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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

CERTAIN LONDON UNDERWRITERS SUBSCRIBING TO COVER NOTE NOS. 618/A01635001/039, 618/A11635001/067 AND 618/A11635001/017, Plaintiff and Respondent, v. FAIRMONT SPECIALTY INSURANCE COMPANY, Defendant and Appellant.	A133478 A134412 (Alameda County Super. Ct. No. RG08421818)

This appeal involves a dispute between insurers arising out of the defense of Newcrest Homes (Newcrest) which had been sued in a construction defect case. Defense of Newcrest was tendered to several insurers including, as pertinent here, Certain London Underwriters (Underwriters) and Fairmont Specialty Insurance Company (Fairmont). Underwriters agreed to defend Newcrest, Fairmont did not. Underwriters incurred defense expenses of $590,550, and sued Fairmont for contribution. Following a bench trial, the court ruled for Underwriters, determining that Fairmont did have a duty to defend Newcrest in the underlying lawsuit, and awarding $241,775 plus prejudgment interest of $90,589. Fairmont appeals, asserting six separate claims of error, the first five of which attack the finding of liability and the damages awarded, and the sixth of which attacks the award of prejudgment interest. We reject Fairmont's fundamental arguments, but agree that the award of prejudgment interest was improper, at least as to the amount awarded. We thus reverse and remand for the limited purpose of determining whether prejudgment interest is proper and, if so, the amount of that interest.

BACKGROUND

The Underlying Lawsuit

On April 30, 2004 a lawsuit was filed in the Los Angeles Superior Court, entitled *Marsicano et al. v . Newcrest Homes* (*Marsicano* action or underlying action). It was brought by the owners of four single family homes in the Primrose Trail development in Granada Hills, California (the project), and alleged that their properties suffered from various defects and deficiencies stemming from the construction of the homes, causing property damage. The underlying action would become at issue on the fourth amended complaint, and involved numerous defendants, including Newcrest, the developer of the project, and various subcontractors, including three pertinent to the issues here: Franke Construction (Franke), the framing subcontractor on the project; MJD Construction, Inc. (MJD), the concrete subcontractor; and J.W. Sutter, Inc. (Sutter), the rough grading subcontractor. The causes of action included strict liability against Newcrest arising out of the work of the subcontractors, including Franke and Sutter, and several causes of action for negligence against the individual subcontractors, including Franke, MJD, and Sutter.

The Insurance Policies

Numerous insurance policies provided the possibility of coverage to the parties in the underlying action. We set forth the basic terms of the policies pertinent here, with more specific provisions set forth below in connection with the particular issue to which it pertains. Thus:

Underwriters insured Newcrest as a named insured under a primary liability policy bearing cover note no. 618/A11635001/017, for the policy period June 7, 2001 to June 7, 2002 (London/Newcrest policy). The policy limits were $2 million for products/completed operations aggregate and $1 million per occurrence. The premium for this policy was $71,000.

Underwriters also insured MJD as a named insured under two liability policies, one bearing cover note no. 618/A01635001/039, for the policy period October 16, 2000 to October 16, 2001 (London/MJD I policy), and the other cover note no. 618/A11635001/067, for the policy period October 16, 2001 to October 16, 2002 (London/MJD II policy). Both policies had limits of $2 million products/completed operations aggregate and $1 million per occurrence. The premium for the London/MJD I policy was $130,000.

Fairmont[1] insured Sutter under a commercial general liability policy bearing policy no. GLO0678151-00, for the policy period July 17, 1998 to July 17, 1999 (Fairmont/Sutter policy). The policy limits were $1 million products/completed operations aggregate and $1 million per occurrence. The premium for this policy was $32,936.

Fairmont also insured Franke under a commercial general liability policy bearing policy no. RPO0115350, for the policy period March 18, 1999 to March 18, 2000 (Fairmont/Franke policy). The policy limits were $1 million products/completed operations aggregate and $1 million per occurrence. The premium for this policy was $23,976.

The Tenders of Defense

The law firm of Wood, Smith, Henning & Berman (Wood Smith) was retained to defend Newcrest in the underlying action.[2] Lisa Dunn was the attorney at the firm primarily responsible for the representation, and on May 10, 2004, she tendered defense of the underlying action to Underwriters under the London/Newcrest policy. Underwriters accepted the defense of Newcrest under this policy.

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[1] The Fairmont policies were in fact issued by a predecessor company, Ranger Insurance Company. For ease of discussion we refer only to Fairmont.

[2] Wood Smith remained defense counsel for Newcrest in the underlying action until November 2006, when Ulrich & Terry substituted in, with Jason Feld the attorney there with primary responsibility for the defense. Ulrich & Terry handled the case through conclusion.

As noted, Underwriters insured MJD as a named insured under two primary liability policies, and on July 26, 2004 defense of Newcrest was also tendered to Underwriters as an additional insured under these policies. Underwriters accepted the defense of Newcrest as an additional insured under the MJD I policy, but declined the tender under the MJD II policy, asserting that Newcrest did not qualify as an additional insured.

That same day, July 26, 2004, Dunn also tendered defense of Newcrest to Fairmont as an additional insured under two policies it issued, the Fairmont/Franke policy and the Fairmont/Sutter policy. Fairmont declined the tender under the Fairmont/Sutter policy on April 18, 2005, and the tender under the Fairmont/Franke policy on December 5, 2005.

Tenders of defense were made to other insurers that had issued policies that were, or could have been, implicated in the defense of Newcrest. These included Claremont Liability Insurance Company (Claremont), The Insurance Corporation of New York (INSCORP), and Certain London Underwriters Subscribing to Policy No. LUC 9811-5263 (ACE).

The Subject Action

In defense of the underlying action Underwriters incurred fees and costs in the amount of $590,550. On November 24, 2008, Underwriters filed a complaint seeking to recover an equitable share of those defense costs. The complaint named as defendants Fairmont, Claremont, and INSCORP; an amended complaint later added ACE as a defendant. The complaint alleged two causes of action: (1) declaratory relief, and (2) equitable contribution.

