees Retirement Assn.* (1995) 32 Cal.App.4th 30, 46, 37 Cal.Rptr.2d 860; *Glover v. Board of Retirement* (1989) 214 Cal.App.3d 1327, 1337, 263 Cal.Rptr. 224; *Harmon v. Board of Retirement* (1976) 62 Cal.App.3d 689, 691, 133 Cal.Rptr. 154.)

[2] [3] “Board members ‘are entrusted by statute with the exclusive authority to determine the factual issues whether a member is permanently incapacitated for duty [citation] and whether the disability is service connected [citation].’ [Citation.] The Board is therefore required to administer **280 the retirement system ‘in a manner to best provide benefits to the participants of the plan.’ [Citations.] It cannot fulfill this mandate unless it investigates applications and pays benefits only to those members who are eligible for them. [Citations.] ... [¶] ... The Board, not the employer, has the constitutional and statutory duty to manage the retirement fund and to determine whether the fund is obligated to pay benefits to any particular applicant.” (*McIntyre v. Santa Barbara County Employees’ Retirement System* (2001) 91 Cal.App.4th 730, 734–735, 110 Cal.Rptr.2d 565.)

*72 III

Prejudgment Interest on Flethez’s Retroactive Disability Retirement Benefit

SBCERA contends the trial court erred by awarding Flethez section 3287(a) prejudgment interest from July 15, 2000, on his retroactive disability retirement benefits because SBCERA could not have granted those benefits until he filed an application for disability retirement and submitted evidence showing his entitlement to those benefits. It asserts prejudgment interest could not apply to retroactive benefits before payments of those benefits were due and before Flethez’s right to recover those payments became vested under section 3287(a), which SBCERA contends did not occur until December 15, 2011, the date of the administrative hearing at which disability benefits to Flethez were denied.

A

Section 3287(a) provides:

“A person who is *entitled to recover damages certain*, or capable of being made certain by calculation, *and the right to recover which is vested in the person upon a particular day*, is entitled also to recover interest thereon from that day, except when the debtor is prevented by law, or by the act of the creditor from paying the debt....” (Italics added.)

“There is scant pertinent legislative history, but [section 3287(a) ’s] meaning is clear. Section 3287(a) allows parties to recover prejudgment interest in damage actions based on a general underlying monetary obligation, including the obligation of a governmental entity determined by way of mandamus.” (*American Federation of Labor v. Unemployment Ins. Appeals Bd.* (1996) 13 Cal.4th 1017, 1030, 56 Cal.Rptr.2d 109, 920 P.2d 1314 (AFL).)

[4] In the context of employees’ salary and benefits, “[a]mounts recoverable as *wrongfully withheld payments of salary or pensions* are damages within the meaning of [section 3287(a)]. [Citations.] *Interest is recoverable on each salary or pension payment from the date it fell due.*” (*Olson v. Cory* (1983) 35 Cal.3d 390, 402, 197 Cal.Rptr. 843, 673 P.2d 720, italics added.) “[P]ursuant to [section 3287(a)], courts have awarded prejudgment interest on a trial court judgment following a successful administrative mandamus action to recover *wrongfully withheld* benefits. [Citations.] Interest may be awarded in the mandamus

action because the requirements for the additional award of interest are met once the court determines the Board wrongfully denied benefits.” (*AFL, supra*, 13 Cal.4th at p. 1022, 56 Cal.Rptr.2d 109, 920 P.2d 1314.)

[5] “[T]o recover section 3287(a) interest in the mandamus action, the claimant must show: (1) an underlying monetary obligation, (2) damages which are *73 certain or capable of being made certain by calculation, and (3) a right to recovery that vests on a particular day. [Citation.] The rationale for the mandamus interest award **281 is that a claimant who is wrongfully denied unemployment insurance [or other] benefits by the Board must receive compensation for the egregious *delay* in receiving benefits caused by the necessity of filing a mandamus action challenging the Board’s denial.” (*AFL, supra*, 13 Cal.4th at p. 1022, 56 Cal.Rptr.2d 109, 920 P.2d 1314.) In the context of unemployment benefits, the California Supreme Court in *AFL* reasoned that the Employment Development Department (EDD) “has no underlying monetary obligation to the claimant until it determines the claimant is eligible for the benefits. [Citation.] Once eligibility has been determined, *the right to receive benefits vests on the first day of the claimant’s entitlement, and the EDD must promptly pay benefits due*, regardless of any appeal taken. [Citations.] Hence, a ‘*wrongful withholding*’ of benefits, and the corresponding delay in receiving benefits, cannot have legal significance entitling the claimant to prejudgment interest until the Board makes its final decision that the claimant is not entitled to the benefits.” (*Id.* at p. 1023, 56 Cal.Rptr.2d 109, 920 P.2d 1314, italics added.) *AFL* alternatively explained: “Benefits ... are due promptly only after a claimant has established benefit eligibility. [Citation.] ... The delays inherent in this system [for determining eligibility for unemployment benefits] are not, however, tantamount to a ‘wrongful withholding’ of benefits giving rise to a right to section 3287(a) prejudgment interest....” (*Id.* at p. 1026, 56 Cal.Rptr.2d 109, 920 P.2d 1314, italics added.) However, if the EDD denies eligibility, the employee may file a petition for writ of administrative mandate in the trial court. (*Ibid.*) If the court then exercises its independent judgment and finds the EDD “has *wrongfully withheld* benefits, ‘a claimant has met all requirements of the act, and all contingencies have taken place under its terms, [the claimant] then has a statutory right to a fixed or definitely ascertainable sum of money. [Citations.]’ [Citation.] At this point, the claimant has met the requirements of section 3287(a), and may seek prejudgment interest on the mandamus judgment for the delay caused by the [EDD] Board’s wrongful denial of benefits.”² (*AFL, supra*, 13 Cal.4th at p. 1027, 56 Cal.Rptr.2d 109, 920 P.2d 1314; cf. *Currie v. Workers’ Comp. Appeals Bd.* (2001) 24 Cal.4th 1109, 1118–1119, 104 Cal.Rptr.2d 392, 17 P.3d 749 [§ 3287(a) prejudgment interest must be awarded by WCAB on retroactive wages from the date employee should have been reinstated and paid those wages for employer’s violation of Lab. Code, § 132a].) In *San Diego County Deputy Sheriffs Assn. v. San Diego County Civil Service Com.* (1998) 68 Cal.App.4th 1084, 1094, 80 Cal.Rptr.2d 712, we observed: “The central theme of *AFL* ... is that [prejudgment] interest is not available absent *74 an agency decision or action which has resulted in *wrongful withholding of, and corresponding delay in receiving, benefits* to which the claimant is entitled.” (Italics added.)

In *Tripp v. Swoap* (1976) 17 Cal.3d 671, 131 Cal.Rptr. 789, 552 P.2d 749 (*Tripp*), the California Supreme Court held that if the Director of the former Department of Social Welfare wrongfully denies a claimant’s application for welfare disability benefits, the claimant may file a petition for writ of administrative mandamus for an order directing the Director to pay the **282 claimant benefits retroactively from the date of his or her application. (*Id.* at pp. 675–676, 131 Cal.Rptr. 789, 552 P.2d 749.) In the circumstances of that case, *Tripp* concluded “the effective date of [the claimant’s] entitlement to benefits” was the “first day of the month following the date of application [for benefits].” (*Id.* at p. 678, 131 Cal.Rptr. 789, 552 P.2d 749.) Citing section 3287(a) ’s language, *Tripp* stated: “[F]or purposes of ordering retroactive payments, the right to receive benefits vests in the recipient on the first date of his [or her] entitlement.” (*Tripp*, at p. 683, 131 Cal.Rptr. 789, 552 P.2d 749.) *Tripp* concluded the claimant was entitled to prejudgment interest on benefits wrongfully withheld from the claimant based on section 3287(a) ’s language and the delay caused by the claimant’s need to vindicate his or her entitlement to benefits. (*Id.* at pp. 683, 685, 131 Cal.Rptr. 789, 552 P.2d 749.) The court held: “[W]here a recipient of welfare benefits is adjudged entitled to retroactive payment of benefits pursuant to the statutory obligation of the state, such recipient is entitled to an award of prejudgment interest at the legal rate *from the time each payment becomes due*.” (*Id.* at p. 685, 131 Cal.Rptr. 789, 552 P.2d 749, italics added.) Interpreting *Tripp*, *AFL* subsequently stated that *Tripp* held “interest awarded in mandamus actions *vests on the date the claimant was entitled to receive payment* of unemployment insurance [benefits].” (*AFL, supra*, 13 Cal.4th at p. 1034, 56 Cal.Rptr.2d 109, 920 P.2d 1314, italics added.)

In *Weber v. Board of Retirement* (1998) 62 Cal.App.4th 1440, 73 Cal.Rptr.2d 769 (*Weber*), the court addressed the question of whether administrative agencies (e.g., retirement boards) have the authority “to award interest on benefits which have *not been denied*, but ... represent the period before the Board made the eligibility determination, and ... are designed to bring the disbursements current.” (*Id.* at p. 1445, 73 Cal.Rptr.2d 769.) *Weber* stated: “*The event which triggers retirement and the right to allowance payments is the disability determination by the Board. Until that time, the member is not retired, and [the retirement system] has no monetary obligation to that member.*” (*Id.* at p. 1448, 73 Cal.Rptr.2d 769, italics added.) “[O]nce disability is demonstrated to the Board’s satisfaction, the member’s right to receive benefits vests retroactively to the date the application was filed.” (*Id.* at p. 1449, 73 Cal.Rptr.2d 769.) Alternatively stated, “[Government Code section 31724] provides that once the eligibility determination is made, the right to benefits vests immediately, effective retroactively.” (*Id.* at p. 1451.) *Weber* explained:

“[T]he member seeking [disability retirement] benefits must apply [citation], and carries the burden [citation] of demonstrating, to the Board’s satisfaction [citation], his or her eligibility for *75 the benefits. [Citation.] *Until the member makes the necessary showing of eligibility, his or her right is merely inchoate.*” (*Weber, supra*, 62 Cal.App.4th at p. 1451, 73 Cal.Rptr.2d 769, italics added.)

Weber concluded neither the CERL nor section 3287(a) authorized an administrative award of prejudgment interest. (*Weber, supra*, at p. 1452, 73 Cal.Rptr.2d 769.)

