

Analyzing Prejudgment Interest Issues in Tort Actions

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Introduction

The plaintiff in a tort action (like all other litigants) is *entitled* to recover prejudgment interest on damages when the damages are "certain, or capable of being made certain by calculation. . . ." CC §3287(a). Even if the damages are uncertain, the plaintiff in a tort action *may* recover prejudgment interest on damages under CC §3288, which gives the trier of fact discretionary authority to award prejudgment interest to the plaintiff in an action "for the breach of an obligation not arising from contract, and in every case of oppression, fraud, or malice." See *Bullis v Security Pac. Nat'l Bank* (1978) 21 C3d 801, 814, 148 CR 22; *Segura v McBride* (1992) 5 CA4th 1028, 7 CR2d 436.

This article addresses how to evaluate when damages are certain enough for an interest award under CC §3287(a) and the elements courts may consider in awarding and upholding awards of discretionary interest under CC §3288. (Civil Code §3291 also permits recovery of interest in personal injury and wrongful death actions under certain circumstances if an offer to compromise was made under CCP §998; these provisions are beyond the scope of this article.)

When Are Damages "Certain, or Capable of Being Made Certain by Calculation" Under CC §3287(a)?

The following questions can be asked to evaluate whether damages in a particular tort case are certain, or capable of being made certain by calculation under CC §3287(a):

- Did the final judgment conform closely to the amount claimed in the proof of loss? See *Koyer v*

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Detroit Fire & Marine Ins. Co. (1937) 9 C2d 336, 70 P2d 927; *Esgro Cent., Inc. v General Ins. Co.* (1971) 20 CA3d 1054, 1060, 98 CR 153.

- Did the defendant actually know the amount of damages owed or could the defendant have computed that amount from reasonably available information? See *Wisper Corp. v California Commerce Bank* (1996) 49 CA4th 948, 960, 57 CR2d 141; *Chesapeake Indus., Inc. v Togova Enters., Inc.* (1983) 149 CA3d 901, 911, 197 CR 348.
- Was the information supporting the damages calculation accurate or based on reliable market values? See *Levy-Zentner Co. v Southern Pac. Transp. Co.* (1977) 74 CA3d 762, 800, 142 CR 1.
- Did the defendant dispute the amount of damages asserted by the plaintiff? See *Levy-Zentner Co. v Southern Pac. Transp. Co.* (1977) 74 CA3d 762, 800, 142 CR 1.
- Did the calculation of the damage amount depend on weighing conflicting evidence? See *Olson v Cory* (1983) 35 C3d 390, 402, 197 CR 843.
- Did the plaintiff provide the defendant with truthful information—either through formal or informal discovery—supporting the amount of damages claimed? *Esgro Cent., Inc. v General Ins. Co.* (1971) 20 CA3d 1054, 1060, 98 CR 153.

The discussion that follows analyzes the cases from which these questions were gleaned.

The Hindsight Inquiry: Claimed Damages Versus Damages Awarded

These cases undertake a hindsight inquiry into the discrepancy between the amount of damages claimed and the amount of damages awarded at trial in determining whether the damages are certain enough for a prejudgment interest award under §3287(a). The cases suggest that a discrepancy of between 5 percent and arguably as high as 15 percent will not necessarily preclude an interest award. See *KGM Harvesting Co. v Fresh Network* (1995) 36 CA4th 376, 391, 42 CR2d 286 (5.5-percent discrepancy between controller's itemized damages in complaint and revised figures just before trial does not preclude award of prejudgment interest); *Marine Terminals Corp. v Paceco Inc.* (1983) 145 CA3d 991, 996, 193 CR 687 (6.3-percent difference between claimed cost of repair and jury's finding as to cost of repair does not preclude award of prejudgment interest); *Esgro Cent., Inc. v General Ins. Co.* (1971) 20 CA3d 1054, 1061, 98 CR 153 (plaintiffs are entitled to prejudgment interest even though parties disputed amount of plaintiffs' loss by 10 percent of total loss claimed and 15 percent of coverage claimed by plaintiffs).

