A MATTER OF INTEREST: ILLINOIS COURTS SHOULD RETURN TO THE TRADITIONAL RULE FOR AWARDING PREJUDGMENT INTEREST IN INSURANCE COVERAGE CASES

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I. INTRODUCTION

Illinois' Interest Act provides that creditors "shall be allowed to receive" prejudgment interest for "all" moneys due on any "instrument of writing."[1] Because Illinois courts have long held that insurance policies are written instruments for purposes of this statute, recovering prejudgment interest on monies owed under an insurance policy would seem to be a matter of right. Although traditionally that was the rule, more recent Illinois Appellate Court cases have held that whether to award interest is actually discretionary in insurance actions.

This Article reviews the history of prejudgment interest awards in Illinois insurance coverage and other contract cases. It maintains that the recent trend toward treating prejudgment interest as discretionary in insurance cases contravenes the terms of the Interest Act, the Illinois Supreme Court decisions that have applied that statute, and the statute's purpose of providing compensation for the time money was wrongfully withheld. The Article asserts that the discretionary approach also invites arbitrariness because appellate court decisions espousing it have not prescribed factors to guide a trial judge in exercising his or her discretion. The Article recommends that Illinois courts return to the traditional rule of viewing prejudgment interest as a matter of right when money is due under an insurance policy.

II. THE ILLINOIS INTEREST ACT

Prejudgment interest in Illinois contract actions such as insurance coverage cases is controlled by Section 2 of the Interest Act.[2] That statute provides:

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1. 815 ILL. COMP. STAT. 205/2 (2012).
2. *Id.*

> Creditors shall be allowed to receive at the rate of five (5) per centum per annum for all moneys after they become due on any bond, bill, promissory note, or other instrument of writing; on money lent or advanced for the use of another; on money due on the settlement of account from the day of liquidating accounts between the parties and ascertaining the balance; on money received to the use of another and retained without the owner's knowledge; and on money withheld by an unreasonable and vexatious delay of payment. In the absence of an agreement between the creditor and debtor governing interest charges, upon 30 days' written notice to the debtor, an assignee or agent of the creditor may charge and collect interest as provided in this Section on behalf of a creditor.[3]

The statute authorizes interest only when the sum owed under a contract is liquidated or at least readily calculable.[4] "An amount due under a contract is liquidated if the parties agree on the amount."[5] The amount is sufficiently calculable if it is legally determinable despite a good faith dispute over liability and the sum owed.[6] For example, interest is permissible where the parties disagree about the method of awarding damages but the amount flows from whichever method is judged to be correct.[7] On the other hand, the amount is not sufficiently ascertainable if deciding damages requires a multi-day trial that produces a substantially

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3. *Id. See generally*, Adam N. Hirsch, *Getting What's Due: Prejudgment Interest in Illinois*, 98 ILL. B.J. 412 (2010).

4. Santa's Best Craft, L.L.C. v. Zurich Am. Ins. Co., 941 N.E.2d 291, 307 (Ill. App. Ct. 2010) ("In order to recover prejudgment interest, the amount due must be liquidated or subject to an easy determination."); Cont'l Cas. Co. v. Commonwealth Edison Co., 676 N.E.2d 328, 334 (Ill. App. Ct. 1997) ("[I]nterest will only be awarded under the Act where the amount due is fixed or easily computed.").

5. Oldenburg v. Hagemann, 565 N.E.2d 1021, 1029 (Ill. App. Ct. 1991). It has also been said that "[a] sum is liquidated if calculation does not require 'judgment, discretion, or opinion.'" Santa's Best Craft, LLC v. St. Paul Fire & Marine Ins. Co., 611 F.3d 339, 355 (7th Cir. 2010) (quoting Dallis v. Don Cunningham & Assocs., 11 F.3d 713, 719 (7th Cir. 1993)).

6. *Santa's Best*, 611 F.3d at 355 ("[A] good-faith defense to liability does not bar prejudgment interest if the amount is ascertainable."); N.H. Ins. Co. v. Hanover Ins. Co., 696 N.E.2d 22, 28 (Ill. App. Ct. 1998). In *Hanover*, the court stated:

> [E]ven if there was a good-faith dispute as to which party was responsible for payment, it would be of no import. Prejudgment interest may be awarded on money payable when a claimed right and the amount due still require legal ascertainment, despite the fact that the parties might reasonably differ as to their liability.