In *Austin v. Board of Retirement* (1989) 209 Cal.App.3d 1528, 258 Cal.Rptr. 106 (*Austin*), the court addressed the question of whether the trial court erred by finding an employee was entitled to interest from the last day of service on the retroactive portion of his award of disability retirement benefits. (*Id.* at pp. 1530–1531, 258 Cal.Rptr. 106.) In that case, the employee applied for disability retirement benefits in 1985, which application was initially denied, and, following an administrative hearing, the retirement board denied his **283 application in 1987 on finding he was not disabled. (*Id.* at p. 1531, 258 Cal.Rptr. 106.) In 1988, the trial court granted the employee’s petition for writ of mandate and issued a writ directing the retirement board to grant him disability retirement benefits retroactive to his last day of service with interest at the legal rate on the amount of the pension that was retroactive (i.e., presumably for payments for the period from 1985 through 1988). (*Ibid.*) *Austin* initially concluded the statutory scheme governing disability pension benefits did not preclude recovery of section 3287(a) interest on “damages awarded as prejudgment benefits *from the date such benefits became due.*” (*Austin*, at p. 1533, 258 Cal.Rptr. 106, italics added.) The court stated: “‘[Section 3287(a)] requires vesting, however, only in order to fix with sufficient certainty the time when the obligation accrues so that *interest should not be awarded on an amount before it is due.*’” (*Id.* at p. 1533, 258 Cal.Rptr. 106, quoting *Mass v. Board of Education* (1964) 61 Cal.2d 612, 625, 39 Cal.Rptr. 739, 394 P.2d 579, italics added.) Accordingly, *Austin* rejected the retirement board’s argument that section 3287(a) interest could not accrue on the amount of retroactive benefits for the period prior to its completion of the administrative process in deciding the employee’s application. (*Austin*, at pp. 1532–1534, 258 Cal.Rptr. 106.) The court reasoned: “If [the employee] had not been wrongfully denied disability retirement benefits, he would have obtained the benefits of the moneys paid as of the date of accrual of each payment.” (*Id.* at p. 1534, 258 Cal.Rptr. 106.) Therefore, *Austin* affirmed the judgment awarding the employee section 3287(a) prejudgment interest. (*Austin*, at p. 1536, 258 Cal.Rptr. 106.)

B

[6] [7] Based on our interpretation of the language of section 3287(a) and that statute’s apparent underlying legislative intent, we conclude an award of section 3287(a) prejudgment interest cannot, and should not, be made for retroactive disability retirement benefit payments for the period prior to the date those payments became due. Section 3287(a) provides: “A person who is *entitled to recover damages certain*, or capable of being made certain by calculation, *and the right to recover which is vested in the person upon a *76 particular day, is entitled also to recover interest thereon from that day....*” (Italics added.) Paraphrasing that statute, we conclude, in the context of disability retirement benefits, a retiring member is entitled to recover section 3287(a) prejudgment interest on a court award of disability retirement benefits from the day on which his or her right to recover those benefit payments became vested. However, it is important to distinguish between the retroactive date from

which benefits are awarded and the date on which the retiring member becomes entitled to recover those retroactive benefit payments. It is not until the retiring member establishes his or her entitlement to retroactive benefit payments that the right to such payments becomes vested. Prior to such proof, the retiring member's right to such retroactive benefit payments is merely inchoate. (*Weber, supra*, 62 Cal.App.4th at p. 1451, 73 Cal.Rptr.2d 769.) Furthermore, until the retiring member proves his or her right to recover retroactive disability retirement payments, there is *no underlying monetary obligation* (i.e., damages) on which to award section 3287(a) prejudgment interest. (Cf. *AFL, supra*, 13 Cal.4th at p. 1023, 56 Cal.Rptr.2d 109, 920 P.2d 1314.) It is only on the date that a retiring member proves entitlement to retroactive benefit payments that those payments become due **284 and the right to recover those payments becomes vested within the meaning of section 3287(a). (*Olson v. Cory, supra*, 35 Cal.3d at p. 402, 197 Cal.Rptr. 843, 673 P.2d 720 [regarding salary and pension payments]; *Weber, supra*, at p. 1451, 73 Cal.Rptr.2d 769 [regarding disability retirement benefits]; cf. *AFL, supra*, at pp. 1023, 1026, 56 Cal.Rptr.2d 109, 920 P.2d 1314 [regarding unemployment benefits]; *Tripp, supra*, 17 Cal.3d at pp. 683, 685, 131 Cal.Rptr. 789, 552 P.2d 749 [regarding welfare disability benefits]; *Mass v. Board of Education, supra*, 61 Cal.2d at p. 625, 39 Cal.Rptr. 739, 394 P.2d 579 [§ 3287(a) interest should not be awarded on an amount before it is due].)

In the context of disability retirement benefits under the CERL, a retiring member generally is not entitled to payment of disability retirement benefits until such time he or she files an application for such benefits. (Gov. Code, § 31721, subd. (a) ["A member may be retired for disability upon the application of the member...."].) Furthermore, the burden of proof is on the retiring member to show he or she is permanently incapacitated and that such incapacity substantially was the result of performing his or her job duties. (Gov. Code, §§ 31723, 31725; *Masters v. San Bernardino County Employees Retirement Assn., supra*, 32 Cal.App.4th at p. 46, 37 Cal.Rptr.2d 860; *Glover v. Board of Retirement, supra*, 214 Cal.App.3d at p. 1337, 263 Cal.Rptr. 224; *Harmon v. Board of Retirement, supra*, 62 Cal.App.3d at p. 691, 133 Cal.Rptr. 154.) The retirement board has the constitutional and statutory duty to manage the retirement fund and, in so doing, to determine whether the fund is obligated to pay benefits to any particular applicant. (*McIntyre v. Santa Barbara County Employees' Retirement System, supra*, 91 Cal.App.4th at pp. 734–735, 110 Cal.Rptr.2d 565.) Until such time as the retiring member submits an application for disability retirement benefits and submits proof that he or she is permanently incapacitated substantially as a result of performing his or her job duties, the retirement board has no obligation to pay *77 such benefits to that member. Therefore, a retiring member has no "vested" right to recover disability retirement benefit payments, whether retroactive or prospective, and thus no "damages," or underlying monetary obligation, within the meaning of section 3287(a) until such time as he or she files an application for such benefit payments and proves entitlement thereto. It is only on that particular day section 3287(a) interest begins to accrue on benefit payments that are then due.

Our interpretation of section 3287(a) in this context is supported by its apparent underlying legislative intent, implicitly recognized by the California Supreme Court. In both *Tripp* and *AFL*, the court explained section 3287(a) prejudgment interest was intended to compensate the claimant for the *delay* in receiving payment of benefits caused by the *wrongful denial* or *withholding* of those benefits. (*Tripp, supra*, 17 Cal.3d at pp. 683, 685, 131 Cal.Rptr. 789, 552 P.2d 749; *AFL, supra*, 13 Cal.4th at pp. 1022–1023, 1027, 56 Cal.Rptr.2d 109, 920 P.2d 1314.) The California Supreme Court stated: "The rationale for the [section 3287(a)] mandamus interest award is that a claimant who is wrongfully denied unemployment insurance [or other] benefits by the Board must receive compensation for the egregious *delay* in receiving benefits caused by the necessity of filing a mandamus action challenging the Board's denial." (*AFL, supra*, at p. 1022, 56 Cal.Rptr.2d 109, 920 P.2d 1314.) Absent any wrongful denial or wrongful withholding of benefits and the delay in receiving benefit payments caused thereby (e.g., by requiring the retiring member to file a petition for writ of mandate to obtain such benefit payments), there is no justification **285 for an award of section 3287(a) prejudgment interest. Until such time a retiring member has filed an application for disability retirement benefits and proves entitlement thereto, the retirement board has neither wrongfully withheld payment of those benefits nor caused any delay in the member's receipt of those payments and therefore no section 3287(a) prejudgment interest should accrue on any retroactive benefits ultimately awarded to the member attributable to the time period before that application and proof.

C

Applying our interpretation of section 3287(a) to the undisputed facts in this case, we conclude, as SBCERA asserts, the trial court erred by awarding Flethez section 3287(a) prejudgment interest on those retroactive disability benefit payments attributable to the period before he filed his application for, and proved his entitlement to, the disability benefits. To the extent *Austin*, *supra*, 209 Cal.App.3d 1528, 258 Cal.Rptr. 106, held to the contrary as Flethez asserts, we disagree with, and decline to follow, its holding.³ Although the trial court in this case properly found, and SBCERA does not contest on *78 appeal, Flethez was entitled to retroactive disability retirement benefits from the day following the last day he received regular compensation (i.e., July 15, 2000), it erred by awarding him section 3287(a) interest on those retroactive benefit payments attributable to the period from July 15, 2000, through the time he applied for, and proved his right to receive, such payments.⁴ However, based on the record on appeal, we cannot conclude with certainty on what date Flethez, in fact, established his right to receive retroactive disability retirement benefit payments pursuant to Government Code section 31724. SBCERA asserts that date was December 15, 2011, the date of the administrative hearing. However, the parties' briefing and evidence in the record cited on that issue is insufficient for us to make that factual finding on appeal. On remand the court is directed to conduct further proceedings to determine that question of fact and then award Flethez the appropriate amount of section 3287(a) prejudgment interest from that date.

DISPOSITION

The judgment is reversed to the extent it awarded Flethez section 3287(a) prejudgment interest on all retroactive disability retirement benefits. In all other respects, the judgment is affirmed. The matter is remanded for further proceedings consistent with this opinion. The parties shall bear their own costs on appeal.

WE CONCUR:

NARES, Acting P.J.

McINTYRE, J.

All Citations

236 Cal.App.4th 65, 186 Cal.Rptr.3d 276, 15 Cal. Daily Op. Serv. 3880

Footnotes

- 1 All statutory references are to the Civil Code unless otherwise specified.
- 2 *AFL* concluded that because "only a court may award prejudgment interest on its judgment following a mandamus action to recover benefits wrongfully withheld by Board," administrative law judges do not have statutory authority to award interest on awards of retroactive unemployment insurance benefit payments. (*AFL*, *supra*, 13 Cal.4th at p. 1043, 56 Cal.Rptr.2d 109, 920 P.2d 1314.)
- 3 It is not clear from the opinion in *Austin* when the retiring member filed his application for, and proved his entitlement to, disability retirement benefits. If, in fact, his last day of service was on or after June 11, 1985, and he met his burden to prove his right to benefits on the date he filed his application (i.e., June 11, 1985), then the result in *Austin* is entirely consistent with our interpretation. (*Austin*, *supra*, 209 Cal.App.3d at pp. 1530–1531, 1536, 258 Cal.Rptr. 106.)
- 4 In resolving this appeal on this ground, we need not, and do not, address SBCERA's alternative contention that section 3287(a) prejudgment interest does not accrue during such time as Flethez's acts, or inactions (i.e., his prolonged delay in filing his application and proving his entitlement to benefits), "prevented" it from paying his retroactive disability retirement payments, or its "debt," within the meaning of section 3287(a).

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Exhibit 2

Supreme Court No. _____

**IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA**

FRANK FLETHEZ,
Plaintiff and Respondent,

v.

