Assignment of Claims Issues Considerations and Guidelines

On a national level, there is an increase in the number of claim assignments that are presented to receivers. One of the many regulator consumer protection duties to be fulfilled on behalf of the policyholder is to make certain that claims assignments are being carried out. Some states have developed policies for managing the assignment of claims and the Receivership Technology and Administration Working Group provided a forum to draw upon the experience of those states as well as those of other state regulators and other interested parties to a receivership to develop guidance of how to address claims assignment issues. Keeping consumer protection in mind, each state should review its state statutes and regulations regarding the access to information that potential claim buyers have and whether there are any legal privacy issues at the state and federal levels.

1. Cost to Receivership of Claims Assignments

   A. Explanation of the issue

      Each state is going to have different issues addressing the specific cost of claims assignments contingent upon their specific state laws pertaining to claims assignments, and their own rules that apply to verify and process such assignments. Some specific costs are noted below.

   B. Considerations

      1. Developing and maintaining the proper infrastructure to record a claims assignment. The Liquidator must maintain the original claim, and record the claim assignee as the new proper claim beneficiary.

      2. Processing the request. Some form of external notice must be generated to initiate a claim assignment. How is it received and recorded?

      3. Due diligence. The liquidation must verify whether the assignor is the appropriate party to execute the assignment.

      4. The disparity of knowledge between the claim seller and claim buyer regarding the claim assignment process can be significant. This results in increased communication demands from buyers on the Liquidator.

   C. Recommendations

      1. Provide additional court filings with required listings of all approved claims on a quarterly basis.

      2. Establish a specified time frame to respond to a claims assignment request irrespective of the quality of information submitted in the request.

      3. Revise the existing database to record whether the creditor was eligible to have the personal data of his claim published or not.
4. Research all open estates, provide listings of creditor information, and obtain consent from all creditors for the release of personal claims data.

5. Require the Liquidator to make a good faith effort to predict when distributions would occur and estimate pay-out percentages for the distribution.

2. Difficulty Associated With Verifying Claims

A. Explanation of the issue

1. Some companies placed in liquidation (hereinafter called “Estates”) have poor records (e.g., accounting, policy, claim and reinsurance records). Records have to be reconstructed by Estate staff before basic policy information can be verified (e.g., in-force coverage at time of loss, policy terms, deductibles and exclusionary endorsements). This information is necessary for the Estate and guaranty funds to verify coverage and appropriately handle asserted claims against the Estate.

2. Some Estates have switched to a paperless environment (i.e., system only records). If these record only systems are not maintained properly or kept current, the Estate is unable to transition complete and accurate records or to access pertinent supporting documents. See 2.A.1. above for reconstructing Estate records.

3. Claimants do not keep Estate informed of changed information (e.g., corporate name change, merger of company into another entity, change of address, name change due to divorce and death of claimant). Lack of updated claimant information slows down the verification process.

B. Considerations

1. The Estate and guaranty funds require accurate information to verify coverage and to appropriately handle asserted claims against the Estate.

2. The issue of the Estate utilizing resources in order to handle inquiries concerning the claims assignment process. Additional pressures exerted on Estate staff to finish verification process quickly by third party vendors.

3. Possibility that the Estate may have to retain legal counsel to assist the Estate in complex claim assignment issues.

C. Recommendations

1. Establish standards, as well as a submission package, for use by all Estates for processing of claim assignments with third party vendors.

2. Permit Estates to bill third party vendors for work performed in processing claim assignments (e.g., telephone inquiries, production of reports; verification of assignment from claimant; detailed claims history information and updating Estate records).

3. Cut-Off Dates

A. Explanation of the issue

1. Establishing a date prior to the issuance of any Estate distribution monies where incomplete and/or unverified claim assignments will no longer be processed by the Estate. Some Estates bulk or batch process its distribution documents (e.g., letters, envelopes and distribution checks). Time
is needed to close the Estate records from any future updates so the distribution documents can be bulk or batch processed.

2. Many third party vendors are either on the Estate’s service list or receive notification through other means of pending Estate distributions. The number of claim assignment requests increase significantly just prior to a pending Estate distribution.

3. Generally, once complete and verified claim assignments are received, Estate records can be updated quickly in 1 or 2 days.

