

# The DEF's of LIGA: An Update to the ABC's of LIGA

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### Repository Citation

Stephanie B. Laborde, James E. Moore Jr., and Heather Landry, *The DEF's of LIGA: An Update to the ABC's of LIGA*, 77 La. L. Rev. (2017)

Available at: <http://digitalcommons.law.lsu.edu/lalrev/vol77/iss4/7>

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# The DEF's of LIGA: An Update to the ABC's of LIGA

*Stephanie B. Laborde, James E. Moore, Jr.,  
and Heather Landry\**

## INTRODUCTION

More than 20 years ago, Carey J. Guglielmo and Daniel J. Balhoff authored an article in the *Louisiana Law Review* entitled, “The ABC’s of LIGA,”<sup>1</sup> which has served as an excellent guide for practitioners and laymen alike in interpreting and understanding the law applicable to the Louisiana Insurance Guaranty Association (“LIGA”). There have been numerous legislative changes to LIGA Law, Louisiana Revised Statutes section 22:2051 and the following,<sup>2</sup> and many important decisions by the courts since Guglielmo and Balhoff’s original article. The purpose of this Article is to discuss developments in LIGA Law. This Article endeavors to set forth the current state of the settled law and to discuss the areas that remain subject to conflict or judicial interpretation. This Article first discusses the character and purpose of LIGA and then the applicable procedures for suing and defending cases involving LIGA. A substantive discussion of the defenses and statutory limits to LIGA’s obligation to pay claims will be followed by an analysis of the application of LIGA Law to the insured. Finally, this Article concludes with a discussion of settlements and judgments in the context of these cases and which version of LIGA Law applies to a specific claim.

## I. BACKGROUND

Before 1970, if a Louisiana property or casualty insurer were declared insolvent, claimants and policyholders would be relegated to filing a claim

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1. Carey J. Guglielmo & Daniel J. Balhoff, *The ABC's of LIGA*, 53 LA. L. REV. 1759 (1993).

2. In 2008, title 22 was renumbered pursuant to Act No. 415. Act No. 415, 2008 La. Acts 1846–1922. Before January 1, 2009, LIGA Law was found in sections 1375 through 1393 of title 22 of the Louisiana Revised Statutes.

in the liquidation proceedings of the insolvent insurer.<sup>3</sup> Any assets of the insolvent insurer were divided among creditors and claimants according to their respective ranks.<sup>4</sup> The process typically took years and rarely resulted in significant payment of claims. In 1969, the National Association of Insurance Commissioners (“NAIC”) drafted a model post-insolvency assessment fund bill (the “Model Act”) in response to federal congressional efforts to address and regulate insurer insolvencies.<sup>5</sup> Variations of the Model Act were quickly adopted by most states, including Louisiana, which adopted its version of the Model Act in 1970.<sup>6</sup> Today, every state, the District of Columbia, Puerto Rico, and the Virgin Islands have active property and casualty guaranty funds.<sup>7</sup> Since the early 1970s, there have been over 550 property and casualty insurer insolvencies with overall guaranty fund payouts of more than \$27 billion.<sup>8</sup> By the end of 2014, LIGA had successfully paid and closed 143,749 claims from 163 insolvent companies, totaling over \$923 million.<sup>9</sup>

## II. WHAT IS LIGA?

LIGA is a *sui generis* entity created by the Louisiana Legislature,<sup>10</sup> and as a legislative creation, LIGA must operate within legislative

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3. LA. REV. STAT. §§ 22:732–22:763 (1969), renumbered as LA. REV. STAT. §§ 22:2001–22:2044 by Act No. 415, 2008 La. Acts 1846.

4. *Id.* § 22:746 (1969), renumbered as LA. REV. STAT. § 22:2025 by Act No. 415, 2008 La. Acts 1846.

5. *La. Workers’ Comp. Corp. v. La. Ins. Guar. Ass’n*, 20 So. 3d 1047, 1052 (La. Ct. App. 2009) (first citing Linda M. Lasley et al., *Insurance Guaranty Funds: The New “Money Pit”?*, 416 COM. L. & PRAC. COURSE HANDBOOK SERIES 113, 115–19 (1987), and then citing Davis J. Howard, *Uncle Sam vs. The Insurance Commissioners: A Multi-Level Approach to Defining the “Business of Insurance” under the McCarran–Ferguson Act*, 25 WILLAMETTE L. REV. 1, 14 (1989)).

6. Act No. 81, 1970 La. Acts 237 (codified at LA. REV. STAT. §§ 22:1375–22:1394 (1971)). Louisiana adopted much of the Model Act almost verbatim. *Hopkins v. Howard*, 930 So. 2d 999, 1002 (La. Ct. App. 2006).

7. *La. Workers’ Comp. Corp.*, 20 So. 3d at 1052; *The Property and Casualty Guaranty Fund System At-A-Glance*, NAT’L CONF. OF INS. GUARANTY FUNDS, <http://ncigf.org/media-facts> [<https://perma.cc/M3TD-PVM3>] (last visited Feb. 11, 2017).

8. *The Property and Casualty Guaranty Fund System At-A-Glance*, *supra* note 7.

9. *About LIGA: Accomplishing Our Mission*, LA. INS. GUARANTY ASS’N, <http://www.laiga.org/history/> [<https://perma.cc/FG7L-VVVE>] (last visited Feb. 11, 2017).

10. *La. Ins. Guar. Ass’n v. Gegenheimer*, 636 So. 2d 209, 210 (La. 1994).

parameters.<sup>11</sup> LIGA was established by the legislature as the administrator of the Louisiana Insurance Guaranty Association Law (“LIGA Law”).<sup>12</sup>

*A. The Association*

LIGA is an association of member insurers whose purpose is to ameliorate some of the losses that would otherwise accrue to claimants and policyholders because of insurance insolvencies and, more generally, to provide stability and safety in the insurance environment.<sup>13</sup> Louisiana Revised Statutes section 22:2056(A) provides,

There is created a private non-profit unincorporated legal entity to be known as the “Louisiana Insurance Guaranty Association.” All member insurers defined in R.S. 22:2055 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. 22:2059 and shall exercise its powers through a board of directors established under R.S. 22:2057.<sup>14</sup>

Louisiana Revised Statutes section 22:2055(9) provides,

- (a) “Member insurer” means any person who meets both of the following criteria:
- (i) Is licensed and authorized to transact insurance in this state.
  - (ii) Since September 1, 1970, has written at least one policy of insurance to which this Part applies.
- (b) An insurer shall cease to be a member insurer effective on the day following the termination or expiration of its license to transact the kinds of insurance to which this Part applies; however, the insurer shall remain liable as a member insurer for any and all obligations, including obligations for assessments levied prior to the termination or expiration of the insurer’s license.<sup>15</sup>

Louisiana Revised Statutes section 22:2057(A) provides,

The Board of Directors of the Association shall consist of nine

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11. *Id.*

12. LA. REV. STAT. §§ 22:2051–22:2070 (2017). Louisiana Revised Statutes section 22:2051 provides, “This Part shall be known and may be cited as the Louisiana Insurance Guaranty Association Law.” *Id.* § 22:2051.

13. *Id.* § 22:2052.

14. *Id.* § 22:2056(A).

15. *Id.* § 22:2055(9).

persons serving terms as established in the plan of operation. The board shall be composed of two consumer representatives appointed by the commissioner [of insurance], one person appointed by the president of the Senate, one person appointed by the speaker of the House of Representatives, all of whom shall be residents of the State of Louisiana, and five additional persons selected by member insurers, one of which shall be a representative selected by the membership of the Louisiana Association of Fire and Casualty Companies (LAFAC), subject to the approval of the commissioner.<sup>16</sup>

LIGA is not authorized to act in any manner inconsistent with the powers expressly granted to it by and in LIGA Law. However, the powers given to LIGA include the ability to perform all acts “necessary or proper to effectuate the purpose” of LIGA Law.<sup>17</sup> Although LIGA has been considered a “public entity” for purposes of the Louisiana Code of Governmental Ethics,<sup>18</sup> the 2010 amendments to LIGA Law added language to Louisiana Revised Statutes section 22:2056(B), which provides that “[t]he association is not and may not be deemed a department, unit, agency, or instrumentality of the state for any purpose, *and shall not be subject to laws governing such departments, units, agencies, or instrumentalities, commissions or boards of the state.*”<sup>19</sup>

Although LIGA is not a state agency,<sup>20</sup> it is statutorily required to submit a plan of operation to the Commissioner of Insurance and the

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16. *Id.* § 20:2057(A).

17. *Id.* § 22:2058(B)(5).

18. *La. Ins. Guar. Ass’n v. Comm’n on Ethics for Pub. Emps.*, 656 So. 2d 670, 675 (La. Ct. App. 1995).

19. LA. REV. STAT. § 22:2056(B) (emphasis added). *See* La. Bd. Ethics Op. No. 2009-344a (2009) (determining that the members of the board of directors for the Louisiana Life and Health Insurance Guaranty Association (“LLHIGA”) were not required to file annual personal financial disclosure statements pursuant to the Code of Governmental Ethics in light of the language in the LLHIGA’s enabling statute, Louisiana Revised Statutes section 22:2085(C), which states that LLHIGA “shall not be subject to laws governing such departments, units, agencies, instrumentalities, commissions, or boards of the state”).

20. Revised Statutes section 22:2056(B) confirms,

The association is not and may not be deemed a department, unit, agency, or instrumentality of the state for any purpose, and shall not be subject to laws governing such departments, units, agencies, instrumentalities, commissions, or boards of the state. 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 may 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.

Senate and House Committees on Insurance for oversight.<sup>21</sup> The plan is not effective until approved in writing by the Commissioner.<sup>22</sup> The Senate and House Committees on Insurance may hold hearings on any plan of operation or amendments thereto, and no plan or amendment may be implemented if rejected by a legislative committee reviewing the previous year's activity.<sup>23</sup> Each year, LIGA must also submit a financial report to the Commissioner, who is statutorily delegated the authority to "examine, audit, or otherwise regulate the association."<sup>24</sup>

### *B. What LIGA is Not*

LIGA is not the legal successor or "statutory successor" of insolvent insurers, despite often being characterized as such by courts.<sup>25</sup> When a court of competent jurisdiction declares an insurer insolvent, the insurer effectively ceases to exist.<sup>26</sup> A new entity arises—the insurer in liquidation or receivership. This new entity, rather than LIGA, is the insolvent insurer's legal successor.<sup>27</sup> LIGA does not encroach upon the rights and obligations of the insolvent insurer's liquidator or receiver, who remains the proper party to enforce these rights and obligations.<sup>28</sup> LIGA remains a separate entity from the liquidator or receiver with an independent obligation to pay only certain covered claims in accordance with LIGA Law.<sup>29</sup> These claims may often equate to the insolvent insurer's obligations, but unlike the liquidator or receiver, LIGA is responsible only for those claims that are defined by LIGA Law as "covered claims."<sup>30</sup> The

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LA. REV. STAT. § 22:2056(B). It is, however, entitled to deferral of payment of court costs until a final judgment is rendered under the same statute granting the privilege to state entities. *Id.* § 13:4521(A)(1).

21. *Id.* § 22:2059(A).

22. *Id.*

23. *Id.* § 22:2059(A)(1).

24. *Id.* § 22:2060.

25. *See, e.g.,* *Gygax v. Brugoto*, 674 So. 2d 366 (La. Ct. App. 1996), *Rideau v. Edwards*, 985 So. 2d 311, 315 (La. Ct. App. 2008). It is likely that LIGA has been referred to as the "statutory successor" due to the lack of a better term to describe the connection between the insolvent insurer and LIGA. However, the term "successor" is misleading.

26. *Tyburczy v. Graham*, No. 91-1978, 1994 WL 150724, at \*3 (E.D. La. Mar. 30, 1994).

27. *Id.* ("When an insurer . . . becomes insolvent, it ceases to exist, and the liquidator or receiver becomes its legal successor, not LIGA.")

28. *Id.*

29. LA. REV. STAT. § 22:2058 (2017).

30. *Id.* § 22:2055(6).

ultimate responsibility for the insolvent insurer's obligations lies with the liquidator or receiver, not with LIGA.<sup>31</sup>

With respect to liability for claims of an insolvent insurer, some Louisiana courts have also characterized LIGA as “stand[ing] in the shoes” of insolvent insurers.<sup>32</sup> Other Louisiana courts have correctly rejected the broad consequences of the “stepping into the shoes” characterization and limit LIGA's liability to the express provisions of LIGA Law. The Third Circuit Court of Appeal twice rejected the argument that LIGA stands in the shoes of the insolvent insurer for all purposes and in both cases employed the following language:

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.”<sup>33</sup>

Some courts, however, have asserted that LIGA is the insolvent insurer for all legal purposes.<sup>34</sup> This trend led the Louisiana Legislature in 2010 to eliminate the language found in former Louisiana Revised Statutes section 22:2058(A)(2), which stated that LIGA shall “*be deemed the insurer* to the extent of its obligations on the covered claims.”<sup>35</sup> Instead, Louisiana Revised Statutes section 22:2058(A)(2) now reads:

To the extent of its obligations on the covered claims, [LIGA shall] have all rights, duties, and obligations of the insolvent insurer as if the insurer had not become insolvent, including but not limited to, the right to pursue and retain salvage and

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31. Louisiana Revised Statutes section 22:2061(A) provides that “[a]ny person recovering under [LIGA Law] shall be deemed to have assigned his rights under the policy to [LIGA] to the extent of his recovery from [LIGA].” *Id.* § 22:2061(A). Accordingly, a claimant may not seek to recover that portion of a claim paid by LIGA from the liquidator, but may seek to recover any amounts not paid or covered by LIGA against the liquidator. LIGA is entitled to file a claim with the liquidator for the amounts paid on covered claims and the expenses associated with those claims. *Id.* § 22:2061(B)–(C).

32. *See, e.g.*, *Backhus v. Transit Cas. Co.*, 549 So. 2d 283, 286 (La. 1989).

33. *Veillon v. La. Ins. Guar. Ass'n*, 608 So. 2d 670, 672 (La. Ct. App. 1992) (quoting *Vaughn v. Vaughn*, 597 P.2d 932 (Wash. Ct. App. 1979)). *See also Williams v. Champion Ins. Co.*, 590 So. 2d 736, 738 (La. Ct. App. 1991) (quoting *Vaughn v. Vaughn*, 597 P.2d 932 (Wash. Ct. App. 1979)).