**SAN BERNARDINO COUNTY EMPLOYEES
RETIREMENT ASSOCIATION,**
Defendant and Appellant.

After a Decision by the Court of Appeal,
Fourth Appellate District, Division Two
Case No. E06044

PETITION FOR REVIEW

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Supreme Court No. _____

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TABLE OF CONTENTS

Subject	Page
TABLE OF CONTENTS	I
TABLE OF AUTHORITIES	ii
ISSUE PRESENTED	1
WHY REVIEW SHOULD BE GRANTED	2
STATEMENT OF THE CASE	10
STATEMENT OF THE RELEVANT FACTS AND PROCEDURAL HISTORY	10
STANDARDS OF REVIEW	13
THE STATUTE IN QUESTION	14
ARGUMENT	14
PREFACE	14
BECAUSE PLAINTIFF FLETHEZ WAS ENTITLED TO PREJUDGMENT INTEREST ON HIS RETROACTIVE DISABILITY RETIREMENT PAYMENTS UNDER WELL ESTABLISHED AND CONCEPTUALLY SOUND LAW, THIS COURT SHOULD REVIEW AND REVERSE THE OPINION OF THE COURT OF APPEAL.	15
A POSTSCRIPT ON LIBERAL CONSTRUCTION	23
CONCLUSION	25

TABLE OF AUTHORITIES

CASES

Case	Page
<u>AFL-CIO v. Unempl. Ins. Appeals Bd.</u> , 23 Cal. 4 th 1017, 920 P.2d 1314, 56 Cal. Rptr. 2d 109 (1996)	3, 5, 16, 20
<u>Aguilar v. Cal. Unempl. Ins. Appeals Bd. (Empl. Dev. Dep't)</u> , 223 Cal. App. 3d 239, 272 Cal. Rptr. 696 (1990)	5
<u>Aryeh v. Canon Bus. Solutions</u> , 55 Cal. 4 th 1185, 292 P.3d 871, 151 Cal. Rptr. 3d 827 (2013)	14
<u>Austin v. Bd. of Ret.</u> , 209 Cal. App. 3d 1528, 258 Cal. Rptr. 106 (1989)	5, 6, 8, 17
<u>Auto Equity Sales v. Superior Court (Hesenflow)</u> , 57 Cal. 2d 450, 369 P.2d 937, 20 Cal. Rptr. 321 (1962)	6
<u>Bellus v. City of Eureka</u> , 69 Cal. 2d 336, 444 P.2d 711, 71 Cal. Rptr. 135 (1968)	23
<u>Cuiellette v. City of L.A.</u> , 194 Cal. App. 4 th 757, 123 Cal. Rptr. 3d 562 (2011)	14

<u>Currie v. WCAB (L.A. Cnty. Metro. Transp. Auth.),</u> 24 Cal. 4th 1109, 12 P.3d 749, 204 Cal. Rptr. 2d 392 (2001)	3, 5, 7
<u>Flethez v. San Bernardino Cnty. Empls. Ret. Ass'n,</u> No. D066959 (Cal. App. Apr. 22, 2015) (Fourth District, Division One)	4
<u>Frink v. Prod.,</u> 31 Cal. 3d 166, 643 P.2d 476, 181 Cal. Rptr. 893 (1982)	4
<u>Martin v. Ede,</u> 103 Cal. 152, 37 P. 199 (1894)	15
<u>Mass v. Bd. of Educ.,</u> 61 Cal. 2d 612, 324 P.2d 579, 39 Cal. Rptr. 739 (1964)	2, 3, 5, 6, 17, 18
<u>Olson v. Cory,</u> 35 Cal. 3d 390, 873 P.2d 720, 197 Cal. Rptr. 843 (1983)	3, 7
<u>Pathe v. City of Bakersfield,</u> 255 Cal. App. 2d 409, 63 Cal. Rptr. 220 (1967)	8
<u>Pearl v. WCAB (Bd. of Trustees of the Cal. State Univ.),</u> 26 Cal. 4 th 189, 26 P.3d 1044, 109 Cal. Rptr. 2d 308 (2001)	23
<u>Piscioneri v. City of Ontario,</u> 95 Cal. App. 4 th 1037, 116 Cal. Rptr. 2d 38 (2002)	18

<u>Porter v. Bd. of Ret.</u> , 222 Cal. App. 4 th 335, 165 Cal. Rptr. 3d 510 (2013)	18
<u>Regents of the Univ. of Cal. v. Superior Court (Molloy)</u> , 20 Cal. 4 th 509, 976 P.2d 808, 85 Cal. Rptr. 2d 257 (1999)	13
<u>Riehl v. Hauck</u> , 224 Cal. App. 4 th 695, 168 Cal. Rptr. 2d 795 (2014)	14
<u>Sanders v. City of L.A.</u> , 3 Cal. 3d 252, 475 P.2d 201, 90 Cal. Rptr. 169 (1970)	4, 7
<u>Tripp v. Swoap</u> , 17 Cal. 3d 671, 552 P.2d 749, 131 Cal. Rptr. 789 (1976)	3, 5, 7, 16, 19, 24
<u>Weber v. Bd. of Ret.</u> , 62 Cal. App. 4 th 1440, 73 Cal. Rptr. 2d 769 (1998)	5, 6, 16, 22
<u>Wendland v. City of Alameda</u> , 46 Cal. 2d 786, 298 P.2d 863 (1956)	24

STATUTES

Statute	Page
Cal. Civ. Code § 3287(a) (West)	passim
Cal. Civ. Proc. Code § 1094.5 (West)	11

Cal. Gov't Code § 21154(d) (West)

19

Cal. Gov't Code § 31724 (West)

12, 18, 20, 21, 22

RULES OF COURT

Rule	Page
Cal. R. Ct. 8.500(b)(1)	2
Cal. R. Ct. 8.504(b)(4)	4

No. _____

SUPREME COURT OF THE STATE OF CALIFORNIA

FRANK FLETHEZ,)	No. _____
)	
Plaintiff and Respondent,)	
)	
vs.)	
)	
SAN BERNARDINO COUNTY)	
EMPLOYEES RETIREMENT)	
ASSOCIATION,)	[San Bernardino Co.
)	Super. Ct No. CIVDS
Defendant and Appellant.)	1212542; 4th Civil No.
_____)	E06044]

ISSUE PRESENTED

Do retroactive disability retirement payments made to a county employee become vested within the meaning of section 3287(a) of the California Civil Code¹ at the time that they accrue and therefore bear prejudgment interest from the dates they accrue, as this Court has long held,

¹ Cal. Civ. Code § 3287(a) (West) [hereinafter section 3287(a) or § 3287(a)].

or do retroactive disability retirement payments not vest and not qualify the retiring county employee to prejudgment interest thereon until the employee proves his or her entitlement to them, as the schismatic opinion of the Court of Appeal declares?

WHY REVIEW SHOULD BE GRANTED

This Court may order review of a decision by the Court of Appeal “[w]hen necessary to secure uniformity of decision or to settle important questions of law”. Cal. R. Ct. 8.500(b)(1). In this case review is acutely necessary to secure both vertical and horizontal uniformity of decision, and in any event the issue presented is inherently important.

As to vertical uniformity, the decision of the Court of Appeal is at war with long established precedents of this Court. These precedents declare that for purposes of awarding statutory prejudgment interest on wrongfully withheld payments to an aggrieved party, the payments vest when they accrue.

That is, “[t]he Civil Code requires vesting . . . only in order to fix with sufficient certainty the time when the obligation accrues so that interest should not be awarded on an amount before it is due”. Mass v. Bd. of Educ., 61 Cal. 2d 612, 625, 324 P.2d 579, 588, 39 Cal. Rptr. 739, 748

(1964). Thus, in this case each retirement payment accrued on a date certain. Consequently, unless Plaintiff-Respondent Frank Flethez (Plaintiff Flethez) is not entitled to any disability retirement after all and Defendant-Appellant San Bernardino County Employees Retirement Association (SBCERA) therefore owes him neither principal nor interest, as a matter of law his retirement "payments became vested as of the dates they accrued".

Id.

Through the last half century this Court has interpreted vesting in various contexts to mean precisely what Mass say that it does. See Currie v. WCAB (L.A. Cnty. Metro. Transp. Auth.), 24 Cal. 4th 1109, 1114, 12 P.3d 749, 754, 204 Cal. Rptr. 2d 392, 398 (2001) ("Interest is recoverable on each salary or pension payment from the date it fell due.") (citing Mass) (backpay awarded to a bus driver); Olson v. Cory, 35 Cal. 3d 390, 402, 873 P.2d 720, 728, 197 Cal. Rptr. 843, 851 (1983) ("Interest is recoverable on each . . . pension payment from the date it fell due.") (citing Mass) (salary and pension increases due to judges and judicial pensioners); Tripp v. Swoap, 17 Cal. 3d 671, 683, 552 P.2d 749, 757, 131 Cal. Rptr. 789, 797 (1976) ("For purposes of awarding interest, each payment of benefits . . . should be viewed as vesting on the date it becomes due.") (citing Mass) (welfare benefits), implicitly overruled on other grounds, AFL-CIO v.

Unempl. Ins. Appeals Bd., 23 Cal. 4th 1017, 1042-43, 920 P.2d 1314, 1329, 56 Cal. Rptr. 2d 109, 124 (1996), and explicitly overruled on other grounds, Frink v. Prod., 31 Cal. 3d 166, 180, 643 P.2d 476, 484, 181 Cal. Rptr. 893, 901 (1982); Sanders v. City of L.A., 3 Cal. 3d 252, 262-63, 475 P.2d 201, 208, 90 Cal. Rptr. 169, 176 (1970) (“The wrongful withholding of past due pension payments . . . fall[s] within the definition of damages . . . and represent[s] obligations on which interest will run.”) (upholding an award of prejudgment interest on retroactive payments of salaries and wages that “were capable of being made certain and were made certain”).

In contrast, the Court of Appeal declares that the right to prejudgment interest pursuant to section 3287(a) on retroactive payments of disability retirement benefits arises only on the date that a retiring employee proves his or her entitlement to those payments. (See Slip Op. at 14, Flethez v. San Bernardino Cnty. Empls. Ret. Ass’n, No. D066959 (Cal. App. Apr. 22, 2015) (Fourth District, Division One) (Designated for Publication) (Exhibit A hereto pursuant to Cal. R. Ct. 8.504(b)(4) [hereinafter Slip Op.].) Only then does the “right to such payments becomes vested”. (Id.) “It is only on the date that a retiring [employee] proves entitlement to retroactive benefit payments that those payments become due and the right to recover those payments becomes vested within

the meaning of section 3287(a)” of the Civil Code. (Slip Op. at 14.)

The opinion of the Court of Appeal, notwithstanding its veneer of merely applying existing law, misreads² the cases decided by this Court articulating the meaning of vesting vis-a-vis section 3287(a). Review by this Court is therefore necessary in order to maintain vertical uniformity of decision, that is, consistency between the law declared by this Court and that declared by the Court of Appeal.

This Court should grant review in order to maintain horizontal uniformity of decision as well. Heretofore, prejudgment interest on retroactive disability retirement payments was granted as a matter of course. See Austin v. Bd. of Ret., 209 Cal. App. 3d 1528, 1533-34, 258 Cal. Rptr. 106, 109 (1989); see also Goldfarb v. Civ. Serv. Comm’n, 225 Cal. App. 3d 633, 636, 275 Cal. Rptr. 284, 286 (1990) (holding that a wrongfully demoted clinical psychologist was “entitled to interest on each installment of back salary from the day it fell due”); Aguilar v. Cal. Unempl. Ins. Appeals Bd. (Empl. Dev. Dep’t), 223 Cal. App. 3d 239, 245-46, 272 Cal. Rptr. 696, 701 (1990) (“For purposes of awarding interest, each payment of

² Of the primary cases cited herein, the Court of Appeal discusses AFL-CIO, Olsen, Tripp, Weber, Currie and Mass but misses the point of all of them. Plaintiff Flethez is at a loss to understand this failure of comprehension.

benefits should be viewed as vesting on the date it becomes due.”) (internal quotation omitted). Following Mass faithfully, Austin unequivocally states that pension payments become vested “as of the dates they accrued”. Id. at 1529, 258 Cal. Rptr. at 109. Herein, however, the Court of Appeal is adamant that “not until the retiring [employee] establishes his or her entitlement to retroactive benefit payments [does] the right to such payments become vested”. (Slip Op. at 14.) The two cases³ are at loggerheads on this issue, and the trial courts are therefore left adrift. See Auto Equity Sales v. Superior Court (Hesenflow), 57 Cal. 2d 450, 457, 369 P.2d 937, 941, 20 Cal. Rptr. 321, 325 (1962) (stating that the trial courts must choose between conflicting decisions of the Court of Appeal).