Debtor Knows Amount Owed or Is Able To Calculate It

There are two tests for certainty under §3287(a): (1) whether the debtor knows the amount owed or (2) whether the debtor would be able to compute the damages. *Wisper Corp. v California Commerce Bank* (1996) 49 CA4th 948, 960, 57 CR2d 141; *Chesapeake Indus., Inc. v Togova Enters., Inc.* (1983) 149 CA3d 901, 911, 197 CR2d 348.

Chesapeake articulated these two tests based on the competing policies underlying §3287(a), *i.e.*, "injured parties should be compensated for the loss of the use of their money during the period between the assertion of a claim and the rendition of judgment," and the countervailing policy—"a person who does not know what sum is owed cannot be in default for failure to pay." 149 CA3d at 906.

In determining whether to award prejudgment interest, the court focused on the *defendant's* knowledge about the amount of plaintiff's claim—it is not enough that the plaintiff or "some omniscient third party" knew or could calculate the amount; the defendant must actually know the amount owed or be able to compute it from reasonably available information. 149 CA3d at 907.

The *Chesapeake* court noted that California courts have broadly construed the meaning of "capable of being made certain by calculation" so as "to provide just compensation to the injured party for loss of money during the pre-judgment period." 149 CA3d at 914. Moreover, the injured party's right to prejudgment interest is "protected by the rule that legal interest allowable under section 3287 cannot be defeated by setting up an unliquidated counterclaim as an offset." 149 CA3d at 907.

Proving Certainty

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After thoroughly reviewing the history of §3287, the appellate court in *Levy-Zentner Co. v Southern Pac. Transp. Co.* (1977) 74 CA3d 762, 800, 142 CR 1, interpreted the certainty requirement to mean that damages must be readily ascertainable from reliable information, such as established market values. 74 CA3d at 798.

In *Levy-Zentner*, the plaintiff sued the defendant for property damage caused by fire. Before trial, plaintiff gave defendant two expert estimates of the cost of repair and replacement of the destroyed property; defendant never challenged the damage amount reflected in the two estimates; and the jury awarded plaintiff the amount of the lower estimate. By submitting expert documentation to defendant, plaintiff "amply supported its claim for damages, and by seeking the lowest of two estimates submitted, [plaintiff] rendered its undisputed damages

certain.” 74 CA3d at 801. Plaintiff was entitled to recover prejudgment interest from the date it provided defendant with the two estimates.

Invoices or Documents Reflecting the Amount of Damages

The appellate court in *Marine Terminals Corp. v Paceco, Inc.* (1983) 145 CA3d 991, 193 CR 687, followed *Levy-Zentner* and concluded that prejudgment interest was proper because the plaintiff supplied the defendant with invoices evidencing repair costs and the defendant did not dispute those charges; “[b]y submitting the invoices to defendant, plaintiff made its damages known to defendant and rendered them ‘certain.’” 145 CA3d at 996.

Custom Lists Itemizing Damages

In *KGM Harvesting Co. v Fresh Networks* (1995) 36 CA4th 376, 379, 42 CR2d 286, the court held that a detailed exhibit providing the defendant with an itemized list of damages was enough information to ascertain the damages for purposes of §3287. The court held that the plaintiff was entitled to prejudgment interest from the day it supplied the defendant with the exhibit. 36 CA4th at 391.

When Parties Dispute Liability, Not Basis of Damages Computation, Minor Dispute Is Not Bar to “Certainty”

Damages are deemed certain or capable of being made certain under CC §3287(a) when “there is essentially no dispute between the parties concerning the basis of computation of damages if any are recoverable but where their dispute centers on the issue of liability giving rise to damage.” *Esgro Cent., Inc. v General Ins. Co.* (1971) 20 CA3d 1054, 1060, 98 CR 153. The *Esgro* court affirmed the denial of prejudgment interest to the plaintiffs, whose stores were destroyed in the Watts riot of 1965, as to their claims under a business interruption policy because the amount of damages depended on “a judicial determination based upon conflicting evidence and [was] not ascertainable from truthful data supplied by the claimant to his debtor.” 20 CA3d at 1062. However, the court found that prejudgment interest was appropriate under the plaintiffs’ fire policy claim because there was no dispute as to the value of destroyed or missing inventory, customer property, or incidental expenses. 20 CA3d at 1061. The only dispute as to the value of destroyed or missing property centered on trade fixtures; this dispute involved approximately 10 percent of plaintiffs’ admitted total loss and 15 percent of the claimed coverage. The court reasoned: “[t]hat dispute, minor in the context of the entire lawsuit, does not detract from the inescapable conclusion that the dispute

between the parties on the fire policy involved essentially [the defendant’s] denial of coverage and not the manner of computation of loss.” 20 CA3d at 1061.

