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DIGEST

LaFleur (SB 268)

Present law provides for the Insurance Guaranty Association Law.

Present law provides the purpose of the 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.

Proposed law removes as a purpose for the law to assist in the detection and prevention of insurer insolvencies but otherwise retains present law.

Present law provides that this Part shall apply to all kinds of direct insurance, except life, annuity, health and accident, title, disability, mortgage guaranty, financial guaranty, or other insurances offering protection against investment risks, credit insurance, and any transaction or combination of transactions which involve the transfer of investment or credit risks unaccompanied by the transfer of the insurance risk, vendor's single interest insurance, collateral protection insurance, or any similar insurance which protects the interests of a creditor arising out of a creditor-debtor transaction, vehicle mechanical breakdown insurance, and ocean marine insurance. It shall likewise not apply to fidelity insurance or surety insurance.

Proposed law retains present law but adds to the exceptions to the kinds of direct insurance to which it applies to include any bonding obligation, any warranty or service contracts, any transaction involving the transfer of investment or credit risk, unaccompanied by transfer of insurance risk and any insurance provided by or guaranteed by government.

Present law provides for the defined terms "Association", "Commissioner", "Covered claim", "Insolvent insurer", "Member insurer", "Net direct written premiums", "Person", "Insurance policy" and "Ocean marine insurance".

Present law provides that the claimant or insured involved in a "covered claim" must be a resident of this state at the time of the insured event. Proposed law clarifies that as to "entities" the residence of the claimant or insured is the state in which it has its principal place of business at the time of the insured event.

Proposed law provides that a "covered claim" also includes the claimant who is a self-insurer, including any arrangement or trust formed a group self-insurance fund for workers' compensation

and is principally domiciled in this state at the time of the insured event.

Proposed law clarifies that a "covered claim" does not include the self-insured portion due any self-insurer as subrogation recoveries, reinsurance recoveries, contributions, or indemnification.

Proposed law adds the following definitions of terms the defined terms of "Affiliate", "Association similar to the association", "Control", "Insurance", "Insurer", "Insured", "Receiver" and "Self-insurer".

Present law provides for the creation of the Insurance Guaranty Association and provides that it is not and may not be deemed a department, unit, agency, or instrumentality of the state for any purpose. Provides that all debts, claims, obligations, and liabilities of the association shall be the debts, claims, obligations, and liabilities of the association only and not of the state, its agencies, instrumentalities, officers, or employees. Provides that association monies may not be considered part of the general fund of the state and the state may not budget for or provide general fund appropriations to the association. Provides that the association shall be subject to R.S. 42:4.1 through 13 (Open Meeting Law) and to R.S. 44:1 through 41(Public Records Law), and may be considered as if it were a public body for the purpose of those provisions. Provides that the association may hold an executive session for discussion of the following and documents related to the following shall not be subject to public disclosure a request by the association for an examination of a member insurer, reports and recommendations made by the association to the commissioner on any matter relevant to the solvency, liquidation, rehabilitation, or conservation of any member insurer, matters protected by attorney-client privilege, matters with respect to claims or claim files, prospective litigation by or against the association, and any other matters now provided for or as may be provided for by the legislature.

Proposed law retains present law but deletes a request by the association for an examination of a member insurer as being exempt from the Public Records Law and the Open Meetings Law.

Present law provides for a nine member board of directors composed of:

- (1) Two consumer representatives appointed by the commissioner;
- (2) One person appointed by the president of the Senate; and
- (3) One person appointed by the speaker of the House of Representatives.
- (4) 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.

Proposed law retains present law but provides that one of the two consumer representatives appointed by the commissioner may not be an officer, director or employee of an insurance company or any person engaged in the business of insurance.

Present law provides for the procedure for the appointment of directors in the event of a vacancy and that members of the board may be reimbursed for expenses incurred.

Proposed law retains present law but clarifies that expenses must be reasonable.

Proposed law provides that any member of the board whose relationship to an insurer in receivership presents a conflict of interest shall be terminated and the seat declared vacant as of the date of the entry of the order of receivership.

Proposed law provides that if the commissioner has reasonable cause to believe that a board member failed to disclose a known conflict of interest with his duties, failed to take appropriate action based on a known conflict of interest with his duties, or has been indicted or charged with a felony, or misdemeanor involving moral turpitude, the commissioner may suspend that board member pending the outcome of an investigation or hearing. In the event that the allegations are substantiated the seat shall be declared vacant.