The conflict is palpable, (see Slip Op. at 17 (declining to follow Austin); see also id. n.3 (attempting to distinguish Austin without much success)), and this case squarely presents the issue of the meaning of

³ Another case, Weber v. Bd. of Ret., 52 Cal. App. 4th 1440, 73 Cal. Rptr. 2d 969 (1998), although technically decided on other grounds, is irreconcilable in principle with the opinion of the Court of Appeal. Compare Weber, 52 Cal. App. 4th at 1449, 73 Cal. Rptr. 2d at 774 (“once disability is demonstrated . . . the [employee’s] right to receive benefits vests retroactively to the date the application was filed”), with Slip Op. at 14 (“It is only on the date that a retiring [employee] proves entitlement to retroactive benefit payments that those payments become due and the right to receive those payments becomes vested withing the meaning of section 3287(a).”).

vesting in the context of section 3287(a), if any ever does. The record is adequate, and the issue is one of law needing but sparse factual development anyway. Nothing would be gained by permitting this issue to percolate among the lower courts, who in the meantime would risk entering incorrect and unjust judgments every time they either do or do not include or uphold prejudgment interest on an award of retroactive disability retirement payments.

In any event, the issue of law presented is of great importance viewed from any perspective. The issue is narrow, but that narrowness belies its significance.

First, the issue is important because the analytic framework employed by the Court of Appeal could be and no doubt will be used to challenge awards of prejudgment interest in contexts far from the subject of disability retirement pensions. Thus, backpay awards to those who labor in our fields and factories (Currie), salaries that for one reason or another have not been paid to those who labor in our modern bureaucracies (Olson); welfare benefits in whatever future form they may take (Tripp), and backpay that becomes due as localities experiment with living wage schemes in various forms (Sanders) will all be at risk as defendants argue a la Flethez that the right to this multitude of benefits has not vested.

Virtually any monetary obligation in the State could potentially be affected by the possible loss of prejudgment interest.

Further, even if the impact of Flethez is ultimately confined to the subject of retroactive pension benefit payments, the already overburdened panels of the Court of Appeal will be peppered with cases seeking to thrash out the issues opened up by this opinion. But this Court could close these doorways by granting review and definitely resolving the meaning of vesting.

From a practical perspective, the issue is important as well. The purpose of the disability retirement system is “to make certain that . . . employees who after long and faithful service become incapacitated by age or physical disabilities . . . will be replaced by more capable employees for the betterment of the public service without undue hardship to the employees removed.” Pathe v. City of Bakersfield, 255 Cal. App. 2d 409, 415, 63 Cal. Rptr. 220, 223 (1967). **Without undue hardship.** The retroactive implementation of disability retirements ensures that the employee will transition from that state to retiree without loss of the pension benefit he or she has earned. But to the extent that the employee is not granted prejudgment interest on his or her retroactive benefit that purpose is frustrated. See Austin, 209 Cal. App. 3d at 1534, 258 Cal. Rptr.

at 109 (observing that, absent interest, the claimant loses “the natural growth and productivity” of the withheld payments). This Court therefore should intervene (grant review) in order to assess the propriety of the interest denial worked by the decision of the Court of Appeal.

Finally, the sheer number of employees potentially impacted by the decision of the Court of Appeal renders the decision important in its own right. There are more than a million public employees eligible for disability retirement, perhaps as many as a million and a half. Each of these employees could find himself or herself in the shoes of Plaintiff Flethez, owed a substantial sum of prejudgment interest. This Court consequently should grant review and determine who is entitled to these sums.

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STATEMENT OF THE CASE

STATEMENT OF THE RELEVANT FACTS

AND PROCEDURAL HISTORY⁴

In 1990 Plaintiff Flethez became an employee of the County of San Bernardino, working as an equipment operator from 1991 until 2000. In 1998 Plaintiff Flethez was injured while performing his job duties and consequently underwent spinal surgery for that 1998 injury. Plaintiff Flethez underwent additional surgeries in 2001 and 2002 and received physical therapy through 2004.

On 12 June 2008 Plaintiff Flethez filed an application with SBCERA for disability retirement benefits, but it was rejected because for personal reasons not in the record no signed medical records authorization was submitted. On 16 July 2009 after communication with SBCERA staff concerning the matter Plaintiff Flethez filed a complete application, including a signed medical records authorization and a supporting physician's report. On 5 August 2010 SBCERA granted Plaintiff Flethez's application for disability retirement benefits based on its staff

⁴ Because the historical facts and events are undisputed, Plaintiff Flethez has adopted the summary thereof generated by the Court of Appeal. (See Slip Op. at 2-4.) All statements of fact not otherwise attributed are taken from this source.

recommendation, effective as of the date of his initial application in 2008. Plaintiff Flethez requested a formal administrative hearing limited to the issue of the appropriate starting date for his retirement benefits. On 15 December 2011 the administrative hearing was held, and the hearing officer subsequently issued proposed findings of fact, conclusions of law, and a recommended decision. On 4 October 2012 SBCERA adopted the hearing officer's proposed decision and maintained the effective date of 12 June 2008 for the commencement of Plaintiff Flethez's disability retirement benefits.

Plaintiff Flethez filed a petition for a writ of mandamus pursuant to Code of Civil Procedure section 1094.5⁵ seeking a writ ordering SBCERA to set aside its decision and grant him service-connected disability retirement benefits effective as of 15 July 2000 with interest at the legal rate on all retroactive amounts. On 21 November 2013 the Superior Court entered a judgment granting Plaintiff Flethez's petition and stating that a peremptory writ of mandate had been issued by the court commanding SBCERA to grant him service-connected disability retirement benefits retroactive to 15 July 2000, the date after the last day he received regular

⁵ Cal. Civ. Proc. Code § 1094.5 (West).

compensation, pursuant to Government Code section 31724.⁶ (See J. Granting Peremp. Writ of Mandate para. 1, at 2; Appellant's App. 127.) "The [Superior] Court order[ed] payment of interest at the legal rate on all retroactive amounts. Those interest payment total \$132,865.37." (Id. para. 2, at 2; Appellant's App. 127.)

SBCERA then appealed but limited the scope of its appeal to the issue of interest. (See Notice of Appeal at 1; Appellant's App. 131.) In all other respects SBCERA complied with the judgment, including payment of the retroactive pension benefits to which Plaintiff Flethez had been found by the Superior Court to be entitled. (See Return to Writ of Mandate at 2; Appellant's App. 61.)

The Court of Appeal reversed the judgment "to the extent that it awarded [Plaintiff] Flethez section 3287(a) prejudgment interest on all retroactive disability retirement benefits". (Slip Op. at 18.) After reviewing the operation of the retirement system with regard to granting disability pensions and determining their effective date, (see id. at 5-7), the opinion of the Court of Appeal then surveys the case law regarding the application of section 3287(a), (see Slip Op. at 7-13), and concludes that retirement

⁶ Cal. Gov't Code § 31724 (West) [hereinafter section 31724 or § 31724].

payments, albeit retroactive, do not become vested and therefore do not generate interest pursuant to that statute until the date that the retiring employee “establishes his or her entitlement to retroactive benefit payments”, (id. at 14). Applying this interpretation of section 3287(a) to the undisputed facts of the case, the Court of Appeal concludes that Plaintiff Flethez is not entitled to section 3287(a) prejudgment interest on his retroactive benefits attributable to the period from 15 July 2000 through the time that he proved his right to receive such payments. (See Slip Op. at 17.) The case was remanded to the Superior Court to determine just when the latter date might be and to then award Plaintiff Flethez prejudgment interest calculated from that date, but the judgment was otherwise affirmed. (See id. at 17-18.)

No petition for rehearing was filed. Plaintiff Flethez now petitions this Court to review and reverse.

STANDARDS OF REVIEW

Plaintiff Flethez agrees that the Court of Appeal applied the correct standards of review.

The interpretation of a statute is a question of law that an appellate court determines de novo independently of the trial court’s interpretation. Regents of the Univ. of Cal. v. Superior Court (Molloy), 20 Cal. 4th 509, 531, 976 P.2d 808,

821, 85 Cal. Rptr. 2d 257, 270 (1999); Riehl v. Hauck, 224 Cal. App. 4th 695, 699, 168 Cal. Rptr. 2d 795, 798 (2014). Furthermore, the application of a statute to undisputed facts is also reviewed de novo. Aryeh v. Canon Bus. Solutions, 55 Cal. 4th 1185, 1191, 292 P.3d 871, 874, 151 Cal. Rptr. 3d 827, 831 (2013); Cuiellette v. City of L.A., 194 Cal. App. 4th 757, 765, 123 Cal. Rptr. 3d 562, 568 (2011).

(Slip Op. at 4 (citations altered).)

THE STATUTE IN QUESTION

Section 3287(a) of the California Civil Code reads in its entirety as follows:

A person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in the person upon a particular day, is entitled also to recover interest thereon from that day, except when the debtor is prevented by law, or by the act of the creditor from paying the debt. This section is applicable to recovery of damages and interest from any debtor, including the state or any county, city, city and county, municipal corporation, public district, public agency, or any subdivision of the state.

ARGUMENT

PREFACE

The opinion of the Court of Appeal herein virtually bans awards of prejudgment interest to public employees who are forced to resort to the courts in order to establish their right to disability pension benefits. The

decision bluntly declares that “no section 3287(a) prejudgment interest should accrue on any retroactive benefits ultimately awarded to [an employee] attributable to the time period before” the actual submission of his retirement application and proof of his entitlement. (Slip Op. at 16.) In so doing the decision plays havoc with the established practices and procedures of the system for the administration of the public employee disability retirement system, misconstrues opinions of this Court, contradicts opinions previously issued by other panels of the Court of Appeal, and ignores pertinent principles of statutory construction. This Court consequently should review and reverse this decision.

**BECAUSE PLAINTIFF FLETHEZ WAS ENTITLED TO
PREJUDGMENT INTEREST ON HIS RETROACTIVE
DISABILITY RETIREMENT PAYMENTS UNDER WELL
ESTABLISHED AND CONCEPTUALLY SOUND LAW, THIS
COURT SHOULD REVIEW AND REVERSE THE OPINION OF
THE COURT OF APPEAL.**

Section 3287(a) provides in general for the recovery of prejudgment interest under certain circumstances. See, e.g., Martin v. Ede, 103 Cal. 152, 162, 37 P. 199, 201 (1894) (“Plaintiff’s demand . . . was capable of being

made certain by computation. It therefore drew interest under section 3287 of the Civil Code.”). Under that statute a claimant must satisfy three conditions for the recovery of prejudgment interest in a mandamus action against a public entity. See Tripp, 17 Cal. 3d at 682, 552 P.2d at 797, 131 Cal. Rptr. at 757. “(1) There must be an underlying monetary obligation, (2) the recovery must be certain or capable of being made certain by calculation, and (3) the right to recover must vest on a particular day.” Id.