34. *Morris v. E. Baton Rouge Par. Sch. Bd.*, 826 So.2d 46, 51 (La. Ct. App. 2002); *La. Ins. Guar. Ass'n v. Dir., Office of Workers' Comp.*, 614 F.3d 179 (5th Cir. 2010).

35. LA. REV. STAT. § 22:2058(A)(2) (2009) (emphasis added).

subrogation recoverable on covered claim obligations to the extent paid by the association. The association shall not be deemed the insolvent insurer for the purpose of conferring jurisdiction.<sup>36</sup>

Thus, the statutory language which courts have used as justification for ruling LIGA stood “squarely in the shoes of” insolvent insurers no longer exists.<sup>37</sup> Accordingly, there is no basis for deeming LIGA the statutory successor of the insolvent insurer. However, the practitioner should be cognizant of the prior law and jurisprudence when making or defending a claim against LIGA, particularly in light of the many pre-2010 cases utilizing such language.<sup>38</sup>

LIGA is neither a corporation nor a partnership, and most importantly, it is not an insurer.<sup>39</sup> Therefore, laws applicable only to insurers do not apply to LIGA.<sup>40</sup> For the practitioner, perhaps the most important effect of LIGA’s not being an insurer is that LIGA is not subject to bad-faith penalties for the actions or omissions of insolvent insurers or for its own actions in handling claims.<sup>41</sup> Rather, LIGA is a “member association” that consists of “member insurers.”<sup>42</sup> It is not a state agency, and neither the state nor any of its agencies are responsible for any of LIGA’s liabilities.

Although it is not a “state agency,” LIGA’s solvency has been recognized to be an important and “appropriate state interest.”<sup>43</sup> In considering the constitutionality of provisions limiting liability to those claims defined as “covered claims,” the practitioner should also keep in

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36. LA. REV. STAT. § 22:2058(A)(2) (2017).

37. It should be noted that prior versions of the statute did not declare LIGA as the statutory successor, nor did the prior versions deem LIGA the insurer for all legal purposes. Rather, the statute provided that LIGA “be deemed the insurer to the extent of its obligation on covered claims.” LA. REV. STAT. § 22:2058(A)(2) (2009) (emphasis added).

38. *Borchardt v. Carline*, 617 So. 2d 970, 973 (La. Ct. App. 1993), *writ denied*, 620 So. 2d 844, *reh’g denied*, 623 So. 2d 1292; *McGuire v. Davis Truck Servs., Inc.*, 518 So. 2d 1171, 1173 (La. Ct. App. 1988), *writ denied*, 526 So. 2d 791 (La. 1988); *Hickerson v. Protective Nat. Ins. Co.*, 383 So. 2d 377, 379 (La. 1980).

39. *Hollingsworth v. Steven Garr Logging*, 110 So. 3d 1219, 1228 (La. Ct. App. 2013); *Bowens v. Gen. Motors Corp.*, 608 So. 2d 999, 1005 (La. 1992).

40. *Bowens*, 608 So. 2d at 1005; *but c.f.* *La. Ins. Guar. Ass’n v. Dir., Office of Workers’ Comp.*, 614 F.3d 179, 187 (5th Cir. 2010) (deeming LIGA the insurance carrier and holding that LIGA was subject to the Longshore & Harbor Workers’ Compensation Act’s “last responsible employer rule” as an insurance carrier by relying on the statutes in effect before the 2010 amendments).

41. *Bowens*, 608 So. 2d at 1005; *Hollingsworth*, 110 So. 3d at 1228. *See also* LA. REV. STAT. § 22:2067 (2017).

42. LA. REV. STAT. § 23:2056(A). All member insurers are subject to the plan of operation. *Id.* § 22:2059(B).

43. *La. Ins. Guar. Ass’n v. Gegenheimer*, 636 So. 2d 209, 210 (La. 1994).



mind that a statutory enactment that “serves to minimize the unnecessary depletion of LIGA funds” has been held to “constitute a legitimate exercise of the state’s police power[s] for the purpose of protecting the state’s citizens from economic harm.”<sup>44</sup>

The legislature’s passage or application of LIGA statutes is subject to scrutiny under Due Process and Equal Protection standards.<sup>45</sup> However, LIGA’s actions do not constitute state action for purposes of the United States Constitution or federal civil rights laws because it is not a state entity, and LIGA is not entitled to Eleventh Amendment immunity from suit in federal court. However, the legislature did provide for immunity for LIGA, its member insurers, its agents, and its employees for any actions taken in the performance of their duties under LIGA Law.<sup>46</sup>

### III. LIGA’S PURPOSE

According to LIGA Law, its purpose

is to provide for the payment of *covered claims* under *certain insurance policies* with a *minimum* delay and a *minimum* financial loss to claimants or policyholders due to the insolvency of an insurer, 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.<sup>47</sup>

Before 2010, the statute read:

The purpose of [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 the association 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.<sup>48</sup>

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44. *La. Workers’ Comp. Corp. v. La. Ins. Guar. Ass’n*, 20 So. 3d 1047, 1053 (La. Ct. App. 2009); *Segura v. Frank*, 630 So. 2d 714, 732 (La. 1994).

45. *See, e.g., S. Silica of La., Inc. v. La. Ins. Guar. Ass’n*, 979 So. 2d 460 (La. 2008), *superseded by statute on other grounds*, Act No. 959, 2010 La. Acts 3330.

46. LA. REV. STAT. § 22:2067.

47. *Id.* § 22:2052 (emphasis added).

48. LA. REV. STAT. § 22:2052 (2009) (emphasis added). For comparison, the current statute provides that, “The purpose of this Part is to provide a ~~mechanism~~ for the payment of covered claims under certain insurance policies ~~to avoid~~

LIGA's stated purpose, therefore, is still to provide assistance to those affected by the insolvency of a property or casualty insurer. LIGA helps, for example, both the policyholder who negligently causes an automobile accident, by providing some level of liability insurance coverage for that accident, and the injured claimant, by providing an avenue to recovery of his damages other than via the rehabilitation proceedings. Before LIGA was created by the legislature in 1970, an injured victim of a motor vehicle accident with a driver whose insurer was insolvent could sue only the offending driver and file a claim in the insurer's liquidation proceedings.<sup>49</sup> Post 1970 and the creation of LIGA, while the victim may still pursue her claims against the insolvent insurer in the liquidation proceeding or pursue the insolvent insurer's insured directly, she may also sue LIGA directly for recovery of a covered claim under certain insurance policies and avoid or minimize the need for any action involving the liquidator.<sup>50</sup> The same principle applies to workers' compensation insurance.<sup>51</sup> Before 1970, the employer would be responsible for compensation benefits when its insurer became insolvent, regardless of its net worth.<sup>52</sup> Now, the employer can look to LIGA for relief if its insurer becomes insolvent and the claim is covered under LIGA Law.

Although LIGA is no longer tasked with assisting in the detection and prevention of insurer insolvencies,<sup>53</sup> it may still help the troubled insurer struggling through rehabilitation or liquidation.<sup>54</sup> LIGA helps the industry as a whole by establishing and maintaining a system for the payment of claims against insolvent insurers, thereby creating a more stable insurance environment.<sup>55</sup> Although a private entity, one court has held that LIGA functions solely and exclusively for the public benefit.<sup>56</sup> Courts liberally construe LIGA Law to effect the stated purpose as set forth in Louisiana Revised Statutes section 22:2052, which "shall constitute an aid and guide

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~~excessive~~ with a minimum delay in payment and to ~~avoid~~ a minimum financial loss to claimants or policyholders due to ~~because of~~ the insolvency of an insurer, ~~to assist in the detection and prevention of insurer insolvencies and to allow the association~~ 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." LA. REV. STAT. § 22:2052 (2017). Deletions are overstruck; additions are underlined and in bold typeface.

49. LA. REV. STAT. §§ 22:2001–22:2044.

50. *Id.* § 22:2052.

51. *Id.*

52. *Id.*

53. *But see id.* § 22:2063 (entitled "Prevention of insolvencies").

54. *Id.* § 22:2058(B)(7).

55. *See id.* § 22:2052.

56. *La. Ins. Guar. Ass'n v. Comm'n on Ethics for Pub. Emps.*, 656 So. 2d 670, 675 (La. Ct. App. 1995); *but see* LA. REV. STAT. § 22:2052.

to interpretation.”<sup>57</sup> While some courts have held that the provisions of LIGA’s enabling legislation “must be interpreted to protect claimants and policyholders and to advance their interests rather than the interests of [LIGA],”<sup>58</sup> the Supreme Court has recognized that “[a] liberal interpretation of the [LIGA Law], even though authorized by the Law itself, cannot overcome the specific statutory exemptions from coverage under that law.”<sup>59</sup> Despite LIGA’s stated purpose and the public benefit for which it was created, the economic realities of the system simply do not allow all involved parties to be made whole or all of the stated purposes to be fully achieved. In reality, the legislature and the courts are required to balance the competing interests of the parties and the public when making determinations regarding the allocation of LIGA’s limited resources. Ultimately, LIGA Law is remedial; the law intends to provide some benefit but not make all parties whole.

The 2010 amendments to LIGA Law reflect the understanding that financial losses to claimants or policyholders are expected. Had the legislature intended LIGA to be an all-purpose guarantor or an insurer’s insurer, it could have so stated in LIGA Law. Such a scheme would be a boon to claimants and policyholders, but inevitably ruinous to member insurers and the prospect of affordable insurance in the state.<sup>60</sup> The stated purpose and goal is to minimize those financial losses due to the insolvency of certain insurers, not necessarily to avoid them.<sup>61</sup> LIGA Law is inherently designed to achieve as much of its purpose as possible, with the understanding that all claims under all policies of all insolvent insurers will not, and are not expected to, be paid or be paid in full.<sup>62</sup>

Limitations upon what is considered a “covered claim” apply to limit LIGA’s potential obligation—time limitations for filing claims, exhaustion

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57. LA. REV. STAT. § 22:2054. The 2010 amendments revised section 22:2054 (formerly section 22:1378) as follows: “This part shall be ~~liberally~~ construed to effect its purpose under ~~section~~ R.S. 22:2052, which shall constitute an aid and guide to interpretation.” Act No. 959, 2010 La. Acts 3330. *See, e.g.*, Louisiana Safety Ass’n of Timbermen, 998 So. 2d 817 (La. Ct. App. 2008); *Morris v. E. Baton Rouge Par. Sch. Bd.*, 826 So. 2d 46 (La. Ct. App. 2002); *Taylor v. Sauls*, 772 So. 2d 686 (La. Ct. App. 2000); *Senac v. Sandefer*, 418 So. 2d 543 (La. 1982).

58. *See, e.g., Morris*, 826 So. 2d at 51.

59. *Backhus v. Transit Cas. Co.*, 549 So. 2d 283, 291 (La. 1989). Further, the court in *Hopkins v. Howard* stated that “the guaranty fund acts by including provisions such as net worth exclusions effectively have abandoned the mandate in the model acts and in the various [Insurance Guaranty Acts] statutes to interpret the guaranty fund statutes broadly to protect the insured.” 930 So. 2d 999, 1009 (La. Ct. App. 2017) (internal quotations omitted).

60. Insurers authorized to do business in Louisiana are assessed the funds available to LIGA. LA. REV. STAT. § 22:2058(A)(3). LIGA receives no government funding. *Id.* § 22:2056(B).

61. *Id.* § 22:2052.

62. *Id.* §§ 22:2055(B)(6), 22:2058(A)(1), 22:2058(A)(6), 22:2061.1, 22:2062.

of other insurance requirements, subrogation limitations, liability caps, and high net worth exclusions, in addition to other provisions in LIGA Law. As aptly noted in “The ABC’s of LIGA,”<sup>63</sup> a close examination of LIGA’s original purpose and its mechanism for accomplishing that purpose reveals a point fundamental to LIGA Law—the mechanism is not extensive enough to fully accomplish the stated purpose. Regardless of the new language of Louisiana Revised Statutes section 22:2052, the many limitations have always meant that when an insurer becomes insolvent, someone is usually going to lose money.<sup>64</sup> LIGA is intended to minimize that loss, in certain circumstances, while maintaining its status as the source of last resort.<sup>65</sup>

As to all covered types of insurance, LIGA is a benefit, but one that might be limited or not received by some. The primary concern to the practitioner is establishing whether the claimant’s claim is a covered claim as defined in Louisiana Revised Statutes section 22:2055(6).<sup>66</sup>

#### IV. SUING AND DEFENDING LIGA

##### A. Requirements for a Suit Against LIGA

When a party has a claim against an insurer that has been declared insolvent, he often has many questions regarding the proper procedure for making a claim against LIGA. If suit has already been filed against the insurer, he may, but is not required to, substitute LIGA for the insolvent insurer in the litigation. If suit has not been filed, he should name LIGA as the proper party defendant in the suit instead of the insolvent insurer.

##### 1. LIGA Only Pays Covered Claims

As the practitioner will quickly learn, much of LIGA litigation centers upon what does or does not represent a “covered claim.” A factual scenario may well support a valid claim against an insolvent insurer’s liquidator, but not a “covered claim” that LIGA may be obligated to pay.

Pursuant to Louisiana Revised Statutes section 22:2055(6)(a), a “covered claim” means the following:

- (a) An unpaid claim, including one for unearned premiums that

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63. See Guglielmo & Balhoff, *supra* note 1.

64. *Hopkins*, 930 So. 2d at 1002 (citing Guglielmo & Balhoff, *supra* note 1, at 1762).

65. See *Fishman v. Auto. Cas. Ins. Co.*, 643 So. 2d 805, 807 (La. Ct. App. 1994). See also *Jackson v. Cockerham*, 931 So. 2d 1138, 1141 (La. Ct. App. 2006); *Freeman v. Philan*, 859 So. 2d 821, 825 (La. Ct. App. 2003).

66. See LA. REV. STAT. § 22:2055(6)(a)(i)–(iii).

arises out of and is within the coverage and not in excess of the applicable limits of an insurance policy to which this Part applies issued by an insurer, if such insurer becomes an insolvent insurer after September 1, 1970, and the policy was issued by such insurer and any of the following:

(i) A claimant or insured is a resident of this state at the time of the insured event, provided that, for entities, the residence of a claimant or insured is the state in which its principal place of business is located at the time of the insured event.