B. Considerations

1. Sufficient time is needed to close the Estate records from any future updates so the distribution documents can be bulk or batch processed. Without establishing a cut-off date, last minute claim assignments could disrupt the Estate distribution process.

2. The concern that the third party vendor (“assignee”) may have more information than is known by the claimant (“assignor”). The need to ensure that the assignor has full knowledge of all relevant facts before making the decision to assign the claim to a third party vendor.

3. Time needed to verify the accuracy of the claim assignment with the assignor prior to the pending Estate distribution.

C. Recommendations

1. Establish a date (1 day to 1 week) prior to any Estate distribution where incomplete and/or unverified claim assignments will not be further processed by the Estate before the pending Estate distribution.

4. Interpretation of Financial Information

A. Explanation of the issue

Explore options to facilitate the interpretation of financial information by entities and claimants that are interested in buying/selling claims.

B. Considerations

1. Publish financial statements and court information (in GRID and/or on receivership websites) with no additional interpretation. (This is currently available in GRID)

2. Develop a consumer guide that would help claimants make an informed decision regarding the potential value of their claim.

Concerns

1. Interpretation of financial information varies based on the type of financial information made available, which varies from state to state.

2. Development of a consumer guide to encompass all types of receiverships.

3. Publish in GRID and/or receivership websites a number to call to receive information on if/when a distribution may be made and possible percentage.
4. Publish a good faith estimate or other type of predictive information regarding the timing and amounts of potential distribution with no additional interpretation.

5. Any combination of the above.

C. Recommendations

To close the gap on asymmetric information concerns, it is recommended that receivers publish a consumer guide with a “Frequently Asked Question” document. However, further discussion is needed to finalize a long term recommendation regarding other available options.

5. Consumer Protection (Fairness)

A. Explanation of the issue

**Basic question:** What duty, if any, does the Insurance Commissioner in his capacity of statutory liquidator have to claimants who may wish to sell their claim?

Claims Assignment Vendors (the entities who purchase creditor claims) who purchase creditor claims in an insurance insolvency proceeding are not regulated. They do not have generally accepted practices applicable to purchasing claims. There is no definition of the due diligence required for identifying the party with the proper legal authority to sell a claim. They have no specific statutory prohibition on what advice they may give the seller of a claim, nor is there any guideline on what they are required to pay for the purchase. There is no statutory requirement that the Claims Assignment Vendor must get a claim purchase approved by the Court overseeing the liquidation process.

Conversely, there is statutory authority which requires a Liquidator to accept assignments, but there are no regulations what the Liquidator may require before it accepts a claim assignment.

Many estates cover several years before a first distribution occurs for the non-Guaranty Association claimants, generally the “little guys” who would be the most likely to benefit from selling a claim for a percentage of its ultimate value and receiving payment for their claim now. The Claims Assignment Vendor then bears whatever risk that unforeseen circumstances may reduce the ability of an Estate to make distributions, but the vendor does receive the entirety of the amount which would have been received by the seller whenever distributions are made.

Consumer protection considerations for the Commissioner include the attempt to make sure that all the claimants are treated equitably. This duty appears to be at least twofold, i.e. the claimant harmed by the insurance insolvency should get the fair value of their claim at any given time, and the Liquidator should not be burdened with a set of rules and regulations that are onerous which causes the Estate to incur expenses which diminish the value of claims of other creditors.

Each state must be conversant with their own, as well as the Federal, consumer protection statutes in terms of what information can go into the public domain. For example, do name, address and amount approved for the creditor claim submitted for a court filing constitute any kind of issue for the Liquidator? Does it make a difference if the creditor is a corporation versus an individual? Does it make a difference if you add a tax payer ID or a Social Security number? How about if you post the same information on the Liquidator’s website instead of within a court filing?

B. Considerations

1. Should claim assignments require court approval whereby a Judge overseeing the liquidation specifically approves the assignment for “fairness”?
2. Should Claims Assignment Vendors be regulated to ensure scrupulous practices; or, should the Liquidator be allowed to create whatever rules deemed appropriate to control the assignment process?

3. What constitutes reasonable expense for the Liquidator to make the creditor information available for Claim Assignment Vendors whereby other creditors of the Estate are not harmed?