Present law provides for the association to pay covered claims in excess of \$100, up to \$300,000, combined single limits, except for return premiums which are covered up to \$10,000 and workers' compensation which is covered for the full amount of workers' compensation benefits.

Proposed law retains present law but increases the covered claim cap from \$300,000 to \$500,000 combined single limits.

Proposed law provides that, in no event, is the association obligated to pay an amount in excess of the obligation of the insolvent insurer under the policy or a claim filed more than five years after the order of liquidation or the final date set by the court for the filing of claims, whichever is earlier.

Proposed law provides that the association has no obligation to defend an insured upon 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.

Present law provides that "Accident or occurrence" means one 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 shall be subject to the aggregate liability limit.

Present law provides that the association shall be deemed the insurer and have all rights and obligations of the insolvent insurer, until the association pays the covered claim, at which time the duty to provide a defense shall end.

Proposed law retains present law and clarifies that the association has the right to pursue and

retain salvage and the right to subrogation, and that the association shall not be deemed the insolvent insurer for the purpose of conferring jurisdiction.

Present law provides the association with the authority to assess member insurers to pay for the obligations of the association in the proportion that the insurers net direct written premiums bear to the net direct written premiums of all member insurers in an amount not to exceed one percent of the member insurers net direct written premium for the preceding year.

Proposed law repeals provisions of present law related to assessments to meet obligations pursuant to a cooperative endeavor agreement dated as of October 1, 1990, which have been satisfied.

Present law provides that the association may exempt or defer assessments of members, if the assessment would cause the member to reflect capital or surplus less than minimum amounts required for a certificate of authority. The association shall issue certificates of contribution for the amount of the assessment paid by member insurers, which member insurers may use to offset premium tax liability.

Present law provides for the association's authority to investigate, adjust, settle, and pay covered claims to the extent of the association's obligation and to deny all other claims and the association may seek to annul any settlement, release or consent judgment entered by the insolvent insurer upon a showing of fraud, ill practice or where the settlement is clearly excessive.

Proposed law retains present law and further provides that the association may pay claims in any order it deems reasonable and that the association has the right to appoint and direct legal counsel.

Present law provides that the association may handle claims through its employees or through other persons designated as servicing facilities, subject to the approval of the commissioner and may reimburse the servicing facility for obligations of the association paid by the facility and for expenses incurred by the facility while handling claims on behalf of the association.

Proposed law provides that the association has the right to apply to have a judgment, order, decision, verdict or finding set aside and be permitted to defend the claim on the merits.

Proposed law retains present law and provides that the receiver for an insolvent insurer may also handle claims on behalf of the association.

Present law provides that the association shall annually submit a plan of operation to the commissioner, annually promulgate policies and procedures designed to increase participation for minorities and women in contractual legal services entered into by such association, annually promulgate policies and procedures relative to the appointment of all legal counsel and annually promulgate policies and procedures relative to a system of alternative dispute resolution of lawsuits and claims.

Proposed law repeals present law and provides that the association shall implement a system of alternative dispute resolution of lawsuits and claims.

Present law provides that the association shall coordinate and work in conjunction with a special deputy commissioner designated and appointed by the commissioner of insurance.

Proposed law provides that the association shall coordinate and work in conjunction with the commissioner of insurance or his designee.

Proposed law provides that the association may submit jointly with the commissioner a plan of rehabilitation or liquidation for court approval and with the approval of the court guarantee or assume policies or other obligations of the member insurer or lend to the member insurer.

Proposed law provides that suits involving the association, except for actions by the receiver, shall be brought in the courts of this state and that the domicile of the association for purposes of venue is East Baton Rouge Parish and that the association may waive venue in its discretion.

Proposed law provides that any person, and any attorney who represents a person, who files a petition against the association alleging the insolvency of an insurer, where the insurer is not an insolvent insurer shall pay the reasonable expenses incurred because of the filing of the petition, including reasonable attorney fees, if the association furnishes written notification that the insurer is not an insolvent insurer and within sixty days of the receipt of the notification, the person or his attorney has not dismissed the petition, with prejudice and at plaintiff's cost.

Present law provides that the association shall submit a plan of operation and any amendments to the plan to the commissioner and the Senate and House committees on insurance for approval and provides for required provisions of the plan of operation.

