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Carey J. Guglielmo

Daniel J. Balhoff

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The ABC's of LIGA

Carey J. Guglielmo*
Daniel J. Balhoff**

This article is a practical guide to making claims against and defending the Louisiana Insurance Guaranty Association (hereinafter "LIGA"). The purpose of this article is not to speculate as to what the law *should* be, but rather to state what the law *is*. However, in certain instances, there are either case law conflicts or issues which have not yet been addressed by the courts. In these instances, the authors will do their best to set forth possible resolutions under existing law.

I. BACKGROUND—THE CREATION OF THE MODEL ACT¹

Prior to 1970, there was no LIGA. If an insurer was declared insolvent, claimants and policyholders were relegated to filing proofs of claims in the liquidation proceeding. The assets of the insolvent insurer would be divided among creditors according to their rank.

In 1966, Senator Thomas Dodd of Connecticut introduced legislation to establish the Federal Motor Vehicle Insurance Guaranty Corporation. The legislation's purpose was to protect automobile insurance policyholders and claimants from insurer insolvency. Senator Warren Magnusson of Washington subsequently introduced another bill, which was more extensive than the Dodd bill.

In response to these developments, the National Association of Insurance Commissioners drafted a model post-insolvency assessment fund bill (known as the "Model Act"). Most states quickly adopted variations of the Model Act, and the Dodd and Magnusson bills never became law.

II. WHAT IS LIGA?

In 1970, the Louisiana Legislature adopted Louisiana's version of the Model Act. The Legislature adopted 1970 La. Acts No. 81 § 1, which is now reported at Louisiana Revised Statutes 22:1375-1394. Louisiana Revised Statutes 22:1375 provides: "This Part [i.e., Louisiana Revised Statutes 22:1375-1394] shall be known and may be cited as the Insurance Guaranty Association Law." For

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* Carey J. Guglielmo is a partner with the law firm of Mathews, Atkinson, Guglielmo, Marks & Day, and is General Counsel of the Louisiana Insurance Guaranty Association.

** Daniel J. Balhoff is a partner with the law firm of Mathews, Atkinson, Guglielmo, Marks & Day.

1. This section is largely derived from a more extensive discussion found in Linda M. Lasley et al., *Insurance Guaranty Funds: The New "Money Pit"?*, in Practising Law Institute, Commercial Law and Practice Course Handbook Series No. 416, Insolvency and Solidity of Insurance Companies at 113 (1987); and M. E. Burggraf, *Nasello v. Transit Casualty Co., Insurance Insolvency: Who Protects the Policyholder?*, 64 Tul. L. Rev. 259 (1989).

purposes of this article, the Insurance Guaranty Association Law will be referred to as the LIGA Law.

La. R.S. 22:1380(A) provides:

There is created a private nonprofit unincorporated legal entity to be known as the "Insurance Guaranty Association," whose domicile for purpose of suit shall be East Baton Rouge Parish, Louisiana. All insurers defined as member insurers in R.S. 22:1379 shall be and remain members of the association as a condition of their authority to transact insurance in this state. The association shall perform its functions under a plan of operation established and approved under R.S. 22:1383 and shall exercise its powers through a board of directors established under R.S. 22:1381.

La. R.S. 22:1380(B) further provides:

The association is not and may not be deemed a department, unit, agency, or instrumentality of the state for any purpose. All debts, claims, obligations, and liabilities of the association, whenever incurred, shall be the debts, claims, obligations, and liabilities of the association only and not of the state, its agencies, instrumentalities, officers, or employees. Association monies may not be considered part of the general fund of the state. The state shall not budget for or provide general fund appropriations to the association, and the debts, claims, obligations, and liabilities of the association may not be considered to be a debt of the state or a pledge of its credit.

From the above, there are two important points for the legal practitioner to consider with respect to LIGA. First, LIGA is an unincorporated legal entity. It is not a corporation or a partnership. Nevertheless, it is an entity in its own right and may sue or be sued as such.²

Second, LIGA is a *private* legal entity. It is *not* a state agency, and neither the state nor any of its agencies are responsible for any of LIGA's liabilities. Because LIGA is not a state entity, its actions typically do not constitute state action for purposes of the U.S. Constitution or federal civil rights laws. Conversely, LIGA is not entitled to Eleventh Amendment immunity from suit in federal court.

III. WHAT LIGA ISN'T

Although LIGA is an association of insurers,³ LIGA itself is not an insurer.⁴ Therefore, laws which apply only to insurers do not apply to LIGA.⁵ LIGA is an

2. La. R.S. 22:1382(B)(3) (Supp. 1993).

3. La. R.S. 22:1380(A) (Supp. 1993).

4. *Bowens v. General Motors Corp.*, 608 So. 2d 999, 1005 (La. 1992).

5. *Id.*

entity in its own right; neither its member insurers nor its employees may be sued for its obligations.⁶

Furthermore, LIGA is not the insolvent insurer's legal successor.⁷ When a court of competent jurisdiction declares an insurer insolvent, the insurer effectively ceases to exist. A new entity arises—the insurer in liquidation or receivership. This entity, not LIGA, is the insolvent insurer's legal successor. The proper party defendant against which to enforce the insolvent insurer's obligations is the liquidator or receiver⁸—not LIGA. LIGA is a separate entity from the liquidator or receiver. As a separate entity, LIGA has an independent obligation to pay certain claims in accordance with the LIGA Law. Whereas the liquidator or receiver is responsible for *all* claims against the insolvent insurer, LIGA is responsible for only *some* claims—those defined by the LIGA Law. Moreover, LIGA has a statutory right to reimbursement against the liquidator or receiver for

6. La. R.S. 22:1391 (1978) provides:

There shall be no liability on the part of and no cause of action of any nature shall arise against any member insurer, the association or its agents or employees, the board of directors, or the commissioner or his representatives for any action taken by them in the performance of their powers and duties under this Part.

