

Prejudgment Interest

Introduction

When a plaintiff wins a civil lawsuit against a defendant, Civil Code § 3287(a) permits the plaintiff to recover prejudgment interest at the rate from 7% or 10% for those damages that are “certain, or capable of being made certain by calculation.” The purpose of the right to recover prejudgment interest is to make an injured party whole. The “certainty” requirement of this statute may be met if the defendant/debtor knows the amount of principal owed or the debtor could compute interest on the principal amount of damages. Recovery of prejudgment interest is mandatory from the first day there exists both a breach and a liquidated claim. Simple interest is calculated at the rate of 10% on sums due under contracts entered into after January 1, 1986, or at 7% on earlier contracts and on tort claims. The plaintiff can recover compound interest in cases of oppression, fraud, or malice and where the defendant breached a fiduciary duty to the plaintiff. Interest may be awarded by the trier of fact, either a judge or a jury.

The Controlling Statute

“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.” (Civ. Code § 3287(a).)

Purpose

“[O]ne purpose of section 3287[(a)], and of prejudgment interest in general, is to provide just compensation to the injured party for loss of use of the award during the prejudgment period – in other words, to make the plaintiff whole as of the date of the injury.” (*Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 663; *Howard v. American National Fire Ins. Co.* (2010) 187 Cal.App.4th 498, 535 (*Howard*).) Prejudgment interest is intended to make an injured party whole “for the accrual of wealth which could have been produced during the period of loss.” (*Wisper Corp. N.V. v. California Commerce Bank* (1996) 49 Cal.App.4th 948, 958.) A similar purpose is served by prejudgment interest awarded by a jury pursuant to Civil Code § 3288. (“In 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.” (Civ. Code § 3288.)) “Prejudgment interest [on a punitive damage recovery] is awarded to compensate a party for loss of use of his or her property and is in the nature of damages. ‘The inclusion of interest in the verdict is not the granting of damages in excess of the loss incurred. When, by virtue of the fraud or breach of fiduciary duty of the defendant, a plaintiff has been deprived of the use of his money or property and is obliged to resort to litigation to recover it, the inclusion of interest in the award is necessary in order to make the plaintiff whole.’ It is always the trier of fact that determines the issue of damages and this is true with regard to prejudgment interest.” (*Michelson v. Hamada* (1994) 29 Cal.App.4th 1566, 1586 (*Michelson*); *Nordahl v. Department of Real Estate* (1975) 48 Cal. App.3d 657, 665 (ellipses omitted).)

Certainty of Amount

Civil Code § 3287(a) permits recovery of prejudgment interest on sums that are “certain, or capable of being made certain by calculation.” California courts have recognized a variety of ways that prejudgment interest becomes due when the requisite certainty is established. “[T]he certainty requirement of section 3287, subdivision (a) has been reduced to two tests: (1) whether the debtor knows the amount owed or (2) whether the debtor would be able to compute the damages.” (*Polster, Inc. v. Swing* (1985) 164 Cal. App.3d 427, 434-35 (*Polster*).) Also,

“[d]amages are deemed certain when, though the parties dispute liability, they essentially do not dispute the computation of damages, if any.” (*Employers Mut. Cas. Co. v. Philadelphia Indem. Ins. Co.* (2008) 169 Cal.App.4th 340, 354.)

“The test for determining certainty under section 3287(a) is whether the defendant knew the amount of damages owed to the claimant or could have computed that amount from reasonably available information. Uncertainty as to liability is irrelevant. A dispute concerning liability does not preclude prejudgment interest in a civil action. The certainty required by section 3287(a) is not lost when the existence of liability turns on disputed facts but only when the amount of damages turns on disputed facts. Moreover, only the claimant’s damages themselves must be certain. Damages are not made uncertain by the existence of unliquidated counterclaims or offsets interposed by the defendant.” (*Howard, supra*, 187 Cal.App.4th at 535-36 (citations and quotation marks omitted).)

“Where the fact of damages is certain, the amount of damages need not be calculated with absolute certainty. The law requires only that some reasonable basis of computation of damages be used, and the damages may be computed even if the result reached is an approximation.” (*GHK Associates v. Mayer Group, Inc.* (1990) 224 Cal. App.3d 856, 873-874; *Michelson, supra*, 29 Cal.App.4th at 1585.) However, §3287(a) “does not authorize pre-judgment interest as a matter of law where the amount of damages depends upon a judicial determination based upon conflicting evidence.” (*Polster, supra*, 164 Cal. App.3d at 434.)

Mandatory Award

“Under section 3287(a), ‘the court has no discretion, but must award prejudgment interest upon request, from the first day there exists both a breach and a liquidated claim.’” (*Howard, supra*, 187 Cal.App.4th at 535; *North Oakland Med. Clinic v. Rogers* (1998) 65 Cal.App.4th 824, 828.) “[The creditor] was entitled as a matter of law to interest from the date it paid the obligation which [the debtor] was, under its contract, obligated to pay.” (*Oil Base, Inc. v. Transport Indem. Co.* (1957) 148 Cal.App.2d 490, 491 (*Oil Base*).