Until the decision of the Court of Appeal the power of the Superior Court to award prejudgment interest pursuant to section 3287(a) in a mandamus action brought to recover disability retirement benefits wrongfully denied by the Board of Retirement was beyond cavil, it was “settled law”. Weber, 62 Cal. App. 4th at 1445, 73 Cal. Rptr. 2d at 772. As this Court recognized, “prejudgment interest is payable on an award of wrongfully withheld disability retirement benefits”. AFL-CIO, 23 Cal. 3d at 1031, 920 P.2d at 1322, 56 Cal. Rptr. 2d at 117.

The question remains, however, when does prejudgment interest begin to run? The Court of Appeal concludes that the payments do not become vested and consequently do not bear prejudgment interest until the employee becomes entitled to retroactive pension benefit payments. (See Slip Op. at 14 (“It is only on the date that a retiring [employee] proves

entitlement to retroactive benefit payments that those payments become due[,] and the right to recover these payments becomes vested within the meaning of section 3287(a).”). In other words, the employee is entitled to prejudgment interest only when he wins his case. Prejudgment interest thus is transformed into postjudgment interest.

But this Court has long since rejected this sort of sleight of hand. When confronted with a similar claim that interest accrued only from the date when a school board bore the legal duty to reinstate a suspended teacher because until that time the right to recover did not vest in him and that until then he was legally suspended, see Austin, 209 Cal. App. 3d at 1533, 209 Cal. Rptr. 3d at 109, this Court was not swayed by such facile reasoning. Section 3287(a) requires vesting ““only in order to fix with sufficient certainty the time the obligation accrues so that interest should not be awarded before it is due””. Austin, 209 Cal. App. 3d at 1533, 209 Cal. Rptr. 3d at 109 (quoting Mass, 61 Cal. 2d at 626, 394 P.2d at 588, 39 Cal. Rptr. at 748).

“Each salary payment in [Mass] accrued on a date certain. Unless the suspension itself [could] be sustained and the board thus relieved of any obligation whatsoever, the salary payments became vested as of the dates they accrued. If [the] plaintiff had not been wrongfully suspended, he would have obtained the benefits of the moneys paid as of those dates; he has thus lost the natural growth and productivity of the withheld salary in the form of interest.”

Id. (quoting Mass., 61 Cal. 2d at 1533-34, 394 P.2d at 588, 39 Cal. Rptr. at 748).

As in Mass., so here. The pension payments to which Plaintiff Flethez was entitled to each occurred on a date certain. Unless the denial of Plaintiff Flethez' disability retirement application could be sustained and the Board of Retirement relieved of any obligation whatsoever, the pension payments became vested as of the dates they accrued. Plaintiff Flethez' pension payments nominally began accruing on the date that his application for disability retirement was filed, but the so called deemer clause (the final sentence of the statute) pushed back the effective date of his retirement to the date following the day for which he last received regular compensation, which was "deemed to be the date the application was filed", § 31724, inasmuch as it was delayed by inability to ascertain the permanency of his incapacity until after that date. See Porter v. Bd. of Ret., 222 Cal. App. 4th 335, 338, 165 Cal. Rptr. 3d 510, 512 (2013) (reversing denial of the earlier date) (thirteen month delay between the applicant's last day of work and the filing of her application for disability retirement); see also Piscieneri v. City of Ontario, 95 Cal. App. 4th 1037, 1044, 116 Cal. Rptr. 2d 38, 43 (2002) (concluding that if an employee can "prove that he has been continuously disabled from the date of discontinuance of . . . service to the time of [his

or her] application for disability retirement, [the] application is timely”⁷) (twelve year delay between first and second applications).

The Court of Appeal treats this case as a simple one of statutory construction, (see Slip Op. at 4, 15-16), and so it is. But the Court of Appeal gravely misconstrued the statute. Simply stated, the right to retroactive payments vests when the payment accrues and the employee, but for its wrongful withholding, would have become entitled to receive it.

Vesting in this context means only that the obligation must be subject to ascertainment either on its face or by calculation. “[F]or purposes of ordering retroactive payments, the right to receive benefits vests in the recipient on the first day of his entitlement. For purposes of awarding interest each payment of benefits similarly should be viewed as vesting on the date it becomes due.” Tripp, 17 Cal. 3d at 683, 552 P.2d at 757, 131 Cal. Rptr. at 797. Not to put too fine a point on the subject, an obligation to pay prejudgment interest vests, not when the retiring employee establishes his or her entitlement to retroactive benefit payments, as the Court of Appeal asserts, (see Slip Op. at 14), but instead when the underlying obligation accrues, as the cases quoted and discussed herein teach.

⁷ See Cal. Gov’t Code § 21154(d) (West).

As something of an afterthought, the Court of Appeal asserts that until the retiring employee proves his or her right to recover retroactive disability retirement payments, “there is no underlying monetary obligation (i.e. damages) on which to award section 3287(a) prejudgment interest” (Slip Op. at 14 (emphasis omitted).) But this ipse dixit is merely a reprise of the argument concerning vesting in a different garb. For, contrary to the Court of Appeal, (see Slip Op. at 14), the operation of section 3287(a) is not dependent on the date that the retiring employee proves his or her right to recover retroactive disability payments.

To reiterate, monetary obligations vest when they accrue. See discussion supra p. 2. By statute, a disability retirement pension, once granted, is effective as of the date of the application therefor, see § 31724, and of necessity retroactive payments of the retiring employee’s pension benefits will be required as the Board of Retirement cannot possibly process and grant the retirement application on the very day that it is filed. The consequent delay of the payment of pension benefits is not wrongful because it is inherent in any system for the distribution of benefits—an administrative determination of eligibility takes time.⁸ See AFL-CIO, 23

⁸ “The requirement that the right to [pension benefits] commences retroactively to the date of the application assures that the employee receives the full amount of his or her benefit coverage.” Weber, 62 Cal.

Cal. 4th at 1037, 920 P. 2d at 1326, 96 Cal. Rptr. 2d at 121 (stating that until the agency erroneously determines that an applicant is ineligible for benefits, thus requiring him or her to seek review by way of administrative mandamus in the Superior Court, “no wrongful withholding of benefits attributable to the administrative process occurs”); see also id. at 1034, 920 P.2d at 1324, 56 Cal. Rptr. 2d at 119 (stating that interest may not be awarded “merely because at some point in the administrative process someone made an error that the administrative agency . . . itself corrected”).

But if the employee is forced to resort to a writ of mandamus in the Superior Court in order to obtain his or her due and then prevails, ipso facto his benefits were wrongfully withheld by the Board of Retirement—all of them. By statutory command the employee’s disability retirement payments become effective “as of the date that [his or her] application [was] filed with the [B]oard, but not earlier than the day following the last day for which he [or she] received regular compensation”. § 31724. Once the pension became effective, each payment vested as it accrued. See discussion supra p. 2. And “once disability is demonstrated to the Board’s satisfaction, the [employee’s] right to receives benefits vests retroactively to

App. 4th at 1448, 73 Cal. Rptr. 2d at 774.

the date that the application was filed”, Weber, 62 Cal. App. 4th at 1449, 73 Cal. Rptr. 2d at 774. Thus, the employee is entitled to prejudgment interest “on all retroactive amounts”, J. Granting Peremp. Writ of Mandate para. 2, at 2; Appellant’s App. 127), inasmuch as SBCERA refused to pay those sums despite being obligated to do so, i.e., inasmuch as it wrongfully withheld them.

The right to prejudgment interest is equally clear when (as here) the benefits begin on the date following the day for which the employee last received regular compensation because this date is “deemed to be the date the application was filed”, id., one of the two contingencies authorizing operation of the deemer clause having been satisfied.⁹ The bottom line may be greater, but the principle is exactly the same: a pension is granted effective as of the date following the employee’s last day of work—the Board of Retirement refuses to pay (wrongfully withholds) the resulting retroactive benefits—retroactive benefits continue to accrue and vest as payments come due—the employee obtains a writ in the Superior Court

⁹ The final sentence of section 31724 (the deemer clause) provides that if the Board of Retirement finds that a retiring employee’s application “was delayed by administrative oversight or by inability to ascertain the permanency of [his or her] incapacity until after the date following the day for which the [employee] last received regular compensation, such date will be deemed the date the application was filed.

ordering payment of the benefits due—and that Court awards interest on all retroactive amounts pursuant to section 3287(a).

Simply stated, the obligation to pay pension benefits arises when an employee's application for disability retirement becomes effective, which it does either as of the actual date his or her application for disability retirement was filed or as of the earlier date it may be deemed to have been filed. The right to receive these payments vests as they accrue, and they constitute damages within the meaning of section 3287(a). If these payments are wrongfully withheld by the Board of Retirement, therefore, prejudgment interest is entirely appropriate and necessary to make the employee whole.

A POSTSCRIPT ON LIBERAL CONSTRUCTION

This Court must view section 3287(a) through the lens of liberal construction. When the law governing a pension plan reasonably can be construed to so permit, this Court is, “of course, required to construe the provisions liberally in favor of the applicant so as to carry out [its] beneficent policy”. Bellus v. City of Eureka, 69 Cal. 2d 336, 351, 444 P.2d 711, 720, 71 Cal. Rptr. 135, 144 (1968) (internal quotation omitted); see Pearl v. WCAB (Bd. of Trustees of the Cal. State Univ.), 26 Cal. 4th 189,

197, 26 P.2d 1044, 1050, 109 Cal. Rptr. 2d 308, 314 (2001) (“provisions of [a pension law] must be liberally construed in favor of pensioners if they are ambiguous or uncertain”) (internal quotation omitted). “[A]ny doubt as to the proper interpretation of the [statute]” must be resolved in favor of the employee. Wendland v. City of Alameda, 46 Cal. 2d 786, 791, 298 P.2d 863, 866 (1956).

Granted, section 3287(a) is not itself a pension statute, but liberal construction is appropriate with regard to ascertainment of its meaning and application when (as here) the subject to which it is applied is one that itself merits liberal construction. See Tripp, 17 Cal. 3d at 685, 552 P. 2d at 759, 131 Cal. Rptr. at 799 (finding that an award of prejudgment interest to be “in conformity with the mandate that the law relating to welfare programs be liberally construed). And liberal construction mandates that Plaintiff Flethez’s workaday reading of that statute, which permits it to operate so as to make county employee retirees whole, be adopted in preference to the crabbed reading of the statute advanced by SBCERA, which would leave them deprived of the earnings on their retroactive payments of the pension benefits.

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CONCLUSION

For the reasons explained herein, Plaintiff Flethez is fully entitled to the judgment entered herein awarding prejudgment interest on his retroactive disability retirement benefits. Accordingly, this Court should grant review and reverse the decision of the Court of Appeal ruling otherwise.

Dated: 30 May 2015

Respectfully submitted,

Mark Ellis Singer
Edward L. Faunce
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By: 
Larry J. Roberts

Attorneys for Plaintiff and Respondent,
Frank Flethez

CERTIFICATE OF COMPLIANCE

WITH APPELLATE RULES 8.204(b)(2)(3)(4)

Plaintiff-Respondent Frank Flethez certifies that his brief is in a proportionately spaced type face (Times New Roman) of 13 point, that it is double spaced, and that it contains 5,223 words.