7. LIGA is sometimes characterized as "stepping into the shoes" of the insolvent insurer. *See, e.g.,* Backhus v. Transit Casualty Co., 549 So. 2d 283 (La. 1989); McMahon v. LIGA, 596 So. 2d 1384 (La. App. 1st Cir.), *writ denied*, 604 So. 2d 970 (1992); Senac v. Sandefer, 405 So. 2d 1128 (La. App. 1st Cir.), *writ granted*, 407 So. 2d 747 (1981), *rev'd on other grounds*, 418 So. 2d 543 (1982); Hall v. LIGA, 589 So. 2d 93 (La. App. 2d Cir. 1991); Guidry v. Cajun Rentals and Servs., Inc., 563 So. 2d 1335 (La. App. 3d Cir. 1990); State Farm Mut. Auto. Ins. Co. v. Chanson, 572 So. 2d 747 (La. App. 4th Cir. 1990). However, when confronted with the broad consequences of the "stepping into the shoes" characterization, Louisiana courts have rejected it:

Plaintiff urges that the Association, by statute, is required to "step into the shoes" of the insolvent insurance carrier and to assume responsibility for all debts owed to the company's insured or to claimants under the insured's policy. This statement is too broad. Under the Act, the Association is liable for only "covered claims."

Vaughn v. Vaughn, 23 Wash. App. 527, 597 P.2d 932 (Wash. App.), *rev. denied*, 92 Wash 2d 1023 (1979), *quoted in* Veillon v. LIGA, 608 So. 2d 670, 672 (La. App. 3d Cir. 1992); Williams v. Champion Ins. Co., 590 So. 2d 736, 738 (La. App. 3d Cir. 1991); Gauthier v. Champion Ins. Co., 583 So. 2d 556, 559 (La. App. 3d Cir. 1991).

In fact, the LIGA Law specifically provides that LIGA shall be "deemed the insurer to the extent of its obligation on the covered claims . . ." La. R.S. 22:1382(A)(2) (Supp. 1993). Likewise, La. R.S. 22:1385(B) (Supp. 1993) provides: "The receiver, liquidator or *statutory successor* of an insolvent insurer shall be bound by settlements of covered claims by [LIGA]." (emphasis added). This implies (correctly) that an entity *other than LIGA* is the insurer's legal successor. In Louisiana, that entity is the liquidator. La. Code Civ. P. art. 740. In fact, Louisiana courts have gone so far as to state that even the rehabilitator "does not stand precisely in the shoes" of the insurer. Republic of Texas Sav. Ass'n v. First Republic Life Ins. Co., 417 So. 2d 1251, 1254 (La. App. 1st Cir.), *writ denied*, 422 So. 2d 161 (1982), *quoted in* LeBlanc v. Bernard, 554 So. 2d 1378, 1381 (La. App. 1st Cir. 1989), *writ denied*, 559 So. 2d 1357 (1990). *Contra* Dardar v. Insurance Guar. Ass'n, 556 So. 2d 272, 274 (La. App. 1st Cir. 1990) ("[B]ecause the rehabilitator, in effect, steps into the shoes of the insurer, he is bound by the same constraints as is the insurer in the normal course of business.").

8. La. Code Civ. P. art. 740.

the amounts LIGA has paid in claims or expenses.⁹ Thus, the ultimate responsibility for all the insolvent insurer's obligations lies with the liquidator or receiver, not with LIGA.

IV. LIGA'S PURPOSE

The purpose of LIGA is best explained by a hypothetical. Jones is insured by Insurer. Jones negligently causes an automobile accident, injuring Smith. Smith sues Jones and Insurer pursuant to the Direct Action Statute. Insurer is subsequently declared insolvent. Prior to 1970, Smith's only recourse would have been against Jones' personal assets and against Insurer in liquidation. However, since the Legislature created LIGA in 1970, Smith may sue LIGA, which is responsible to pay "covered claims." In this fashion, LIGA protects both the claimant (Smith) and the insured (Jones), inasmuch as Smith is able to collect for his injuries, and Jones' assets are protected (subject to the limitations of the insurance policy and the LIGA Law).

As defined by statute, the purpose of the LIGA Law is

to provide a mechanism for the payment of covered claims under certain insurance policies to avoid excessive delay in payment and to avoid financial loss to claimants or policyholders because of the insolvency of an insurer, to assist in the detection and prevention of insurer insolvencies and to allow [LIGA] to provide financial assistance to member insurers under rehabilitation or liquidation, and to provide an association to assess the cost of such operations among insurers.¹⁰

LIGA's *purpose* which concerns most legal practitioners is "to avoid financial loss to claimants or policyholders because of the insolvency of an insurer . . ."¹¹ LIGA accomplishes this *purpose* through the *mechanism* of "payment of *covered claims* under *certain insurance policies* . . ."¹²

A close examination of LIGA's purpose and its mechanism for accomplishing its purpose reveals a point which is fundamental to the LIGA Law—the *mechanism is not extensive enough to fully accomplish the purpose*. Because not all claims are covered claims, *some claimants and some policyholders will incur losses due to the insurer's insolvency*. Likewise, the other limitations of liability specified in the LIGA Law—the LIGA deductible,¹³ the liability cap,¹⁴ etc.—more often than not result in somebody losing money.

9. La. R.S. 22:1385 (Supp. 1993).

10. La. R.S. 22:1376 (Supp. 1993).

11. *Id.*

12. *Id.* (emphasis added).

13. La. R.S. 22:1382(A)(1)(a)(iii) (Supp. 1993).

14. *Id.*

If the Legislature had intended LIGA to be an all-purpose guarantor, the LIGA Law would simply state: "The association shall be deemed liable for all obligations incurred by the insolvent insurer prior to insolvency." This of course would fully protect claimants and policyholders. It would also greatly increase LIGA's cash flow—the greater output would require a commensurate increased input. LIGA's assessments upon member insurers¹⁵ necessarily would increase, making insurance less affordable.