Along the way, Underwriters settled with Claremont and ACE, receiving a total of $107,000: $30,000 from Claremont and $77,000 from ACE. INSCORP was dismissed following its insolvency. The result was that Fairmont alone remained as a defendant, and the amount now in dispute as the matter reached trial was $483,550: $590,550 less $107,000.

A nonjury trial began on October 15, 2010, before the Honorable Brenda Harbin-Forte. At the beginning of trial, the parties stipulated to certain facts for purposes of trial, 14 pages of facts, to be precise. They also filed a stipulation regarding the admissibility and/or authenticity of exhibits. Testimony began on October 18, and was taken over three more court days.

It was an unusual trial in several respects, most significantly because most of the time was consumed with counsels' identification, and description, of the claimed significance of numerous exhibits. Only six witnesses were called, five on behalf of Underwriters and one by Fairmont. And the sum total of all testimony was set forth in 183 pages of the reporter's transcript—significantly less than half.

The five witnesses called by Underwriters included two adjusters; Matt DiCecco, the president of MJD; and Dunn and Feld, the two primary lawyers defending Newcrest. The sole witness for Fairmont was Dennis Govan, a forensic architect. The pertinent testimony of these witnesses will be discussed in connection with the issues to which it pertains. Suffice to say here that Dunn and Feld testified that the plaintiffs in the underlying action alleged defects in the original construction of the properties; that they sought property damage arising out of these defects; that the claims potentially included damage which first began while the properties were being constructed; and that the damages were continuous and progressive. Both also testified that the plaintiffs in the underlying action sought to hold Newcrest liable for property damage caused by the work of Sutter and Franke.

Following Underwriters' case, Fairmont moved for judgment pursuant to Code of Civil Procedure section 631.8. The trial court denied the motion, and closing arguments were presented on October 27.

On February 4, 2011, the trial court issued its tentative decision, concluding that (1) Fairmont owed a duty to defend Newcrest in the *Marsicano* action, and (2) "equal shares" was the most equitable means to allocate Newcrest's defense costs. The court also concluded that Underwriters' contribution claim was not barred by the two-year statute of limitations. Deducting the $107,000 received in settlement, the court concluded that Fairmont owed Underwriters $240,153, representing two of the four equal shares, plus prejudgment interest.

The court ordered Underwriters "to prepare a proposed statement of decision and a proposed judgment consistent with the Court's findings." Underwriters did so, and Fairmont filed objections to it, asserting numerous objections in a 29-page pleading.

On May 10 the court extended the deadline for filing a final statement of decision, and on June 23 ordered the parties to submit competing statements of decision by July 15. Underwriters submitted a revised proposed statement of decision, and Fairmont three alternative proposed statements of decision. On July 22, Fairmont filed its objection to Underwriters' revised proposed statement of decision, reiterating the arguments set forth in its original objection to the first proposed statement of decision, this time in a 39-page pleading.

On July 29, the court entered its final statement of decision. The statement of decision was thorough indeed, 33 pages to be exact, explaining in detail the reasons for the conclusions the court had reached. The court ordered Underwriters to submit a proposed judgment, which it did on August 11. Again, Fairmont filed objections, objecting on six grounds.

On August 19, the court entered judgment "in favor of Underwriters Subscribing to Cover Note Nos. 618/A11635001/039 [London/MJD I] and 618/A11635001/067 [London/MJD II] and against Fairmont" in the amount of $241,775.14. The basis of this award was to allocate the defense into four shares of $120,887.57, and to hold Fairmont responsible for two of those four shares. The court also awarded prejudgment interest in the amount of $90,589.82, for a total award of $332,364.96.

On September 6, Fairmont moved for a new trial or, alternatively, to vacate the judgment. The motion was denied, and on October 18, Fairmont filed a notice of appeal from the judgment entered on August 19.

On October 21, Underwriters submitted a proposed amended judgment nunc pro tunc, seeking to correct an error in the original judgment. The original judgment had found "in favor of Underwriters Subscribing to Cover Note Nos. 618/A11635001/039

[London/MJD I] and 618/A11635001/067 [London/MJD II]." The proposed amended judgment sought to clarify that the court found in favor of "Underwriters Subscribing to Cover Note Nos. 618/A11635001/017 [London/Newcrest] and 618/A01635001/039 [London/MJD I]." The court entered the amended judgment nunc pro tunc on December 21, with judgment against Fairmont in the same amounts—$241,775.14 plus pre-judgment interest in the amount of $90,589.82, for a total award of $332,364.96.

On January 19, 2012, Fairmont filed a notice of appeal from the amended judgment, and we ordered the appeals consolidated.

DISCUSSION

General Principles

The most fundamental principle of appellate review is that "A judgment or order of a lower court is *presumed correct*. All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown." (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564; accord, *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1140.)

All evidence must be viewed most favorably to the prevailing party, here Underwriters, and in support of the judgment. (*Nestle v. City of Santa Monica* (1972) 6 Cal.3d 920, 925-926; *Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881.) This precept is equally applicable here, where the trial court issued a statement of decision: "Where statement of decision sets forth the factual and legal basis for the decision, any conflict in the evidence or reasonable inferences to be drawn from the facts will be resolved in support of the determination of the trial court decision." (*In re Marriage of Hoffmeister* (1987) 191 Cal.App.3d 351, 358.) And we assume that all possible findings are supported by substantial evidence. (*In re Marriage of Fink* (1979) 25 Cal.3d 877, 887; *Foreman v. Clark Corp. v. Fallon, supra*, 3 Cal.3d at p. 881.)

An appellant challenging the sufficiency of the evidence to support a judgment is required to state in the opening brief all evidence pertinent to that point. If this is not done, the reviewing court may treat the issue as waived. (*In re Marriage of Fink, supra*, 25 Cal.3d at p. 887; *Foreman v. Clark Corp. v. Fallon, supra*, 3 Cal.3d at p. 881; *In re*

Marriage of Steiner (2004) 117 Cal.App.4th 519, 530; *Estate of Hilton* (1996) 44 Cal.App.4th 890, 922.)