Dated: 30 May 2015

Respectfully submitted,

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Edward L. Faunce
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Larry J. Roberts

Attorneys for Plaintiff and Respondent,
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EXHIBIT "A"

CERTIFIED FOR PUBLICATION
COURT OF APPEAL, FOURTH APPELLATE DISTRICT
DIVISION ONE
STATE OF CALIFORNIA

FRANK FLETHEZ,

Plaintiff and Respondent,

v.

SAN BERNARDINO COUNTY
EMPLOYEES RETIREMENT
ASSOCIATION,

Defendant and Appellant.

D066959

(Super. Ct. No. CIVDS1212542)

APPEAL from a judgment of the Superior Court of San Bernardino County, David Cohn, Judge. Affirmed in part; reversed in part and remanded for further proceedings.

Arias & Lockwood and Christopher D. Lockwood for Defendant and Appellant.

Faunce, Singer & Oatman, Mark Ellis Singer and Edward L. Faunce for Plaintiff and Respondent.

On February 1, 2000, following his last day of work as an employee of San Bernardino County (County), Frank Flethez underwent surgery for a work-related spinal injury he suffered in 1998. In 2008, he filed an application with the San Bernardino County Employees Retirement Association (SBCERA) for work-related disability

retirements benefits. SBCERA granted his request for disability benefits, beginning as of 2008, but did not grant him retroactive benefits for the period before the date of his application. Flethez filed a petition for writ of mandamus seeking retroactive disability retirement benefits beginning July 15, 2000. The trial court issued a judgment granting his petition and awarding him Civil Code section 3287, subdivision (a),¹ (§ 3287(a)) prejudgment interest on the retroactive benefits to which the judgment provided he was entitled. On appeal, SBCERA contends the trial court erred by awarding Flethez section 3287(a) prejudgment interest on his retroactive benefits beginning July 15, 2000, because SBCERA could not have granted those benefits until he filed an application for disability retirement and submitted evidence showing his entitlement to those benefits in 2008. Based on our interpretation of section 3287(a) and consideration of relevant case law and the facts in this case as discussed below, we conclude the trial court erred by awarding Flethez prejudgment interest on his retroactive disability benefits before payments of those benefits were due and before his right to recover those payments became vested under section 3287(a).

FACTUAL AND PROCEDURAL BACKGROUND

In 1990, Flethez became an employee of County. He worked as an equipment operator from 1991 until 2000. In 1998, he was injured while performing his job duties. After his last day of work on January 28, 2000, he underwent spinal surgery for that 1998

¹ All statutory references are to the Civil Code unless otherwise specified.

injury. He underwent additional surgeries in 2001 and 2002 and received physical therapy through 2004.

On June 12, 2008, Flethez filed an application with SBCERA for disability retirements benefits, but it was rejected for omission of a signed medical records authorization. On July 16, 2009, he filed a complete application, including a signed medical records authorization and a supporting physician's report. On August 5, 2010, based on its staff's recommendation, SBCERA granted Flethez's application for disability retirement benefits, effective as of the date of his initial application in 2008. Flethez requested a formal administrative hearing limited to the issue of the appropriate starting date for his retirement benefits. On December 15, 2011, the administrative hearing was held and the hearing officer subsequently issued proposed findings of fact, conclusions of law, and a recommended decision. On October 4, 2012, SBCERA adopted the hearing officer's proposed decision and maintained the effective date of June 12, 2008, for the beginning of Flethez's disability retirement benefits.

Flethez filed the instant petition for writ of mandamus pursuant to Code of Civil Procedure section 1094.5, seeking a writ ordering SBCERA to set aside its decision and grant him service-connected disability retirement benefits effective as of July 15, 2000, with interest at the legal rate on all retroactive amounts. On November 21, 2013, the trial court entered a judgment granting Flethez's petition, stating that a peremptory writ of mandate had been issued by the court commanding SBCERA to grant him service-connected disability retirement benefits retroactive to July 15, 2000, the day after the last day he received regular compensation pursuant to Government Code section 31724. The

judgment also ordered "payment of interest at the legal rate on all retroactive amounts. Those interest payments total \$132,865.37." SBCERA timely filed a notice of appeal "limited to the issue of interest."

DISCUSSION

I

Standard of Review

The interpretation of a statute is a question of law that an appellate court determines de novo independently of the trial court's interpretation. (*Regents of University of California v. Superior Court* (1999) 20 Cal.4th 509, 531; *Riehl v. Hauck* (2014) 224 Cal.App.4th 695, 699.) Furthermore, the application of a statute to undisputed facts is also reviewed de novo. (*Aryeh v. Canon Business Solutions, Inc.* (2013) 55 Cal.4th 1185, 1191; *Cuiellette v. City of Los Angeles* (2011) 194 Cal.App.4th 757, 765.)

"The rules governing statutory construction are well settled. We begin with the fundamental premise that the objective of statutory interpretation is to ascertain and effectuate legislative intent. [Citations.] 'In determining intent, we look first to the language of the statute, giving effect to its "plain meaning." ' [Citations.] Although we may properly rely on extrinsic aids, we should first turn to the words of the statute to determine the intent of the Legislature. [Citation.] Where the words of the statute are clear, we may not add to or alter them to accomplish a purpose that does not appear on the face of the statute or from its legislative history." (*Burden v. Snowden* (1992) 2 Cal.4th 556, 562.)

II

Disability Retirement Benefits for County Employees under CERL

The retirement benefits for county employees are generally set forth in the County Employees Retirement Law of 1937 (Gov. Code, §§ 31450 et seq.) (CERL). County employees may be entitled to disability retirement benefits regardless of their age if they have become permanently incapacitated as a result of injury or disease substantially arising out of and in the course of their employment. (Gov. Code, §§ 31720, 31720.1.)

To obtain disability retirement benefits, a county employee (or his or her employer, the retirement board, or another person on his or her behalf) must file an application for disability retirement benefits. (Gov. Code, § 31721, subd. (a) ["A member may be retired for disability upon the application of the member"]) An application for disability retirement benefits "shall be made while the member [i.e., employee who is part of a county retirement system] is in service, within four months after his or her discontinuance of service, within four months after the expiration of any period during which a presumption is extended beyond his or her discontinuance of service, or while, from the date of discontinuance of service to the time of the application, he or she is continuously physically or mentally incapacitated to perform his or her duties." (Gov. Code, § 31722.) The county retirement board [e.g., SBCERA] "may require such proof, including a medical examination at the expense of the member, as it deems necessary or the board upon its own motion may order a medical examination to determine the existence of the disability." (Gov. Code, § 31723.)

Importantly for this case, Government Code section 31724 provides:

"If the proof received, including any medical examination, shows to the satisfaction of the board that the member is permanently incapacitated physically or mentally for the performance of his [or her] duties in the service, it shall retire him [or her] effective on the expiration date of any leave of absence with compensation to which he [or she] shall become entitled . . . or effective on the occasion of the member's consent to retirement prior to the expiration of such leave of absence with compensation. His [or her] *disability retirement allowance shall be effective as of the date such application is filed with the board*, but not earlier than the day following the last day for which he [or she] received regular compensation. . . .

"When it has been demonstrated to the satisfaction of the board that the filing of the member's application was delayed by administrative oversight or by inability to ascertain the permanency of the member's incapacity until after the date following the day for which the member last received regular compensation, such date will be deemed to be the date the application was filed." (Italics added.)

The retirement board shall determine whether the member is permanently incapacitated for the performance of his or her job duties. (Gov. Code, § 31725.) The burden of proof is on the member applying for disability retirement benefits to show he or she is permanently incapacitated as a result of performing his or her job duties. (*Masters v. San Bernardino County Employees Retirement Assn.* (1995) 32 Cal.App.4th 30, 46; *Glover v. Board of Retirement* (1989) 214 Cal.App.3d 1327, 1337; *Harmon v. Board of Retirement* (1976) 62 Cal.App.3d 689, 691.)

"Board members 'are entrusted by statute with the exclusive authority to determine the factual issues whether a member is permanently incapacitated for duty [citation] and whether the disability is service connected [citation].' [Citation.] The Board is therefore required to administer the retirement system 'in a manner to best provide benefits to the participants of the plan.' [Citations.] It cannot fulfill this mandate unless it investigates

applications and pays benefits only to those members who are eligible for them. [Citations.] . . . [¶] . . . The Board, not the employer, has the constitutional and statutory duty to manage the retirement fund and to determine whether the fund is obligated to pay benefits to any particular applicant." (*McIntyre v. Santa Barbara County Employees' Retirement System* (2001) 91 Cal.App.4th 730, 734-735.)

III

Prejudgment Interest on Flethez's Retroactive Disability Retirement Benefit

SBCERA contends the trial court erred by awarding Flethez section 3287(a) prejudgment interest from July 15, 2000, on his retroactive disability retirement benefits because SBCERA could not have granted those benefits until he filed an application for disability retirement and submitted evidence showing his entitlement to those benefits. It asserts prejudgment interest could not apply to retroactive benefits before payments of those benefits were due and before Flethez's right to recover those payments became vested under section 3287(a), which SBCERA contends did not occur until December 15, 2011, the date of the administrative hearing at which disability benefits to Flethez were denied.

A

Section 3287(a) provides:

"A person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in the person upon a particular day, is entitled also to recover interest thereon from that day, except when the debtor is prevented by law, or by the act of the creditor from paying the debt. . . ."
(Italics added.)

"There is scant pertinent legislative history, but [section 3287(a)'s] meaning is clear. Section 3287(a) allows parties to recover prejudgment interest in damage actions based on a general underlying monetary obligation, including the obligation of a governmental entity determined by way of mandamus." (*American Federation of Labor v. Unemployment Ins. Appeals Bd.* (1996) 13 Cal.4th 1017, 1030 (*AFL*.)

In the context of employees' salary and benefits, "[a]mounts recoverable as *wrongfully withheld payments of salary or pensions* are damages within the meaning of [section 3287(a)]. [Citations.] *Interest is recoverable on each salary or pension payment from the date it fell due.*" (*Olson v. Cory* (1983) 35 Cal.3d 390, 402, italics added.)

"[P]ursuant to [section 3287(a)], courts have awarded prejudgment interest on a trial court judgment following a successful administrative mandamus action to recover *wrongfully withheld* benefits. [Citations.] Interest may be awarded in the mandamus action because the requirements for the additional award of interest are met once the court determines the Board wrongfully denied benefits." (*AFL, supra*, 13 Cal.4th at p. 1022.)