But the Legislature has *not* deemed LIGA to be an all-purpose guarantor. LIGA instead is responsible for only "covered claims under certain insurance policies . . ."¹⁶ As the Louisiana Supreme Court has stated:

While this court can consider the reason and spirit of a law that brought about its enactment, . . . it is not free to rewrite the law to effect a purpose that is not otherwise expressed. A liberal interpretation of the Insurance Guaranty Law, even though authorized by the Law itself, cannot overcome the specific statutory exemptions from coverage under that law.¹⁷

V. SUING AND DEFENDING LIGA

A. Prerequisites to a Suit Against LIGA

1. LIGA Only Pays Covered Claims

As was stated above, LIGA does not pay all claims against an insolvent insurer. LIGA only pays covered claims.

La. R.S. 22:1379(3) defines a "covered claim" as:

(a) an unpaid claim, including one for unearned premiums by or against the insured or agent, which arises out of and is within the coverage and not in excess of the applicable limits of an insurance policy to which [the LIGA Law] applies issued by an insurer, if such insurer becomes an insolvent insurer after September 1, 1970, and:

(i) The claimant or insured is a resident of this state at the time of the insured event; or

(ii) The property from which the claim arises is permanently located in this state.

(b) "Covered claim" shall not include any amount due any reinsurer, insurer, insurance pool, or underwriting association, as subrogation recoveries or otherwise. In addition, the insured of an insolvent insurer shall likewise not be liable for any subrogation claim asserted by any

15. La. R.S. 22:1382(A)(3)(a)(i) (Supp. 1993) empowers LIGA to assess member insurers "amounts necessary to pay the obligations of the association . . ."

16. La. R.S. 22:1376 (Supp. 1993).

17. *Backhus v. Transit Casualty Co.*, 549 So. 2d 283, 291 (La. 1989).

reinsurer, insurer, insurance pool, or underwriting association to the extent of the applicable liability limits previously provided to such insured by the insolvent insurer.

(c) "Covered claim" shall not include any amount due under or arising from a bail bond contract.

(d) "Covered claim" shall not include any claim based on or arising from a preinsolvency obligation of an insolvent insurer, including but not limited to contractual attorneys' fees and expenses, statutory penalties and attorneys' fees, court costs, interest and bond premiums, or any other expenses incurred prior to the determination of insolvency.

Subject to the limitations enumerated in the LIGA Law, "covered claims" include both first-party and third-party claims.

2. *LIGA Only Pays Claims on "Insurance Policies"*

As the statutory definition of "covered claim" implies,¹⁸ LIGA only pays claims on "insurance policies." The LIGA Law defines an "insurance policy" as:

an insurance contract as defined in R.S. 22:624,¹⁹ and shall not include an agreement whereby an insurer agrees to assume and carry out directly with the policyholder any of the policy obligations of another insurer, such as cut-through endorsements, reinsurance endorsements, facultative reinsurance agreements, treaty reinsurance agreements, and other such agreements, when either insurer is affiliated with the other. "Affiliated" as used in this Section means that either insurer owns or controls, directly or indirectly, a majority of the voting shares of the other or the controlling interest therein, or that both insurers are so owned or controlled by another.²⁰

3. *LIGA Only Pays Claims on Certain Kinds of Insurance*

LIGA only covers the kinds of insurance defined by La. R.S. 22:1377, which provides:

A. This Part shall apply to all kinds of direct insurance, except life, health and accident, title, disability, mortgage guaranty, financial guaranty, or other insurances offering protection against investment risks, credit insurance, and any transaction or combination of transactions which involve the transfer of investment or credit risks unaccom-

18. La. R.S. 22:1379(3)(a) (Supp. 1993).

19. La. R.S. 22:624(A) (Supp. 1993) provides: "The written instrument, in which a contract of insurance is set forth, is the policy."

20. La. R.S. 22:1379(8) (Supp. 1993).

panied by the transfer of the insurance risk, vendor's single interest insurance, collateral protection insurance, or any similar insurance which protects the interests of a creditor arising out of a creditor-debtor transaction, vehicle mechanical breakdown insurance, and ocean marine insurance. It shall likewise not apply to fidelity and surety insurance nor to bail bond contracts.

B. The kind and coverage of insurance afforded by any policy shall be determined solely by the coverage specified and established in the provisions of that policy regardless of any name, label, or marketing designation for the policy.

4. *LIGA Only Pays Claims Against Certain Insurers*

LIGA only provides coverage if the applicable insurance policy is "issued by an insurer, if such insurer becomes an *insolvent insurer* after September 1, 1970" ²¹ An "insolvent insurer" is

[a]n insurer authorized to transact insurance in this state either at the time the policy was issued or when the insured event occurred, and . . . [a]gainst whom an order of liquidation with a finding of insolvency has been entered by a final judgment of a court of competent jurisdiction in the insurer's state of domicile or of this state, and which order of liquidation has not been stayed or been the subject of a perfected suspensive appeal or other comparable order. ²²

Thus, LIGA only covers policies issued by insurers that are *authorized*²³ either at the time the policy was issued or when the insured event occurred.

5. *There Must Be an Insured Event*

Obviously, LIGA will have no responsibility unless there is an insured event, typically an automobile accident. The insured event must occur prior to the first of three events: 1) expiration of thirty days after the date of insolvency; 2) expiration of the policy; or 3) replacement or cancellation of the policy at the instance of the insured. ²⁴

21. La. R.S. 22:1379(3)(a) (Supp. 1993) (emphasis added).

22. La. R.S. 22:1379(4)(a) (Supp. 1993).

23. Unauthorized insurers may transact business in Louisiana under certain conditions. La. R.S. 22:1249 (1978 and Supp. 1993). "Surplus line" insurance from unauthorized carriers, although allowed by law, is not protected by LIGA. La. R.S. 22:1257 (Supp. 1993).