What an appellant cannot do is merely reargue the "facts" as it would have them, an argumentative presentation that not only violates the rules noted above, but also disregards the admonition that it is not to "merely reassert [its] position at . . . trial." (*Conderback, Inc. v. Standard Oil Co.* (1966) 239 Cal.App.2d 664, 687; accord, *Albaugh v. Mt. Shasta Power Corp.* (1937) 9 Cal.2d 751, 773.) As Justice Mosk well put it, such "factual presentation is but an attempt to argue on appeal those factual issues decided adversely to it at the trial level, contrary to established precepts of appellate review. As such, it is doomed to fail." (*Hasson v. Ford Motor Co.* (1982) 32 Cal.3d 388, 398-399.) As will be seen, Fairmont's briefs manifest a treatment of the record that disregards the most fundamental rules of appellate review.

Substantial Evidence Supports the Trial Court's Conclusion that Fairmont Owed a Duty to Defend Newcrest Under the Fairmont/Sutter Policy

Newcrest qualified as an additional insured under the Fairmont/Sutter policy, which policy would indemnify Newcrest for property damage arising out of the acts, errors, or omissions of Sutter. Since the underlying action potentially sought to hold Newcrest liable for property damage arising out of such acts, errors, or omissions, the potential for indemnity was present. (*Scottsdale Ins. Co v. MV Transportation* (2005) 36 Cal.4th 643, 654-655.) This, therefore, would trigger a duty to defend, shifting the burden to Fairmont to show by a preponderance of evidence that it had no such duty. (*Safeco Ins. Co. of America v. Superior Court* (2006) 140 Cal.App.4th 874, 879 ["The alleged absence of *actual* coverage . . . is a defense which the coinsurer must raise and prove."]; *North American Capacity Ins. Co. v. Claremont Liability Ins. Co.* (2009) 177 Cal.App.4th 272, 296.)

Fairmont's first argument is that the trial court erred in finding that Fairmont owed a duty to defend Newcrest under the Fairmont/Sutter policy, an argument premised on two separate provisions of that policy, policy provisions, Fairmont asserts, that apply here as a matter of law, apparently because the policy provisions are claimed to be unambiguous.

Fairmont's first policy-based argument is premised on what it calls the absolute earth movement exclusion. The argument is as follows: the policies "exclude coverage for 'any claims for . . . property damage . . . resulting from, attributable or contributed to, or aggravated *by earth movement.*' [Citation.] (emphasis added.) The Absolute Earth Movement Exclusion further provides: '*This exclusion applies regardless of the cause or causes of the earth movement.*' [Citation.] (emphasis added.) There can only be one reasonable interpretation of this language. The Fairmont Policies exclude coverage for any claim involving earth movement, regardless of cause." This, Fairmont asserts, supports its argument that the absolute earth movement exclusion "unambiguously precludes coverage for the claims alleged against Newcrest arising out of Sutter's rough grading operations in the *Marsicano* action." We disagree.

To begin with, nowhere in the pleading in the underlying action is there anything that limits any damage claim against Sutter to "earth movement." And the trial court made no finding or ruling that it did. Beyond this, there was express testimony from Dunn and Feld, the two attorneys primarily responsible for Newcrest's defense, that Newcrest was potentially liable for damage arising out of Sutter's rough grading work unrelated to earth movement. This evidence is utterly ignored by Fairmont.

Dunn and Feld testified about the potential damage to ABS pipes caused by rocks and debris left in the soil at the time of recompaction done by the plumbing contractor. As Dunn put it, a potential source of the excess water in the soil was the cracking or uncoupling damage caused to the ABS sewer lines during recompaction. Feld's testimony was similar—and could not have been clearer:

"Q. Were plaintiffs seeking to hold Newcrest liable for damage to the ABS pipes potentially arising out of the poorly prepared soil?

"A. Yes.

"Q. Did this potential include cracks in a coupling, or a weakening of the ABS pipes which began after the pipes were laid, tested, and recompacted?

"A. That was one of the theories, yes.

"Q. Were these damages, in your mind, related or unrelated to earth movement?

"A. Well, there is two issues regarding the ABS piping. One is the fact that it could swell and compact, based on earth movement. The more important issue was basically when they were doing the compaction activities, the fact that they didn't remove rocks and debris could have caused damage during the compaction process on top of the pipes.

"Q. And that would have occurred after the pipes were laid, soil laid on top, and then compacted?

"A. Correct.

"Q. Did plaintiffs ever limit their liability or damage theory concerning ABS sewer pipes?

"A. They didn't limit their liability theory at all.

"Q. Did plaintiffs rule out any theory of recovery for any grading issue?

"A. No.

"Q. And plaintiffs were seeking to hold Newcrest liable for the work of Sutter, correct?

"A. Plaintiffs were seeking to hold Newcrest liable for all work of all the subcontractors, including JW Sutter."

Such damage was further supported by the building inspection records, and by the testimony of DiCecco, the president of the foundation contractor MJD, which confirmed the dates of recompaction by the plumbing subcontractor over the ABS pipes occurred during the Fairmont/Sutter policy period. This evidence, too, is ignored by Fairmont.

Potential damage unrelated to "earth movement" was also supported by the preliminary defect list produced in the underlying action, which list indicated that the ABS sewer lines had been, or would potentially be, damaged, and that the moisture content of the engineered fill at the properties exceeded appropriate levels. This list was introduced at trial here.

Fairmont at least acknowledges the defect list and, faced with it, asserts that "[t]he fact that the defect list was admitted into evidence . . . does not change this result. While the defect list was provided to *Fairmont/Franke* in connection with Newcrest's tender under the Fairmont/Franke Policy, the *Fairmont/Sutter* claim was handled by a different adjuster, and the defect list is not contained in the Fairmont/Sutter claim file. There is simply no evidence that Newcrest's counsel ever advised *Fairmont/Sutter* that the homeowners in *Marsicano* were claiming damages out of the work of *Sutter* that were unrelated to earth movement."