(ii) The claimant is a self-insurer, including an arrangement or trust formed under R.S. 23:1191 *et seq.*, and is principally domiciled in this state at the time of the insured event.

(iii) The claim is a first party claim for damage to property with a permanent location in this state.<sup>67</sup>

Claims for penalties, sanctions, or interest are not covered claims.<sup>68</sup> A claim made on a post-insolvency incident more than 30 days after the determination of insolvency is not a covered claim.<sup>69</sup> A claim made after the deadline for claims against the liquidator in a liquidation order, or more than five years after a declaration of insolvency, is not a covered claim.<sup>70</sup> Claims for any amount due to any insurer, reinsurer, insurance pool or underwriting association, health maintenance organization or plan, preferred provider organization or plan, hospital plan corporation, professional health services corporation, employee retirement fund, Medicaid, or the self-insured portion due to any self-insurer as subrogation recoveries, reinsurance recoveries, contribution, indemnification or otherwise is not a covered claim.<sup>71</sup> A claim excluded due to the high net worth of an insured as defined in LIGA Law, discussed in Part V.B, is not a covered claim.<sup>72</sup> A return of premium under a retrospective rating plan is not a covered claim.<sup>73</sup> Neither is a first-party claim by an insured that is

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67. *Id.* § 22:2055(6)(a).

68. *Id.* § 22:2055(6)(b)(viii).

69. *Id.* § 22:2058(A)(1)(a)(i).

70. *Id.* § 22:2058(A)(1)(c)(i). This deadline is often referred to as the “bar date,” meaning the date after which all claims are barred or prescribed.

71. *Id.* § 22:2055(6)(b)(iii). *See* La. Safety Ass’n of Timbermen v. La. Ins. Guar. Ass’n, 17 So. 3d 350, 360 (La. 2009); *see also* Hadley v. Centex, 990 So. 2d 68, 74 (La. Ct. App. 2008).

72. LA. REV. STAT. § 22:2055(6)(b)(iv); *see also id.* § 22:2061.1 (discussing the “net worth exclusion”). *See also id.* § 22:2055(6)(b)(iv). High net worth entities run the risk of liability for penalties, expenses, and attorney fees if they do not cooperate with LIGA’s net worth investigation efforts to establish whether their claims are “covered claims.” *Id.* § 22:2061.1(B)(2).

73. *Id.* § 22:2055(6)(b)(ii).

an affiliate of the insolvent insurer.<sup>74</sup> Recovery sought by or on behalf of an attorney or other provider of goods and services retained by the insolvent insurer or the insured before the insolvency<sup>75</sup> or by any insured or claimant<sup>76</sup> in connection with a claim against LIGA does not qualify as a covered claim.

Self-insurers qualify as covered insurers.<sup>77</sup> Any claim by a group self-insurance fund, however, for an amount within the self-insured retention, deductible, co-pay, or other obligation of the group self-insurance fund as stated in the policy, or the first \$300,000 of a claim, whichever is greater, does not qualify as a covered claim.<sup>78</sup> Generally, any claim outside the scope of coverage under LIGA Law or that exceeds the powers and duties of LIGA is not a covered claim.<sup>79</sup>

## 2. LIGA Pays Claims Only on Certain Insurance Policies

As noted in the statutory definition of a “covered claim” under Louisiana Revised Statutes section 22:2055(6)(a), LIGA pays only unpaid claims arising from and within the coverage of an “insurance policy” to which LIGA Law applies. “Insurance policy” is defined in LIGA Law as

an insurance contract as defined in R.S. 22:864, and shall not include an agreement in which 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 an affiliate of the other.<sup>80</sup>

Often companies will self-insure a significant portion of their risk for financial reasons, carrying an umbrella or excess policy for catastrophic loss. Properly run self-insurance funds typically use policy forms that

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74. *Id.* § 22:2055(6)(b)(v).

75. *Id.* § 22:2055(6)(b)(vi). Such costs would be pre-insolvency costs that must be recovered in the liquidation proceeding. *Id.*

76. *Id.* § 22:2055(6)(b)(vii). Accordingly, costs associated with experts, attorneys, or otherwise are not covered by LIGA. *Id.*

77. *Id.* § 22:2055(15).

78. *Id.* § 22:2055(6)(b)(xi).

79. *Id.* § 22:2055(6)(b)(x).

80. *Id.* § 22:2055(12). LIGA Law was amended in 1989 to provide the definition of “insurance policy” and to statutorily overrule cases holding that cut-through endorsements constituted direct insurance and was covered by LIGA. Act No. 688, 1989 La. Acts 1957 (“Insurance policy” . . . shall not include . . . cut-through endorsements, reinsurance agreements . . . and other such agreements.”). *E.g.*, *Wilkerson v. Jimco, Inc.*, 499 So. 2d 1245 (La. Ct. App. 1986), *writ denied*, 537 So. 2d 1162 (La. 1989).

provide “following form” coverage for the excess policies. Before 2010, LIGA treated self-insurers as insurers and their excess policies as reinsurance by a reinsurer.<sup>81</sup> The 2010 amendments to LIGA Law<sup>82</sup> added to the definition of “covered claims” claims by self-insurers,<sup>83</sup> including group self-insurance funds principally domiciled in Louisiana, subject to the significant limitations of Louisiana Revised Statutes section 22:2055(6)(b)(iii) and 22:2055(6)(b)(xi).<sup>84</sup> The self-insurance policy forms are not, however, “policies” under LIGA Law. Subject to the referenced limitation, the excess policy of a group self-insurance fund is now considered to be an insurance policy for purposes of LIGA Law, as opposed to reinsurance.<sup>85</sup>

In the Louisiana Supreme Court case *Louisiana Safety Ass’n of Timbermen v. Louisiana Insurance Guaranty Ass’n*,<sup>86</sup> the LSAT, a worker’s compensation self-insurance fund, sought a declaratory judgment against LIGA holding that LIGA was responsible for its losses as a result of the insolvency of its reinsurer.<sup>87</sup> LIGA had denied the claim on the basis that the LSAT was an “insurer,” and therefore its claim was not a “covered claim.”<sup>88</sup> The LSAT’s request was denied, and the Louisiana Supreme Court ruled that LIGA was not liable for the reimbursement of claims covered by LSAT’s failed reinsurer.<sup>89</sup> Several self-insurance funds attempted to have LIGA Law amended in 2010 as a result of *Timbermen*,<sup>90</sup> but it is not clear to what extent they succeeded. The insolvency of a self-insurance fund

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81. See *La. Safety Ass’n of Timbermen v. La. Ins. Guar. Ass’n*, 17 So. 3d 350, 355 (La. 2009) (“From the outset, LIGA contends the Fund’s claims against it are disallowed because the Fund is an insurer . . . and, at least for LIGA purposes, it was as an insurer that the Fund obtained a policy of reinsurance from [the insolvent insurer].”).

82. See generally Act No. 959, 2010 La. Acts 3330.

83. The term “self-insurer” is specifically defined in Louisiana Revised Statutes section 22:2055(15) as “a person that covers its liabilities through a qualified individual or group self-insurance program created for the specific purpose of covering liabilities typically covered by insurance. A group self-insurance fund formed under Louisiana Revised Statutes section 23:1191 and the following shall not be deemed to be an insurer with respect to this Chapter.” LA. REV. STAT. §22:2055(15).

84. Excluded from the definition of a “covered claim” is “the self-insured portion due any self-insurer as subrogation recoveries, reinsurance recoveries, contribution, indemnification or otherwise” and claims “by a group self-insurance fund for the amount within the self-insured retention, deductible, co-pay, or any other obligation or liability of the group self-insurance fund, stated in the policy of the insolvent insurer, or for the first [\$300,000] of each claim, whichever is greater.” *Id.* § 22:2055(6)(b)(iii), (xi).

85. *Id.* § 22:2055(6)(a)(ii).

86. *La. Safety Ass’n of Timbermen v. La. Ins. Guar. Ass’n*, 17 So. 3d 350 (La. 2009).

87. *Id.*

88. *Id.* at 352.

89. *Id.* at 359.

90. See generally *id.*

itself does not implicate LIGA coverage, as both LIGA Law's definition of "self-insurer"<sup>91</sup> and the statute authorizing the creation and use of such funds<sup>92</sup> provide that such funds are neither "insurers" nor otherwise subject to LIGA Law. Now, however, section 22:2055(6)(a)(ii) expressly provides that a self-insurer's claim can be a "covered claim."<sup>93</sup> Nevertheless, this revision does not change the holding of *Timbermen*, which was that LIGA was not liable for the self-insurance fund's claims against an insolvent *reinsurer*, to which the fund had ceded a portion of the risk it had undertaken, as opposed to an *excess insurer*, which would provide coverage above the fund's coverage limit.<sup>94</sup> Accordingly, the fund's claim against the insolvent reinsurer was not a "covered claim" within the contemplation of former Louisiana Revised Statutes section 22:1379(3)(b), the provisions of which are currently found in somewhat broadened form at section 22:2055(6)(b). The current provision, however, arguably does not change the *Timbermen* case's characterization of the Timbermen's self-insurance fund as an "insurer" based on its purchase of reinsurance rather than excess insurance.

Although LIGA Law applies to many kinds of direct insurance, it does not apply to life, annuity, health, or accident or disability insurance; mortgage guaranty, financial guaranty, or other forms of insurance offering protection against investment risks; fidelity or surety bonds, bail bond contracts, or any other bonding obligations; credit insurance, vendor's single interest insurance, collateral protection insurance, or any similar insurance that protects the interest of a creditor arising out of credit-debtor transaction; warranty insurance or service contracts providing for the repair, replacement, or service for the operational structure failure of goods or property due to a defect in materials, workmanship, or normal wear and tear or insurance providing for the liability incurred by the issuer of agreements or service contracts that provide such benefits; title insurance; ocean marine insurance;<sup>95</sup> any transaction or combination of transactions between a person, including affiliates of such person, and an insurer, including affiliates of such insurer, that involve the transfer of investment or credit risk unaccompanied by

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91. See LA. REV. STAT. § 22:2055(15) (2017) (providing the statutory definition of "self-insurer").

92. *Id.* § 23:1195(A)(1).

93. *Id.* § 22:2055(6)(a)(ii).

94. *Timbermen*, 17 So. 3d at 359–60.

95. See LA. REV. STAT. § 22:2055(13) (defining "ocean marine insurance"); see also *Blair v. Sealift, Inc.*, 91 F.3d 755 (5th Cir. 1996); *Tidelands Ltd. v. La. Guar. Ins. Ass'n*, 645 So. 2d 1240 (La. Ct. App. 1994) (explaining the history of how courts interpreted LIGA's exclusion of "ocean marine insurance" before and after the 1989 amendments to LIGA Law).



transfer of insurance risk;<sup>96</sup> any insurance provided by or guaranteed by a government; and property residual value insurance.<sup>97</sup>

The kind and coverage of insurance afforded by any policy is 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.<sup>98</sup> Insurance policies with the types of coverage specifically excluded from LIGA Law in Louisiana Revised Statutes section 22:2053(A) are not insurance policies “to which [LIGA Law] applies,”<sup>99</sup> and claims under these policies are not covered claims for which LIGA could be responsible.<sup>100</sup>

### 3. LIGA Only Pays Claims Against Certain Insurers

LIGA provides coverage only if the applicable insurance policy is issued by an “insolvent insurer.”<sup>101</sup> To be considered an insolvent insurer, the insurer must have become insolvent after September 1, 1970.<sup>102</sup> Further, LIGA Law requires that an insolvent insurer meet both of the following criteria:

- (a) [The insurer is] licensed and authorized to transact insurance in this state, either at the time the policy was issued or when the insured event occurred.
- (b) [The insurer is one] [a]gainst whom an order of liquidation with the 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.<sup>103</sup>

As stated in the law, the insolvent insurer must be licensed and authorized.<sup>104</sup> Notably, some insurers conduct permissible business in Louisiana but are not “authorized” and thus not protected by LIGA—for example, surplus

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96. See also LA. REV. STAT. § 22:2055(12) (excluding “cut-through endorsements, reinsurance endorsements, facultative reinsurance agreements, treaty reinsurance agreements, and other such agreements, when either insurer is an affiliate of the other” from the definition of “insurance policy”).

97. *Id.* § 22:2053(A).

98. *Id.* § 22:2053(B).

99. *Id.* § 22:2055(6)(a).

100. *Id.* §§ 22.2053(A), 22:2055(6)(a).

101. *Id.* § 22:2055(6)(a).

102. *Id.*

103. *Id.* § 22:2055(7).

104. *Id.* § 22:2055(7)(a).

lines insurers.<sup>105</sup> A practitioner must determine whether the insurer is an “insolvent insurer” pursuant to LIGA Law before filing suit against LIGA.<sup>106</sup> If suit is filed against LIGA on the basis that an insurer is an “insolvent insurer,” but the insurer does not meet the statutory definition thereof, the plaintiff and the plaintiff’s attorney can be liable for the reasonable expenses incurred, including attorney fees, by LIGA as a result of the suit.<sup>107</sup> To recover such expenses, LIGA must provide written notification to the plaintiff or the attorney that the insurer is not an “insolvent insurer” under LIGA Law and the plaintiff or attorney must file to dismiss the suit with prejudice and at the plaintiff’s cost within 60 days of receipt of the written notification by LIGA.<sup>108</sup>

#### *4. There Must Be an Insured Event*

For LIGA coverage to apply, the claim must arise from and be within the coverage terms and limits of the policy.<sup>109</sup> Further, the insured event giving rise to a covered claim must have occurred before the determination of insolvency or after, but only if the insured event occurred before the earlier of the following events: the expiration of 30 days since the declaration of insolvency;<sup>110</sup> the expiration of the policy; or the replacement or cancellation of the policy by the insured within 30 days of the insolvency.<sup>111</sup>

#### *B. Time for Making a Claim and Filing Suit*

The applicable time limitations for making a claim against an insolvent insurer and LIGA, in addition to the applicable prescriptive period for filing suit, are important for a practitioner to consider. An order of liquidation will establish a final date for filing claims against the liquidator or receiver of an insolvent insurer.<sup>112</sup> The prudent practitioner should file all applicable claims in the liquidation proceedings of the

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105. *Id.* §§ 22:431–22:446; *see also id.* § 22:46(2), (7.1), (17). The status of an insurer can be verified through the Louisiana Department of Insurance.

106. A practitioner must also remain aware of applicable prescriptive periods. A lawsuit must be timely filed against an insured or insurer even if suit cannot yet be filed against LIGA because the insurer has not yet been declared insolvent.