24. La. R.S. 22:1382(A)(1)(a) (Supp. 1993).

6. *There Must Be an Insolvency Order*

Even if the other prerequisites are satisfied, LIGA has no responsibility whatsoever until a court of competent jurisdiction enters an insolvency order which has not been stayed or is not the subject of a perfected suspensive appeal.²⁵

In Louisiana, the Commissioner of Insurance may ask the court to place an insurer in rehabilitation or take the more drastic step of placing the insurer in liquidation.²⁶ In both cases, the court typically issues a stay of litigation pending against the insurer. However, only liquidation, and not rehabilitation, triggers LIGA liability.²⁷ No insolvency order is issued when an insurer is placed in rehabilitation; therefore, *LIGA has no responsibility for claims against an insurer in rehabilitation.*

This is crucial for the practitioner because a claim against LIGA prior to the issuance of an insolvency order is premature. If a plaintiff sues LIGA for a claim against an insurer that is *not* an "insolvent insurer," the plaintiff is liable to LIGA for reasonable expenses, including attorney's fees.²⁸

B. *Interrupting Prescription*

The same laws of prescription apply to LIGA as apply to any other "persons" in Louisiana. The majority of claims against LIGA arise from personal injuries, the prescriptive period of which is one year.²⁹

Likewise, the general laws of suspension and interruption of prescription apply to LIGA. Therefore, interruption or suspension only occurs with respect to LIGA if it would occur with respect to the other relevant solidary obligors, i.e., the tortfeasor and/or the insolvent insurer.

Several examples serve to illustrate prescription with respect to LIGA.

25. La. R.S. 22:1379(4)(a)(ii) (Supp. 1993).

26. La. R.S. 22:736 (1978 and Supp. 1993).

27. La. R.S. 22:1379(3)(a) (Supp. 1993).

28. La. R.S. 22:1379(4)(b) (Supp. 1993) provides:

Any person, and any attorney who represents a person, who files a petition against the association alleging as a basis for the claim the insolvency of an insurer, where said insurer is not an insolvent insurer within the meaning of R.S. 22:1379(4)(a), shall pay the reasonable expenses incurred because of the filing of the petition, including a reasonable attorney's fee, subject to the following conditions:

- (i) The association shall furnish to either the person or his attorney, by ordinary service of process, hand delivery, or certified mail, return receipt requested, written notification that the insurer is not an insolvent insurer within the meaning of R.S. 22:1379(4)(a); and
- (ii) If, within sixty days of the receipt of such notification, the person or his attorney has not dismissed the petition, with prejudice and at plaintiff's cost.

29. La. Civ. Code art. 3492.

- 1) Smith is injured by Insured. Smith does not sue either Insured or Insurer within one year of the accident. Insurer subsequently is declared insolvent. Smith's rights against LIGA have prescribed.
- 2) Smith is injured by Insured. Insurer is declared insolvent within one year of accident, but Smith sues neither Insured, insolvent Insurer, nor LIGA within one year of accident. Smith's claim has prescribed.
- 3) Smith is injured by Insured. Smith sues Insured within one year of accident. Insurer subsequently is declared insolvent. Smith's suit against Insured interrupts prescription against LIGA.
- 4) Smith is injured by Insured and solidary obligor. Smith sues solidary obligor, but sues neither Insured nor Insurer within one year of accident. Insurer subsequently is declared insolvent. Smith's suit against solidary obligor interrupts prescription against LIGA, assuming solidary obligor's obligation is solidary with LIGA's obligation.³⁰

The insolvency order typically states that proceedings in all suits pending against the insolvent insurer are stayed for a certain period of time. However, *this does not mean the victim cannot sue LIGA*. In the past, some victims have assumed that the stay order suspends or interrupts the running of prescription against LIGA. This assumption is not correct.³¹ The victim may sue LIGA even during the stay in order to interrupt prescription.

C. Subject Matter Jurisdiction

LIGA is a private unincorporated legal entity,³² and the procedural rules—including jurisdictional rules—that apply to unincorporated associations also apply to LIGA. Therefore, LIGA can sue or be sued in any state court and can sue or be sued in any city or parish court assuming the suit does not exceed the relevant jurisdictional amount.

Furthermore, LIGA can sue or be sued in federal court if the typical jurisdictional prerequisites are satisfied. The principal bases of federal jurisdiction are federal question jurisdiction³³ and diversity jurisdiction.³⁴ With respect to federal question jurisdiction, LIGA is just like any other party; therefore, if a federal cause of action is alleged by or against LIGA, federal jurisdiction lies. With respect to diversity jurisdiction, LIGA is deemed to be a citizen of all the states of which its member insurers are citizens.³⁵ Therefore, it is almost impossible to

30. La. Civ. Code arts. 1799, 3503.

31. *White v. Haydel*, 593 So. 2d 421 (La. App. 1st Cir. 1991); *Lee v. Champion Ins. Co.*, 591 So. 2d 1364 (La. App. 4th Cir. 1991).

32. La. R.S. 22:1380(A) (Supp. 1993).

33. 28 U.S.C. § 1331 (Supp. 1993).

34. 28 U.S.C. § 1332 (1966 and Supp. 1993).

35. *Temple Drilling Co. v. LIGA*, 946 F.2d 390, 393-94 (5th Cir. 1991).

assert diversity jurisdiction with respect to LIGA, inasmuch as LIGA is rarely completely diverse with any party.

D. Venue

The general venue laws apply to LIGA just as they do to any other party. LIGA is deemed to be domiciled in East Baton Rouge Parish³⁶ and thus always can be sued in the 19th judicial district.³⁷

E. The Petition

If the claimant has not filed suit against the tortfeasor-insured and/or his insurer at the time of the insolvency order, LIGA may be named in the original petition as a solidary obligor. If the claimant has already filed suit against the tortfeasor-insured and/or his insurer, he may ask for leave of court to file a supplemental petition pursuant to Louisiana Code of Civil Procedure article 1151. The pleading should be a *supplemental* petition rather than an *amended* petition, since the cause of action against LIGA will have arisen subsequent to the filing of the original petition.