10% or 7% Rate of Interest

Civil Code § 3289(b) provides in part: “If a contract entered into after January 1, 1986, does not stipulate a legal rate of interest, the obligation shall bear interest at a rate of 10 percent per annum after a breach.” For earlier contracts and tort claims, the interest rate is 7%. (Ca Const. Art. 15, §1; see *Michelson, supra*, 29 Cal.App.4th at 1586.) “Whether the proper interest rate was applied is a question of law. [T]he constitutional rate of 7 percent applies to tort damages.” (*Michelson, supra*, 29 Cal.App.4th at 1585 (citations and ellipses omitted).)

Simple or Compound Interest

The Civil Code § 3287(a) does not authorize an award of compound interest. However, a jury may exercise its discretion to award compound interest pursuant Civil Code § 3288 in cases of oppression, fraud, or malice or where the defendant “stood in a fiduciary relationship with [the plaintiff] and the jury found that [the defendant] breached his fiduciary duty. These cases confirm that an award of compound interest is appropriate in this type of case.” “[Defendant] stood in a fiduciary relationship with [plaintiff] and the jury found that [defendant] breached his fiduciary duty. These cases confirm that an award of compound interest is appropriate in this type of case.” (*Michelson supra*, 29 Cal.App.4th at 1586.) The judge or the jury may award prejudgment interest. “It is always the trier of fact that determines the issue of damages and this is true with regard to prejudgment interest pursuant to section 3288.” (*Ibid.*)

Waiver of Interest

“A waiver is the voluntary and intentional relinquishment of a known right. It depends

upon the intention of one party only.” (*Kawasho International, USA Inc. v. Lakewood Pipe Service Inc.* (1983) 152 Cal.App.3d 785, 793 (*Kawasho*)).) But Civil Code § 3290 provides: “Accepting payment of the whole principal, as such, waives all claim to interest.” However, this statute has been narrowly construed. “We are inclined to the view that interest is due on a legacy not as a penalty for nonpayment or default in payment, but as a part of or an accretion to the legacy [read principal amount] itself. In the case last above cited, an action in assumpsit to recover interest due on a legacy was allowed even though the legacy had theretofore been paid. From what has been said, it follows that any payment less than the aggregate of the legacy and interest constitutes nothing more than a payment on account and should not serve to extinguish the right to interest on the legacy.” (*Estate of Hubbell* (1932) 216 Cal. 574, 578; see also, *Kawasho, supra*, 152 Cal.App.3d at 794-95 (citation omitted).)

Liability Insurer’s Obligation To Pay Prejudgment Interest

1. The Duty to Defend

When an insurer fails to faithfully fulfill its duty to defend, the amount due from the insurer for costs of defense may be “certain” because the insurer must pay “all” defense costs. “[The insurer] was under a duty to defend [the policyholder] in the [liability] action and is liable for all costs and attorneys’ fees expended by [the policyholder] for this purpose.” (*Hogan v. Midland National Ins. Co.* (1970) 3 Cal.3d 553, 558.) “[The insurer’s] obligation to reimburse [the insured] attached the moment [the insured] made the payment which [the insurer] was obligated under its policy to make, and, the amount being certain, interest commenced to run from that date.” (*Oil Base, supra*, 148 Cal.App.2d at 492.) Breach of the duty to defend renders the insurer liable for all damage proximately caused damages suffered by the insured “plus appropriate interest.” (See, *Amato v. Mercury Casualty Co.* (1997) 53 Cal.App.4th 825, 840.) However, if Civil Code § 2860 applies, the amount that the insurer owes may not become “certain” until adjudicated by mandatory arbitration. “Any dispute concerning attorney’s fees not resolved by [policy language] shall be resolved by final and binding arbitration by a single neutral arbitrator selected by the parties to the dispute.” (Civ. Code § 2860(c).)

2. Duty to Indemnify

When an insurer wrongfully fails to defend and the policyholder settles with the plaintiff, the defaulting insurer owes interest on the amount of the settlement paid by the policyholder from the date of payment. “[The insurer’s] liability was created by its contract and, under its contract, it was obligated to pay the [settlement amount] that was paid by [the policyholder]. The fact that it misconceived and put an erroneous construction upon this contract in no way affected its liability to pay the [settlement amount] at the time the [liability] claim was settled, and its obligation to reimburse [the policyholder] attached the moment [the policyholder] made the payment which [the insurer] was obligated under its policy to make, and, the amount being certain, interest commenced to run from that date.” (*Oil Base, supra*, 148 Cal.App.2d at 492.)

When judgment is entered against the policyholder that the insurer wrongfully fails to pay, postjudgment interest accrues automatically on the judgment at the rate of 10%. The insurer may be held liable for the entire amount of the judgment, including the amount of post judgment interest. (Code Civ. Proc. § 685.010; *County of Alameda v. Weatherford* (1995) 36 Cal.App.4th 666, 670.)