107. LA. REV. STAT. § 22:2058(C)(3).

108. *Id.*

109. *Id.* § 22:2055(6)(a).

110. Typically, an order of insolvency declares that existing policies of an insolvent insurer are cancelled 30 days after the entry of the order of insolvency.

111. *Id.* § 22:2058(A)(1)(a).

112. *Id.* §§ 22:2040(A), 22:2041(A), 22:2058(1)(c)(i).

insolvent insurer.<sup>113</sup> Additionally, LIGA Law requires claims to be filed with LIGA within the deadline set by the domiciliary court for the filing of claims against the liquidator or receiver or at least before the expiration of five years after the date of the order of liquidation, whichever occurs first.<sup>114</sup> However, LIGA is deemed notified of a claim if the claim is filed with the liquidator.<sup>115</sup>

The same laws of prescription apply to LIGA as apply to any other party in Louisiana. “Prescription runs against all persons unless exception is established by legislation.”<sup>116</sup> Likewise, the general laws of suspension and interruption of prescription apply to LIGA. Interruption or suspension occurs with respect to LIGA only if it would occur with respect to the other relevant solidary obligors, namely the tortfeasor and the insolvent insurer.<sup>117</sup> The prudent practitioner will file his lawsuit against the tortfeasor and insurer within the applicable prescriptive period. Although rehabilitation orders may contain stays of litigation in pending proceedings, such stay orders do not operate to suspend or interrupt prescription of a suit not yet filed.<sup>118</sup>

Additionally, after an insurer is declared insolvent, Louisiana Revised Statutes section 22:2068(A) provides for a six-month stay of all proceedings pending in Louisiana in which the insolvent insurer is a party or is obligated to defend a party. This provision does not provide for suspension of prescription of potential, unfiled suits against an insolvent insurer, nor does it prohibit the filing of suit against LIGA or the insolvent

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113. Importantly, claims filed either with the liquidator or with LIGA for protection provided in the insolvent insurer’s policy for incurred, but not reported, losses are not considered covered claims. *Id.* § 22:2055(6)(b)(ix).

114. *Id.* § 22:2058(A)(1)(c)(i). A liquidation order may set a claims deadline of less than one year.

115. *Id.* § 22:2058(A)(1)(c)(iii). LIGA also requires that a claim form be completed by a claimant seeking to recover from LIGA; the form elicits basic information necessary for LIGA to evaluate a claim. The LIGA claim form can be found at <http://app.laiga.org/iupdates/LIGA%20Claim%20Form.pdf> [<https://perma.cc/W2T3-GPXE>].

116. LA. CIV. CODE art. 3467 (2017).

117. *See Rivard v. Petroleum Transp. Co., Inc.*, 663 So. 2d 755, 758 (La. Ct. App. 1995) (allowing Louisiana Code of Civil Procedure article 1153 to permit plaintiffs’ amended petition to relate back to the date the original petition was filed, thus avoiding the prescriptive bar to the amended claim). *See also* *Maumus v. Leblanc*, 733 So. 2d 1268, 1270 (La. Ct. App. 1999) (determining that the amended petition adding LIGA and the insured driver to the lawsuit filed against an alleged tortfeasor two years later was untimely. Prescription was not interrupted because, at trial, the original tortfeasor sued was found not to be at fault, and no solidary obligation existed between the alleged tortfeasor and the insured driver).

118. LA. REV. STAT. §§ 22:2040(A), 22:2041(A), 22:2058(1)(c)(i).

insurer.<sup>119</sup> On the contrary, the statute merely provides for a stay of all pending causes of action, preserving the rights of the insured of an insolvent insurer and LIGA in such action after an insurer is declared insolvent.<sup>120</sup>

### C. Subject-Matter Jurisdiction

Because LIGA is an unincorporated, private legal entity,<sup>121</sup> it is subject to the procedural and jurisdictional rules applicable to unincorporated associations. The power given to LIGA to sue “includes the power and right to intervene as a party before any court in this state that has jurisdiction over an insolvent insurer.”<sup>122</sup> However, LIGA “shall not be deemed the insolvent insurer for the purpose of conferring jurisdiction.”<sup>123</sup>

For suits filed in federal court, the jurisdictional requirements—diversity jurisdiction and federal-question jurisdiction—apply to LIGA. With the exception of corporations, the citizenship of an artificial entity for purposes of diversity is the citizenship of each of the entity’s constituent members.<sup>124</sup> LIGA, therefore, would be deemed a citizen of all states in which its member insurers are citizens, which would make it difficult to achieve federal diversity jurisdiction.<sup>125</sup> If a federal cause of action is asserted, federal-question jurisdiction could apply to LIGA. Importantly, the 2010 amendments added Louisiana Revised Statutes section 22:2058(C)(1), which provides that any action against LIGA relating to or arising out of LIGA Law must be brought in a Louisiana court and that Louisiana courts “shall have exclusive jurisdiction” over all such actions.<sup>126</sup>

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119. *White v. Haydel*, 593 So. 2d 421, 422 (La. Ct. App. 1991); *see also Castaneda v. La. Ins. Guar. Ass’n*, 657 So. 2d 338, 340 (La. Ct. App. 1995) (holding that the doctrine of *contra non valentum* did not apply to a suit filed within seven months of the lifting of a stay order issued by the liquidating court, but over one year after the date of the automobile accident). However, suits filed after an insurer is declared insolvent should also be stayed by virtue of the fact that they are now pending. The justification for the stay is the same whether the suit was pending before the insolvency or became pending after the insolvency, that is, “to permit proper defense by the association of all causes of action.” LA. REV. STAT. § 22:2068(A).

120. LA. REV. STAT. § 22:2068(A).

121. *Id.* § 22:2056(A).

122. *Id.* § 22:2058(B)(3).

123. *Id.* § 22:2058(A)(2).

124. *Carden v. Arkoma Assocs.*, 494 U.S. 185, 195–96 (1990).

125. *See Temple Drilling Co. v. La. Ins. Guar. Ass’n*, 946 F.2d 390, 393–94 (5th Cir. 1991).

126. Act. No. 959, 2010 La. Acts 3330 (codified as amended at LA. REV. STAT. § 22:2058(C)(1)).

#### D. Venue

Louisiana Revised Statutes section 22:2058(C)(2) provides that “[t]he domicile of the association for purposes of venue is East Baton Rouge Parish. The association may, at its option, waive exceptions to venue for specific actions.” LIGA can, and usually must, intervene in pending actions involving the insolvent insurer or insured throughout the state.

#### E. The Petition

If the claimant has not filed suit against the tortfeasor–insured, his insurer, or both at the time of the insolvency order, LIGA may be named in the original petition as a defendant.<sup>127</sup> Suit must be brought against LIGA within the applicable prescriptive period.<sup>128</sup> If the claimant has already filed suit, he or she may seek leave of court to file a supplemental petition pursuant to Louisiana Code of Civil Procedure article 1151 adding LIGA as a defendant.<sup>129</sup> The pleading should be a supplemental petition rather than an amended petition, as the cause of action against LIGA will have arisen after the filing of the original petition.<sup>130</sup>

Although it occurs with relative frequency, the plaintiff should not attempt to bring LIGA into the lawsuit by a motion to substitute for the insolvent insurer.<sup>131</sup> Substitution of parties is governed by Louisiana Code of Civil Procedure articles 801 through 807, which provide for the substitution of legal successors of the parties to a suit.<sup>132</sup> The legal successor of the insolvent insurer is the liquidator, not LIGA.<sup>133</sup> The courts

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127. LA. REV. STAT. §§ 22:2058(B)(3), 22:2058(C). Typically, once an insurer is declared insolvent, the domiciliary court will prohibit suits from being filed or brought against the insolvent insurer and will prohibit any pending actions from being maintained against the insolvent insurer. As stated, LIGA is not the legal successor of an insolvent insurer; rather, the insurer in liquidation or receivership is its legal successor. *See* discussion *supra* Part II.B. To the extent that a claimant has a covered claim against LIGA, LIGA is the proper party from which to seek relief. *Tyburczy v. Graham*, No. 91-1978, 1994 WL 150724, at \*3 (E.D. La. Mar. 30, 1994).

128. *See* *Castaneda v. La. Ins. Guar. Ass’n*, 657 So. 2d 338 (La. Ct. App. 1995); *White v. Haydel*, 593 So. 2d 421 (La. Ct. App. 1991).

129. LA. CODE CIV. PROC. art. 1155 (2017).

130. *Id.*

131. *See, e.g.,* *Thibodeau v. Mayor & Councilmen of Morgan City*, 640 So. 2d 830, 830 n.1 (La. Ct. App. 1994).

132. LA. CODE CIV. PROC. arts. 801–807.

133. In fact, the Louisiana Code of Civil Procedure specifically identifies the proper party defendant for actions against insurers in rehabilitation or liquidation:

The receiver appointed by a court of this state for a domestic insurer is the proper defendant in an action to enforce an obligation of the insurer, or of its receiver.

have been lenient in not penalizing plaintiffs for incorrectly characterizing a supplemental petition as an amended petition or by granting a requested substitution. However, such an imprecise formulation of pleadings is not only technically wrong, but it also reveals a fundamental misconception of LIGA and its purpose. As LIGA is not the legal successor of the insurer, it does not, no matter how many times the term is used by the courts, “step into the shoes” of the insurer for all legal purposes.

For the same reason, LIGA is not properly sued under the Direct Action Statute.<sup>134</sup> It is, however, amenable to direct suit in its own right. LIGA has an independent obligation created by statute to pay covered claims that coincides to some extent with the obligations of the insolvent insurer and the tortfeasor.<sup>135</sup>

The petition naming LIGA, whether 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.<sup>136</sup> In other words, the petition should allege the following: first, that the tortfeasor was insured by an “insolvent insurer”;<sup>137</sup> second, that a court of competent jurisdiction has entered an order declaring the insurer insolvent; and third, that LIGA has a statutory obligation to the

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Except as otherwise provided by law, the ancillary receiver appointed by a court of this state for a foreign or alien insurer is the proper defendant in an action to enforce an obligation of the insurer, or of its domiciliary or ancillary receiver.

*Id.* art. 741. Louisiana Code of Civil Procedure article 741 must be read in conjunction with article 693, which provides in pertinent part, “As used herein and in Article 741, ‘receiver’ includes liquidator, rehabilitator, and conservator.” *Id.* art. 693.

134. *But see* Rideau v. Edwards, 985 So. 2d 311, 314 (La. Ct. App. 2008), wherein the court stated,

When the Commonwealth of Pennsylvania declared Reliance insolvent, the Rideaus substituted LIGA as a defendant pursuant to the Insurance Guaranty Association Act. LIGA’s liability as guarantor of the Reliance policy is the same as Reliance’s liability would be had it not been declared insolvent. Likewise, LIGA has all the rights, duties, and obligations of Reliance under the terms of the policy.

*Id.* (internal citations omitted). LIGA is not a guarantor of an insolvent insurer or its policy and never has been. The court compounded its misunderstanding of LIGA Law by holding that, because the policy allowed the Rideaus to recover from LIGA, the Direct Action Statute also allowed the Rideaus to substitute LIGA as a party. *Id.* at 315.

135. A covered claim, by definition, includes claims within the coverage and not in excess of the applicable limits of an insurance policy issued by an insolvent insurer, but LIGA Law specifically excludes certain claims otherwise covered under the insurance policy. *See, e.g.*, LA. REV. STAT. §§ 22:2055(6), 22:2058, 22:2061.1 (2017).

136. LA. CODE CIV. PROC. art. 891.

137. *See* LA. REV. STAT. § 22:2055(7).

plaintiff under LIGA Law. Typically, a few sentences outlining the facts necessary to establish a cause of action against LIGA is sufficient to satisfy this requirement.

#### *F. Service*

LIGA may be served through its Executive Director or its Claims Manager.<sup>138</sup> Information concerning the names and office address of the Executive Director and Claims Manager may be obtained by contacting LIGA's office in Baton Rouge or visiting the LIGA website at [www.laiga.org](http://www.laiga.org). Additionally, LIGA's designated agent for service of process is on file with the Louisiana Department of Insurance.<sup>139</sup>

#### *G. The Answer*

Because LIGA is an independent entity, it is not bound by the insolvent insurer's answer. However, LIGA is entitled to raise any and all defenses available to the insolvent insurer and can also raise additional defenses available to it under LIGA Law.<sup>140</sup> Even if LIGA has been properly sued or added as a defendant in a pending action, pursuant to Louisiana Revised Statutes section 22:2068(A),

all proceedings in which the insolvent insurer is a party or is obligated to defend a party in any court in this state shall be stayed for six months and such additional time as may be determined by the court from the date the insolvency is determined to permit proper defense by the association of all pending causes of action.<sup>141</sup>

Hence, LIGA may delay its answer for up to six months, depending upon the status of the insolvency, and may admit or deny any allegations of the petition regardless of how the insolvent insurer previously answered.

Louisiana Code of Civil Procedure article 1005 requires that the answer affirmatively set forth all matters constituting an affirmative

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138. *Contact Us*, LA. INS. GUARANTY ASS'N, <http://www.laiga.org/contactus/> [<https://perma.cc/2NES-HPHC>] (last visited Apr. 3, 2017) (listing the current Claims Manager under "Agents for Service of Process").

139. *Active Company Search*, LA. DEP'T OF INS., <https://www.ldi.la.gov/onlineservices/ActiveCompanySearch/Default.aspx> [<https://perma.cc/S66R-K3MX>] (select "Name" from the "Search Type" menu, type "Louisiana Insurance Guaranty Association" in the "Name" field, select "Search," select "Louisiana Insurance Guaranty Association" from the search results, select "Service of Process").

140. *See, e.g.*, LA. REV. STAT. §§ 22:2055(6), 22:2062, 22:2058(A)(1)(d), 22:2058(A)(1)(b)(iii), 22:2058(A)(1)(e)(i).

