SUPERIOR COURT OF CALIFORNIA, COUNTY OF RIVERSIDE

TITLE:	DATE & DEPT:	NUMBER:
STATE OF CALIFORNIA vs. UNDERWRITERS AT LLOYD'S OF LONDON, et al.	08/11/15 D10	CIV239784

FILED
SUPERIOR COURT OF CALIFORNIA
COUNTY OF RIVERSIDE
AUG 11 2015
L. Hall

COUNSEL:	REPORTER:
None present	None

PROCEEDING:
NOTICE OF RULING

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PREJUDGMENT INTEREST

The remaining issue to be decided by this Court is whether the State is entitled to an award of prejudgment interest under Civil Code Section 3287, subd. (a) or (b), the parties having entered into a stipulation under which the remaining Insurers have paid the amounts due under their respective insurance policies. The Court finds the State is entitled to interest under subdivision (a) from September 11, 1998, through the date of payment by Insurers, in the amount of $13,914,082.09. The court also exercises its discretion under subdivision (b) as an alternative basis for an award of prejudgment interest and awards interest in the amount of $10,554,082.19 from the filing of the complaint against these Insurers on September 11, 2002, through the date of payment. This alternative award shall only be effective in the event the award of mandatory prejudgment interest under subdivision (a) is reversed through the appellate process.

Mandatory Award of Prejudgment Interest Under Civil Code Section 3287(a)

Under Civ. Code §3287(a), "[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." "Courts generally apply a liberal construction in determining whether a claim is certain, or liquidated. [Citation.] The test for

Sharon Waters, Judge
L. Hall (cmg), Clerk
Page 1 of 8 Page(s)

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. [Citation.] Uncertainty as to *liability* is irrelevant." (*Howard v. Am. Nat. Fire Ins. Co.* (2010) 187 Cal. App. 4th 498, 535 (italics in original; emphasis added); see also *Uzyel v. Kadisha* (2010) 188 Cal. App. 4th 866, 919: "A legal dispute concerning the defendant's liability or uncertainty concerning the measure of damages does not render damages unascertainable.")

Thus, "[d]amages are deemed certain or capable of being made certain within the provisions of subdivision (a) of section 3287 where 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." (*Fireman's Fund Ins. Co. v. Allstate Ins. Co.* (1991) 234 Cal. App. 3d 1154, 1173.) Stated another way, "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." (*Collins v. City of Los Angeles* (2012) 205 Cal. App. 4th 140, 150-51.)

The Insurers make numerous arguments to suggest that the amount owed was not certain, some of which the Court will comment on herein but none of which the Court found persuasive.

Whether the Rule 54(b) Judgment Required the State to Pay $80,174,584.22

The judgment in the federal action found the State's liability as 65% under CERCLA and 100% under the state law claims. It also found that the United States had incurred costs of response in connection with the site in the amount of $80,174,584.22 through February 29, 1992, approximately six and one-half years prior to the judgment. CERCLA §107, 42 U.S.C. §9607(a) provides for liability for all costs of removal or remediation incurred by the United States Government not inconsistent with the national contingency plan. Thus, under the CERCLA claims, through this judgment, the State was liable for 65% of at least $80,174,584.22. The judgment also declared the State was liable

to the counterclaimants under the state law claims and essentially was 100% responsible for all costs of remediation. Thus, the remaining 35% owed on the $80,174,584.22 which was apportioned to the counterclaimants was ultimately required to be paid by the State anyway. Reading the judgment in its entirely, it is an adjudication that the State must pay the United States at least $80,174, 584.22.

Conflicting Issues of Liability

The Insurers also argue: that damages were not certain because the State has taken the position that there were thousands of occurrences; that the amount of damages "had no significance" until the court adopted vertical exhaustion; that the prior (reversed) judgment adjudicated the State's damages as $0, that there were other disputes as to coverage issues, and so on. These are all issues that go to the Insurers' liability, not the State's damages or how to calculate them.

For example, the issue of whether vertical or horizontal exhaustion was a legal issue that affected liability, i.e., whether and when payment was due under the policies and did not affect the amount of the State's damages or how much was due under the policies. Admittedly, had the court adopted Insurers' position that all self-insured retentions across all policy periods must be exhausted and all insurers with lower SIR amounts must be exhausted before liability would attach under their policies, there would have been significant questions, some factual, to be resolved in order to determine whether the "rising bathtub" had reached these insurers' policies and if so, as of when. But, again, these are questions of liability, not damages.