Id.; Krantz v. Chessick, 668 N.E.2d 77, 80 (Ill. App. Ct. 1996) ("If the amount is determinable, interest can be awarded on money payable even when the claimed right and the amount due require legal ascertainment."); Kan. Quality Constr., Inc. v. Chiasson, 250 N.E.2d 785, 789-90 (Ill. App. Ct. 1969) ("The fact that the parties could reasonably differ as to defendants' liability is not a consideration so far as the statute is concerned.").

7. Boyd v. United Farm Mut. Reinsurance Co., 596 N.E.2d 1344, 1350 (Ill. App. Ct. 1992) ("The issue was not the amount due, but rather which method of calculation, plaintiffs' or defendant's, was proper. Once the method was decided, the sum due was subject to easy determination by the court, according to an agreement by the parties.").

reduced award.[8] Prejudgment interest is unavailable in breach of contract cases apart from the Interest Act unless the contract specifically provides for it.[9]

III. THE TRADITIONAL "MATTER OF RIGHT" APPROACH FOR WRITTEN CONTRACTS

It was once clear that recovering prejudgment interest was a matter of right for money due under written contracts. In *John Kubinski & Sons, Inc. v. Dockside Development Corp.*, the Illinois Appellate Court reversed the ruling of a trial judge who believed the contrary.[10] There, the plaintiff contractor petitioned for prejudgment interest on a judgment it won for breach of an excavation contract.[11] Denying the petition, the trial judge stated:

> Taking all of these facts into consideration, I feel it is within the Court's discretion; the interest answer (sic) is not a mandatory statute, it is a discretionary statute. It gives the Court discretion to determine whether or

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8. *Santa's Best*, 941 N.E.2d at 307-08 (affirming refusal to award prejudgment interest on defense costs where trial court had to conduct three-day hearing on outstanding defense costs and awarded only a fraction of the amount claimed because "[t]he vast disparity in the amount sought and the amount awarded, together with the lengthy evidentiary hearing required to calculate the amount of the fees due, similarly support[ed] the conclusion that the damages were not easily determined, nor were they liquidated."); *see also* Lyon Metal Prods., L.L.C. v. Prot. Mut. Ins. Co., 747 N.E.2d 495, 510 (Ill. App. Ct. 2001) ("The large difference between what Lyon claimed in business interruption loss, what Protection Mutual calculated that loss to be, and what the jury ultimately awarded is a strong indication that the sum due pursuant to the business interruption endorsement was not easily determined."); Couch v. State Farm Ins. Co., 666 N.E.2d 24, 28 (Ill. App. Ct. 1996). In *Couch*, the court held:

> > [T]he trial judge denied prejudgment interest because she found the case did not involve an easily determined amount of damages. Our review of the record supports the trial court's conclusion. The plaintiff claimed actual losses of $270,670 in his proof of loss. The jury awarded only $35,000. This fact alone serves as a strong indication that the amount of damages was not readily ascertainable.
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> *Id.*

9. *See* Zokoych v. Spalding, 463 N.E.2d 943, 954 (Ill. App. Ct. 1984) ("It is a general rule in Illinois that interest is not recoverable unless provided for by agreement . . . or by statute."); First Arlington Nat'l Bank v. Stathis, 450 N.E.2d 833, 842 (Ill. App. Ct. 1983). The rule is different in equity cases in which courts have recognized an equitable power to award prejudgment interest. Tri-G, Inc. v. Burke, Bosselman & Weaver, 856 N.E.2d 389, 412 (Ill. 2006) (holding that where case is an action at law, the Interest Act controls, but in equity cases, courts have the discretion to award interest where it is equitable to do so); Golden v. Cervenka, 116 N.E. 273, 283 (Ill. 1917) ("In equity . . . interest is allowed because of equitable considerations, and is given or withheld as under all the circumstances of the case seems equitable and just."); *Cont'l Cas.*, 676 N.E.2d at 332 ("Illinois courts have declined to apply the rule governing equitable awards of prejudgment interest to cases at law, notwithstanding that an injured party who is eventually compensated may suffer detriment from the inability to use the money from the date of loss to the date of compensation.").

10. 339 N.E.2d 529, 537 (Ill. App. Ct. 1975).

11. *Id.* at 536.