How Comparative Fault Impacts the Certainty Requirement of §3287(a)

In *Wisper Corp. v California Commerce Bank* (1996) 49 CA4th 948, 57 CR2d 141, the court of appeal held that prejudgment interest was not recoverable under §3287(a) because the damages were too uncertain based on a jury finding of 75-percent comparative fault. 49 CA4th at 960. In *Wisper*, the defendant argued that prejudgment interest should not be awarded because the lawsuit was a “comparative negligence case,” and, as such, defendant “[did] not know the amount of damages that ultimately [would] be awarded against it.” 49 CA4th at 958. The court treated this argument as an issue of first impression, noting that §3287(a) was enacted before the comparative negligence doctrine, and agreed with defendant’s contention that because of the jury’s findings of 75-percent comparative fault, the damages “awarded against it were necessarily ‘uncertain’ and [thus] . . . prejudgment interest could not be awarded.” 49 CA4th at 959. However, the court went on to state that prejudgment interest might still be required in cases with a finding of small comparative fault:

Undoubtedly, there may be cases in which a plaintiff who recovers virtually all of the claimed damages, except for a minor percentage based on his or her comparative fault, would still be entitled to an award of prejudgment interest. [9] This is not such a case, however, because of the vast disparity between the claimed damage and that which was awarded, arising from a factual environment in which it . . . [was] decided that most, if not all, of [the plaintiff’s] loss was a result of its own irresponsible behavior.

49 CA4th at 962.

Wisper can be cited for the proposition that prejudgment interest should not be awarded when the jury finds a significant amount of comparative fault, but it did not prescribe a bright-line percentage of comparative fault that would automatically bar an award of prejudgment interest.

When Prejudgment Interest Begins To Accrue

Prejudgment interest begins to accrue from the date when damages are “certain, or capable of being made certain by calculation,” *i.e.*, from the date on which the party seeking interest provides the other party with truthful information from which the amount of damages can be calculated. See *KGM Harvesting Co. v Fresh Network* (1995) 36 CA4th 376, 391, 42 CR 2d 286; *Levy-Zentner Co. v Southern Pac. Transp. Co.* (1977) 74 CA3d 762, 798, 142 CR 1. For example, in *Stein v*

Southern Cal. Edison Co. (1992) 7 CA4th 565, 8 CR2d 907, the plaintiff sued for fire damage to his home caused by the defendant's work in a nearby area. The jury found for the plaintiff and the court awarded plaintiff prejudgment interest. 7 CA4th at 568. The appellate court affirmed the prejudgment interest award from the date plaintiff gave defendant notice via proofs of claim of its various losses and not from the date of the fire because "the extent of the monetary loss and amount of repair was not known on that date." 7 CA4th at 573.

The Discretionary Award of Prejudgment Interest Under CC §3288

Civil Code §3288 provides that "[i]n an action for the breach of an obligation not arising from contract, and in every case of oppression, fraud, or malice, interest may be given, in the discretion of the jury." Also in the discretion of the trier of fact is the determination of the interest accrual period for any interest given. *Brunson v Babb* (1956) 145 CA2d 214, 230, 302 P2d 647. The California Supreme Court has held that §3288 applies to unliquidated tort claims and that a party seeking to recover prejudgment interest under §3288 does not have to prove both a breach of a noncontractual obligation and oppression, fraud, or malice. *Bullis v Security Pac. Nat'l Bank* (1978) 21 C3d 801, 814, 148 CR 22. The supreme court also held that the trial court, when acting as the trier of fact, may award prejudgment interest under §3288. 21 C3d at 814 n16. Thus, even when damages are too uncertain for an award of prejudgment interest under CC §3287, a party may nonetheless recover prejudgment interest in tort actions at the discretion of the trier of fact under §3288. See *Canavin v Pacific Southwest Airlines* (1983) 148 CA3d 512, 524, 196 CR 82 (damages too uncertain for interest award under §3287 but discretionary award of prejudgment interest as to past economic loss still allowable under §3288).