Insurers contend that *St. Paul Mercury Insurance Co. v. Mountain W. Farm Bureau Mut. Ins. Co.* (2012) 210 Cal. App. 4th 645 compels the conclusion that prejudgment interest is not available to the State under subd. (a). That case involved a dispute between insurers in which the court was faced with the question of how to equitably allocate a certain loss among multiple insurers. The appellate court held that since the issues at trial included not only legal questions about whether the

defendant insurer was responsible for contribution, but also questions about the allocation of responsibility, the insurer's precise share of the loss was not certain or capable of being made certain "until the trial court determined what method of allocation was most equitable." (*St. Paul Mercury Insurance,* 210 Cal. App. 4th 645, 665-666.) If equitable allocation among the insurers were the issue in this case, then *St. Paul Mercury Insurance* would have a place in this discussion. But this is a different dispute and *St. Paul* does not apply.

Here, the dispute is between insured and insurer. The precise amount to be paid upon a finding of a breach of contract by the insurer is fixed by the provisions of the policy itself. (*Fireman's Fund Ins. v. Allstate Ins. Co, et al.* (1991) 234 Cal. App. 3d 1154,1174: in finding that prejudgment interest was properly awarded on the balance of the policy limits the court noted, "once liability was established, the extent of that liability was no longer a question. Fireman's policy limits were $ 1 million and it paid $ 250,000 toward the settlement. The court properly awarded prejudgment interest on the remaining $ 750,000.") There is no issue of equitable allocation in a breach of contract action by the insured against the insurer.

As noted in this Court's November 19, 2014, ruling on the summary adjudication motions: "[A]pportionment [on equitable principles among multiple insurers], however, has no bearing upon the insurers' obligations to the policyholder. . . . The insurers' contractual obligation to the policyholder is to cover the full extent of the policyholder's liability (up to the policy limits)." *Dart Industries, Inc. v. Commercial Union Ins. Co.* (2002) 28 Cal. 4th 1059, 1080 (quoted in November 19, 2014, ruling).

The Court's November 19, 2014, ruling further noted that "CNA's policies were not written in excess of primary insurance. They were written in excess of an 'Insured's Retention' identified as a specific dollar amount of ultimate net loss. . . . The Loss Payable clause provides that *CNA's liability will attach following exhaustion of the Insured's Retention, described as a specific dollar amount*, not underlying insurance." (emphasis added). Thus, as soon as the loss exceeded $50 million dollars,

the State was entitled to go to an insurer of a $2 million slice of the highest level of liability for any period in which the loss occurred and demand the full amount be paid. And if equity demanded that other, lower tier insurers of a different coverage period cover that loss instead of the higher tier insurers, the insurers should fight that out separately. With the Insurers admittedly responsible for $12 million loss in excess of specific dollar amounts above $16 or $25 million (depending on the policy period), at a minimum, once the State's liability exceeded $50 million, the full amount on all policies was certain, at least until the State was satisfied. Thus, when the liability under the policy was created on September 11, 1998, by entry of the $80,174,584.22 federal court judgment, the damages were certain and interest began to accrue.

In short, while there have been numerous disputes about the fact of liability, and whether allocation of the loss among the insurers was appropriately litigated in this case, and if so by how much, and whether there should be offsets, and so on, the State's damages and how to calculate it has always been known as being the amount the State was ordered to pay in restitution, plus any additional costs of cleanup, up to the policy limits – an amount that was capable of being made certain as soon as the maximum amount of liability for an implicated policy period ($50 million) was reached.

Discretionary Award of Prejudgment Interest under Civil Code Section 3287(b)

In the alternative, the State argues that prejudgment interest should be awarded from the date of the filing of this action under Civ. Code §3287(b). "[B]y its very terms, subsection (b) was designed to allow trial courts flexibility in circumstances like those in the present case where the exact amount of damage is in dispute. (*A & M Produce Co. v. FMC Corp.* (1982) 135 Cal. App. 3d 473, 496.) There are various factors that courts have considered as are highlighted by the parties in their briefs, but fundamentally the issue is one of equity, as the court is given "flexibility to determine whether an

award of prejudgment interest is appropriate in light of the particular facts and circumstances in the case." (*Faigin v. Signature Grp. Holdings, Inc.* (2012) 211 Cal. App. 4th 726, 751.)