We know of no law that an insurance company can close its eyes to a document that is in a claim file in its office. We do know of law that holds an insurer's obligation of equitable contribution may arise when the insurer has constructive notice of the claim against its insured, i.e., "where, after notice of litigation, a diligent inquiry by the insurer would reveal the potential exposure to a claim for equitable contribution, thus providing the insurer the opportunity for investigation and participation in the defense in the underlying litigation." (*OneBeacon America Ins. Co. v. Fireman's Fund Ins. Co.* (2009) 175 Cal.App.4th 183, 202-203.) Such an inquiry here would not need be very diligent.

Monticello Ins. Co. v. Essex Ins. Co. (2008) 162 Cal.App.4th 1376, relied on by Fairmont in claimed support of its contention that the defect list "could not be considered," is distinguishable. There, the court affirmed a summary judgment that there was no duty to defend because the underlying complaint did not implicate the work of the insured, and the insurer had not received any extrinsic information on the claimed damages until after the suit was dismissed. (*Id.* at pp. 1387-1389.) Here, as noted, the defect list was in evidence—by stipulation, yet—and was, as also noted, in fact in one of the Fairmont files.

In sum, whether unambiguous or not, the trial court held that the earth movement exclusion did not apply as a matter of *fact*. And that fact was supported by substantial evidence. Likewise the nonapplicability of the completed operations provision.

Fairmont's second policy-based argument is that the Fairmont/Sutter policy "does not afford coverage to Newcrest because Sutter's work at the project was not completed before the expiration of the Fairmont/Sutter policy." A rather convoluted argument follows, beginning with a recitation of what is "covered," then of "exclusions" to such coverage, one of which, Fairmont asserts, is "particularly relevant, exclusion j(6)." Then, after quoting such exclusion, Fairmont asserts that there is an "exception to the j(6) exclusion," which it then quotes. And Fairmont concludes: "Thus, the products-completed operations hazard extends only to damage arising out of our insured's completed work." From there Fairmont goes on to cite to evidence it claims supports its view that its work was on-going. We are nonplussed.

Sutter entered into the rough grading subcontract on October 27, 1998, and its policy with Fairmont was in effect until July 17, 1999. Sutter's daily logs confirmed that Sutter finished its work at the project on March 3, 1999, and an arbitrator's award found that all work called for under Sutter's contract, other than potential repair, replacement or correction, was completed in March of 1999. In a verified answer to an interrogatory in the underlying action Sutter said its work was completed on March 3, 1999. Indeed, Fairmont *stipulated* that Sutter ceased all work on March 3, 1999. There was substantial evidence.

Fairmont's reliance on *Baroco West, Inc. v. Scottsdale Ins. Co.* (2003) 110 Cal.App.4th 96 and *Clarendon America Ins. Co. v. General Security Indemnity Co. of Arizona* (2011) 193 Cal.App.4th 1311 is unavailing. Both are summary judgment cases, both affirmed. But not on any basis supporting Fairmont. In *Baroco,* the undisputed facts established that the insured's work was "ongoing" when the policy expired. (*Baroco West, Inc. v. Scottsdale Ins. Co., supra,* 110 Cal.App.4th at p. 104.) In *Clarendon*, the undisputed evidence established that the insured's work was never completed and not abandoned. (*Clarendon America Ins. Co. v. General Security Indemnity Co. of Arizona, supra,* 193 Cal.App.4th at pp. 1318.) Neither applies to the situation here.

There Was No Error Concerning a Failure to Find That Underwriters and Fairmont Covered the Same Risk

Fairmont next asserts that an insurer seeking to recover in equitable contribution must show among other things that "the participating insurer and non-participating co-carrier *insured the same risk*, and that the participating insurer paid *more than its fair share* of the defense. *Transcontinental Ins. Co. v. Insurance Co. of the State of Pennsylvania* (2007) 148 Cal. App. 4th 1296, 1303-1304." From there, Fairmont goes on as follows:

"Following these principles, the trial court was required to determine whether each of the Plaintiffs and Fairmont cover the same risk. If the policies do not insure the same risk, Underwriters cannot state a claim against Fairmont for equitable contribution, only equitable subrogation.

"The trial court erred because the undisputed evidence established that the policies issued by Underwriters do not cover the same risk as the Fairmont/Sutter Policy and Fairmont/Franke Policy. Specifically, the London/Newcrest Policy provided *completed operations coverage* to Newcrest for *all damages* arising out of the work of *any subcontractor* implicated in the *Marsicano* action. [Citations.] The London/MJD I Policy only provided coverage to Newcrest for damages arising out of the work of Newcrest's *concrete* subcontractor, MJD. [Citations.]

"By contrast, the Fairmont/Sutter Policy only provided coverage to Newcrest for liability arising out of the work of Newcrest's *rough grading* subcontractor, Sutter. [Citations.] The Fairmont/Franke Policy only provides coverage to Newcrest for liability arising out of the work of Newcrest's *framing* subcontractor, Franke. [Citation.] The Fairmont Policies do not provide coverage for liability arising out of Newcrest's own products, acts, errors or omissions, or the work of any other subcontractor. [Citations.] Furthermore, under the Fairmont Policies, the additional insured coverage per certificate of insurance was also limited to the *ongoing* grading and framing operations of Sutter and Franke. [Citations.] The Fairmont Policies also specifically *exclude coverage* for claims arising out of soils subsidence, which is a risk covered under the London Policies and the gravamen of the claims asserted in the *Marsicano* action. [Citations.].”