"[T]o recover section 3287(a) interest in the mandamus action, the claimant must show: (1) an underlying monetary obligation, (2) damages which are certain or capable of being made certain by calculation, and (3) a right to recovery that vests on a particular day. [Citation.] The rationale for the mandamus interest award is that a claimant who is wrongfully denied unemployment insurance [or other] benefits by the Board must receive compensation for the egregious *delay* in receiving benefits caused by the necessity of filing a mandamus action challenging the Board's denial." (*AFL, supra*, 13 Cal.4th at

p. 1022.) In the context of unemployment benefits, the California Supreme Court in *AFL* reasoned that the Employment Development Department (EDD) "has no underlying monetary obligation to the claimant until it determines the claimant is eligible for the benefits. [Citation.] Once eligibility has been determined, *the right to receive benefits vests on the first day of the claimant's entitlement, and the EDD must promptly pay benefits due*, regardless of any appeal taken. [Citations.] Hence, *a 'wrongful withholding' of benefits, and the corresponding delay in receiving benefits, cannot have legal significance entitling the claimant to prejudgment interest until the Board makes its final decision that the claimant is not entitled to the benefits.*" (*Id.* at p. 1023, italics added.) *AFL* alternatively explained: "*Benefits . . . are due promptly only after a claimant has established benefit eligibility.* [Citation.] . . . The delays inherent in this system [for determining eligibility for unemployment benefits] are not, however, tantamount to a 'wrongful withholding' of benefits giving rise to a right to section 3287(a) prejudgment interest . . ." (*Id.* at p. 1026, italics added.) However, if the EDD denies eligibility, the employee may file a petition for writ of administrative mandate in the trial court. (*Ibid.*) If the court then exercises its independent judgment and finds the EDD "has *wrongfully withheld* benefits, 'a claimant has met all requirements of the act, and all contingencies have taken place under its terms, [the claimant] then has a statutory right to a fixed or definitely ascertainable sum of money. [Citations.]' [Citation.] At this point, the claimant has met the requirements of section 3287(a), and may seek prejudgment interest on the mandamus judgment for the delay caused by the [EDD] Board's wrongful

denial of benefits."² (*AFL, supra*, 13 Cal.4th at p. 1027; cf. *Currie v. Workers' Comp. Appeals Bd.* (2001) 24 Cal.4th 1109, 1118-1119 [§ 3287(a) prejudgment interest must be awarded by WCAB on retroactive wages from the date employee should have been reinstated and paid those wages for employer's violation of Lab. Code, § 132a].) In *San Diego County Deputy Sheriffs Assn. v. San Diego County Civil Service Com.* (1998) 68 Cal.App.4th 1084, 1094, we observed: "The central theme of *AFL* . . . is that [prejudgment] interest is not available absent an agency decision or action which has resulted in *wrongful withholding of, and corresponding delay in receiving, benefits* to which the claimant is entitled." (Italics added.)

In *Tripp v. Swoap* (1976) 17 Cal.3d 671 (*Tripp*), the California Supreme Court held that if the Director of the former Department of Social Welfare wrongfully denies a claimant's application for welfare disability benefits, the claimant may file a petition for writ of administrative mandamus for an order directing the Director to pay the claimant benefits retroactively from the date of his or her application. (*Id.* at pp. 675-676.) In the circumstances of that case, *Tripp* concluded "the effective date of [the claimant's] entitlement to benefits" was the "first day of the month following the date of application [for benefits]." (*Id.* at p. 678.) Citing section 3287(a)'s language, *Tripp* stated: "[F]or purposes of ordering retroactive payments, the right to receive benefits vests in the

² *AFL* concluded that because "only a court may award prejudgment interest on its judgment following a mandamus action to recover benefits wrongfully withheld by Board," administrative law judges do not have statutory authority to award interest on awards of retroactive unemployment insurance benefit payments. (*AFL, supra*, 13 Cal.4th at p. 1043.)

recipient on the first date of his [or her] entitlement." (*Tripp*, at p. 683.) *Tripp* concluded the claimant was entitled to prejudgment interest on benefits wrongfully withheld from the claimant based on section 3287(a)'s language and the delay caused by the claimant's need to vindicate his or her entitlement to benefits. (*Id.* at pp. 683, 685.) The court held: "[W]here a recipient of welfare benefits is adjudged entitled to retroactive payment of benefits pursuant to the statutory obligation of the state, such recipient is entitled to an award of prejudgment interest at the legal rate *from the time each payment becomes due.*" (*Id.* at p. 685, italics added.) Interpreting *Tripp*, *AFL* subsequently stated that *Tripp* held "interest awarded in mandamus actions *vests on the date the claimant was entitled to receive payment* of unemployment insurance [benefits]." (*AFL, supra*, 13 Cal.4th at p. 1034, italics added.)

In *Weber v. Board of Retirement* (1998) 62 Cal.App.4th 1440 (*Weber*), the court addressed the question of whether administrative agencies (e.g., retirement boards) have the authority "to award interest on benefits which have *not been denied*, but . . . represent the period before the Board made the eligibility determination, and . . . are designed to bring the disbursements current." (*Id.* at p. 1445.) *Weber* stated: "*The event which triggers retirement and the right to allowance payments is the disability determination by the Board. Until that time, the member is not retired, and [the retirement system] has no monetary obligation to that member.*" (*Id.* at p. 1448, italics added.) "[O]nce disability is demonstrated to the Board's satisfaction, the member's right to receive benefits vests retroactively to the date the application was filed." (*Id.* at p. 1449.) Alternatively stated, "[Government Code section 31724] provides that once the eligibility determination is

made, the right to benefits vests immediately, effective retroactively." (*Id.* at p. 1451.)

Weber explained:

"[T]he member seeking [disability retirement] benefits must apply [citation], and carries the burden [citation] of demonstrating, to the Board's satisfaction [citation], his or her eligibility for the benefits. [Citation.] *Until the member makes the necessary showing of eligibility, his or her right is merely inchoate.*" (*Weber, supra*, 62 Cal.App.4th at p. 1451, italics added.)

Weber concluded neither the CERL nor section 3287(a) authorized an administrative award of prejudgment interest. (*Weber, supra*, at p. 1452.)

In *Austin v. Board of Retirement* (1989) 209 Cal.App.3d 1528 (*Austin*), the court addressed the question of whether the trial court erred by finding an employee was entitled to interest from the last day of service on the retroactive portion of his award of disability retirement benefits. (*Id.* at pp. 1530-1531.) In that case, the employee applied for disability retirement benefits in 1985, which application was initially denied, and, following an administrative hearing, the retirement board denied his application in 1987 on finding he was not disabled. (*Id.* at p. 1531.) In 1988, the trial court granted the employee's petition for writ of mandate and issued a writ directing the retirement board to grant him disability retirement benefits retroactive to his last day of service with interest at the legal rate on the amount of the pension that was retroactive (i.e., presumably for payments for the period from 1985 through 1988). (*Ibid.*) *Austin* initially concluded the statutory scheme governing disability pension benefits did not preclude recovery of section 3287(a) interest on "damages awarded as prejudgment benefits *from the date such benefits became due.*" (*Austin*, at p. 1533, italics added.) The court stated: "[Section

3287(a)] requires vesting, however, only in order to fix with sufficient certainty the time when the obligation accrues so that *interest should not be awarded on an amount before it is due.*" (*Id.* at p. 1533, quoting *Mass v. Board of Education* (1964) 61 Cal.2d 612, 625, italics added.) Accordingly, *Austin* rejected the retirement board's argument that section 3287(a) interest could not accrue on the amount of retroactive benefits for the period prior to its completion of the administrative process in deciding the employee's application. (*Austin*, at pp. 1532-1534.) The court reasoned: "If [the employee] had not been wrongfully denied disability retirement benefits, he would have obtained the benefits of the moneys paid as of the date of accrual of each payment." (*Id.* at p. 1534.) Therefore, *Austin* affirmed the judgment awarding the employee section 3287(a) prejudgment interest. (*Austin*, at p. 1536.)

B

Based on our interpretation of the language of section 3287(a) and that statute's apparent underlying legislative intent, we conclude an award of section 3287(a) prejudgment interest cannot, and should not, be made for retroactive disability retirement benefit payments for the period prior to the date those payments became due. Section 3287(a) provides: "A person who is *entitled to recover damages certain*, or capable of being made certain by calculation, *and the right to recover which is vested in the person upon a particular day, is entitled also to recover interest thereon from that day*" (Italics added.) Paraphrasing that statute, we conclude, in the context of disability retirement benefits, a retiring member is entitled to recover section 3287(a) prejudgment interest on a court award of disability retirement benefits from the day on which his or

her right to recover those benefit payments became vested. However, it is important to distinguish between the retroactive date from which benefits are awarded and the date on which the retiring member becomes entitled to recover those retroactive benefit payments. It is not until the retiring member establishes his or her entitlement to retroactive benefit payments that the right to such payments becomes vested. Prior to such proof, the retiring member's right to such retroactive benefit payments is merely inchoate. (*Weber, supra*, 62 Cal.App.4th at p. 1451.) Furthermore, until the retiring member proves his or her right to recover retroactive disability retirement payments, there is *no underlying monetary obligation* (i.e., damages) on which to award section 3287(a) prejudgment interest. (Cf. *AFL, supra*, 13 Cal.4th at p. 1023.) It is only on the date that a retiring member proves entitlement to retroactive benefit payments that those payments become due and the right to recover those payments becomes vested within the meaning of section 3287(a). (*Olson v. Cory, supra*, 35 Cal.3d at p. 402 [regarding salary and pension payments]; *Weber*, at p. 1451 [regarding disability retirement benefits]; cf. *AFL*, at pp. 1023, 1026 [regarding unemployment benefits]; *Tripp, supra*, 17 Cal.3d at pp. 683, 685 [regarding welfare disability benefits]; *Mass v. Board of Education, supra*, 61 Cal.2d at p. 625 [§ 3287(a) interest should not be awarded on an amount before it is due].)

In the context of disability retirement benefits under the CERL, a retiring member generally is not entitled to payment of disability retirement benefits until such time he or she files an application for such benefits. (Gov. Code, § 31721, subd. (a) ["A member may be retired for disability upon the application of the member . . .".]) Furthermore,

the burden of proof is on the retiring member to show he or she is permanently incapacitated and that such incapacity substantially was the result of performing his or her job duties. (Gov. Code, §§ 31723, 31725; *Masters v. San Bernardino County Employees Retirement Assn.*, *supra*, 32 Cal.App.4th at p. 46; *Glover v. Board of Retirement*, *supra*, 214 Cal.App.3d at p. 1337; *Harmon v. Board of Retirement*, *supra*, 62 Cal.App.3d at p. 691.) The retirement board has the constitutional and statutory duty to manage the retirement fund and, in so doing, to determine whether the fund is obligated to pay benefits to any particular applicant. (*McIntyre v. Santa Barbara County Employees' Retirement System*, *supra*, 91 Cal.App.4th at pp. 734-735.) Until such time as the retiring member submits an application for disability retirement benefits and submits proof that he or she is permanently incapacitated substantially as a result of performing his or her job duties, the retirement board has no obligation to pay such benefits to that member. Therefore, a retiring member has no "vested" right to recover disability retirement benefit payments, whether retroactive or prospective, and thus no "damages," or underlying monetary obligation, within the meaning of section 3287(a) until such time as he or she files an application for such benefit payments and proves entitlement thereto. It is only on that particular day section 3287(a) interest begins to accrue on benefit payments that are then due.

Our interpretation of section 3287(a) in this context is supported by its apparent underlying legislative intent, implicitly recognized by the California Supreme Court. In both *Tripp* and *AFL*, the court explained section 3287(a) prejudgment interest was intended to compensate the claimant for the *delay* in receiving payment of benefits

caused by the *wrongful* denial or withholding of those benefits. (*Tripp, supra*, 17 Cal.3d at pp. 683, 685; *AFL, supra*, 13 Cal.4th at pp. 1022-1023, 1027.) The California Supreme Court stated: "The rationale for the [section 3287(a)] mandamus interest award is that a claimant who is wrongfully denied unemployment insurance [or other] benefits by the Board must receive compensation for the egregious *delay* in receiving benefits caused by the necessity of filing a mandamus action challenging the Board's denial." (*AFL*, at p. 1022.) Absent any wrongful denial or wrongful withholding of benefits and the delay in receiving benefit payments caused thereby (e.g., by requiring the retiring member to file a petition for writ of mandate to obtain such benefit payments), there is no justification for an award of section 3287(a) prejudgment interest. Until such time a retiring member has filed an application for disability retirement benefits and proves entitlement thereto, the retirement board has neither wrongfully withheld payment of those benefits nor caused any delay in the member's receipt of those payments and therefore no section 3287(a) prejudgment interest should accrue on any retroactive benefits ultimately awarded to the member attributable to the time period before that application and proof.