The plaintiff should not attempt to bring LIGA into the lawsuit via a motion to substitute it for the insolvent insurer. Substitution of parties is governed by Louisiana Code of Civil Procedure articles 801-807. Those articles provide for the substitution of *legal successors* of the parties to a suit. The legal successor of the insolvent insurer is the *liquidator*, not LIGA.³⁸

Because pleadings are liberally construed, courts probably would not penalize a plaintiff for incorrectly characterizing a supplemental petition as an amended petition or a substitution. However, such an imprecise formulation of pleadings not only is technically wrong, but also reveals a fundamental misconception of LIGA and its purpose. LIGA is *not* the legal successor of the insurer; it does not "step into the shoes" of the insurer.³⁹ LIGA does, however, have an independent obligation created by statute to pay covered claims.

The petition naming LIGA—whether it is an original petition or a supplemental petition—must state the facts necessary to establish a cause of action against LIGA in addition to the facts necessary to establish a cause of action against the insured.⁴⁰ In other words, the petition should allege: 1) the tortfeasor was insured by an authorized insurer; 2) a court of competent jurisdiction has entered an order declaring the insurer insolvent; and 3) LIGA has a statutory obligation to the plaintiff under the LIGA Law.

36. La. R.S. 22:1380(A) (Supp. 1993).

37. La. Code Civ. P. art. 42(3).

38. See La. Code Civ. P. art. 740.

39. See *supra* note 7.

40. La. Code Civ. P. 891.

F. Service

A plaintiff may serve LIGA through its executive director or its claims administrator.⁴¹ Information concerning the name and office address of the executive director and the claims administrator may be obtained by contacting LIGA's office in Baton Rouge.

G. The Answer

Because LIGA is an independent entity, it is not bound by the insolvent insurer's answer. LIGA may deny allegations of the petition which the insolvent insurer has admitted and may raise affirmative defenses which the insolvent insurer has waived.

Louisiana Code of Civil Procedure article 1005 provides: "The answer shall set forth affirmatively . . . any . . . matter constituting an affirmative defense." One case has stated that "[a]n affirmative defense raises new matter which, assuming the allegations in the petition to be true, constitutes a defense to the action and will have the effect of defeating plaintiff's demand on its merits."⁴²

No Louisiana cases have addressed whether the "defenses" peculiarly available to LIGA—nonduplication of recovery, the LIGA deductible, the statutory cap, etc.—are affirmative defenses which must be specially pled. However, Louisiana courts have held that analogous non-LIGA defenses are *not* affirmative defenses.⁴³ While it appears the LIGA defenses need not be specially pled, the cautious practitioner nevertheless should avoid the question by specially pleading the applicable LIGA defenses in his answer.

H. Discovery

The discovery rules detailed at Louisiana Code of Civil Procedure articles 1420-1474 are applicable to LIGA in the same manner as they apply to any other party. LIGA is a separate entity from the insolvent insurer, and thus is not bound by any admissions or answers made by the insolvent insurer.

41. La. Code Civ. P. art. 1264 provides:

Service on an unincorporated association is made by personal service on the agent appointed, if any, or in his absence, upon a managing official, at any place where the business of the association is regularly conducted. In the absence of all officials from the place where the business of the association is regularly conducted, service of citation or other process may be made by personal service upon any member of the association.

42. *Keller v. Amedeo*, 512 So. 2d 385, 386 (La. 1987).

43. *See, e.g., Keller*, 512 So. 2d 385 (existence of additional liability insurance covering the allegedly underinsured motorist, thus rendering UM coverage inapplicable, is not an affirmative defense); *Mitchell v. State*, through DOTD, 596 So. 2d 353, 357 (La. App. 3d Cir.) (statutory cap on tort damages against state pursuant to La. R.S. 13:5106 is not affirmative defense), *writ denied*, 600 So. 2d 680 (1992); *Lee v. New England Ins. Co.*, 579 So. 2d 1182 (La. App. 2d Cir. 1991) (insurance policy deductible is not affirmative defense).

Although each case's discovery requests will vary according to the facts, there is one question which a LIGA defense attorney should *always* ask in his first set of interrogatories: "Are there any other policies of insurance which might provide coverage for the accident sued upon herein? If so, please state the insurer, the policyholder, the policy number, and the type of insurance policy." The purpose of this inquiry is to gather the information necessary to protect LIGA's rights against nonduplication of recovery, which will be discussed *infra*.

I. The Trial

Louisiana Revised Statutes 13:5105 restricts the right to a jury trial in suits against the state, its agencies, and its political subdivisions. However, LIGA is not a state agency.⁴⁴ Therefore either the plaintiff or LIGA may request a jury trial, assuming the legal prerequisites are satisfied.

J. Execution of Judgments Against LIGA

Louisiana Revised Statutes 22:1392(C) provides:

In addition to any other requirement imposed by law, no judgment creditor shall attempt the execution of any judgment against the association without providing prior notice of its intent to do so. As a prerequisite of the execution of judgment, the executive director of the association or the chairman of the board of directors of the association shall be notified by certified mail, return receipt requested, not less than fifteen days prior to the execution of the judgment.

VI. STATUTORY PENALTIES AND ATTORNEY'S FEES

Insurers have a statutory duty not to arbitrarily or capriciously refuse to pay claims.⁴⁵ If an insurer breaches this duty, it is liable for statutory penalties and attorney's fees.

With respect to LIGA, two questions arise. Is LIGA responsible for penalties and attorney's fees for the insolvent insurer's pre-insolvency conduct? Is LIGA responsible for penalties and attorney's fees for its own post-insolvency conduct?

The answer to both questions is no. The Louisiana Supreme Court has held that pre-insolvency penalties and attorney's fees are not "covered claims,"⁴⁶ and furthermore that LIGA is not an "insurer" and thus not subject to penalty provisions applicable to insurers.⁴⁷

44. La. R.S. 22:1380(B) (Supp. 1993).

45. La. R.S. 22:658(B)(1), 1220(B)(5) (Supp. 1993).

46. The Legislature codified this result at La. R.S. 22:1379(3)(d) (1978 and Supp. 1993).

47. *Bowens v. General Motors Corp.*, 608 So. 2d 999, 1004-05 (La. 1992).

