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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

AXIS SURPLUS INSURANCE COMPANY,

Plaintiff and Appellant,

v.

GLENCOE INSURANCE LTD.,

Defendant and Respondent.

D059275

(Super. Ct. No. 37-2009-00095815-  
CU-IC-CTL)

APPEAL from an order of the Superior Court of San Diego County, Jeffrey B. Barton, Judge. Affirmed.

Axis Surplus Insurance Company (Axis) appeals an order granting Glencoe Insurance Ltd.'s (Glencoe) motion to tax costs. We affirm.

**FACTUAL AND PROCEDURAL BACKGROUND**

Axis and Glencoe insured Pacifica Pointe L.P. under separate general liability policies. Pacifica was sued in a construction defect suit and tendered claims to both Axis and Glencoe. Axis accepted the tender under a reservation of rights, and defended

Pacifica in a construction defect suit, ultimately paying \$750,000 to settle the matter.

Glencoe did not participate in the defense or settlement of the construction defect suit.

Axis then sued Glencoe for declaratory relief and equitable contribution to recover at least a portion of the \$750,000 it paid as part of the settlement of the construction defect suit.<sup>1</sup> In its trial brief, Axis argued alternative measures of damages. For example, Axis asserted Glencoe should pay the entire \$750,000 because the Glencoe policy covered the specific construction project involved in the construction defect suit. In the alternative, it claimed Glencoe should pay \$600,000 in damages based on the respective policy limits under the Axis and Glencoe policies. Under a time on risk argument, Axis insisted Glencoe should have to pay \$625,000, \$562,000, or \$500,000. Finally, Axis presented the possibility of a 50-50 split of the \$750,000 as damages. In contrast, Glencoe, in its trial brief, disputed any liability, but argued, if the court found it liable, the appropriate damages would be \$45,667.28.

After a bench trial, the court found in favor of Axis and awarded it damages in the amount of \$450,000. In awarding damages, the court found a 60/40 split in favor of Axis to be most equitable after "balancing all the pertinent factors including the greater time on risk and limits by Glencoe with the co-insurance provisions in both policies and the facts and circumstances regarding the covered claims in each carrier's policies and the participation in the settlement by Axis. . . ."

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<sup>1</sup> A more complete discussion of the factual and procedural background in this case is found in our published opinion filed concurrently with this opinion in *Axis Surplus Insurance Company v. Glencoe Insurance Ltd.* (D058963). In that case, we affirmed the judgment awarding Axis \$450,000 in damages for its equitable contribution claim.

Axis filed a memorandum of costs seeking, among other things, \$55,125 in prejudgment interest. Glencoe filed a motion to tax costs, specifically asking the court to strike Axis's request for prejudgment interest. Axis opposed the motion, and Glencoe filed a reply. The court granted Glencoe's motion to tax costs, finding "there was no sum certain until the time the court entered its order. . . ." Axis timely appealed.

## DISCUSSION

Axis contends it was entitled to receive an award of prejudgment interest under Civil Code<sup>2</sup> section 3287, subdivision (a). We disagree.

If the requirements of section 3287, subdivision (a) are met, an award of prejudgment interest is mandatory. (*North Oakland Medical Clinic v. Rogers* (1998) 65 Cal.App.4th 824, 828-829.) "The denial of prejudgment interest under section 3287, subdivision (a) presents a question of law we must review on an independent basis." (*Employers Mutual Casualty Co. v. Philadelphia Indemnity Ins. Co.* (2008) 169 Cal.App.4th 340, 347.)

Section 3287, subdivision (a) provides in part: "(a) Every 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 him upon a particular day, is entitled also to recover interest thereon from that day, except during such time as the debtor is prevented by law, or by the act of the creditor from paying the debt."

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<sup>2</sup> Statutory references are to the Civil Code unless otherwise specified.

Damages are deemed certain when, though the parties dispute liability, they essentially do not dispute the computation of damages, if any. (*Wisper Corp. v. California Commerce Bank* (1996) 49 Cal.App.4th 948, 958.) " '[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 damages.' [Citation.]" (*Polster, Inc. v. Swing* (1985) 164 Cal.App.3d 427, 434-435 (*Polster*)). "The statute does not authorize prejudgment interest where the amount of damage, as opposed to the determination of liability, 'depends upon a judicial determination based upon conflicting evidence and is not ascertainable from truthful data supplied by the claimant to his debtor.' [Citations.]" (*Fireman's Fund Ins. Co. v. Allstate Ins. Co.* (1991) 234 Cal.App.3d 1154, 1173.)