> not interest should be applied or added to a money judgment that results in a finding that the defendant was guilty of a breach of contract.[12]

The appellate court reversed and remanded with directions to award interest at the statutory rate.[13] It pointed out that the statute provides for interest in various circumstances, only some of which called for an exercise of discretion.[14] Discretion was needed in applying the statutory provision for interest "on money withheld by an unreasonable and vexatious delay of payment" but not for "all moneys . . . due on any . . . instrument of writing."[15] Because the building contract was "an 'instrument of writing'" and the amount due under it was liquidated by a provision on the withholding of payments until contract completion, "the granting of interest was not subject to the court's discretion and was required under the statute."[16]

The same point was made in *Tomaso v. Plum Grove Bank*.[17] There, a trial judge entered judgment for the plaintiff in his suit against a bank for wrongfully withholding two cashier's checks.[18] The trial judge then awarded the plaintiff the check amounts without prejudgment interest.[19] As in *Kubinski*, the appellate court reversed the denial of interest.[20] Because the cashier's checks were instruments of writing that created an indebtedness for specific sums, interest was deemed a matter of right under the Interest Act.[21] The court held:

> To recover prejudgment interest under this provision there must be a fixed and easily calculated amount due from a debtor-creditor relationship that has come into being by virtue of a written instrument. If these requisites

12. *Id.*
13. *Id.* at 537.
14. *Id.* at 536.
15. *Id.*
16. *Id.* The contractor was thus "entitled to interest" from the date of the breach. *Id.* at 537. Courts following *Kubinski* did refuse interest where the requirement of a liquidated or easily calculable sum was not met. Stevenson v. ITT Harper, Inc., 366 N.E.2d 561, 570-71 (Ill. App. Ct. 1977) (following *Kubinski* but deciding interest was not proper on bonus award that involved a complex formula for calculation and this was not subject to easy calculation); Bise's Supermarket, Inc. v. Valley Forge Ins. Co., 363 N.E.2d 186, 189 (Ill. App. Ct. 1977) (no right to interest under written instrument provision where contract did not provide when payment was to be made or where money was not "a liquidated amount or subject to easy computation," as stated in *Kubinski*).
17. 473 N.E.2d 588 (Ill. App. Ct. 1985).
18. *Id.* at 592.
19. *Id.*
20. *Id.* at 597.
21. *Id.*

> are satisfied, interest attaches to the amount due under the instrument of writing as a matter of law.[22]

A. Insurance Cases Applied the Matter of Right Approach

The matter of right approach also prevailed in insurance coverage cases. In *Central National Chicago Corp. v. Lumbermens Mutual Casualty Co.*, a trial judge granted summary judgment to an insured under a Lumbermens' policy that covered losses arising from the purchase of accounts receivable, but the judge refused to award prejudgment interest on what Lumbermens owed.[23] The Illinois Appellate Court held the failure to award interest was error.[24] "An insurance policy is considered an 'instrument of writing' within the meaning" of the Interest Act, the court observed, and "it has long been held that interest may be recovered from the time money becomes due under a policy."[25] As long as the sum due was liquidated or subject to computation, interest should be awarded.[26] "[T]hat the parties could reasonably differ as to their liability [was] not a consideration so far as the statute [was] concerned."[27] Saying nothing about discretion, the court held: "Here, although there may have been a legitimate dispute as to Lumbermens' liability, the amount due under Lumbermens' policy is ascertainable as plaintiffs' loss from the purchase of the fraudulent DCASR accounts. . . . The order in favor of Lumbermens on the issue of prejudgment interest is therefore reversed."[28]

The Illinois Supreme Court relied solely on the *Central National* decision in holding that an insured could recover prejudgment interest on unpaid defense costs in *Conway v. Country Casualty Insurance Co.*[29] The supreme court said nothing about discretion, and the insurer did not even dispute liability for interest from the date "the attorney fees became due and capable of exact computation."[30] Interest was awarded though the insurer had not acted in bad faith.[31]

A trial judge followed *Central National* as well in holding an insurer liable for prejudgment interest in *Employers Insurance of Wausau v. Ehlco*

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22. *Id.* at 596-97 (citations omitted). The court stressed that "the existence of a good faith dispute as to liability does not affect the operation of the statute under these circumstances." *Id.* Because the face values of the checks readily supplied the amount due, the Interest Act's "'instrument of writing' clause" required a remand for an award prejudgment interest. *Id.* at 597.
23. 359 N.E.2d 797, 798-99 (Ill. App. Ct. 1977).
24. *Id.* at 802.
25. *Id.*
26. *Id.*
27. *Id.* (quoting Martin v. Orvis Bros. & Co., 323 N.E.2d 73, 83 (Ill. App. Ct. 1974)).
28. *Id.*
29. 442 N.E.2d 245, 249-50 (Ill. 1982).
30. *Id.* at 250.
31. *Id.*