Once again, Fairmont’s argument is myopic. This time it ignores the law. Equitable contribution is proper when multiple primary insurers are obligated to defend the common insured and one insurer has defended the action without participation from the others. (*Fireman’s Fund Ins. Co. v. Maryland Casualty Co.* (1998) 65 Cal.App.4th1279, 1293.) Here, the evidence was that the policies issued by Underwriters and Fairmont afforded a defense obligation to the same common insured. The fact that these policies may have potentially provided different indemnity obligations is irrelevant, as Justice Croskey’s text succinctly puts it: Whatever limitations there might be on an insurer’s duty to indemnify, they “do not affect its duty to defend: ‘Since a defense duty is broader than an indemnification obligation, the limitation on the scope of coverage does not eliminate the defense duty . . .’ [*Presley Homes, Inc. v. American States Ins. Co.* (2001) 90 Cal.App.4th 571, 576 (internal quotes omitted) . . . .].” (Croskey et al., Cal. Practice Guide: Insurance Litigation (The Rutter Group 2012), § 7:631.2, p. 7B-42.) “The insurer’s duty to defend includes persons named as ‘additional insureds’ under the policy even if such persons are covered only with respect to certain liabilities. (E.g., a subcontractor’s liability insurance may cover the general contractor as an ‘additional insured’ only with respect to vicarious liability for defective work by the subcontractor.” (*Ibid.*)

The three cases on which Fairmont relies—*Transcontinental Ins. Co. v. Insurance Co. of the State of Pennsylvania, supra,* 148 Cal.App.4th 1296, 1300, *The Homes Ins. Co. v. Cincinnati Ins. Co.* (2004) 213 Ill.2d 307, 316-317 [821 N.E.2d 269, 276-277, and *Schal Bovis, Inc. v. Casualty Ins. Co.* (2000) 315 Ill.App.3d 353, 363 [732 N.E. 1179, 1187]—all involved disputes between “primary” and “excess” insurers. They were, to put it otherwise, not on the “same level” of coverage. (*Transcontinental, supra,* 148 Cal.App.4th at p. 1304.) They thus did not have a common duty to defend.

Using the "Equal Shares" Method of Apportionment Was Not An Abuse of Discretion

As indicated above, the trial court determined that there would be four shares in the defense of the underlying action and held Fairmont responsible for two of them. Fairmont contends that "The Trial Court Abused its Discretion by Adopting an Equal Shares Method of Apportionment without Properly Addressing the Equitable Factors Required under *Centennial Ins. Co. v. United States Fire Ins. Co.* [(2001) 88 Cal.App.4th 105 (*Centennial*).]" Hardly.

There is no fixed rule for allocating defense costs between or among coinsurers. Rather, courts consider the "varying equitable considerations which may arise . . . and which depend upon the particular policies of insurance, the nature of the claim made, and the relation of the insured to the insurers." (*Signal Cos., Inc. v. Harbor Ins. Co.* (1980) 27 Cal.3d 359, 369; see also *Fireman's Fund Ins. Co. v. Maryland Cas. Co., supra,* 65 Cal.App.4th at pp. 1306-1307.) As most recently put in *Axis Surplus Ins. Co. v. Glencoe Ins. Ltd.* (2012) 204 Cal.App.4th 1214, 1231, "The trial court exercises its discretion and weighs the equities seeking to attain distributive justice . . . ." In sum, the trial court has broad discretion in determining which method of allocation will most equitably distribute the loss among the insurers. (*Scottsdale Ins. Co. v. Century Surety Co.* (2010) 182 Cal.App.4th 1023, 1032; *North American Capacity Ins. Co. v. Claremont Liability Ins. Co.* (2009) 177 Cal.App.4th 272, 295-297.)

As *Axis Surplus Ins. Co. v. Glencoe Ins., Ltd.* also confirmed, "We review the trial court's ultimate equitable determination in allocating liability among the responsible insurers for abuse of discretion. (*Scottsdales Ins. Co. v. Century Surety Co.* (2010) 182 Cal.App.4th 1023, 1033; *Hartford Casualty Ins. Co. v. Travelers Indemnity Co.* (2003) 110 Cal.App.4th 710, 724.)" (204 Cal.App.4th at p. 1231.) No such abuse is shown here.

As the Croskey treatise notes, "The sharing of defense costs will typically be pro rata because every insurer that *potentially* covers the risk owes an immediate and complete defense." (Croskey, *supra,* § 8:67.1, p. 8-29.)

Were this general principle not enough, the evidence—indeed, uncontradicted evidence—was that the standard apportionment used by Fairmont itself in construction defect cases was "equal shares." Moreover, Fairmont *stipulated* that "equal shares" would result in two equal shares to Fairmont and two equal shares to Underwriters. Again, Fairmont ignores the evidence.

Fairmont's argument also ignores the rule that where several insurers share the risk, each owes a duty to defend the entire action. (*Haskel, Inc. v. Superior Court* (1995) 33 Cal.App.4th 963, 976-977.)

Fairmont's argument is based almost exclusively on *Centennial, supra,* 88 Cal.App.4th 105, an argument that is as follows: "The Court of Appeal in *Centennial* found that it would be 'patently arbitrary and inequitable' to apply in equal shares allocation when one insurer has a substantially smaller time on risk for the claim. [Citation.] As discussed in more detail below, the same facts are presented in this case, as Fairmont had a substantially smaller time on risk for this claim than does London/Newcrest and London/MJD I. Moreover, the Fairmont/Franke Policy and Fairmont/Sutter Policy do not provide the same coverage, the same exclusions, the same limits or the same premiums as the London/Newcrest and London/MDJ Policies. [Citations.] [¶] Under the controlling authority of *Centennial*, the trial court was required to consider factors such as: '[1] the particular terms, *exclusions* and limits of the respective insurance policies in effect; [2] the time each co-insurer is "on the risk"; [3] the nature of the given claim; [4] the relation of the insured to the several insurers; and [5] the relative amounts of the premiums paid.' *Centennial*, *supra,* 88 Cal.App.4th at 116. The trial court failed to consider any of these factors."

Taking up the last sentence first, to say that the trial court "failed to consider" *Centennial* is outrageous, given that the court devoted almost two pages to a discussion—and distinction—of that case. Beyond that, *Centennial* is not only not "controlling," it is distinguishable, on two separate bases.