VII. THE STATUTORY CAP AND THE LIGA DEDUCTIBLE

Every claim against LIGA is subject to a \$100 statutory deductible. Unearned premium claims are statutorily limited to \$10,000 each, and all other claims are statutorily limited to \$150,000 per claim and \$300,000 per accident or occurrence.⁴⁸ The sole exception is workers' compensation claims, which LIGA must pay in full.⁴⁹ However, LIGA is never liable beyond the obligation of the insolvent insurer.⁵⁰ Thus, LIGA benefits from the insurance policy's deductible and limits of liability to the extent they are applicable.

VIII. SETTLEMENTS AND JUDGMENTS

What if the insolvent insurer is bound by a settlement or judgment entered prior to insolvency but not yet paid? Is LIGA liable to the claimant for the settlement or judgment? If so, is liability unconditional?

With respect to judgments, Louisiana Revised Statutes 22:1392(B) states:

As to any covered claims arising from a judgment under any decision, verdict, or finding based on the default of the insolvent insurer or its failure to defend an insured, the association either on its own behalf or on behalf of such insured may apply to have such judgment, order, decision, verdict, or finding set aside by the same court or administrator that made such judgment, order, decision, verdict, or finding and shall be permitted to defend against such claim on the merits.

This implies LIGA is bound by judgments against the insured and/or insolvent insurer with two exceptions: default judgments and judgments arising out of a failure to defend the insured. If the judgment falls within these exceptions, LIGA may apply to the court to have it set aside.⁵¹

The Louisiana Fourth Circuit Court of Appeal has recently held that LIGA is liable for the insolvent insurer's settlements as well. In *Lastie v. Warden*,⁵² the plaintiff sought to enforce a settlement against LIGA that had been entered into by the plaintiff and the insurer prior to insolvency. LIGA contended that there was no coverage under the policy for the vehicle in which the plaintiffs were injured. The fourth circuit rejected LIGA's position, holding that LIGA was bound by the settlement just as if LIGA had been a party to the agreement:

48. La. R.S. 22:1382(A)(1)(a)(iii) (Supp. 1993).

49. La. R.S. 22:1382(A)(1)(c) (Supp. 1993).

50. La. R.S. 22:1382(A)(1)(d) (Supp. 1993). Furthermore, LIGA is not liable for pre-insolvency court costs or post-insolvency court costs. La. R.S. 22:1379(3)(d) and 1993 La. Acts No. 958 (amending La. R.S. 13:4521 (Supp. 1993)).

51. See, e.g., *Duplantis v. McGuire*, 610 So. 2d 969 (La. App. 1st Cir. 1992).

52. 611 So. 2d 721 (La. App. 4th Cir. 1992), writ denied, 614 So. 2d 64 (1993).

LIGA cannot avoid honoring the compromise merely by claiming it was not a party to the agreement. LIGA was not a party to the insurance contract either, but LIGA is clearly Champion's successor in interest by virtue of the statutory law requiring it to stand in the shoes of an insolvent insurer. The application of *res judicata* does not require that the parties be actually the same physical parties, but only that they be the same parties in the legal sense of the word. Therefore, the requirement of identity of parties is satisfied where a successor of one of the parties is involved.⁵³

Lastie is based on the mistaken assumption repeatedly discussed in this article—that LIGA is the “successor” of the insolvent insurer. It is not. LIGA must pay only “covered claims.” A claim cannot be a “covered claim” unless it is payable pursuant to the insurance policy.⁵⁴

Moreover, the *Lastie* court failed to address the applicability of Louisiana Revised Statutes 22:1382(A)(4), which provides in part:

On contradictory motion of the association, a court of proper jurisdiction and venue over the claim shall enter a formal order annulling any unsatisfied preinsolvency settlement, release, or consent judgment entered into by the insolvent insurer in its name or the name of the insured, upon a showing of fraud, ill practice, or where the settlement is clearly excessive, considering all relevant factors, including but not limited to coverage, liability, and quantum issues.⁵⁵

A strong argument can be made that settlement of a claim for which there is no coverage is “clearly excessive.”

Presumably, *Lastie* only bars LIGA from reopening policy coverage questions, and does not bar LIGA from examining whether settlements and judgments satisfy the other statutory requirements of the LIGA Law. For instance, if the insolvent insurer had promised to pay a claim for statutory penalties and attorney's fees, or had settled a claim on an ocean marine policy, LIGA could not be responsible for such claims.⁵⁶ *Lastie* appears to limit its holding to “covered claims,” although it fails to recognize that a claim outside the coverage of an insurance policy is not “covered” by definition.

53. *Id.* at 723.

54. La. R.S. 22:1379(3)(a) (Supp. 1993) defines a “covered claim” as “an unpaid claim . . . which arises out of and is within the coverage . . . of an insurance policy”

55. 1991 La. Acts No. 941, § 2, mandates that this amendment applies to all existing claims.

56. *But see* *Borchardt v. Carline*, 617 So. 2d 970 (La. App. 4th Cir.) (where insolvent insurer had settled, LIGA could not raise nonduplication of recovery defense, but could raise defenses of statutory cap and statutory deductible), *writ denied*, 620 So. 2d 844 (1993). *See also* *Buggage v. Yellow-Checker Cab Co.*, 623 So. 2d 906 (La. App. 4th Cir. 1993) (holding LIGA bound by pre-insolvency settlement). Of course, the liquidator is liable for such settlements and judgments because the liquidator (unlike LIGA) really is the insolvent insurer's successor for *res judicata* purposes.

IX. NONDUPLICATION OF RECOVERY

One of the most litigated provisions of the LIGA Law is Louisiana Revised Statutes 22:1386—the nonduplication of recovery section. That section provides:

A. Any person having a claim against an insurer under any provision in an insurance policy, other than a policy of an insolvent insurer which is also a covered claim, shall be required first to exhaust his rights under such policy. Such other policies of insurance shall include but shall not be limited to liability coverage, uninsured or underinsured motorist liability coverage, or both, hospitalization, and other medical expense coverage. As to the association, any amount payable by such other insurance shall act as a credit against the damages of the claimant, and the association shall not be liable for such portion of the damages of the claimant.