Liquidating Trust.[32] There, in ruling that insurer Wausau had breached its duty to defend a Wyoming suit and was thus responsible for the amount the insured paid to settle it, the judge cited *Central National* in stating: "Ehlco is entitled to the 1.3 million it paid to Union Pacific in settlement, the costs Ehlco incurred in defending that action, prejudgment interest and Ehlco's cost of defending this action . . . ."[33] The Illinois Supreme Court later affirmed that aspect of the trial court's judgment in full without suggesting that court discretion was involved in any way.[34]

The Illinois Appellate Court explicitly described prejudgment interest as a right in *New Hampshire Insurance Co. v. Hanover Insurance Co.*[35] There, an umbrella insurer sued a primary commercial general liability insurer to recover part of a covered tort settlement for which the umbrella carrier believed it was not primarily liable.[36] The insurers had agreed to litigate over which of them owed the amount the umbrella insurer contributed in settlement.[37] The trial judge decided that the umbrella insurer's coverage was in excess of the primary carrier's and awarded prejudgment interest on the figure that the primary insurer should have paid.[38] In affirming, the appellate court observed that "[p]rejudgment interest is . . . a statutory right."[39] The primary insurance policy and the insurers' agreement to litigate priority were written instruments for purposes of the Interest Act.[40] The umbrella insurer "stepped into the shoes of the insured," which "would have had a right to prejudgment interest" on the amount the primary carrier owed.[41]

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32. No. 93 CH 01869, slip op. at 9, 1994 WL 16484848 (Ill. Cir. Ct. Nov. 7, 1994), *rev'd*, 687 N.E.2d 82 (Ill. App. Ct. 1997), *aff'd in part, rev'd in part*, 708 N.E.2d 1122 (Ill. 1999).
33. *Id.* (citations omitted).
34. *Id.*; Employers Ins. of Wausau v. Ehlco Liquidating Trust, 708 N.E.2d at 1128, 1138 (Ill. 1999).
35. 696 N.E.2d 22, 26 (Ill. App. Ct. 1998).
36. *Id.* at 24.
37. *Id.*
38. *Id.*
39. *Id.* at 26. The court made that statement in rejecting an argument that interest was improper because it was not mentioned in the parties' agreement to litigate priority of coverage. *See id.* As a statutory right, the matter did not have to be reserved by agreement. *See id.* In a similar way, courts have held that a claim for prejudgment interest will be read into a complaint that does not mention it. *See* Boyd v. United Farm Mutual Reinsurance Co., 596 N.E.2d 1344, 1349 (Ill. App. Ct. 1992) ("Contrary to the defendant's argument, the mere fact that plaintiffs' complaint did not ask for interest was of no moment, since interest is provided by statute and will be read into the complaint.") Madison Park Bank v. Field, 381 N.E.2d 1030, 1034 (1978) ("The fact too that the complaint did not ask for interest is of no moment, since the same is provided for by statute and will be read into the complaint.").
40. *Hanover*, 696 N.E.2d at 27.
41. *Id.*

B. Courts Viewed the Matter of Right Approach as the Established Rule

The Illinois Appellate Court summarized the rule established by the holdings described above in *Milligan v. Gorman*.[42] That case involved a party's failure to pay an amount due under a written settlement agreement.[43] The trial court awarded the sum due but no prejudgment interest.[44] After reviewing prior cases, including *Kubinski*, *New Hampshire*, and *Tomaso*, the appellate court held that the refusal of interest for money due under a written agreement was erroneous as a matter of law.[45] It stated:

> This court generally accords deference to a trial court's decision on a request for interest on a judgment. The Act allows considerable discretion for determination of whether an unreasonable delay warrants an award of prejudgment interest. But the Act mandates prejudgment interest, as a matter of right, when the creditor seeks payment of a fixed sum on an instrument of writing.[46]

As another case described the state of the law: "Prejudgment interest will be awarded for amounts due on an instrument in writing if the amount was liquidated or was easily computed."[47]

IV. THE NEWER "MATTER OF DISCRETION" APPROACH

Despite the clarity of the rulings discussed above, recent Illinois Appellate Court cases involving insurance policies have described the awarding of prejudgment interest as wholly discretionary even though such cases involve written contracts. For example, in *United National Insurance Co. v. 200 North Dearborn Partnership*, the appellate court reviewed a