First, in *Centennial*, both insurers participated in the defense of the underlying action. Fairmont, of course, did not. Second, the insurers in *Centennial* had apparently agreed that one of the two bases of apportionment should be used. In the court's words, "A disagreement arose between the parties concerning whether U.S. Fire had contributed sufficiently toward the defense of Lincoln. Specifically, the parties disputed whether the insurers' respective shares of the defense costs should be apportioned using a time on the risk method, or instead on an equal basis with each insurer paying one-third of the costs." (*Centennial*, *supra,* 88 Cal.App.4th at p. 109.)

We are constrained to note that Fairmont's approach, dissecting the policies, is misplaced. That is, Fairmont focuses on the amount of premiums; the relative coverage amounts; the supposed time on the risk; and when the work was done. Indeed, relying on the testimony of its one witness, Govan, Fairmont goes so far as to assert that it "presented uncontroverted evidence that plaintiffs' cost of repair for the damages sought in the *Marsicano* action were 80% soils related, 10% framing related and 10% other. [Citation.] The undisputed evidence also demonstrated that $211,119.54 of Newcrest's defense fees and costs were generated by Newcrest's geotechnical expert, Stoney-Miller Consultants."

In a related argument Fairmont asserts that the trial court's allocation on equal shares results in a "windfall" to Underwriters, and constitutes an "abuse of discretion" because this allocation will result in Underwriters paying less than their fair share. This argument, based on *Scottsdale Ins. Co. v. Century Surety Co.* (2010) 182 Cal.App.4th 1023, is also misplaced. There, Scottsdale failed to submit any evidence of what it claimed constituted its fair share of defense costs in the underlying case, contending that it should receive "half" of those costs—this despite that Scottsdale in fact shared defense costs with multiple other insurers. (*Id.* at p. 1033.) The Court of Appeal noted that "half" bore no relationship to any evidence of what Century would have paid had it actually participated in the defense in the first place, and that Scottsdale never raised the issue of the other insurer's contribution in its damage calculation or, indeed, joined these other insurers, because Scottsdale hoped to gain a windfall. (*Id.* at pp. 1033-1035.) The court thus remanded the matter for further evidence at trial to ensure that century was charged with its proper fair share of the defense. (*Id.* at p. 1039.)

Here, the evidence of "who" defended and "what" was paid in defense of the common insured was in evidence—and undisputed: Underwriters alone defended Newcrest. Underwriters alone paid the entire cost of defense. And Fairmont stipulated that if the superior court selected "equal shares," two shares would be ascribed to Underwriters and two shares would be ascribed to Fairmont. To argue, as Fairmont does, that Underwriters paid the fees and costs under two separate policies, is particularly disingenuous, for, as will be seen, contrary to its argument here—essentially that "Underwriters" is a bunch of separate entities—is 180 degrees from a later argument that all "Underwriters" are one.

Allocation of the Settlements to Reduce the Overall Cost of Defense Was Not an Abuse of Discretion

As noted above, Underwriters had initially sued other insurers besides Fairmont, and prior to trial had settled with two of them, receiving a total of $107,000. The trial court subtracted that amount from the $590,550 paid by Underwriters, resulting in a balance of $493,550. This, then, was the amount the trial court divided into four shares of $120,887, and then allocated two shares to Fairmont, resulting in the $241,775 awarded against it. Doing so, the trial court expressly noted that "The Court finds nothing self-serving, as Fairmont argues, in the proposal by Underwriters to apply the settlements in this fashion. This proposal appears fair and reasonable under these circumstances as it equally benefits the parties. The alternative suggestion by Fairmont that this allocation should only apply to benefit Fairmont is neither equitable nor supported by the law. Fairmont did nothing to secure these settlement [*sic*], or otherwise named these settling carriers in any Cross-Complaint or separate action. Fairmont's references to cases addressing allocation of settlements in a CCP Section 877.6 motion among joint tortfeasors (*Alcal v. Superior Court* (1992) 8 Cal.App.4th 1121, 1125) are inapposite. This is not an [*sic*] CCP Section 877.6 proceeding; the parties are not joint tortfeasors; and issues presented involving equitable contribution are based on principles of equity and not contract. *CSE Ins. Group v. Northbrook Property & Casualty Co.*

(1994) 23 Cal.App.4th 1839, 1845. The argument presented by Fairmont has no precedence or support under the law and is rejected."

Once again, Fairmont eschews any reference to the court's decision. Once again, Fairmont does nothing but reassert its argument below—indeed, citing the identical cases rejected by the court.

And the court's approach was well within the court's discretion. (See *CSE Ins. Group v. Northbrook Property & Casualty Co., supra,* 23 Cal.App.4th 1839, 1844.) There is nothing in the law which mandated that the court use the settlements as a "set off" to Fairmont's obligation. Certainly not the cases cited by Fairmont. *Arbuthnot v. Relocation Realty Service Corp.* (1991) 227 Cal.App.3d 682 and *Alcal Roofing & Insulation v. Superior Court, supra,* 8 Cal.App.4th 1121 both deal with settlement allocation requirements imposed upon tort defendants by Code of Civil Procedure section 877 and 877.6. And as the trial court noted, Underwriters and Fairmont were not joint tortfeasors, and this appeal does not address a Code of Civil Procedure section 877 or 877.6 proceeding. This is not an issue of joint and several liability, so *Jhaveri v. Teitelbaum* (2009) 176 Cal.App.4th 740 has no application. Nor *Howard v. American National Fire Ins. Co.* (2010) 187 Cal.App.4th 498, which involved a judgment creditor seeking satisfaction of a debt.

There Was No Error As To the Statute of Limitations

An action for contribution to recover defense costs must be filed within two years from the date the underlying litigation is resolved. (*Lambert v. Commonwealth Land Title Ins. Co.* (1991) 53 Cal.3d 1072, 1077; see also *Eaton Hydraulics Inc. v. Continental Casualty Co.* (2005) 132 Cal.App.4th 966, 973-974.)