Proposed law retains present law and adds the following required provisions of the plan of operation:

- (1) Establish procedures for the disposition of liquidating dividends or other monies received from the estate of the insolvent insurer.
- (2) Establish policies and procedures designed to increase participation for minorities and women in contractual legal services entered into by the association.
- (3) Establish policies and procedures relative to the appointment of legal counsel.
- (4) Establish policies and procedures relative to a system of alternative dispute resolution of lawsuits and claims.
- (5) Establish procedures whereby a director may be removed for cause.

Present law provides that the commissioner shall notify the association of the existence of an

insolvent insurer not later than three days after he receives notice of the determination of the insolvency.

Proposed law retains present law and adds that the association shall be entitled to a copy of a petition seeking an order of liquidation with a finding of insolvency against a member company at the same time that the petition is filed.

Present law provides that the commissioner may require that the association notify the insureds of the insolvent insurer and any other interested parties of the determination of insolvency and of their rights.

Present law provides that the commissioner may suspend or revoke the certificate of authority to transact insurance in this state of any member insurer that fails to pay an assessment when due or fails to comply with the plan of operation or levy a fine on any member insurer that fails to pay an assessment when due. Additionally, the commissioner may revoke the designation of any servicing facility if he finds claims are being handled unsatisfactorily.

Proposed law retains present law and adds that the commissioner may examine, audit, or otherwise regulate the association.

Proposed law provides that the association may join one or more organizations of other state associations of similar purposes, to further the purposes and administer the powers and duties of the association. The association may designate one or more of these organizations to act as a liaison for the association and to bind the association in agreements or settlements with receivers of insolvent insurance companies.

Present law provides that any person recovering from the association shall be deemed to have assigned his rights under the policy to the association to the extent of his recovery and shall cooperate with the association to the same extent he would have been required to cooperate with the insolvent insurer and that the association shall have no cause of action against the person for any sums it has paid out except such causes of action as the insolvent insurer would have had if the insolvent insurer had paid.

Proposed law retains present law but adds that sums paid on a claim excluded due to the high net worth of an insured may be recovered by the association.

Proposed law provides that the association and any association similar to the association in another state shall be entitled to file a claim in the liquidation of an insolvent insurer for amounts paid by them and shall receive dividends and other distributions.

Proposed law provides that a "high net worth insured" means any policyholder or named insured, other than any state or local governmental agency, whose net worth exceeds \$25,000,000 on December 31 of the year prior to the year in which the insurer becomes an insolvent insurer and that an insured's net worth shall include the aggregate net worth of the insured and all of its subsidiaries and affiliates calculated on the basis of their fair market values and that the

association is not responsible for claims of high net worth insureds.

Proposed law provides that member employers of an arrangement or trust formed as a group self-insurance fund for workers' compensation are not deemed affiliates of the arrangement or trust and are not to be included in the determination of the net worth of the arrangement or trust.

Proposed law provides that the member employers of an arrangement or trust formed under Title 23 shall not be deemed to be affiliates of the arrangement or trust, and shall not be included in the determination of the net worth of the arrangement or trust.

Proposed law clarifies that the association is not obligated to provide a defense for high net worth insureds and that the association may recover from high net worth insureds any costs incurred or amounts paid on their behalf.

Proposed law provides that the association shall not be obligated to pay any claim on behalf of a person who has a net worth greater than that allowed by the insurance guaranty association law of the state of residence of the claimant.

Proposed law provides that the association shall establish reasonable procedures for requesting financial information from insureds on a confidential basis and if an insured refuses to provide the requested financial information the association may deem the insured to be a high net worth insured and deny the claim.

Present law provides that where an insured refuses to provide financial information requested there is created a rebuttable presumption that the insured is a high net worth insured.

Proposed law retains present law but adds that in the event of a lawsuit, if the insured fails to prove that its net worth was less than \$25,000,000, then the court shall award the association its full costs in contesting the claim, including attorney fees.

Present law provides that any person having a claim against the association shall be required to first exhaust all coverage provided by any other policy of insurance.

Proposed law retains present law but clarifies that the requirement to exhaust other coverage includes the right to defense, but does not require a person to exhaust any right under a life insurance policy or annuity.

Present law provides that any amount payable by other insurance shall act as a credit against the damages of the claimant and the association shall not be liable for such portion.

Present law provides that 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, any and all other insurance available to the insured must first be exhausted before recovering from the association.