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42. 810 N.E.2d 537 (Ill. App. Ct. 2004).
43. *See id.* at 538.
44. *Id.*
45. *Id.* at 541.
46. *Id.* at 540-41 (citations omitted).
47. Krantz v. Chessick, 668 N.E.2d 77, 80 (Ill. App. Ct. 1996) (ruling that "the contingency-fee agreement was an instrument in writing within the meaning of the interest statute"); *see also* Aulich v. Aetna Life Ins. Co., 428 N.E.2d 703, 705 (Ill. App. Ct. 1981) ("Prejudgment interest is due upon insurance benefits where, as here, the sum due is subject to exact computation even though the insurer has a good faith legal defense."); State, Dept. of Transp. *ex rel.* Moline Consumers Co. v. American Ins. Co., 557 N.E.2d 932, 936 (Ill. App. Ct. 1990). The *Moline Consumers* court noted:

> > Section 2 of the Interest Act states that creditors shall be allowed interest at five percent per annum for all monies due on any bond or other writing or on a settlement of accounts. The statute is clearly applicable. . . . It is sufficient that this is a suit on a bond and that the money is due.
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> *Id.* (citation omitted).

claim that a trial judge had erred in awarding prejudgment interest.[48] The court stated that "[g]enerally, the decision to award prejudgment interest is a matter within the sound discretion of the trial court and will not be reversed absent an abuse of discretion."[49] Because the trial judge had not specifically addressed prejudgment interest, the appellate court chose not to do so either.[50] Numerous other recent insurance cases similarly say the decision to award interest is discretionary.[51]

The most extreme example of the discretionary approach in the insurance context may be *Federal Insurance Co. v. Binney & Smith, Inc.*[52] In that case, the appellate court reviewed a trial court decision that held an insurer liable for the amount the insured incurred in settling a class action.[53] Although the trial judge held the insurer liable for the full settlement amount, he refused to award prejudgment interest as a matter of discretion.[54] Apparently deeming an award inappropriate where the insurer disputed coverage in good faith, the trial judge stated:

> Pre-judgment interest is generally recoverable where allowed by agreement of the parties or by statute. A court may also exercise its discretion to award pre-judgment interest under section 2 of the Illinois Interest Act depending upon the relevant circumstances. After considering all relevant factors, including the nature of the genuine dispute initiated by Federal's declaratory judgement [sic] action and that Federal has paid defense costs pursuant to an earlier court ruling, this court declines to exercise its discretion in awarding interest as claimed by Binney under the factual circumstances presented in this case.[55]

The appellate court affirmed the refusal of interest.[56] It quoted the trial judge's reasoning and stated: "We will reverse a trial court's determination as to whether prejudgment interest is warranted only if it is against the

48. *See* 979 N.E.2d 920, 929 (Ill. App. Ct. 2012).
49. *Id.* at 929.
50. *Id.*
51. *See* Santa's Best Craft, L.L.C. v. Zurich Am. Ins. Co., 941 N.E.2d 291, 307 (Ill. App. Ct. 2010) ("The decision to award prejudgment interest is a matter within the sound discretion of the circuit court and will not be reversed absent an abuse of discretion."); Statewide Ins. Co. v. Houston Gen. Ins. Co., 920 N.E.2d 611, 624 (Ill. App. Ct. 2009) (citation omitted) ("The decision to award prejudgment interest under section 2 of the Illinois Interest is within the circuit court's sound discretion and will not be reversed absent an abuse of discretion.").
52. 913 N.E.2d 43 (Ill. App. Ct. 2009).
53. *See id.* at 48.
54. *Id.*
55. Federal Ins. Co. v. Binney & Smith, Inc., No. 00 CH 13734, slip op. at 14, 2008 WL 618284 (Ill. Cir. Ct. Feb. 27, 2008) (citations omitted), *aff'd in part, rev'd in part*, 913 N.E.2d 43 (Ill. App. Ct. 2009).
56. *Binney & Smith*, 913 N.E.2d at 60.

manifest weight of the evidence. . . . Based on the record before us, we see no reason to disturb the trial court's finding."[57]

The role of discretion in *Binney & Smith* stands in stark contrast with the role discretion played in earlier decisions. As shown above, previous cases saw no room to refuse interest as a discretionary matter where a calculable sum was due under a written instrument.[58] The decision of the appellate court in *Binney & Smith* is particularly puzzling in this regard because the lone case the court cited on prejudgment interest applied the traditional rule and said good faith was no ground to refuse interest.[59]

V. COURTS SHOULD RETURN TO THE TRADITIONAL RULE FOR INSURANCE CONTRACTS

The trend in recent Illinois Appellate Court decisions to treat prejudgment interest as wholly discretionary in insurance cases is a troubling development. Because insurance policies are written instruments, leaving an award solely to court discretion conflicts with the Interest Act's terms as well as its purpose. It likewise conflicts with the Illinois Supreme Court's application of the statute. The trend seems to overlook the distinctions among the Interest Act's different grounds for an award. It also invites arbitrariness because appellate courts have not articulated the factors to be considered in exercising such discretion. These difficulties would be avoided by a return to the traditional rule that interest is a matter of right