Fairmont acknowledges that the underlying action, filed on November 24, 2008, was timely. Despite that, Fairmont contends that Underwriters can only recover the fees and costs incurred within the two years prior to filing. The trial court expressly ruled against Fairmont on this issue, where, quoting Justice Croskey's manual, said "[t]he statute of limitations for an action for equitable contribution 'must be commenced no later than two years after the plaintiff insurer's last payment in the underlying lawsuit.' "

Indeed, the trial court rejected Fairmont's argument in quite blunt terms: "There is no authority, in this or any other state, which has ever suggested, let alone held, that a carrier in a viable equitable contribution action is limited to recovery of only those fees and costs incurred within two years of the date of filing of its suit. Indeed, not only have our Courts never applied such a limitation, they appear to take the position that fees and costs incurred prior to the two year statute are fully recoverable. As an example, in *OneBeacon America Ins. Co. v. Fireman's Fund Ins. Co.*[,*supra,*] 175 Cal.App.4th 183, 189-209, the Court of Appeal specifically awarded defense fees and costs incurred by one Beacon in 1999 in its equitable contribution action which was filed by OneBeacon in 2005."

Fairmont asserts this was error, saying "However, the case cited by the Rutter Group—*Century Indemnity*, 50 Cal. App. 4th at 1124—does not even discuss the issue of *accrual* of an insurer's cause of action against a co-insurer for equitable contribution. The Court in *Century Indemnity* concluded that an insurer's obligation to contribute to another's insurer's defense of a common insured was based upon principles of equity , not contract, and therefore the two-year statute of limitations under Code of Civil Procedure Section 339 applied. (*Century Indemnity*, 50 Cal. App. 4th at 1124.) The Court in *Century Indemnity* specifically noted: 'In so holding, *we do not rule on the issue of when Scottsdale's purported equitable contribution cause of action arose*.' (*Id.* at 1117, emphasis added.)."

Not only does Fairmont cite nothing in any way even attempting to take issue with the trial court's rejection of its position, neither of its briefs so much as mentions *OneBeacon*.

We cannot conclude discussion of this issue without observing the myriad problems that Fairmont's position would present. For example, it would force the participating insurer to file suit prematurely, before all the damages are ascertained, and then, apparently, amend its complaint from time to time. Or perhaps the insurer would have to file multiple actions, especially if the contribution action proceeded to trial before the conclusion of the underlying lawsuit. This hardly promotes judicial economy or the orderly resolution of claims. It would, in short, be a terrible policy.[3] In sum, Fairmont's statute of limitations argument has no merit, including its argument based on judicial estoppel.

Belatedly, after the trial—indeed, after the court announced its tentative decision—Fairmont argued that Underwriters was "judicially estopped" to assert its position on the statute of limitations. Fairmont's brief describes what allegedly occurred, and when, this way: "In its Opposition to Underwriters' Proposed Statement of Decision, Fairmont advised the trial court that Underwriters recently advocated in another action that an insurer's cause of action for equitable contribution against a co-insurer accrues when the participating insurer *begins paying the claim*, not when it makes its final payment. [Citation.] Specifically, on July 19, 2010, in support of its Motion to Dismiss/Motion for Summary Judgment in the matter of *Steadfast Ins. Co. v. Certain Underwriters at Lloyd's London, et al.,* filed in the United States District Court for the Central District of California, bearing Case No. SACV10-528 DOC (RNBx) (the "*Steadfast* action") . . . ."

Then, after quoting the argument made in the *Steadfast* case, Fairmont continues: "After the Federal District Court remanded the *Steadfast action,* Underwriters prevailed on a motion for summary judgment in state court on the grounds that the statute of limitations on an insurer's cause of action for equitable contribution against a co-insurer begins to run when the participating insurer *begins paying the claim*, not when it makes its final payment. [Citation.] Having prevailed on the argument in another judicial proceeding, judicial estoppel precludes Underwriters from now taking a contrary position in the instant case."

[3] In part in recognition of problems such as we described, the Supreme Court has held that, although an insured's cause of action against an insurer accrues at the time the insurer refused to defend, under principles of equity the statute of limitations is equitably tolled until resolution of the underlying action. (*Lambert v. Commonwealth Land Title Ins. Co., supra,* 53 Cal.3d 1072, 1077-1079.)

We discussed the law of judicial estoppel in *Levin v. Ligon* (2006) 140 Cal.App.4th 1456, 1468-1470, as follows:

"Judicial estoppel, sometimes referred to as the doctrine of preclusion of inconsistent positions, ' "prevents a party from 'asserting a position in a legal proceeding that is contrary to a position previously taken in the same or some earlier proceeding.' " '[Citation.] The dual purposes for applying this doctrine are ' " 'to maintain the integrity of the judicial system and to protect parties from opponents' unfair strategies.' " ' [Citation.] Judicial estoppel 'is intended to prevent litigants from " ' " 'playing "fast and loose with the courts." ' " [Citation.]" [Citation.] It is an " 'extraordinary remed[y] to be invoked when a party's inconsistent behavior will otherwise result in a miscarriage of justice.' " ' [Citation.]

"Judicial estoppel is an equitable doctrine and its application by the court is discretionary. [Citation.] Courts may decide to apply this doctrine against a plaintiff's claims to prevent 'judicial fraud from a litigant's deceitful assertion of a position completely inconsistent with one previously asserted, thus compromising the integrity of the administration of justice by creating a risk of conflicting judicial determinations.' [Citation.] Some Courts of Appeal have held that the inconsistent position 'generally must be factual in nature.' [Citation.] If the challenge is merely a legal challenge that reflects two different positions in two lawsuits, this may be a 'reasonable' litigation tactic, which does not undermine the integrity of the judicial process. [Citation.] [¶] . . . [¶]

"The court in *Jackson*[*v. County of Los Angeles* (1997) 60 Cal.App.4th 171 (*Jackson*)] considered whether a county safety police officer was precluded from claiming his employer had violated the Americans with Disabilities Act of 1990 (ADA) (42 U.S.C. § 12111 et seq.) after he had filed a workers' compensation claim and resolved it by stipulation that resulted in his receiving $ 48,359. [Citation.] The parties' stipulation also stated that the parties agreed that the plaintiff was under a restriction that his ' "work environment [be] free from emotional stress and strain and no heavy work." ' [Citation.]