Here, the parties clearly disputed the computation of damages. Axis itself argued in the alternative that six damage calculations could be appropriate. After considering the evidence and balancing a variety of factors, the court ultimately decided a 60/40 split was most equitable and awarded Axis damages in the amount of \$450,000. Thus, the damages were not certain, under section 3287, subdivision (a) until the court decided the appropriate split of contribution. In doing so, it did not use any of the methods offered by Axis, but instead, appropriately exercised its discretion based on relevant factors. (See *Truck Ins. Exchange v. Unigard Ins. Co.* (2000) 79 Cal.App.4th 966, 974; *Fireman's Fund Ins. Co. v. Maryland Casualty Co.* (1998) 65 Cal.App.4th 1279, 1293 (*Fireman's Fund*)). Glencoe neither knew the amount of damages nor could compute the damages until the court issued its decision. (See *Polster, supra*, 164 Cal.App.3d at pp. 434-435.)

Only at that time, did the amount of damages become certain. Prejudgment interest therefore was not appropriate, and we conclude the court correctly granted Glencoe's motion to tax costs.

Axis relies on *Koyer v. Detroit Fire & Marine Ins. Co.* (1937) 9 Cal.2d 336 (*Koyer*), *Fireman's Fund, supra*, 65 Cal.App.4th 1279, and *Hartford Accident & Indemnity Co. v. Sequoia Ins. Co.* (1989) 211 Cal.App.3d 1285 (*Hartford*) to support its position the court erred in granting Glencoe's motion. None of the cases are helpful.

Our Supreme Court affirmed a judgment awarding prejudgment interest in *Koyer, supra*, 9 Cal.2d 336 because the damages were based on what the parties agreed to in the subject insurance policy. (*Id.* at pp. 345-346.) No such certainty exists here.

Although the trial court awarded prejudgment interest in *Fireman's Fund, supra*, 65 Cal.App.4th 1279, the propriety of that award was not challenged on appeal. As such, Axis's reliance on *Fireman's Fund* is misplaced. (See *Santisas v. Goodin* (1998) 17 Cal.4th 599, 620 ["An appellate decision is not authority for everything said in the court's opinion but only 'for the points actually involved and actually decided.' [Citations.]".])

In *Hartford*, an insurer settled a case involving a car accident for approximately \$1.8 million. The settling insurer sued two nonsettling insurers. It obtained damages but not prejudgment interest. The prejudgment interest was awarded on appeal because "the amount of damages recoverable was 'certain, or capable of being made certain by calculation' and was 'vested' in [the settling insurer] on October 14, 1986, the day [the settling insurer] exhausted its primary policy limit and first paid out money under its umbrella policy." (*Hartford, supra*, 211 Cal.App.3d at p. 1307.) Assuming the settling

insurer was entitled to recover damages, the only issue was how the trial court would prioritize the policies. "In this respect, the trial court had only two options. . . . This was purely a question of law since the amount of damages under either formula was readily ascertainable by mathematical calculation. Thus, the amount of damages was never 'unliquidated' or 'contingent' but rather, only the legally proper order of priority of the respective policies was uncertain. Under these circumstances, [the settling insurer] is entitled to prejudgment interest." (*Ibid.*)

Unlike the damages in *Hartford*, here, the damages were not readily ascertainable by a mathematical formula. Instead, the court had substantial discretion to determine the equitable amount. (*Scottsdale Ins. Co. v. Century Surety Co.* (2010) 182 Cal.App.4th 1023, 1033.) *Hartford, supra*, 211 Cal.App.3d 1285 thus is not instructive.

Finally, without authority, Axis asserts the court should have awarded prejudgment interest to "equitably balance the rights of the parties." We disagree. The court correctly used equity to determine the proper measure of damages. We are aware of no authority that would allow the court to ignore the requirements of a statute and established case law under the guise of equity to award prejudgment interest on damages that were not certain by calculation.

DISPOSITION

The order is affirmed. Glencoe is awarded its costs of this appeal.

HUFFMAN, Acting P. J.

WE CONCUR:

HALLER, J.

AARON, J.