B. Any person having a claim which may be recovered under more than one insurance guaranty association or its equivalent shall seek recovery first from the association of the place of residence of the insured except that if it is a first party claim for damages to property with a permanent location, he shall seek recovery first from the association of the location of the property, and if it is a workers' compensation claim, he shall seek recovery first from the association of the residence of the claimant.

C. Any recovery under this Part by any claimant not a resident of the state of Louisiana at the time such claim arose, shall not exceed the lesser of the recovery allowed under this Part or that payable by the insurance guaranty association or its equivalent in the claimant's state of residence. As to the association, any amount payable by the other guaranty association or its equivalent shall act as a credit against the damages of the claimant, and the association shall not be liable for that portion of the damages of the claimant.

D. The association shall have no duty to provide a separate defense at its cost to an insured of an insolvent insurer as to any issue arising out of the coverage of this Section.

Prior to 1990, the Louisiana Supreme Court had stated that the purpose of the nonduplication of recovery section is, as its title implies, to prevent double recovery.⁵⁷ However, this does not reveal the whole story. The section is based upon the principle that, as between a solvent insurer and LIGA, the solvent insurer should have primary responsibility for the loss. Put another way, LIGA is the obligor of last resort.⁵⁸ This legislative policy choice is also reflected in Louisiana

57. *Hickerson v. Protective Nat'l Ins. Co.*, 383 So. 2d 377, 379 (La. 1980); and *McMahon v. LIGA*, 596 So. 2d 1384, 1390 (La. App. 1st Cir.), *writ denied*, 604 So. 2d 970 (1992).

58. This is especially clear in the wake of the 1990 amendment to La. R.S. 22:1386, which overruled *Hickerson*, 383 So. 2d 377.

Revised Statutes 22:1379(3)(b), which provides that an insurer's subrogation claim is not a "covered claim" for which LIGA is responsible.

The operation of the nonduplication of recovery section is best illustrated via a series of hypotheticals:

- 1) Plaintiff has \$5,000 in damages. Insurer A has primary liability coverage of \$10,000. Insurer B has secondary liability coverage of \$10,000. Insurer A is declared insolvent. Insurer B pays \$5,000. LIGA pays nothing.
- 2) Plaintiff has \$15,000 in damages. Insurer A has primary liability coverage of \$10,000. Insurer B has secondary liability coverage of \$10,000. Insurer A is declared insolvent. Insurer B pays \$10,000. LIGA pays \$4,900 (\$5,000 minus statutory deductible of \$100).
- 3) Plaintiff has \$15,000 in damages. Insurer A has primary liability coverage of \$10,000. Insurer B has UM coverage of \$10,000. Insurer A is declared insolvent prior to September 7, 1990.⁵⁹ LIGA pays \$9,900 (\$10,000 minus statutory deductible of \$100). Insurer B pays \$5,100.
- 4) Same as 3) above except Insurer A is declared insolvent on or after September 7, 1990. Insurer B pays \$10,000. LIGA pays \$4,900 (\$5,000 minus statutory deductible of \$100).
- 5) Plaintiff has \$15,000 in damages. Insurer A has primary liability coverage. Insurer B has excess coverage. Insurer A is declared insolvent. Whether LIGA or Insurer B has primary coverage (i.e., whether Insurer B "drops down") depends on the language of Insurer B's policy.

X. LIGA AND THE INSURED

Louisiana Revised Statutes 22:1382(A)(2) provides that LIGA shall [b]e deemed the insurer to the extent of its obligation on the covered claims and to such extent shall have all rights, duties, and obligations of the insolvent insurer as if the insurer had not become insolvent; however, when the liability of the association under this Part has been exhausted by payment, the obligation of the association to provide a defense to the insured of an insolvent insurer shall cease.

Thus, LIGA has a duty to defend the insured, but it is discharged from this duty when it tenders the limits of its liability.

59. The amendment overruling *Hickerson*, 383 So. 2d 377, became effective September 7, 1990. The Legislature further amended La. R.S 22:1386 in 1992, specifying that the amended statute applies to all pending claims. 1992 La. Acts No. 237, § 3. No Louisiana court has yet fully addressed the retroactive implications of this amendment.

When LIGA pays a claim, whether a first-party claim or a third-party claim, the beneficiary is deemed to have assigned his rights to LIGA:

Any person recovering under this Part shall be deemed to have assigned his rights under the policy to the association to the extent of his recovery from the association. Every insured or claimant seeking the protection of this Part shall cooperate with the association to the same extent as such person would have been required to cooperate with the insolvent insurer. The association shall have no cause of action against the insured of the insolvent insurer for any sums it has paid out except such causes of action as the insolvent insurer would have had if such sums had been paid by the insolvent insurer. In the case of an insolvent insurer operating on a plan with assessment liability, payments of claims of the association shall not operate to reduce the liability of insureds to the receiver, liquidator or statutory successor for unpaid assessments.⁶⁰

Furthermore:

"Covered claim" shall not include any amount due any reinsurer, insurer, insurance pool, or underwriting association, as subrogation recoveries or otherwise. In addition, the insured of an insolvent insurer shall likewise not be liable for any subrogation claim asserted by any reinsured, insurer, insurance pool, or underwriting association to the extent of the applicable liability limits previously provided to such insured by the insolvent insurer.⁶¹

Thus, if Smith is injured by Jones, and Jones' insurer is declared insolvent, then Smith can recover from his own UM carrier, and the UM carrier will have no right of reimbursement against LIGA. The UM carrier's right of reimbursement against Jones will be limited to that portion of the UM payment made by the UM carrier which is greater than the applicable policy limit previously provided to Jones by the insolvent insurer.⁶² The protection afforded insureds by this provision is illustrated by the following examples:

1) Smith has \$5,000 in damages. Insurer A has liability coverage of \$10,000. Insurer B has UM coverage of \$10,000. Insurer A is declared insolvent on or after September 7, 1990. Insurer B pays \$5,000 and has no subrogation rights against Jones.