141. *Id.* § 22:2068(A).

defense.<sup>142</sup> An affirmative defense is one that “raises a 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 the plaintiff’s demands on its merits.”<sup>143</sup> For example, an exclusion in an insurance policy must be asserted as an affirmative defense.<sup>144</sup> Although one court has held that the LIGA statutory limit of liability need not be pled as an affirmative defense to be effective and intimated that none of the statutory defenses need be pled to be available to LIGA,<sup>145</sup> prudent LIGA counsel should avoid the potential for any problems by specifically pleading all of the applicable LIGA defenses in the answer and generally pleading “all defenses available under the LIGA Law, La. R.S. 22:2051, *et seq.*”

#### *H. Discovery*

The discovery rules detailed in Louisiana Code of Civil Procedure articles 1420 through 1474 are applicable to LIGA in the same manner as they are to any other party.<sup>146</sup> Although LIGA is a separate entity from the insolvent insurer, insureds and claimants seeking relief under LIGA Law “shall cooperate with [LIGA] to the same extent as such person would have been required to cooperate with the insolvent insurer.”<sup>147</sup> Further, LIGA may enforce the terms and obligations of the insolvent insurer’s policy against an uncooperative insured.<sup>148</sup>

Although each case’s discovery requests will vary according to the facts, one of the main focuses of the LIGA defense attorney should be determining whether there are any other policies of insurance that might provide coverage for the accident at issue.<sup>149</sup> Because there are numerous ways in which other insurance may be available to a claimant, defense counsel will need to tailor specific interrogatories to each case. For example, a passenger in a vehicle may have her own automobile insurance providing her with uninsured or underinsured motorist (“UM”) coverage, or she may reside in the same household with a person who has UM coverage, which coverage could be available to the claimant. Asking the question broadly may not produce a response that includes the type of

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142. LA. CODE CIV. PROC. art. 1005 (2017).

143. *Keller v. Amedeo*, 512 So. 2d 385, 387 (La. 1987) (quoting *Webster v. Rushing*, 316 So. 2d 111 (La. 1975)).

144. *Wimberly v. McCoy Tree Surgery Co.*, 766 So. 2d 729, 737 (La. Ct. App. 2000).

145. *Knowles v. Barnes*, 671 So. 2d 1123, 1126 (La. Ct. App. 1996); *see also Brewster v. Santos*, 646 So. 2d 486, 488 (La. Ct. App. 1994).

146. LA. CODE CIV. PROC. arts. 1420–1470.

147. LA. REV. STAT. § 22:2061(A) (2017).

148. *Id.*

149. *See id.* § 22:2062(1).



insurance described above. However, such insurance could be applicable to the claim, and LIGA would need this information to evaluate its rights and obligations to the claimant.<sup>150</sup> The claimant's counsel should always request production of the insolvent insurer's policy to determine the limits of LIGA's liability and whether there exists any applicable exclusion to coverage.

### *I. The Trial*

Louisiana Revised Statutes section 13:5105 restricts the right to a jury trial in suits against the state, its agencies, and its political subdivisions.<sup>151</sup> However, LIGA is not a state agency.<sup>152</sup> Therefore, either the plaintiff or LIGA may request a jury trial, assuming the legal prerequisites are satisfied.<sup>153</sup> An insured under an insolvent insurer's policy will have a contractual duty to cooperate with the insurer in pre-trial defense efforts and trial, and the same duty is owed to LIGA.<sup>154</sup> As with pre-trial matters, such as discovery, LIGA is entitled to call witnesses, assert all defenses, and generally conduct trial just as any other party would do.

### *J. Execution of Judgments Against LIGA*

Louisiana Revised Statutes section 22:2068(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.<sup>155</sup>

Provided that the statutory requirements for notice are met, LIGA, as any private entity, would be subject to the procedural rules regarding execution of judgments found in Louisiana Code of Civil Procedure articles 2251 through 2254 and 2291 through 2299.<sup>156</sup>

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150. *Id.* § 22:2061(A).

151. *Id.* § 13:5105.

152. *Id.* § 22:2056(B).

153. LA. CODE CIV. PROC. art. 1732 (2017).

154. LA. REV. STAT. § 22:2061(A).

155. *Id.* § 22:2068(C).

156. *See* LA. CODE CIV. PROC. arts. 2251–2254, 2291–2299.

V. LIGA'S DEFENSES AND STATUTORY LIMITS TO  
LIGA'S OBLIGATION ON CLAIMS

“A statutory enactment that ‘serves to minimize the unnecessary depletion of LIGA’s funds’ has been held to ‘constitute a legitimate exercise of the state’s police power for the purpose of protecting the state’s citizens from economic harm.’”<sup>157</sup> LIGA Law provides limitations on LIGA’s obligations that serve to protect LIGA’s funds and ensure its solvency, some of which have been discussed above.<sup>158</sup>

*A. The Statutory Cap and the LIGA Deductible*

With the exception of “covered claims” involving workers’ compensation, the amount LIGA could be obligated to pay on a covered claim is limited.<sup>159</sup> A covered claim for the recovery of an unearned premium is limited to \$10,000 per policy.<sup>160</sup> All claims, other than workers’ compensation, are statutorily limited to \$500,000 per claim, with a maximum limit of \$500,000 per accident or occurrence.<sup>161</sup> These claims are also subject to what is commonly referred to as the “LIGA deductible.”<sup>162</sup> Pursuant to Louisiana Revised Statutes section 22:2058(A)(1)(b)(iii), LIGA is obligated to pay a claimant only an “amount which is in excess of one hundred dollars.”<sup>163</sup> Notwithstanding the per-claim limit, LIGA is never be obligated to pay an amount in excess of the obligation of the insolvent insurer pursuant to the terms of the policy, which could have a lower limit of liability or a deductible.<sup>164</sup> Further, the applicable limit per claim and per accident or occurrence “shall be exhaustive of the entire liability of [LIGA] under [LIGA Law], however arising, without regard to the nature of or

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157. *La. Workers’ Comp. Corp. v. La. Ins. Guar. Ass’n*, 20 So. 3d 1047, 1052 (La. Ct. App. 2009) (citing *Segura v. Frank*, 630 So. 2d 714, 732 (La. 1994)); *La. Ins. Guar. Ass’n v. Gegenheimer*, 636 So. 2d 209, 210 (La. 1994).

158. For example, LIGA pays only “covered claims” as defined in Louisiana Revised Statutes section 22:2055(6) on certain insurance policies issued by certain insurers falling within the coverage of such policy. Further, LIGA does not pay claims involving high net worth insureds.

159. LA. REV. STAT. § 22:2058(A)(1)(b)(i).

160. *Id.* § 22:2058(A)(1)(b)(ii).

161. *Id.* § 22:2058(A)(1)(b)(iii).

162. *Breaux v. Richardson*, 671 So. 2d 1140 (La. Ct. App. 1996); *Johnson v. Midland Ins. Co.*, 541 So. 2d 1010 (La. Ct. App. 1989); *Harris v. Lee*, 377 So. 2d 1352 (La. Ct. App. 1979), *writ granted*, 380 So. 2d 1211 (La. 1980), *aff’d in part, amended in part*, 387 So. 2d 1145 (La. 1980).

163. LA. REV. STAT. § 22:2058(A)(1)(b)(iii).

164. *Id.* § 22:2058(A)(1)(c)(i).

basis for that liability, except court costs incurred subsequent to the date of insolvency.”<sup>165</sup>

LIGA Law expressly defines “accident or occurrence” as follows:

[o]ne proximate, uninterrupted, or continuing cause which results in all of the injuries or damages even though several discrete items of damage result, and even though multiple claims and claimants may arise as a result of one such accident or occurrence. A series of claims arising from the same accident or occurrence shall be treated as due to that one accident or occurrence and thus shall be subject to the aggregate liability limit established herein.<sup>166</sup>

In *Cole v. Celotex Corp.*,<sup>167</sup> the Louisiana Supreme Court recognized that, where *multiple insurance policies* issued by the same insurer were triggered over multiple years of exposure, the policies could be horizontally stacked for multiple aggregate exposures.<sup>168</sup> However, the Court relied, in part, upon general principles of insurance law, noting,

[I]t has been suggested that the 1966 revisions to the standard policy language defining an occurrence as “injurious exposure to conditions which results in injury” were intended to mean that “[i]n some exposure types of cases involving cumulative injuries, it is possible that more than one policy will afford coverage. Under these circumstances, each policy will afford coverage to the bodily injury or property damage, which occurs during the policy period.”<sup>169</sup>

Thus, for “long-tail” exposure cases, each year of exposure could be considered a separate policy “occurrence” for the purpose of triggering coverage under the terms of that particular insurance policy.<sup>170</sup>

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165. *Id.* § 22:2058(A)(1)(e)(i).

166. *Id.* § 22:2058(A)(e)(ii).

167. 599 So. 2d 1058 (La. 1992).

168. *Id.* at 1080.

169. *Id.* (first citing Comment, *Liability Insurance For Insidious Disease: Who Picks Up the Tab?*, 48 *FORDHAM L. REV.* 657, 684 n.152 (1980), and then citing GARY Z. NOTHSTEIN, *TOXIC TORTS: LITIGATION OF HAZARDOUS SUBSTANCE CASES* 635 (1984) (noting that “the intended trigger of coverage is *bodily injury* occurring during the policy period and that once the policy is triggered, the carrier would be required to pay *all sums* which the insured may become *legally obligated* to pay as a result of the underlying toxic tort claim”).

170. *Arceneaux v. Amstar Corp.*, 200 So. 3d 277 (La. 2016) (holding that the duty to defend in long latency disease cases may be pro-rated between the insured and the various insurers when occurrence-based policies provide coverage for only a portion of the time during which exposure occurred, as opposed to pro-rating defense costs among only the insured).

The same horizontal-stacking reasoning does not apply to LIGA, which is neither an insurer nor the legal successor of an insurer.<sup>171</sup> Judicial interpretations of insurance policy language, which generally apply an expansive view in favor of affording coverage, do not apply to the interpretation of LIGA Law.<sup>172</sup> LIGA Law cap or claim limitation is reasonably “viewed as a measure designed to ensure the continued availability of the protection LIGA affords claimants and policyholders who otherwise would suffer financial losses because of the insolvency of an insurer.”<sup>173</sup> Moreover, the definition of “occurrence” under commercial general liability insurance policies differs from the statutory definition of “accident or occurrence” under LIGA Law.<sup>174</sup> Unlike the standard commercial general liability policy definition of “occurrence,” the LIGA definition is used to set an aggregate cap for all underlying claims and is clearly not limited to a particular “policy period.”<sup>175</sup> Although Louisiana courts have yet to rule on the issue, it seems clear that the cap should apply to the entire claim, rather than to each policy period, under the wording of the statute.<sup>176</sup> The LIGA cap is a true “per claim” aggregate cap, regardless of the number of policy periods implicated by the claim.<sup>177</sup>

#### *B. High Net Worth Insureds*

Expressly excluded from the definition of “covered claim” are claims involving high net worth insureds.<sup>178</sup> Before the 2010 amendments to LIGA Law, the provisions applicable to high net worth insureds were found within the definition of covered claim.<sup>179</sup> The 2010 amendments created section 22:2061.1 dealing exclusively with high net worth insureds and expanded the prior provisions.<sup>180</sup> A “high net worth insured” is defined in Louisiana Revised Statutes section 22:2061.1(A) as follows:

[A]ny policyholder or named insured, other than any state or local governmental agency or subdivision thereof, whose net worth

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171. *Tyburczy v. Graham*, No. 91-1978, 1994 WL 150724, at \*3 (E.D. La. Mar. 30, 1994); *Bowens v. Gen. Motors Corp.*, 608 So. 2d 999, 1005 (La. 1992).

172. LA. REV. STAT. § 22:2054 (2017).

173. *Segura v. Frank*, 630 So. 2d 714, 731–32 (La. 1994) (discussing the application of Act No. 237 of 1992 requiring claimants to exhaust any available UM coverage before proceeding against LIGA).

174. LA. REV. STAT. § 22:2058(A)(1)(e)(ii).

175. *Id.* § 22:2058(A)(1)(b)(iii), (d), (e)(i).

176. *Id.*

177. *Id.*

178. *Id.* § 22:2055(6)(b)(iv).

179. LA. REV. STAT. § 22:2055(3)(F) (2009) (repealed by Act No. 949, 2010 La Acts 3330).

180. LA. REV. STAT. § 22:2061.1(A) (2017).

exceeds twenty-five million dollars on December thirty-first of the year prior to the year in which the insurer becomes an insolvent insurer if an insured's net worth on that date shall be deemed to include the aggregate net worth of the insured and all of its subsidiaries and affiliates as calculated on a consolidated basis. The consolidated net worth of the insured and all of its affiliates shall be calculated on the basis of their fair market values. The members of a group self-insurance fund formed pursuant to R.S. 23:1191 et seq. shall not be deemed to be affiliates of the fund, and shall not be included in the determination of the net worth of the fund. For the purposes of this Section, a group self-insurance fund, and each individual member of the fund upon whose behalf a claim is submitted, shall be deemed to be policyholders or named insureds of any policy of insurance issued to the fund.<sup>181</sup>

LIGA Law specifically provides that LIGA "shall not be obligated to pay any claims or provide a defense to any claims asserted for coverage under a policy when the insured is a high net worth insured."<sup>182</sup> Furthermore, "[LIGA] shall have the right to recover from a high net worth insured all costs incurred and all amounts paid by [LIGA] to or on the behalf of such insured, whether for indemnity, defense or otherwise, including attorney fees, administrative costs, court costs, settlement, or other defense costs."<sup>183</sup> Additionally, LIGA is not obligated to pay any claim of a person or entity whose net worth is greater than that allowed by the Insurance Guaranty Association Law of his state of residence when he has been denied coverage there on that basis.<sup>184</sup>

The rationalization and need for the net worth exclusion was succinctly put by the court in *Hopkins v. Howard*<sup>185</sup>:

Over the years, a large amount of LIGA's funds were expended on behalf of large commercial insureds. Net worth exclusions were enacted in an effort to redirect available resources away from entities with high net worth in favor of individuals who would not otherwise be covered and for whom it was intended. Thus, the legislature determined that insureds with a net worth over 25 million dollars were in a better position to bear the loss of an

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181. *Id.*

182. *Id.* § 22:2061.1(B)(1).

183. *Id.* § 22:2061.1(B)(2).

184. *Id.* § 22:2061.1(C).