57. *Id.*

58. Earlier cases dealing with written instruments confined the role of trial court discretion to the evaluation of whether the amount due was sufficiently determinable to support an interest award, not whether such an award was fair. *See, e.g.*, Bank of Chi. v. Park Nat. Bank, 640 N.E.2d 1288, 1296 (Ill. App. Ct. 1994) ("The decision to allow statutory interest lies within the sound discretion of the circuit court. Here, Garfield's participation [in a loan participation agreement] was subject to exact computation. The circuit court did not abuse its discretion in awarding prejudgment interest."); Mich. Ave. Nat. Bank of Chi. v. Evans, Inc., 531 N.E.2d 872, 881 (Ill. App. Ct. 1988) ("We emphasize that the statute distinguishes between claims for interest based on an instrument in writing and claims brought for unreasonable and vexatious refusal to pay. . . . Since the plaintiff met the requirements of the law [in suing on a written instrument], the court had no discretion in the matter."); Miller v. Board of Educ., 456 N.E.2d 143, 148 (Ill. App. Ct. 1983) ("[P]laintiffs still have not met the . . . requirement . . . that the amount be fixed or easily computed. . . . The trial judge evidently felt that an additional interest computation for each plaintiff could not be done easily. We agree. We see no abuse of discretion in this decision."); Farwell Const. Co. v. Ticktin, 405 N.E.2d 1051, 1065 (Ill. App. Ct. 1980) (citation omitted) ("In view of the above, we do not believe the damages were so certain or definite as to fall within the statute and cannot say that the trial court abused its discretion in denying prejudgment interest.").

59. The *Binney & Smith* court cited *Krantz v. Chessick*, 668 N.E.2d 77 (Ill. App. Ct. 1996), for the proposition that it would "reverse a trial court's determination as to whether prejudgment interest [was] warranted only if it [was] against the manifest weight of the evidence." *Binney & Smith*, 913 N.E.2d at 60. The *Krantz* case employed the traditional rule, holding that "[a] good-faith dispute would preclude an award for prejudgment interest in claims brought for unreasonable refusal to pay but would not preclude an award in a claim brought under a written instrument." *Krantz*, 668 N.E.2d at 80.

where the amount due under the policy was liquidated or sufficiently ascertainable.

A. The Discretionary Approach Conflicts with the Interest Act's Terms and Purpose

As noted above, the section of the Interest Act on prejudgment interest begins by stating: "Creditors *shall* be allowed to receive at the rate of five (5) per centum per annum for *all* moneys after they become due on any bond, bill, promissory note, or other instrument of writing. . . ."[60] Use of the word "shall" in a statute is generally understood to prescribe an obligation that is mandatory rather than discretionary.[61] For example, in *In re S.L.*, the appellate court considered a statutory requirement that the state "shall file with the court and serve on the parties a pleading that specifies the 9-month period or periods relied on" in a petition to terminate parental rights.[62] In ruling that provision was mandatory, the court explained: "We first note that the statute uses the term 'shall' in relation to the State's obligation to file the notice pleading. Such language indicates that the State is required to comply rather than use its discretion to decide whether or not to comply."[63] The language of the Interest Act is just as affirmative as the notice provision that case interpreted. That the Interest Act directs prejudgment interest on "all" moneys due under written instruments reinforces the mandatory nature of the provision.[64]

Leaving interest to court discretion in written contract cases also runs counter to the Interest Act's purpose. "The Act directs the award of prejudgment interest to fully compensate the injured party for the monetary loss suffered."[65] "Statutory interest based on a written instrument is not meant to be punitive but merely compensatory."[66] A wronged party, such as an insured who has been denied benefits owed under an insurance policy, necessarily suffers from the lost value of money due. As one appellate decision observed:

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60. 815 ILL. COMP. STAT. 205/2 (2012) (emphasis added).
61. *See* People v. Ousley, 919 N.E.2d 875, 884 (Ill. 2009) ("When the issue is whether the force of the statutory language is mandatory or permissive, then 'shall' does usually indicate the legislature intended to impose a mandatory obligation.") (quoting People v. Robinson, 838 N.E.2d 930, 936 (Ill. 2005)); Read v. Sheahan, 833 N.E.2d 887, 891 (Ill. App. Ct. 2005) (citations omitted) ("Generally, 'shall' indicates a mandatory intent, and the legislature's use of the word 'shall' in a statutory provision is regarded as evidence that the legislature intended the provision to be mandatory, rather than directory.").
62. 980 N.E.2d 796, 805 (Ill. App. Ct. 2012).
63. *Id.* at 806.
64. *See* 815 ILL. COMP. STAT. 205/2 (2012).
65. Milligan v. Gorman, 810 N.E.2d 537, 541 (Ill. App. Ct. 2004).
66. Haas v. Cravatta, 389 N.E.2d 226, 231 (Ill. App. Ct. 1979).