C

Applying our interpretation of section 3287(a) to the undisputed facts in this case, we conclude, as SBCERA asserts, the trial court erred by awarding Flethez section 3287(a) prejudgment interest on those retroactive disability benefit payments attributable to the period before he filed his application for, and proved his entitlement to, the disability benefits. To the extent *Austin, supra*, 209 Cal.App.3d 1528, held to the

contrary as Flethez asserts, we disagree with, and decline to follow, its holding.³

Although the trial court in this case properly found, and SBCERA does not contest on appeal, Flethez was entitled to retroactive disability retirement benefits from the day following the last day he received regular compensation (i.e., July 15, 2000), it erred by awarding him section 3287(a) interest on those retroactive benefit payments attributable to the period from July 15, 2000, through the time he applied for, and proved his right to receive, such payments.⁴ However, based on the record on appeal, we cannot conclude with certainty on what date Flethez, in fact, established his right to receive retroactive disability retirement benefit payments pursuant to Government Code section 31724.

SBCERA asserts that date was December 15, 2011, the date of the administrative hearing. However, the parties' briefing and evidence in the record cited on that issue is insufficient for us to make that factual finding on appeal. On remand the court is directed to conduct further proceedings to determine that question of fact and then award Flethez the appropriate amount of section 3287(a) prejudgment interest from that date.

³ It is not clear from the opinion in *Austin* when the retiring member filed his application for, and proved his entitlement to, disability retirement benefits. If, in fact, his last day of service was on or after June 11, 1985, and he met his burden to prove his right to benefits on the date he filed his application (i.e., June 11, 1985), then the result in *Austin* is entirely consistent with our interpretation. (*Austin, supra*, 209 Cal.App.3d at pp. 1530-1531, 1536.)

⁴ In resolving this appeal on this ground, we need not, and do not, address SBCERA's alternative contention that section 3287(a) prejudgment interest does not accrue during such time as Flethez's acts, or inactions (i.e., his prolonged delay in filing his application and proving his entitlement to benefits), "prevented" it from paying his retroactive disability retirement payments, or its "debt," within the meaning of section 3287(a).

DISPOSITION

The judgment is reversed to the extent it awarded Flethez section 3287(a) prejudgment interest on all retroactive disability retirement benefits. In all other respects, the judgment is affirmed. The matter is remanded for further proceedings consistent with this opinion. The parties shall bear their own costs on appeal.

McDONALD, J.

WE CONCUR:

NARES, Acting P. J.

McINTYRE, J.

I, KEVIN J. LANE, Clerk of the Court of Appeal, Fourth Appellate District, State of California, do hereby certify that this proceeding and annexed is a true and correct copy of the original on file in my office.

WITNESS, my hand and the Seal of the Court this
April 22, 2015

KEVIN J. LANE, CLERK



By A. Galvez
Deputy Clerk

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF ORANGE

I am employed in the County of Orange, State of California. I am over the age of eighteen years and not a party to the within action; my business address is 404 Enclave Circle #208, Costa Mesa, CA 92626

That on May 30, 2015, I served the foregoing document described as: **PETITION FOR REVIEW** on all interested parties as follows:

(X) by placing () the original (X) a true copy thereof enclosed in sealed envelope(s) addressed as follows:

SEE ATTACHED SERVICE

(X) **(BY MAIL)** I deposited such envelope(s) in the mail at 3101 W. Sunflower Ave., Santa Ana, CA 92799.

I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. The envelope was mailed with postage thereon fully prepaid. It is deposited with U.S. postal service on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than 1 day after date of deposit for mailing as stated in the Declaration.

Executed on May 30, 2015 at Costa Mesa, California.

I declare under penalty of perjury, under the laws of the State of California that the above is true and correct.



Diane Castillo

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Exhibit 3



Supreme Court of California
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NEWS RELEASE

Contact: Cathal Conneely, 415-865-7740

FOR IMMEDIATE RELEASE

July 17, 2015

Summary of Cases Accepted and Related Actions During Week of July 13, 2015

[This news release is issued to inform the public and the press of cases that the Supreme Court has accepted and of their general subject matter. The statement of the issue or issues in each case set out below does not necessarily reflect the view of the court, or define the specific issues that will be addressed by the court.]

#15-119 *Association of California Ins. Companies v. Jones, S226529.* (B248622; 235 Cal.App.4th 1009; Los Angeles County Superior Court; BC463124.) Petition for review after the Court of Appeal affirmed the judgment in a civil action. This case presents the following issues: (1) Does the Unfair Insurance Practices Act (Ins. Code, § 790, et seq.) give the Insurance Commissioner authority to promulgate a regulation that sets forth requirements for communicating replacement value and states that noncompliance with the regulation constitutes a misleading statement, and therefore an unfair trade practice, for purposes of the act? (2) Does the Insurance Commissioner have the statutory authority to promulgate a regulation specifying that the communication of a replacement cost estimate that omits one or more of the components in subdivisions (a)-(e) of section 2695.183 of title 10 of the California Code of Regulations is a “misleading” statement with respect to the business of insurance? (Cal. Code of Regs., tit. 10, § 2695.183, subd. (j).)

#15-120 *Flethez v. San Bernardino County Employees Retirement Assn., S226779.* (D066959; 236 Cal.App.4th 65; San Bernardino County Superior Court; CIVDS1212542.) Petition for review after the Court of Appeal reversed the judgment in an action for writ of administrative mandate. This case includes the following issue: If a retroactive award of service-connected disability retirement benefits is made in an administrative mandate proceeding, is prejudgment interest under Code of Civil Procedure section 3287 calculated from the day after the employee’s last day of regular compensation or the day on which the employee submitted the claim for the benefits?

#15-121 *In re Aguilar, S226995.* (H040784; nonpublished opinion; Monterey County Superior Court; HC7945.) Petition for review after the Court of Appeal granted relief on a petition for writ of habeas corpus.

#15-122 *People v. Prescott*, S226553. (A135991; nonpublished opinion; Alameda County Superior Court; C165685A.) Petition for review after the Court of Appeal remanded for resentencing and otherwise affirmed a judgment of conviction of a criminal offense.

The court ordered briefing in *Aguilar* and *Prescott* deferred pending decision in *In re Alatraste*, S214652 (#14-21), *In re Bonilla*, S214960 (#14-22), and *People v. Franklin*, S217669 (#14-56), which include the following issues: (1) Did Senate Bill 260 (Reg. Sess. 2013-2014), which includes provisions for a parole suitability hearing after a maximum of 25 years for most juvenile offenders serving life sentences, render moot any claim that such a sentence violates the Eighth Amendment to the federal Constitution and that the petitioner is entitled to a new sentencing hearing applying the mitigating factors for such juvenile offenders set forth in *Miller v. Alabama* (2012) 567 U.S. __ [132 S.Ct. 2455]? If not: (2) Does *Miller* apply retroactively on habeas corpus to a prisoner who was a juvenile at the time of the commitment offense and who is presently serving a sentence that is the functional equivalent of life without the possibility of parole? (3) Is a total term of imprisonment of 77 years to life (*Alatraste*) or 50 years to life (*Bonilla* and *Franklin*) for murder committed by a 16-year-old offender the functional equivalent of life without possibility of parole by denying the offender a meaningful opportunity for release on parole? (4) If so, does the sentence violate the Eighth Amendment absent consideration of the mitigating factors for juvenile offenders set forth in *Miller*?

#15-123 *Boyce v. T.D. Service Co.*, S226267. (B255958; 235 Cal.App.4th 429; Santa Barbara County Superior Court; 1438504.) Petition for review after the Court of Appeal affirmed the judgment in a civil action. The court ordered briefing deferred pending decision in *Yvanova v. New Century Mortgage Corp.*, S218973 (#14-100), which presents the following issue: In an action for wrongful foreclosure on a deed of trust securing a home loan, does the borrower have standing to challenge an assignment of the note and deed of trust on the basis of defects allegedly rendering the assignment void?

#15-124 *People v. Gattis*, S226917. (H040330; nonpublished opinion; Santa Clara County Superior Court; C1359476.) Petition for review after the Court of Appeal affirmed a judgment of conviction of a criminal offense. The court ordered briefing deferred pending decision in *People v. Friday*, S218288 (#14-77), *People v. Garcia*, S218197 (#14-78), and *People v. Klatt*, 218755 (#14-79), which present the following issue: Are the conditions of probation mandated by Penal Code section 1203.067, subdivision (b), for persons convicted of specified felony sex offenses — including waiver of the privilege against self-incrimination, required participation in polygraph examinations, and waiver of the psychotherapist–patient privilege — constitutional?

#15-125 *People v. Lopez*, S227028. (H039896; 236 Cal.App.4th 518; Santa Clara County Superior Court; 202265.) Petition for review after the Court of Appeal affirmed

the denial of a petition to recall sentence. The court ordered briefing deferred pending decision in *People v. Chaney*, S223676 (#15-13), and *People v. Valencia*, S223825 (#15-14), which present the following issue: Does the definition of “unreasonable risk of danger to public safety” (Pen. Code, § 1170.18, subd. (c)) under Proposition 47 (“the Safe Neighborhoods and Schools Act”) apply on retroactivity or other grounds to resentencing under the Three Strikes Reform Act of 2012 (Pen. Code, § 1170.126)?

#15-126 *People v. Young*, S226972. (E061236; nonpublished opinion; Riverside County Superior Court; RIF74426.) Petition for review after the Court of Appeal affirmed the denial of a petition to recall sentence. The court ordered briefing deferred pending finality of decision in *People v. Johnson*, S219454 (#14-87), and *People v. Machado*, S219819 (#14-88), which present the following issues: (1) For the purpose of determining eligibility for resentencing under the Three Strikes Reform Act of 2012 (Prop. 36, Gen. Elec. (Nov. 6, 2012) [Pen. Code, § 1170.126]), is an offense considered a serious or violent felony if it was *not* defined as a serious or violent felony on the date the offense was committed but *was* defined as a serious or violent felony on the effective date of the Act? (2) Is an inmate serving an indeterminate term of life imprisonment under the Three Strikes Law (Pen. Code, §§ 667, subs. (b)-(j), 1170.12), which was imposed for a conviction of an offense that is *not* a serious or violent felony, eligible for resentencing on that conviction under the Three Strikes Reform Act if the inmate is also serving an indeterminate term of life imprisonment under the Three Strikes Law for a conviction of an offense that *is* a serious or violent felony?

#

The Supreme Court of California is the state's highest court and its decisions are binding on all other California state courts. The court's primary role is to decide matters of statewide importance and to maintain uniformity in the law throughout California by reviewing matters from the six districts of the California Courts of Appeal and the fifty-eight county superior courts (the trial courts). Among its other duties, the court also decides all capital appeals and related matters and reviews both attorney and judicial disciplinary matters.