185. 930 So. 2d 999 (La. Ct. App. 2006).

insolvent insurer [than was an insured<sup>186</sup>] worth less money for whom LIGA funds would be available. Thus, “[t]he theory behind the exclusion is that because insurance guaranty fund resources are limited, parties with assets over a certain amount should not be able to make claims against the fund because ‘they are in a position to better bear the inevitable loss themselves.’” Simply stated, the “net worth provision results in leaving more resources available for those entities less able to absorb an uncovered loss.” Indeed, a net worth exclusion has been noted to be similar to the general cap on the fund’s liability in that both serve to preserve the limited resources of the fund.<sup>187</sup>

Additionally, “[a] corollary reason for the exclusion is the belief ‘that an insured with that much net worth ought to buy insurance intelligently enough so that it would not be insured by an unsound insurer.’”<sup>188</sup>

Louisiana Revised Statutes section 22:2061.1(D) requires LIGA to establish reasonable procedures, subject to the approval of the Commissioner of Insurance, for requesting financial information from insureds on a confidential basis for the purpose of applying the net worth exclusion, provided that the financial information may be shared with any other insurance guaranty association and the liquidator of the insolvent insurer, on the same confidential basis. The “reasonable procedure” established by LIGA and the Commissioner is the mailing of detailed correspondence to a suspected high net worth insured setting forth the law and consequences of failure to respond and a request for the financial information required by law.<sup>189</sup> The requested information consists of a net worth affidavit that the person or entity is requested to execute, attesting to whether it and its affiliates had an aggregate net worth of \$25 million or more at the end of the year preceding the insolvency of the insurer.<sup>190</sup> LIGA is entitled to provisionally deem an insured to be a high net worth insured if the insured does not cooperate with the production of a net worth affidavit for the purposes of denying a claim under Louisiana Revised

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186. The court’s opinion in *Hopkins* omitted this portion of the quoted language from the *Johnson Controls*. La. Ins. Guar. Ass’n v. Johnson Controls, Inc., 905 So. 2d 444, 450 (La. Ct. App. 2005).

187. *Hopkins*, 930 So. 2d at 1006.

188. *Id.* at 1006 n.13 (quoting *Harold Ives Trucking Co. v. Pickens*, 139 S.W.3d 471 (Ark. 2003)).

189. LA. REV. STAT. § 22:2061.1.

190. *Id.* § 22:2061.1(A). “Affiliate” is defined as “a person who directly or indirectly, through one or more intermediaries, controls, is controlled by, or is under common control with another person.” *Id.* § 22:2055(1). The term “affiliate” has been interpreted as being intended by the legislature to have a broad meaning, including a parent company. *Hopkins*, 930 So. 2d at 1008.

Statutes section 22:2061.1(B).<sup>191</sup> Whether the insured meets the definition of a “high net worth insured” and is therefore excluded from LIGA coverage on that basis or the insured fails to cooperate with LIGA’s requests for information regarding its net worth and is excluded from coverage on the basis of its lack of cooperation, LIGA is not obligated to pay the claimant.<sup>192</sup>

Additionally, Louisiana Revised Statutes section 22:2061.1(E) provides,

In any lawsuit contesting the applicability of this Section where the insured has refused to provide financial information under the procedure established pursuant to Subsection D of this Section, the insured shall bear the burden of proof concerning its net worth at the relevant time. If the insured fails to prove that its net worth at the relevant time was less than the applicable amount, the court shall award the association its full costs, expenses and reasonable attorney fees in contesting the claim.<sup>193</sup>

Accordingly, it is incumbent upon the insured to timely provide the requested information concerning its net worth to LIGA.

### *C. Exhaustion and Credits*

Formerly known as the “Nonduplication of Recovery” section,<sup>194</sup> section 2062 of LIGA Law still remains one of its most litigated areas. Section 2062 requires that LIGA be, essentially, the entity of last resort.<sup>195</sup> First, the statute requires that, before seeking relief from LIGA, a person must seek and exhaust all coverage provided by any other policy “if the claim under the other policy arises from the same facts, injury or loss that gave rise to the covered claim against [LIGA].”<sup>196</sup> The requirement to exhaust other coverage includes the right to a defense under the other policy.<sup>197</sup> Further, the statute broadly defines “a claim under an insurance policy” to encompass claims against “a health maintenance organization, a hospital plan corporation, a professional health service corporation or disability insurance policy, liability coverage, uninsured or underinsured motorist liability coverage, hospitalization, coverage under self-insurance certificates, preferred provider organization, or similar plan, and any and

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191. LA. REV. STAT. § 22:2061.1(D).

192. *Id.* §§ 22:2061.1(B)(1), 22:2061.1(D).

193. *Id.* § 22:2061.1(E).

194. LA. REV. STAT. § 22:2062 (2009) (amended by Act No. 959, 2010 La. Acts. 3330, 3354).

195. LA. REV. STAT. § 22:2062 (2017).

196. *Id.* § 22:2062(A)(1).

197. *Id.*

all other medical expense coverage,” any amounts payable by or on behalf of self-insurers, and any claims against persons prohibited from recovering against LIGA, but the list is not meant to be exhaustive.<sup>198</sup>

Prior versions of the statute allowed LIGA a credit for the limits of other available insurance;<sup>199</sup> however, courts differed on the effect of the application of the credit. The Louisiana Legislature re-wrote former Louisiana Revised Statutes section 22:1386—formerly section 22:2062—in 2010 to confirm that the credit due to LIGA is a “dollar one” credit against the maximum LIGA could be obligated to pay and to specifically overrule the Louisiana Supreme Court’s holdings in *Southern Silica of Louisiana, Inc. v. Louisiana Insurance Guaranty Association*<sup>200</sup> and *Hall v. Zen-Noh Grain Corp.*<sup>201</sup>

Before 2010, some courts interpreted section 2062—formerly section 1386—to allow a credit or “set off” of other insurance amounts payable to the claimant against LIGA’s maximum exposure to the claimant,<sup>202</sup> which could eliminate LIGA’s potential obligation to the claimant.<sup>203</sup> However, other courts disagreed and held that the “dollar-for-dollar credit LIGA receives is in the form of having to pay only the remaining amount which would fully compensate the victim.”<sup>204</sup> The court in *Blackwell v. Williams* noted that if the remaining amount of a claimant’s damages—after the

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198. *Id.* § 22:2062(A)(5).

199. LA. REV. STAT. § 22:2062 (2009) (amended by Act No. 959, 2010 La. Acts 3330).

200. 979 So. 2d 460, 468 (La. 2008) (“Thus, the . . . procedure for asserting a claim against LIGA: the claimant must ‘exhaust’ the other solvent insurers’ pro rata shares of his or her damages before asserting a claim against LIGA.”).

201. 787 So. 2d 280, 282 (La. 2001) (“A review of Zen-Noh’s third-party demands in these matters reveals that the applicable policy periods are outside of the . . . time frame for which Zen-Noh seeks coverage from LIGA. Nothing in these pleadings contradicts Zen-Noh’s allegation that it does not have a claim against an insurer under any provision in any insurance policy in effect during the [applicable] period.”).

202. Although LIGA’s covered claim limit is \$500,000 pursuant to Louisiana Revised Statutes section 22:2058(A)(b)(iii), LIGA can never be obligated to pay an amount in excess of the obligation of the insolvent insurer pursuant to the applicable policy. LA. REV. STAT. § 22:2058(A)(1)(c)(i).

203. *See, e.g.,* Gurley v. Fisher, 598 So. 2d 1199 (La. Ct. App. 1992).

204. *Blackwell v. Williams*, 618 So. 2d 477, 479 (La. Ct. App. 1993). The court in *Blackwell* examined the language of Louisiana Revised Statutes section 22:1386 before and after the 1992 revisions, which altered the language in from “[a]ny amounts payable by such other insurance shall act as a dollar-for-dollar credit against any liability of the association” to “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.” *Id.* at 478, 480.



application of the other insurance—was less than the policy limits of the insolvent insurer, LIGA would only be liable for the remaining amount.<sup>205</sup>

Acts 2010, No. 959, Section 1 amended former Section 2062(A) as follows:

A. (1) 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~~ all coverage provided by any other policy, including the right to a defense under the other policy, if the claim under the other policy arises from the same facts, injury or loss that gave rise to the covered claim against the association. The requirement to exhaust shall apply without regard to whether or not the other insurance policy is a policy written by a member insurer. However, no person shall be required to exhaust any right under the policy of an insolvent insurer or any right under a life insurance policy or annuity. Such other policies of insurance shall include but shall not be limited to liability coverage, uninsured or underinsured motorist liability coverage, or both, hospitalization, coverage under self insurance certificates, coverage under a health maintenance organization or plan, preferred provider organization or plan, or similar plan, and any and all other medical expense coverage. All entities that are prohibited from recovering against the association, as specified in R.S. 22:2055(3)(b), shall also be considered insurers for purposes of this Subsection. 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.

(2) Any amount payable on a covered claim under this Part shall be reduced by the full applicable limits stated in the other insurance policy, or by the amount of the recovery under the other insurance policy as provided herein. The association and the insured shall receive a full credit for the stated limits, unless the claimant demonstrates that the claimant used reasonable efforts to exhaust all coverage and limits applicable under the other insurance policy. If the claimant demonstrates that the claimant used reasonable efforts to exhaust all coverage and limits applicable under the other insurance policy, or if there are no applicable stated limits under the policy, the association and the

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205. *Blackwell*, 618 So.2d at 479.

insured shall receive a full credit for the total recovery.

(a) The credit shall be deducted from the lesser of [the following<sup>206</sup>]:

(i) The association's covered claim limit;

(ii) The amount of the judgment or settlement of the claim; [~~or~~<sup>207</sup>]

(iii) The policy limits of the policy of the insolvent insurer.

(b) In no case, however, shall the obligation of the association exceed the covered claim limit of this Part.

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(5) For purposes of this Section, a claim under an insurance policy other than a life insurance policy or annuity shall include, but is not limited to:

(a) A claim against a health maintenance organization, a hospital plan corporation, a professional health service corporation or disability insurance policy, liability coverage, uninsured or underinsured motorist liability coverage, hospitalization, coverage under self-insurance certificates, preferred provider organization, or similar plan, and any and all other medical expense coverage[~~; and~~.<sup>208</sup>]

(b) Any amount payable by or on behalf of a self-insurer.

(c) Any claim against persons prohibited from recovering against the association as specified in this Part.<sup>209</sup>

Therefore, it is now clear that, despite past interpretations, all other available insurance must first be exhausted before LIGA's liability is implicated; LIGA and the person insured by the insolvent insurer's policy are entitled to a credit for the full applicable limits stated in the other insurance policy;<sup>210</sup> and the credit shall be taken from the lesser of LIGA's covered claim limit, the amount of the judgment or settlement of the claim, and the policy limits of the insolvent insurer's policy, which is the maximum amount LIGA could be obligated to pay on a covered claim.

The Fourth Circuit Court of Appeal applied and analyzed the post-2010 LIGA Law in *Brown v. Norman Fuegero*.<sup>211</sup> The court determined

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206. This revision was made by Act No. 271, 2012 La. Acts 1775–76.

207. *Id.*

208. *Id.*

209. Act No. 959, 2010 La. Acts 3354–56. Words that are struck through are deletions from prior law; words in boldface type and underscored are additions.

210. However, “[i]f the claimant demonstrates that the claimant used reasonable efforts to exhaust all coverage and limits applicable under the other insurance policy, or if there are no applicable stated limits under the policy, the association and the insured shall receive a full credit for the total recovery.” LA. REV. STAT. § 22:2062(A)(2) (2017).

211. 165 So. 3d 1059 (La. Ct. App. 2015).

that the *Blackwell*<sup>212</sup> case was not applicable, as it was decided “long before the current version of La. R.S. 22:2062 was enacted, and the current version is substantially different from the version in effect when [*Blackwell* was] decided.”<sup>213</sup> The court held that, pursuant to section 2062, LIGA and the insured were entitled to a credit for other insurance against the policy limits of the insolvent insurer’s policy—LIGA’s maximum obligation in that case—which extinguished any liability against LIGA for the plaintiff’s claim.<sup>214</sup> In *Brown*, the tortfeasor’s insurer issued a policy with liability limits of \$15,000, but the insurer was declared insolvent.<sup>215</sup> The plaintiff sought recovery from the insured and LIGA.<sup>216</sup> The plaintiff was a Medicaid beneficiary and had received Medicaid benefits in excess of \$20,000.<sup>217</sup> Although the plaintiff argued that Medicaid benefits were not “other insurance” as contemplated by section 2062, the Fourth Circuit disagreed and held that Medicaid is “other medical expense coverage” as defined in section 22:2062(A)(5)(a) of LIGA Law.<sup>218</sup> Accordingly, the court applied the credit from Medicaid’s payments totaling over \$20,000<sup>219</sup> to LIGA’s maximum obligation of \$15,000 and determined that LIGA’s obligation was extinguished.<sup>220</sup>

Consider the following scenarios applying pre-2010 law under *Blackwell* and post-2010 LIGA Law:

1. Plaintiff has \$10,000 in damages. Insurer A has primary liability coverage of \$15,000. Insurer B has secondary liability coverage of \$15,000. Insurer A is declared insolvent. Application of pre-2010 law and post-2010 law produce the same result: Insurer B pays \$10,000 in total satisfaction of Plaintiff’s damages, and LIGA pays nothing.
2. Plaintiff has \$25,000 in damages. Insurer A has primary liability coverage of \$15,000. Insurer B has secondary liability coverage of \$15,000. Insurer A is declared insolvent. Under the pre-2010 law and *Blackwell* analysis, Insurer B pays \$15,000 to Plaintiff with \$10,000 in unpaid damages, and LIGA pays \$9,900 (\$10,000

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212. 618 So. 2d 477 (La. Ct. App. 1993).

213. *Brown*, 165 So. 3d at 1064.

214. *Id.* at 1065.

215. *Id.* at 1060.

216. *Id.*

217. *Id.*

218. *Id.* at 1063.

219. The court held that “[b]ecause there are no applicable stated limits under Medicaid, LIGA and the insured are entitled to receive full credit for the total recovery of other insurance exhausted, including medical expenses paid by Medicaid,” pursuant to Louisiana Revised Statutes section 22:2062(A)(2). *Id.* at 1065.