60. La. R.S. 22:1385(A) (Supp. 1993).

61. La. R.S. 1379(3)(b) (Supp. 1993).

62. In *Hickerson v. Protective Nat'l Ins. Co.*, 383 So. 2d 377, 379 (La. 1980), the supreme court held that UM insurance is not "other insurance" for purposes of La. R.S. 22:1386, the nonduplication of recovery section. One concern the court raised was that the UM carrier would have a right to reimbursement against the tortfeasor, but not against LIGA. In 1990, the Legislature overruled *Hickerson* and addressed the *Hickerson* court's concerns by protecting the tortfeasor via La. R.S. 22:1379(3)(b) (Supp. 1993).

2) Smith has \$15,000 in damages. Insurer A has primary liability coverage of \$10,000. Insurer B has UM coverage of \$10,000. Insurer A is declared insolvent on or after September 7, 1990. Insurer B pays \$10,000. LIGA pays \$4,900 (\$5,000 minus statutory deductible of \$100). Insurer B may subrogate against Jones for \$5,000 (Jones had total liability protection of \$10,000, and would have been ultimately responsible for \$5,000 if Insurer A had been solvent).

3) Smith has \$20,000 in damages. Insurer A has primary liability coverage of \$10,000. Insurer B has UM coverage of \$10,000. Insurer A is declared insolvent on or after September 7, 1990. Insurer B pays \$10,000. LIGA pays \$9,900 (\$10,000 minus statutory deductible of \$100). Insurer B may subrogate against insured for full \$10,000.

Note that examples 2 and 3 carry the implicit assumption that the UM carrier pays *before* the LIGA. The careful LIGA attorney should therefore attempt early settlement of those cases where it is apparent that the claim will exceed the UM policy, so that a full release can be obtained for the insured.

XI. THE APPLICABLE LAW

The Legislature has repeatedly amended the LIGA Law in recent years. This raises the issue of what date determines the applicable substantive law. Should the court apply the law as it existed at the time of the issuance of the insurance policy, at the time of the accident, at the time of insolvency, or at the time of decision?

The courts have split on this issue. The third and fourth circuits have held that the courts should apply the law existing at the time of the accident.⁶³ The first and fifth circuits have held that the law in effect on the date of insolvency applies.⁶⁴ The supreme court apparently will soon resolve the conflict, inasmuch as it has granted writs in cases arising out of the third and fifth circuits.

The first and fifth circuits' rule appears to better conform with supreme court precedent concerning the retroactivity of laws. In *Cole v. Celotex Corp.*,⁶⁵ the supreme court stated: "Generally, the determinative point in time separating prospective from retroactive application is the date the cause of action accrues. Once a party's cause of action accrues, it becomes a vested property right that may not be constitutionally divested."⁶⁶ The court further stated: "Under Louisiana law, a cause of action accrues when the party has the right to sue."⁶⁷ Thus, a plaintiff's cause of action does not accrue against LIGA until the plaintiff can sue

63. *Segura v. Frank*, 615 So. 2d 516 (La. App. 3d Cir.), writ granted, 620 So. 2d 822 (1993); *Dangerfield v. Soto*, 599 So. 2d 1092 (La. App. 4th Cir. 1991).

64. *Hebert v. Limer*, 615 So. 2d 55 (La. App. 1st Cir. 1993); *Rey v. Guidry*, 618 So. 2d 425 (La. App. 5th Cir.), writ granted, 620 So. 2d 822 (1993).

65. 599 So. 2d 1058 (La. 1992).

66. *Id.* at 1063.

67. *Id.* at 1063 n.15.

LIGA. Until the insolvency order is issued, the plaintiff cannot sue LIGA.⁶⁸ Therefore, under *Cole*, the date of the insolvency determines the applicable law.

Applying the law in effect at the time of insolvency does not violate the principle of non-retroactivity of laws. Retroactive application presumes the plaintiff's right vests *before* the change in law. A plaintiff's right against LIGA does not vest *until* insolvency. If the law changes before insolvency, *there is no retroactive application*. Thus, *the law in effect on the date of insolvency should control*.⁶⁹

XII. CONCLUSION

LIGA is an important element in addressing the problems associated with insurer insolvency. It provides some protection for claimants and policyholders from the insolvency of insurers. However, it is not a panacea. In the age of "spreading the risk" by going after "deep pockets," LIGA—commonly looked upon (although not accurately) as the "insurers' insurer"—must be a tempting target.

However, the LIGA Law practitioner must understand not only LIGA's purpose (which is fairly simple), but also its mechanism (which is fairly complex). Whether or not one agrees with its reasoning, the Legislature has chosen to specifically limit LIGA's responsibility. Unlike the insurer, LIGA's liability arises not out of its voluntary contracts, but rather from legislative mandate.

68. See La. R.S. 22:1379(3)(a) (1978 and Supp. 1993). If the plaintiff sues LIGA prior to the date of insolvency, he is liable for LIGA's expenses and attorney's fees subject to certain conditions. La. R.S. 22:1379(4)(b) (Supp. 1993).

69. The Legislature occasionally has amended the LIGA Law specifying that the amendment applies even to *pending* claims. See, e.g., 1992 La. Acts No. 237, § 3 (amending La. R.S. 22:1386). Louisiana courts have not addressed the legal effect of such language with respect to the LIGA Law. *But see* *Blackwell v. Williams*, 618 So. 2d 477, 480 (La. App. 4th Cir. 1993) (giving retroactive effect to act without discussing "pending claims" language).

Furthermore, procedural and interpretive laws apply retroactively. See, e.g., *Luna v. American Bldg. Sys., Inc.*, 620 So. 2d 465, 468 (La. App. 3d Cir. 1993). The debate over the effective date of LIGA amendments discussed in cases such as *Segura* only concerns *substantive* changes in the law.