Proposed law retains present law and adds that only after exhaustion of all solvent insurer's, including a self-insured's total policy aggregate limits for any alleged exposure periods will the association be obligated to provide a defense and indemnification.

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

Proposed law retains present law and defines the "residence of the insured" to mean the residence, on the date of insolvency of the insurer, of the first named or primary insured or the state to which the insolvent insurer was or would have been liable for the payment of a surcharge or assessment on the subject insurance policy.

Present law provides that a claimant alleging personal injury or death caused by exposure to asbestos fibers or resulting from exposure to, release of, or contamination from any environmental pollutant or contaminant, asserted against the association must either be a domiciliary of the state of Louisiana at the time of the exposure or allege that his exposure occurred in Louisiana and that where more than one claimant is joined, each claimant must independently establish that Louisiana is either his domicile or place in which the alleged exposure occurred.

Present law provides that the board of directors shall notify the commissioner of any information indicating any member insurer may be insolvent or in a financial condition hazardous to the policyholders or the public and may request that the commissioner order an examination and within 30 days the commissioner shall begin such examination. Further it shall be the duty of the commissioner to report to the board of directors when he has reasonable cause to believe that any member insurer examined or being examined at the request of the board of directors may be insolvent or in a financial condition hazardous to the policyholders or the public.

Present law provides that the board of directors shall at the conclusion of any insurance company insolvency prepare a report on the history and causes of the insolvency and submit the report to the commissioner.

Proposed law retains present law changes from shall make a report to may make a report and that the board of directors may make recommendations to the commissioner on matters generally related to improving regulation for solvency and any such reports or recommendations shall not be public records.

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

Proposed law retains present law and provides the same immunity to the participation in any organization of one or more other state associations of similar purposes and to any such organization and its agents or employees.

Present law provides that all proceedings in which an insolvent insurer is a party shall be stayed for 90 days and upon motion of the association the court may extend the stay for an additional 90 days.

Proposed law provides that all proceedings in which an insolvent insurer is a party shall be stayed for six months and deletes the provision allowing for the court to extend the stay for an additional 90 days.

Present law provides that as to any covered claims arising from a default judgment or based on the insolvent insurer's failure to defend an insured, the association may apply to have such judgment set aside by the court and shall be permitted to defend against such claim on the merits.

Proposed law provides that the liquidator or receiver of an insolvent insurer shall permit access by the association to the insolvent insurer's records that are necessary to carry out its functions and shall provide the association with copies of those records upon request by and at the expense of the association.

Present law prohibits advertisements which include a reference to the coverage or protection by the Insurance Guaranty Association and defines "advertisements" to mean any communication by print, television, radio, or other means for mass distribution of information.

Proposed law retains present law and adds "Internet" to the list of means of communication.

Effective August 15, 2010.

(Amends R.S. 22:2051, 2052, 2053(A), 2054, 2055, 2056, 2057(A) and (C), 2058(A) ,(B)(7), (C) and (D), 2059(A) and (C)(1) through (4), 2060(A)(1) and (B), 2061(A), 2062(A) and (B), 2063, 2067, 2068(A) and (B), 2069(A) and (B), and R.S. 44:4.1(B)(10); adds R.S. 22:2057(D) and (E), 2059(C)(10) through (14), 2060.1, 2061(D), and 2061.1; repeals R.S. 22:2060(A)(3))

Summary of Amendments Adopted by Senate

Committee Amendments Proposed by Senate Committee on Insurance to the original bill.

1. Clarifies the definition of "covered claim" to include the claimant who is a self-insurer, arrangement or trust formed under Title 23 and is principally domiciled in this state at the time of the insured event.
2. Makes technical changes.

3. Provides the definition for "insurance" and "insurer" shall have the same meaning specified in R.S. 22:46.
4. Decreases the limit on the assessment from 2% to 1% as stated in present law.
5. Provides that the member employers of an arrangement or trust formed under Title 23 shall not be deemed to be affiliates of the arrangement or trust, and shall not be included in the determination of the net worth of the arrangement or trust.
6. Adds that only after exhaustion of all solvent insurer's including a self-insurer's total policy aggregate limits for any alleged exposure periods will the association be obligated to provide a defense and indemnification.

Senate Floor Amendments to engrossed bill.

1. Technical amendments.
2. Changes reference from the association may to the association has the right to apply to have a judgment, order, decision, verdict or finding set aside and be permitted to defend the claim on the merits.