220. *Id.*

less the \$100 LIGA deductible). Under the post-2010 LIGA Law, Insurer B pays \$15,000, and LIGA pays nothing. LIGA and the insured are entitled to a credit in the amount of the policy limits of the other insurance, here Insurer B with limits of \$15,000, which credit is taken from the maximum amount LIGA could have been obligated to pay on this claim, here the \$15,000 policy limit of Insurer A, reducing LIGA's exposure to \$0.<sup>221</sup>

3. Plaintiff has \$100,000 in damages. Insurer A has primary liability coverage of \$50,000. Insurer B has secondary liability coverage of \$25,000. Insurer A is declared insolvent. Under the pre-2010 analysis, Insurer B pays \$25,000. With \$75,000 in unpaid damages, LIGA pays \$49,900 (\$50,000 less the \$100 LIGA deductible). Applying the current law, Insurer B pays its policy limits of \$25,000, and LIGA and the insured receive a credit against its maximum obligation on this claim, here the policy limits of the insolvent insurer of \$50,000. After applying the \$25,000 credit to the \$50,000 policy limit, there remains \$25,000. LIGA pays \$24,900 (\$25,000 less the \$100 LIGA deductible).<sup>222</sup>

The 2010 amendments also addressed the 2008 Louisiana Supreme Court decision in *Southern Silica of Louisiana*.<sup>223</sup> *Southern Silica* was a declaratory judgment action brought by two insureds of an insolvent insurer seeking a judgment declaring that LIGA was required to defend and indemnify them for long-latency disease claims concerning years for which the insolvent insurer issued the only liability policies.<sup>224</sup> LIGA argued that the LIGA Law applicable in 2004, which applied this suit,<sup>225</sup> required Southern Silica's other solvent insurers to first absorb the insolvent insurer's share of defense and indemnity to the full extent of their policies before Southern Silica could claim defense and indemnity from LIGA.<sup>226</sup> At the time, Louisiana Revised Statutes section 22:1386(A) provided as follows:

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

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221. The same results would occur in this scenario if Insurer A had secondary coverage and Insurer B had primary liability coverage.

222. *Id.*

223. 979 So. 2d 460 (La. 2008).

224. *Id.* at 462.

225. *Id.*

226. *Id.* at 463.

include but shall not be limited to liability coverage, uninsured or underinsured motorist liability coverage, or both, hospitalization, coverage under self-insurance certificates, coverage under a health maintenance organization or plan, preferred provider organization or plan, or similar plan, and any and all other medical expense coverage. All entities that are prohibited from recovering against the association, as specified in R.S. 22:1379(3)(b), shall also be considered insurers for purposes of this Subsection. 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 . . . *In the case of a claimant alleging personal injury or death caused by exposure to asbestos fibers or other claim resulting from exposure to, release of, or contamination from any environmental pollutant or contaminant, such claimant must first exhaust any and all other insurance available to the insured for said claim for any policy period for which insurance is available before recovering from the association, even if an insolvent insurer provided the only coverage for one or more policy periods of the alleged exposure.*<sup>227</sup>

The italicized portion had been recently enacted and made effective in August 2004.<sup>228</sup> Based on the language added in 2004, LIGA argued that all other insurance available for any policy period must be first exhausted before recovering from LIGA, regardless of whether the insolvent insurer had provided the only coverage for a certain period of the alleged exposure to asbestos.<sup>229</sup> LIGA asserted that Southern Silica's solvent insurers must absorb the insolvent insurer's (Reliance's) share of the defense and indemnity to the extent of their policies before Southern Silica could claim a defense and indemnity from LIGA.<sup>230</sup>

The Supreme Court analyzed the first sentence of former section 1386(A)<sup>231</sup> and drew attention to the credit portion of the statute, providing that "[a]ny 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."<sup>232</sup> Further, the Court drew attention to the credit portion of former section 1386(A), which provided that "any amount payable by such other insurance shall act as a credit against the damages of the claimant, and the

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227. *Id.* at 463 (quoting LA. REV. STAT. § 22:1386(A) (2004)) (emphasis added).

228. Act No. 108, 2004 La. Acts 1071.

229. *Id.*

230. *Id.*

231. LA. REV. STAT. § 22:1386(A) (2004).

232. *Southern Silica*, 979 So. 2d at 463.

association shall not be liable for such portion of the damages of the claimant.”<sup>233</sup> Then, the Court revisited its holding in *Zen-Noh*.<sup>234</sup>

In *Zen-Noh*, a grain corporation was being sued for damages in a toxic tort action for actions beginning in 1975 through the beginning of the suit.<sup>235</sup> Zen-Noh brought a third-party action against LIGA due to the insolvency of its primary and excess insurer from 1982 through 1984.<sup>236</sup> LIGA filed an exception of no cause of action, which the trial court granted, based on the fact that Zen-Noh was required to exhaust all other available coverage before seeking recovery from LIGA.<sup>237</sup> The Supreme Court reversed the lower court’s ruling and held that Zen-Noh established that it had no claim against an insurer under any provision in an insurance policy in effect at the time of the insolvent policies.<sup>238</sup> The other insurers and policies did not provide coverage for the time periods in which the insolvent insurer provided coverage.<sup>239</sup> The *Southern Silica* Court noted the fact that Zen-Noh “did not have a claim against an insurer . . . under any provision in any insurance policy in effect during the time period of the insolvent policies.”<sup>240</sup> Accordingly, the Supreme Court in *Southern Silica* held that coverage for exposure outside the policy period could not be demanded of solvent insurers on an exposure theory and pro-rata share allocation.<sup>241</sup> In rejecting LIGA’s argument that the 2004 amendment to section 1386(A) legislatively overruled *Zen-Noh*, the Court stated:

There is nothing in the added provision that would require “filling the gap” left by the insolvency of Reliance. The operative wording is: In the case of a claimant alleging personal injury or death caused by exposure to . . . or contamination from any environmental pollutant or contaminant, such claimant must *first exhaust any and all other insurance available to the insured for said claim* for any policy period for which insurance is available before recovering from the association, even if an insolvent insurer provided the only coverage for one or more policy periods of the alleged exposure.<sup>242</sup>

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233. *Id.*

234. *Id.* at 467 (citing *Hall v. Zen-Noh Grain Corp.*, 787 So. 2d 280 (La. 2001)).

235. *Hall v. Zen-Noh Grain Corp.*, 787 So. 2d 280, 280–81 (La. 2001).

236. *Id.* at 281.

237. *Id.*

238. *Id.* at 282.

239. *Id.*

240. *S. Silica of La., Inc. v. La. Ins. Guar. Ass’n*, 979 So. 2d 460, 467–68 (La. 2008).

241. *Id.* at 468–69.

242. *Id.* at 468 (citing LA. REV. STAT. § 22:1386(A) (2004)).

The Court ruled that the new provisions merely provided a procedure for asserting a claim against LIGA.<sup>243</sup> The 2004 amendment, as written, provided that the claimant must first collect other insurance, “available to the insured before the claimant can collect from LIGA.”<sup>244</sup> The Supreme Court interpreted the word “available” in the statute to mean “the pro rata share of each insurer for each year that insurer was on the risk.”<sup>245</sup> Essentially, the Supreme Court held that LIGA would be required to pay its pro-rata share for the years during which Reliance provided coverage under the terms of its policy. However, the Court did agree that the solvent carriers would be required to pay their own pro-rata shares before LIGA would be responsible for its share.<sup>246</sup> In other words, LIGA had read the statutory language in the context of its relative priority, meaning that all other insurance had to be exhausted first before LIGA had any liability at all. The Supreme Court, on the other hand, read the statute to address the issue of timing, rather than priority, so that LIGA was responsible for its share, but all other insurance coverage had to be collected from other insurers before it could be collected from LIGA.<sup>247</sup>

The 2010 revisions to section 2062(A)(6) overrule *Southern Silica* and *Zen-Noh*:

In the case of a claimant alleging personal injury or death caused by exposure to asbestos fibers or other claim resulting from exposure to, release of, or contamination from any environmental pollutant or contaminant, ~~such claimant must first exhaust~~ any and all other insurance available to the insured for ~~[said the~~<sup>248</sup> claim for ~~any~~ all policy periods for which insurance is available must first be exhausted before recovering from the association, even if an insolvent insurer provided the only coverage for one or more policy periods of the alleged exposure. Only after exhaustion of all solvent insurer's total policy aggregate limits for any alleged exposure periods will the association be obligated to provide a defense and indemnification within the obligations of this Part, subject to a credit for the total amount thereof, whether or not the total amount has actually been paid or recovered.<sup>249</sup>

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243. *Id.*

244. *Id.*

245. *Id.*

246. *Id.*

247. *Id.*

248. Act No. 271, 2012 La. Acts 1776.

249. Act No. 959, 2010 La. Acts 3356. Words that are struck through are deletions from prior law; words in boldface type and underscored are additions.

In section 2062(A)(6), the language indicating that the “claimant must first exhaust” was removed and additional language was added.<sup>250</sup> Now, the statute is clear in stating that in cases where a claimant alleges damages from long-latency diseases or environmental contaminants, all other insurance available to the insured for all policy periods must first be exhausted before recovering from LIGA.<sup>251</sup> Although the legislature kept the term “available” in the statute, it made clear with the addition of the last sentence that *all* solvent insurers’ total policy aggregate limits for *any* alleged exposure periods, not just the exposure period implicated by the insolvent insurer’s policy, must be exhausted prior to LIGA having an obligation to provide a defense or indemnification.<sup>252</sup> Further, the added sentence makes it clear that LIGA is entitled to receive a credit for the total amounts of defense and indemnification provided by the other policies regardless of whether the limits of the other policies have been paid or recovered, which is a significant difference between the current law and the law applied in the *Southern Silica* case.

The exhaustion and credit provisions in LIGA Law are important for the practitioner to be aware of and understand. If there is other insurance implicated on a particular claim, a claimant must first exhaust that insurance before proceeding against LIGA. Payment cannot be demanded from LIGA until it is shown that no other insurance exists or that the insurance has been exhausted. If there is other insurance, then the credit provisions are triggered and the question is whether LIGA has any remaining obligation on the claim. These provisions serve to protect LIGA’s funds from depletion and to ensure that LIGA can continue to effectuate its legislative purpose.

## VI. LIGA LAW AND THE INSURED

As discussed above, some litigants and courts have been confused regarding LIGA’s role, casting LIGA in the position of “stepping into the shoes” of the insolvent insurer. It is important to remember that LIGA assumes some, but not all, of the insolvent insurer’s obligations. “To the extent of its obligation on the covered claims, [LIGA shall] have all rights, duties, and obligations of the insolvent insurer as if the insurer had not become insolvent . . . .”<sup>253</sup> However, the duties owed directly to an insured by LIGA are less than those owed by the insolvent insurer, which received a premium for its exposure.

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250. *Id.*

251. LA. REV. STAT. § 22:2062(A)(6) (2017).

252. *Id.*

253. LA. REV. STAT. § 22:2058(A)(2).



LIGA owes a duty to defend the insured pursuant to the terms of the applicable policy.<sup>254</sup> Importantly, pursuant to Louisiana Revised Statutes section 22:2058(A)(1)(d), LIGA shall “[h]ave no obligation to defend an insured upon the association’s payment or tender of an amount equal to the lesser of the association’s covered claim obligation limit or the applicable policy limit, or written notice of extinguishment of the obligation due to application of a credit.”<sup>255</sup> Hence, LIGA has a duty to defend the insured, but it is discharged from this duty when it tenders the limits of its liability or is absolved of liability due to the application of a credit. For example, if LIGA is defending an insured under a policy with \$50,000 limits, and it is determined through discovery that the claimant has \$50,000 of UM coverage, LIGA has the right to terminate its defense of the insured through written notice of extinguishment of the obligation to the insured.

The requirement that the insured exhaust all other coverage also applies to LIGA’s potential defense obligation. Louisiana Revised Statutes section 22:2062(A)(1) provides, in pertinent part,

Any person having a claim against an insurer shall be required first to exhaust all coverage provided by any other policy, including the right to a defense under the other policy, if the claim under the other policy arises from the same facts, injury, or loss that gave rise to the covered claim against the association. The requirement to exhaust shall apply without regard to whether or not the other insurance policy is a policy written by a member insurer. However, no person shall be required to exhaust any right under the policy of an insolvent insurer or any right under a life insurance policy or annuity.<sup>256</sup>

Further, Louisiana Revised Statutes section 22:2062(A)(3) provides,

If the insured or claimant has a contractual right to claim defense under an insurance policy issued by another insurer, including a self-insurer, the insured or claimant shall first exhaust all rights to indemnity and defense under such policy before claiming indemnity or defense from the association, or the insured of the insolvent insurer. The association’s duty to defend under the policy issued by the insolvent insurer is subject to any other

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254. Importantly, LIGA is not an insurance company and is not subject to penalty provisions in the Insurance Code, such as section 22:1892. *See also id.* §§ 22:2067, 22:2055(6)(b)(i).

255. *Id.* § 22:2058(A)(1)(d).

256. *Id.* § 22:2062(A)(1).

limitation on the duty to defend in this Part. This duty is secondary to the obligation of any other insurer or self-insurer to provide a defense, whose duty to the claimant is primary.<sup>257</sup>

LIGA Law also provides additional protection to insureds. As defined for purposes of LIGA Law, a “covered claim” does not include the following:

Any amount due any reinsurer, insurer, insurance pool or underwriting association, health maintenance organization or plan, preferred provider organization or plan, hospital plan corporation, professional health service corporation, employee retirement fund Medicaid, or the self-insured portion due any self-insurer . . . as subrogation recoveries, reinsurance recoveries, contribution, indemnification or otherwise. *In addition, any person insured under a policy issued by an insolvent insurer shall likewise not be liable for any subrogation claim or any contractual indemnity claim asserted by . . . [the same] or any other person with an interest in the claim, other than to the extent the claim exceeds the association's obligation limitations.*<sup>258</sup>

Similar to how LIGA is not obligated to pay claims for subrogation, neither is the insured,<sup>259</sup> up to LIGA's maximum obligation on the claim.<sup>260</sup> Thus, if Smith is injured by Jones, and Jones's insurer is declared insolvent, then Smith can recover from his own UM carrier. The UM carrier will have no right of reimbursement against LIGA. The UM carrier's right of reimbursement against Jones will be limited to the portion, if any, of the UM payment made by the UM carrier that is greater than LIGA's obligation limitations on the claim.<sup>261</sup> The protection afforded insureds by this provision is illustrated by the following examples:

1. Smith has \$15,000 in damages. Insurer A has liability coverage

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257. *Id.* § 22:2062(A)(3).

258. *Id.* § 22:2055(6)(b)(iii) (emphasis added).