In *Bullis*, the supreme court established the standard of review for a discretionary award of prejudgment interest under §3288:

[T]he decision to award prejudgment interest may not be overturned unless the trial court abused its discretion. A trial court's exercise of discretion will be upheld if it is based on a "reasoned judgment" and complies with the ". . . legal principles and policies appropriate to the particular matter at issue."

21 C3d at 815.

After *Bullis*, the supreme court considered whether a trial court improperly awarded prejudgment interest under §3288 in a nuisance action for mental and emotional injuries. In *Greater Westchester Homeowners Ass'n v City of Los Angeles* (1979) 26 C3d 86, 160 CR 733, the supreme court reversed the trial court's decision to award prejudgment interest in these circumstances,

comparing it to an award of prejudgment interest to compensate for loss of property:

The award of such interest represents the accretion of wealth which money or particular property could have produced during the period of loss. Using recognized and established techniques a fact finder can usually compute with fair accuracy the interest on a specific sum of money, or on property subject to specific valuation. Furthermore, the date of loss of the property is usually ascertainable, thus permitting an accurate interest computation. [Citation omitted.] [9] However, damages for the intangible, noneconomic aspects of mental and emotional injury are of a different nature. They are inherently nonpecuniary, unliquidated and not readily subject to precise calculation. The amount of such damages is necessarily left to the subjective discretion of the trier of fact. Retroactive interest on such damages adds uncertain conjecture to speculation.

26 C3d at 102.

Bullis and *Greater Westchester* suggest that, although not as stringent as the certainty requirement of §3287, an award of prejudgment interest under §3288 must be based on "reasoned judgment" and that such an award will not be upheld if done in a capricious manner. The extent to which a court effectuates the policy underlying an interest award bears on this issue.

Standards for Calculating the Amount of Prejudgment Interest

The Prejudgment Interest Rate

Civil Code §3289 provides for a 10-percent prejudgment interest rate for breach of contract actions. In all other cases, including tort actions, 7 percent is the prejudgment interest rate. *Michelson v Hamada* (1994) 29 CA4th 1566, 1585, 36 CR2d 343. The *Michelson* court determined that "[t]here is no legislative act specifying the rate of pre-judgment interest for a fraud claim, and therefore the constitutional rate of 7 percent applies to the [amount] awarded as tort damages." 29 CA4th at 1585.

Similarly, there is no legislation specifying the rate of prejudgment interest for other tort actions. See, e.g., CC §3288. Thus, the prejudgment interest rate in tort actions must be the constitutional rate of 7 percent.

Applying Simple or Compound Interest to an Interest Award

Prejudgment interest is not compounded, except in cases involving a breach of fiduciary duty or a willful violation of duty. There are several cases supporting this conclusion (see, e.g., *Wheeler v Bolton* (1891) 92 C 159, 172, 28 P 558 (trustee is not charged with compound interest unless guilty of positive misconduct or willful violation of duty; "in cases of mere negligence, no more than simple interest is ever added to the loss or damage

resulting therefrom.”); *Michelson v Hamada* (1994) 29 CA4th 1566, 1586, 36 CR2d 343 (compound prejudgment interest appropriate when there is breach of fiduciary duty); *McNulty v Copp* (1954) 125 CA2d 697, 712, 271 P2d 90 (compound prejudgment interest properly awarded because evidence supported conclusion that defendant was guilty of fraud)), and no case has indicated otherwise.

Conclusion

In a tort action, damages are generally considered certain under §3287(a) when they are readily ascertainable from reasonably available information. Courts have consistently found certainty when a judgment results in a damage award that is close, *e.g.*, within 10–15 percent, to the amount of damages itemized by the plaintiff and given to the defendant before trial, *e.g.*, in the complaint, a settlement demand, expert reports, or discovery responses. A significant finding of comparative fault may render the amount of interest uncertain, thereby eliminating the right to recover interest. When damages are uncertain for purposes of §3287(a), prejudgment interest on a tort claim may still be available under §3288, but it is within the discretion of the trier of fact. The prejudgment interest rate is 7 percent for all cases except those for breach of contract, for which the rate is 10 percent. Prejudgment interest is not compounded unless the case involves a breach of fiduciary duty or willful violation of duty.