> If a creditor is denied payment of a sum rightfully his, he loses not only that sum but the right to use it. In our society the use of money is worth money. Use carries with it the opportunity to deposit or lend it at interest or, in the alternative, the ability to avoid the borrowing of other funds and paying of interest. It would be unjust as well as contrary to the language of the statute for us to ignore this economic fact of life.[67]

B. The Matter of Discretion Cases Confuse the Various Provisions of the Interest Act

The discretionary approach seems to have blended the Interest Act's written instrument provision with its provision for interest on monies that are unreasonably and vexatiously withheld. As already noted, under the traditional approach, an award was a matter of discretion if it was based on the statutory category of "money withheld by an unreasonable and vexatious delay of payment."[68] For example, in *Greenberger, Krauss & Tenenbaum v. Catalfo*, the appellate court saw no abuse of discretion in a refusal of interest where a defendant "raised legitimate argument in her summary judgment motion and at trial relating to the existence and enforceability of an oral contract."[69]

The recent decisions may be viewed as extending the unreasonable and vexatious standard to money due under insurance policies. This seems particularly evident in the *Binney & Smith* court's affirmance of a refusal of interest because the insurer had raised a "genuine dispute" in its declaratory action.[70] If the Illinois General Assembly had intended the unreasonable and vexatious standard to apply in all cases, it would have made no sense to include a provision for interest on written instruments in particular.

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67. *Id.* at 231.

68. Emmenegger Constr. Co. v. King, 431 N.E.2d 738, 743-44 (Ill. App. Ct. 1982). The *Emmenegger* court held:

> An honest dispute as to the existence of a legal obligation will not result in an unreasonable and vexatious delay which would permit recovery of interest. On the question of interest, the trial judge has discretion, according to the equities of the case, to award or deny interest as an element of recoverable damages. . . .

Id. (citations omitted).

69. 687 N.E.2d 153, 161 (Ill. App. Ct. 1997). The court held: "The Interest Act provides for the award of interest when money is withheld by an unreasonable and vexatious delay of payment. The circuit court's decision granting or denying such an award is discretionary and will not be reversed on appeal absent abuse." *Id.* (citations omitted).

70. *See supra* text accompanying notes 52-57.

C. The Discretionary Approach Runs Counter to Illinois Supreme Court Cases

As shown above, the Illinois Supreme Court employed the traditional matter of right approach in affirming interest awards in the case of insurance contracts. In recognizing the propriety of interest on unpaid defense costs in *Conway*, the supreme court relied solely on the *Central National* decision, which had held prejudgment interest was a matter of right.[71] In contrast with the *Binney & Smith* court's refusal of interest because an insurer had raised a "genuine" dispute on liability, the supreme court held prejudgment interest was owed in *Conway* where the insurer "unjustifiably, but not in bad faith, declined to defend . . . ."[72] Later, in *Ehlco*, the supreme court affirmed a trial court's award of interest that was also based solely on the *Central National* matter of right decision.[73] My research found no instance in which the supreme court talked of prejudgment interest as a discretionary matter for money due under a written contract as opposed to awards on a different basis.[74]

D. Committing the Matter to Court Discretion Invites Arbitrary Outcomes

Although recent cases have said that whether to award prejudgment interest rests in the trial court's discretion, they have not set out the factors a trial judge should consider in deciding whether to exercise that discretion. As exemplified by the *Binney &* Smith decision, the appellate court has often treated prejudgment interest in a cursory fashion, simply reciting that it saw no basis to disturb whatever discretionary decision the trial judge reached.[75]