"The *Jackson* court reviewed both federal and state law and concluded that judicial estoppel applies when: '(1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake.' [Citation.] . . . ."

Passing over the untimeliness of Fairmont's claim, we reject its judicial estoppel argument for several reasons.

First, judicial estoppel is an "equitable doctrine." We see nothing here indicating any equities favoring Fairmont.

Beyond that, Fairmont cannot demonstrate all five elements required by *Jackson*, beginning with the "same party" requirement. That is, Fairmont has not shown that the insurer involved in *Steadfast*—described as "R J Kiln & Co., Ltd., on behalf of defendant those Certain Underwriters at Lloyd's London subscribing to Certificate No. B10558/06PYOMO119"—is identical to the Underwriters involved in this case. True, as Fairmont asserts, the insurer was "Underwriters," which, Fairmont goes on to assert, is somehow one giant association. Or, as Fairmont would have it for this argument, all Underwriters are apparently one. However, when that position does not suit Fairmont, all Underwriters are different, and thus the "Underwriters" on one policy are not the same as the "Underwriters" on another. The irony is not lost on us, especially in such an equitable setting.

Fairmont has also not shown that the position taken in *Steadfast* is entirely inconsistent with the position taken here. The issue in *Steadfast* was whether a "contractual suit limitation" applied when the statute of limitations began to run for reimbursement of a first-party indemnity payment. That is not the issue here, which is whether the two year statute of limitations operates as a bar to recovery of fees and costs incurred more than two years before the date of filing.

The Amount of Prejudgment Interest Awarded Was Not Supported

The law of prejudgment interest was recently set forth in *Collins v. City of Los Angeles* (2012) 205 Cal.App.4th 140, 150-151:

"A person who is entitled to recover damages that are 'certain, or capable of being made certain by calculation' is also entitled to recover prejudgment interest on that amount from the date that the right to recover arose. [Citation.] Damages are certain or capable of being made certain by calculation, or ascertainable, for purposes of the statute if the defendant actually knows the amount of damages or could calculate that amount from information reasonably available to the defendant. [Citation.] In contrast, damages that must be determined by the trier of fact based on conflicting evidence are not ascertainable. [Citation.] A legal dispute concerning the defendant's liability or the proper measure of damages, however, does not render damages unascertainable. [Citations.]

"Thus, the general rule is that damages are unascertainable if the amount of damages depends on disputed facts or the available factual information is insufficient to determine the amount; and damages are ascertainable if the only impediment to the determination of the amount is a legal dispute concerning liability or the measure of damages. On appeal, we independently determine whether damages were ascertainable for purposes of the statute, absent a factual dispute as to what information was known or available to the defendant at the time."

As indicated above, the judgment included an award of prejudgment interest in the amount of $90,589. Fairmont contends that such award was improper, its fundamental argument running as follows: "Any amount that Fairmont may owe in connection with the claims asserted by Underwriters was never a fixed and ascertainable amount. Indeed, at least one of the three Plaintiffs, London/MJD II, did not prevail against Fairmont, and the amount which Fairmont actually owed to London/Newcrest and/or London/MJD I could only be determined once the Court resolved a myriad of issues." In furtherance of this argument, Fairmont points to Underwriters' trial brief where, Fairmont asserts, Underwriters offered six alternate calculations as to Fairmont's liability, ranging from $196,771 to $241,775, and then an amended trial brief offering two new, and different, amounts, $240,101 and $168,969. And Fairmont concludes, "Conspicuously, none of Underwriters' multiple proposals regarding how Newcrest's defense costs should be allocated were ultimately adopted by the Court. Instead, the Court's Tentative decision concluded that Fairmont should owe $240,153.00."

While offering such alternative amounts may not bar an award of prejudgment interest per se (cf. *Fireman's Fund Ins. Co. v. Allstate Ins. Co.* (1991) 234 Cal.App.3d 1154, 1173), we conclude that the amount of prejudgment interest awarded was not correct. While the trial court did not at any place explain the basis of the amount of prejudgment interest awarded, the documents in the record indicate that Underwriters sought—and the trial court awarded—prejudgment interest beginning with the first payment of a defense cost invoice on May 27, 2005. That is, Underwriters submitted a three-page schedule called "Prejudgment Interest Calculations" that, however complicated it might be, specifically indicated that its right to prejudgment interest began on May 27, 2005. This, we conclude, cannot be, as the amount of Fairmont's liability was not "certain, or capable or being made certain by calculation" on May 27, 2005.

It will be recalled that in this action Underwriters originally included three other insurers besides Fairmont. With them in the case, the amount of Fairmont's liability was certainly not "certain." Also recalled is that along the way those other insurers were dismissed from the action, one, INSCORP, due to insolvency and the other two following settlements, Claremont via a settlement on October 14, 2009 and ACE via a settlement on March 22, 2010. Those settlements totaled $107,000, and at that point the net amount of Underwriters' claim for defense expenses was set, at $483,500. At that point, and only at that point, might it be that prejudgment interest could enter the picture. And if it did, it would run from that point, March 22, 2010, to August 19, 2019, the date of the judgment, at a rate of seven percent. That cannot support an award of $90,589 in prejudgment interest.

DISPOSITION

The judgment in favor of Underwriters and against Fairmont and awarding damages is affirmed in all respect except for the award of prejudgment interest. The matter is remanded for the limited purpose of determining whether prejudgment interest is proper and, if so, the amount of such interest.

Each side shall bear its own costs on appeal.

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Richman, J.

We concur:

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Kline, P.J.

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Haerle, J.