259. Early cases reasoned that LIGA Law's purpose was not served by exposing a policyholder to a “dollar one” subrogation claim by a UM carrier. Hence, UM coverage was not contemplated by the Act as other receivable insurance. The legislature amended Louisiana Revised Statutes section 22:1379(A)(3) in 1990 to protect policyholders from “dollar one” subrogation claims. *See Segura v. Rey*, 630 So. 2d at 720–21 (discussing *Hickerson v. Protective Nat'l Ins. Co. v. Smith*, 383 So. 2d 377 (La. 1980) and the effect of Act Nos. 105 and 130 of 1990).

260. *See Horton v. State Farm Ins. Co.*, 641 So. 2d 993, 997 (La. Ct. App. 1994).

261. LIGA's “obligation limitations” are interpreted by the authors to mean the lesser of LIGA's covered claim limit—\$500,000—or the amount LIGA could be obligated to pay on the covered claim (e.g., policy limits).

of \$25,000. Insurer B has UM coverage of \$25,000. Insurer A is declared insolvent. LIGA pays nothing because of the application of the credit. Insurer B pays \$15,000 and has no subrogation rights against Jones or LIGA.

2. Smith has \$25,000 in damages. Insurer A has primary liability coverage of \$15,000. Insurer B has UM coverage of \$25,000. Insurer A is declared insolvent. LIGA pays nothing because of the application of the credit. Insurer B pays \$25,000. Insurer B may subrogate against Jones for \$10,000 (Jones had total liability protection of \$15,000 and would have been ultimately responsible for \$10,000 if Insurer A had been solvent), but may not subrogate against LIGA.

3. Smith has \$50,000 in damages. Insurer A has primary liability coverage of \$50,000. Insurer B has UM coverage of \$25,000. Insurer A is declared insolvent. Insurer B pays \$25,000. LIGA pays \$24,900.<sup>262</sup> Insurer B may not subrogate against Jones, as he carried enough insurance to cover the damages, and cannot subrogate against LIGA.

4. Smith has \$1,000,000 in damages. Insurer A has primary liability coverage of \$1,000,000. Insurer B has coverage of \$250,000. Insurer A is declared insolvent. Insurer B pays \$250,000. LIGA pays \$249,900.<sup>263</sup> Insurer B may not subrogate against Jones as LIGA's obligation limitations for this claim was at most \$500,000, which amount is more than the amount paid by Insurer B.

## VII. SETTLEMENTS AND JUDGMENTS

The insolvent insurer is bound by a settlement or judgment entered before insolvency but not yet paid, which constitutes a claim against the estate of the liquidation. However, is LIGA liable to the claimant for pre-insolvency settlements or judgments? To fully answer that question, a review of case law, prior law, and the current law is helpful.

With respect to judgments entered based on the default of the insolvent insured or its failure to defend an insured, LIGA has the right to have such judgments set aside and to be permitted to defend the claims on the

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262. After applying the \$25,000 in credit from the UM coverage to LIGA's maximum obligation, \$25,000 remains. LIGA then pays the \$25,000 less the LIGA deductible of \$100.

263. After applying the \$250,000 credit to LIGA's maximum potential obligation of \$500,000—covered claim limit—\$250,000 remains. LIGA then pays the \$250,000 less the LIGA deductible of \$100.

merits.<sup>264</sup> The court in *Duplantis v. McGuire*<sup>265</sup> held that LIGA was entitled to have a default judgment against the insolvent insurer and its insured set aside pursuant to Louisiana Revised Statutes section 13:1392(B) regardless of whether the insurer was declared insolvent before or after the entering of the default judgment.<sup>266</sup> The court stated:

On appeal, LIGA contends that it is entitled to set aside the default judgment in order to protect its rights. It claims that the law allows it the opportunity to defend against claims on their merits. Otherwise, an insurer in financial straits might fail to properly handle lawsuits filed against it, resulting in default judgments being rendered. LIGA asserts that La. R.S. 22:1392 B was enacted to protect the association from being obligated to respond on behalf of claimants and/or insureds as a result of default judgments.<sup>267</sup>

The language of former Louisiana Revised Statutes section 22:1392(B), renumbered as 22:2068(B), is substantially similar to current Louisiana Revised Statutes section 22:2058(A)(6)(b)<sup>268</sup> and the reasoning in *Duplantis* remains relevant under the current law.<sup>269</sup>

With respect to unsatisfied pre-insolvency settlements, releases, or consent judgments, LIGA had the right to annul such agreements upon the occurrence of certain conditions. Former Louisiana Revised Statutes section 22:1382(A)(4)—later 22:2058(A)(4)—provided that LIGA shall

[i]nvestigate claims brought against [LIGA] and adjust, compromise, settle, and pay covered claims to the extent of [LIGA's] obligation and deny all other claims. 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,

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264. LA. REV. STAT. § 22:2058(A)(6)(b) (2017) (formerly LA. REV. STAT. § 22:2068(B) (2009)); Act No. 959, 2010 La. Acts 3330. Section 22:2068(B) originally was numbered section 22:1397, but was renumbered by Act No. 415, 2008 Acts 1846–1922.

265. 610 So. 2d 969 (La. Ct. App. 1992).

266. *Id.* at 970.

267. *Id.*

268. LA. REV. STAT. § 22:2058(A)(6)(b) provides as follows:

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

269. *Duplantis*, 610 So. 2d 969.

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.<sup>270</sup>

Although the statute clearly permitted LIGA to have settlements annulled for fraud, ill practice, or when the settlement is clearly excessive in light of the facts, including considerations for coverage, liability, and quantum, the relevant cases held LIGA to strict standards based on the erroneous assumption that LIGA was the insolvent insurer's legal successor for settlement or *res judicata* purposes.<sup>271</sup>

In *Lastie v. Warden*,<sup>272</sup> the plaintiff sought to enforce a settlement against LIGA that had been entered into by the plaintiff and the insurer before insolvency.<sup>273</sup> 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:

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.<sup>274</sup>

This holding is yet another example of the misunderstanding of LIGA's separate legal status from the insolvent insured. LIGA does not become the insolvent insured for all legal purposes.<sup>275</sup> Importantly, LIGA has numerous limitations impacting its obligations and liability on claims against insolvent insurers, and these limitations serve to protect LIGA's

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270. Act No. 941, 1991 La. Acts 2888 (mandating that the amendment applied to all existing claims).

271. *Lastie v. Warden*, 611 So. 2d 721 (La. Ct. App. 1992), *writ denied*, 614 So. 2d 64 (La. 1993); *Weaver v. Kitchens*, 556 So. 2d 120, 122 (La. Ct. App. 1990), *writ denied*, 573 So. 2d 1123 (La. 1990).

272. *Lastie*, 611 So. 2d 721.

273. *Id.*

274. *Id.* at 723.

275. *See supra* Part I.B.

solvency, which is an appropriate state interest.<sup>276</sup> These limitations include LIGA's right to have a settlement or compromise set aside if the settlement is clearly excessive in view of all relevant factors, including whether such settlement is within the coverage of the policy, which is a reasonable right considering that an insurer who has become insolvent may not have properly handled its claims before its demise.<sup>277</sup>

Notably, *Lastie* never considered the provisions of former Louisiana Revised Statutes section 22:1382(A)(4), which permitted LIGA to have the settlement set aside. Instead, the court required LIGA to pay an uncovered claim.<sup>278</sup> Subsequent decisions cited *Lastie* with favor,<sup>279</sup> but required that claimants exhaust other available insurance before proceeding against LIGA in enforcement of the settlement in accordance with LIGA Law.<sup>280</sup>

As part of the 2010 amendments to LIGA Law, the legislature modified the language of Louisiana Revised Statutes section 22:2058(A)(4)—formerly Louisiana Revised Statutes section 22:1382—and added Louisiana Revised Statutes section 22:2058(A)(6). Section 22:2058(A)(4) was amended to provide that LIGA shall

[i]nvestigate claims brought against the association and adjust, compromise, settle, and pay covered claims to the extent of the association's obligation and deny all other claims. The association may pay claims in any order that it may deem reasonable, including the payment of claims as they are received from the claimants or in groups or categories of claims. The association shall have the right to appoint and to direct legal counsel retained under liability insurance policies for the defense of covered claims. ~~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~~

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276. *E.g.*, *La. Workers' Comp. Corp. v. La. Ins. Guar. Ass'n*, 20 So. 3d 1047, 1053 (La. Ct. App. 2009); *La. Ins. Guar. Ass'n v. Gegenheimer*, 636 So. 2d 209, 210 (La. 1994); *Segura v. Frank*, 630 So. 2d 714, 732 (La. 1994).

277. *Cf. Duplantis v. McGuire*, 610 So. 2d 969, 970 (La. Ct. App. 1992).

278. The issue of whether the insurance policy did or did not provide coverage for the accident at issue was not decided on the merits in *Lastie*. 611 So. 2d at 724.

279. *Smith v. Am. Lloyds Ins. Co.*, 663 So. 2d 531, 533 (La. Ct. App. 1995).

280. *Fishman v. Auto. Cas. Ins. Co.*, 643 So. 2d 805, 807 (La. Ct. App. 1994); *Mancuso v. Siegel*, 646 So. 2d 1200, 1203 (La. Ct. App. 1994).

~~to coverage, liability, and quantum issues.~~<sup>281</sup>

Further, section 2058(A)(6) was amended by the same Act to provide that LIGA shall:

(a) Have the right to review and contest as set forth in this Subsection settlements, releases, compromises, waivers and judgments to which the insolvent insurer or its insureds were parties prior to the entry of the order of liquidation. In an action to annul, vacate, or enforce settlements, releases and judgments to which the insolvent insurer or its insureds were parties prior to the entry of the order of liquidation, the association shall have the right to assert the following defenses, in addition to the defenses available to the insurer:

(i) The association is not bound by an unsatisfied settlement, release, compromise or waiver executed by an insured or the insurer, or any unsatisfied judgment entered against an insured or the insurer by consent or through a failure to exhaust all appeals, if the settlement, release, compromise, waiver or judgment was executed or entered within one hundred twenty days prior to the entry of an order of liquidation, and the insured or the insurer did not use reasonable care in entering into the settlement, release, compromise, waiver or judgment, or did not pursue all reasonable appeals of an adverse judgment; or executed by or taken against an insured or the insurer based on default, fraud, ill practice, collusion, the insurer's failure to defend, or the clearly excessive amount of any settlement, release, compromise, waiver or judgment considering all relevant issues including but not limited to coverage, liability, and quantum.

(ii) If a court of competent jurisdiction finds that the association is not bound by a settlement, release, compromise, waiver or judgment for the reasons described in Item (i) of this Subparagraph, the settlement, release, compromise, waiver or judgment shall be set aside, and the association shall be permitted to defend any covered claim on the merits. The settlement, release, compromise, waiver or judgment may not be considered as evidence of liability or damages in connection with any claim brought against the association or any other party under this Part.

(iii) The association shall have the right to assert any statutory defenses or rights of offset against any settlement, release,

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281. Act No. 959, 2010 La. Acts 3356. Words that are struck through are deletions from prior law; words in boldface type and underscored are additions.

compromise or waiver executed by an insured or the insurer, or any judgment taken against the insured or the insurer.<sup>282</sup>

The amendments make it clear that LIGA is not bound by unsatisfied settlements or judgments entered by consent or failure to exhaust appeals if the settlements or judgments were entered or executed within 120 days before the date of the order of liquidation and one of the following: the insurer or insured did not use reasonable care in entering into the settlement; the insurer or insured did not pursue all reasonable appeals; the settlement or judgment was based on default, fraud, ill practice, collusion, or the insurer's failure to defend; or the amount of any settlement or judgment was clearly excessive considering the relevant factors, including coverage, liability, and quantum.<sup>283</sup> If a settlement or judgment is set aside for the above reasons, LIGA is entitled to defend the claim on the merits and the settlement or judgment cannot be considered as evidence of liability or damages.<sup>284</sup> Further, the addition of Louisiana Revised Statutes section 22:2058(A)(6)(a)(iii) confirms that LIGA has the right to assert any statutory defenses or rights of offset or credit against any settlement or judgment against the insured or insurer.<sup>285</sup>

#### VIII. THE APPLICABLE LAW

The legislature has repeatedly amended LIGA Law over the years. The comprehensive amendments in 2010 are specifically stated as having prospective application only.<sup>286</sup> The Louisiana Supreme Court has confirmed that the applicable substantive LIGA Law is determined by the date of insolvency,<sup>287</sup> and the claimant's existing rights vest against LIGA only upon insolvency of the insurer.<sup>288</sup> Applying the law in effect at the time of insolvency does not violate due process or the principle of non-retroactivity of laws, as retroactive application presumes the plaintiff's right vests before the change in the law. As a plaintiff's right against LIGA

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282. *Id.* Words that are struck through are deletions from prior law; words in boldface type and underscored are additions.

283. LA. REV. STAT. § 22:2058(A)(6)(a)(i) (2017).

284. *Id.* § 22:2058(A)(6)(a)(ii).

285. *Id.* § 22:2058(A)(6)(a)(iii).

286. Act No. 959, 2010 La. Acts 3356 ("This Act, in its entirety, is intended to have prospective application only. However, the provisions of R.S. 22:2055(15) in this Act with regard to group self-insurance funds formed under Subpart J of Part 1 of Chapter 10 of Title 23 of the Revised Statutes of 1950 are interpretive and intended to restate the original legislative intent with regard to such funds. Such affirmation is not intended to confer any retroactive effect whatsoever to the provisions of this Act.").

287. *Prejean v. Dixie Lloyds Ins. Co.*, 660 So. 2d 836, 837 (La. 1995).

288. *Id.* See also *Harvey v. Taylor*, 688 So. 2d 1324 (La. Ct. App. 1997).



does not vest until the insolvency of the applicable insurer, if the law changes before insolvency, there is no retroactive application. Thus, the law in effect on the date of insolvency controls.

#### CONCLUSION

LIGA Law can be a complex body of law for the practitioner accustomed to litigating for or against property and casualty insurance companies. While insurance policies are intended to make the claimant whole to the extent of the stated limits, LIGA Law is intended to minimize damages and assist claimants in need of its protections as determined by the legislature. The limitations upon and conditions to LIGA's responsibility are numerous. These limitations apply as to when a claim can be brought, against what entity, and for what recovery. The law should be read thoroughly by the practitioner because it can often seem unfair or contradictory to established principles of insurance law. It is, nonetheless, the law and the best method yet developed to spread the risk of insurer insolvencies and provide recovery for the most claimants.