Once the State was found 100% liable for all costs of clean-up and remediation, there was no doubt that the State owed the federal government over $80 million; was required to reimburse the counterclaimants the full costs of their remediation work; and could not shift any of the State's own remediation costs to any other responsible party. The evidence at the hearing on prejudgment interest in this Court revealed that at the time of the entry of the Rule 54(b) judgment, the United States' remediation costs through September 1998 exceeded $116 million and the counterclaimants' remediation costs exceeded $90 million. The State's own remediation costs were nearly $50 million at that time and have grown to over $200 million. While settlements with other insurers over the years have compensated the State for a large portion of its damages, a substantial portion has remained unpaid. That is even with the assumption that the entire amounts received in settlement are applied to the State's damages in this case and there is a legitimate argument that the entire amounts of the settlements are not properly allocated as payment of the State's damages.

Ultimately through the efforts of the State alone, with little, if any, assistance or cooperation by any of its insurers, the State's responsibility to the United States was capped by payment of the $99.4 million and completely eliminated as to the counterclaimants for their remediation costs. It is interesting to note that had the State not negotiated down its liability to the United States and the counterclaimants from over $200 million to less than $100 million, it appears that even under the Insurers' horizontal exhaustion argument, the amount of damages necessary to trigger their duty to pay would have been reached not too long after this lawsuit was filed, perhaps as early as 2004.

Some courts have recognized that in insurance coverage disputes, an award of prejudgment interest may be even more appropriate that in other breach of contract cases. (*Esgro Cent., Inc. v. General Ins. Co.* (1971) 20 Cal. App. 3d 1054, 1065 and cases cited therein.) This Court cannot

disagree. Here if there was some uncertainty about the total amount of the State's damages, there is something "not right" about delaying an insured policyholder's collection of money owed under its policies because various insurers cannot agree among themselves about how to allocate a loss that must be covered by one policy or another.

This is not to suggest that the sole reason we are here 13 years after these Insurers was first sued is their refusal to pay under its policies. Other insurers took the identical position for nearly as long. And the State must accept some responsibility for the protracted litigation by, for example, taking the position that there were multiple occurrences, ultimately claiming five and the court ultimately finding one. But the award of prejudgment interest is never intended as punishment for litigating a bona fide dispute and so ultimately little can be accomplished by trying to shift or allocate "blame" for the protracted nature of this litigation. The fact remains the State has been deprived of the use of its money for a lengthy period of time and that the Insurers essentially have had a loan from the State of $12,000,000.00 for nearly 13 years. Imposing interest on the loan at the legal rate of seven percent is not unreasonable under the facts of this case.

Entry of Judgment.

The parties have agreed in their stipulation that this Court can and should now enter judgment in favor of the State and against the Insurers for breach of contract based on the Court's prior rulings and now this ruling. The State is directed to prepare the judgment, seek Insurers' approval as to the form of the judgment and then submit to this Court. A hearing for receipt of the proposed judgment is set for August 31, 2015, at 8:30 a.m. in Dept. 10. No appearance is required if the judgment is submitted to the Court prior to August 31.

Sharon J. Waters, Judge of the Superior Court

Sharon Waters, Judge
L. Hall (cmg), Clerk
Page 7 of 8 Page(s)

Sharon Waters, Judge
L. Hall (cmg), Clerk
Page 8 of 8 Page(s)

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CLERK'S CERTIFICATE OF MAILING

STATE OF CALIFORNIA

vs. CASE NO. CIV239784

SEATON INSURANCE COMPANY

TO:

I certify that I am currently employed by the Superior Court of California, County of Riverside and I am not a party to this action or proceeding. In my capacity, I am familiar with the practices and procedures used in connection with the mailing of correspondence. Such correspondence is deposited in the outgoing mail of the Superior Court. Outgoing mail is delivered to and mailed by the United States Postal Service, postage prepaid, the same day in the ordinary course of business. I certify that I served a copy of the attached Notice of Ruling on this date, by depositing said copy as stated above.

Court Executive Officer/Clerk

Dated: 08/11/15 by: _____
LETICIA HALL, Deputy Clerk

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