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71. *See supra* text accompanying notes 29-31.
72. Conway v. Country Cas. Ins. Co., 442 N.E.2d 245, 250 (Ill. 1982).
73. *See supra* text accompanying notes 32-34.
74. The Illinois Supreme Court appears to have spoken of prejudgment interest as discretionary only when the award rested on a basis other than the Interest Act, such as a court's general power to award interest in equitable proceedings. *See* Tri-G, Inc. v. Burke, Bosselman & Weaver, 856 N.E.2d 389, 412 (Ill. 2006) ("In chancery proceedings, the allowance of interest lies within the sound discretion of the judge and is allowed where warranted by equitable considerations and disallowed if such an award would not comport with justice and equity."); Stanton v. Republic Bank of S. Chi., 581 N.E.2d 678, 682 (Ill. 1991) ("[B]ecause section 29 of the Illinois Banking Act does not specify a particular rate for prejudgment interest, it was within the trial court's discretion to apply an interest rate between the 5% urged by the Bank and the 9.69% prime rate urged by plaintiffs."); *In re* Estate of Wernick, 535 N.E.2d 876, 888 (Ill. 1989) ("Whether equitable circumstances support an award of interest is a matter lying within the sound discretion of the trial judge.").
75. *See supra* text accompanying notes 52-57; *see also* LaGrange Memorial Hosp. v. St. Paul Ins. Co., 740 N.E.2d 21, 30 (Ill. App. Ct. 2000) ("After reviewing the record, we find no evidence to suggest that the circuit court abused its discretion in deciding to award LaGrange prejudgment interest and we affirm the decision.").

Failing to identify the grounds for a discretionary award invites inconsistent outcomes. To reduce this danger, the appellate court would do well to follow the approach of an appellate panel in *InsureOne Independent Insurance Agency, LLC v. Hallberg*.[76] There, the panel reversed and remanded a refusal to award prejudgment interest in favor of buyers of insurance company assets against the seller for breach of covenants not to compete and not to solicit employees because the trial judge had failed to set out the factors supporting its refusal to exercise its discretion.[77] The appellate court held:

> A trial court's decision to award statutory prejudgment interest is reviewed for an abuse of discretion. The generally recognized basis for an award of prejudgment interest is the need to grant an award to make a deprived plaintiff whole. . . . It is well settled that a court abuses its discretion when it "acts arbitrarily without the employment of conscientious judgment or, in view of all the circumstances, exceeds the bounds of reason and judgment and ignored recognized principles of law." Here, the record does not reveal the trial court's basis for denial of plaintiffs' request for prejudgment interest on their award. Accordingly, we are unable to determine whether this denial was a proper exercise of the court's discretion. Therefore, we reverse that ruling and remand this cause to the trial court solely for further consideration of the prejudgment interest issue.[78]

Demanding that factors be set out and ruled upon by the appellate court would at least establish grounds to ensure prejudgment interest decisions are made in a consistent fashion and avoid the danger of arbitrariness of which the *InsureOne* court warned.

E. A Return to the Traditional Rule Would Avoid These Defects

Returning to the traditional rule for insurance policies and other written contracts would remedy these difficulties. The traditional rule views prejudgment interest as mandatory under written contracts where sums are liquidated or easily calculable. That approach complies with the mandatory language of the Interest Act and comports with the statutory purpose of compensating a wronged party for the value of the lost use of unpaid money. It would also comply with the approach the Illinois Supreme Court has taken in insurance cases in affirming interest awards without suggesting the award was an act of discretion.[79]

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76. 976 N.E.2d 1014 (Ill. App. Ct. 2012).
77. *Id.* at 1039.
78. *Id.* (citations omitted) (quoting Jahn v. Kinderman, 814 N.E.2d 116, 122 (Ill. App. Ct. 2004)).
79. *See supra* note 34 and accompanying text.

A return to the traditional rule would keep the provisions of the Interest Act separate as well, reserving discretion as relevant in deciding whether money was unreasonably and vexatiously withheld but not for amounts due under written instruments like insurance policies. Finally, it would guard against inconsistent results, as an insured would not be subjected to a trial judge's unfettered discretion. The certainty of an interest award would serve as a deterrent to an insurer prolonging coverage litigation unnecessarily. It would enable the parties to a coverage case to more easily calculate a potential award too, something that could help both sides in negotiating for settlement.

VI. CONCLUSION

The Illinois Appellate Court's recent trend of treating prejudgment interest as wholly discretionary in insurance coverage cases is an unwelcome departure from established law. Illinois' Interest Act provides that prejudgment interest "shall" be awarded on "all" sums due under an "instrument of writing,"[80] and Illinois courts have long considered insurance policies to qualify as written instruments under that statute. The appellate court would better implement the terms and purpose of the statute, as well as avoid conflicts with Illinois Supreme Court precedent and arbitrary outcomes, by returning to the once settled rule that where a sum owed under an insurance policy is liquidated or legally ascertainable, prejudgment interest is a matter of right.

80. 815 ILL. COMP. STAT. 205/2 (2012).