4. What mechanism allows creditors to find a Claims Assignment Vendor?

5. In general, individuals are perceived to have more acute needs for immediate money than corporate entities, but they also have more privacy protections afforded. Should the Claims Assignment process be limited to just businesses?

6. Should the liquidator allow all approved creditors the opportunity to opt-in, or to opt-out, of the publication of their name, address, approved claim amount, and Tax-ID or SS#?

7. Should the liquidator be responsible for having sufficiently simple financial data available on their website to allow relatively unsophisticated creditors to knowledgeably be able to discuss the value of their claim with a probably more sophisticated representative of the Claims Assignment Vendor?

C. Recommendations

Each state should review its current state statutes and requirements to make sure they are compliant.

6. Information Exchange

A. Explanation of the issue

Explore options to facilitate the exchange of information between entities and claimants that are interested in buying/selling claims.

B. Considerations

1. Provide information through a matchup of willing buyers and willing sellers.
   a. Identify willing sellers through an “opt in” process and a forum for willing buyers and sellers to communicate.

   b. Concerns:
      i. Limiting the exchange of information to a subset of claimants willing to sell their claims may not pass public records scrutiny.
      ii. Providing a forum for buyers and sellers to exchange information will add additional cost to the receivership.
      iii. The creation of a receiver-sponsored forum will create potential issues regarding the implied endorsement/recommendation of a particular buyer and may influence the consumer’s ultimate decision to sell a claim.

2. Provide information by filing claim reports with the receivership court.
   • Address privacy concerns regarding protected personal information.

3. Provide non-protected information through claim report court filings.

4. Provide non-protected information through web postings.
5. Provide non-protected information in response to public records request.

C. Recommendations

To promote efficiency of receivership resources and transparency in providing non-protected information to the public, it is recommended that receiverships provide non-protected information through claims report filing with the receivership court and web posting of such information as it becomes available.

7. Availability of Receivership Information to the Public and Related Procedures

A. Explanation of the issue

Consumer privacy concerns (both legal and common sense) advocate identity protection for consumer claimants. However, certain state laws contain requirements regarding identifying information which must be included in receivership proceedings. To the extent permitted by state law, receivership pleadings should accordingly seek to protect specific identifying information of individual consumer claimants. For example, where permitted, receivership pleadings should not combine both names and addresses, or other specific identifying information, for individual consumer claimants.

B. Considerations

1. Privacy concerns aside the receiver has no fundamental objection to claim assignments.
   a. Property right
   b. A fair claim assignment can be a good result (time, uncertainty)
   c. Receiver has sold claims it holds in other receiverships

2. Nonetheless, assignments have consumer protection issues that are Commissioner/Receiver’s legitimate concern
   a. Fundamentally, consumer protection is a key aspect of insurance regulation
   b. Obligation to have a process that is designed to yield best results for creditors (not a duty to achieve a particular result, but for good process)

3. Reasonable measures to protect creditor interest in claims trading are warranted. Areas of concern that these measures address should include:
   a. Information symmetry/transparency
   b. Preventing abuse
   c. No undue administrative burden
   d. Fraud detection

C. Recommendations

1. Receiver should develop practical methods for distinguishing individual consumer claims from commercial/corporate creditors in receivership pleadings.

2. Contested claim pleadings, where specific identifying information may need to be plead, may require special procedures where appropriate (e.g. filing under seal).

3. Receiver believes it has identified a number of protections that, in combination, can give the Director confidence that claims trading on receiver Estate claim takes place in a fair environment.
   a. Convenient publication of better Estate information including publishing allowable corporate claim lists with identifiers.
b. Good Faith Estimates (forward looking statements of intent, typically regarding amount and time of distribution)
c. Requiring acknowledgement of information.
d. Tracking of assignment percentage (price),

4. With these protections in place, the receiver is not, as an initial matter, opposed to a carefully constructed process by which buyers and sellers find each other (whether an information exchange or a publication of claimant identifying information that avoids legal and common sense privacy concerns). The construction and ultimate acceptance and implementation of any such process would involve consideration of many complex issues such as: liability, unintended implicit receiver approval, and use of resources.

8. Federal / State Privacy of Claimants’ Personal Information

A. Explanation of the issue

Information regarding claims is typically reported in a receivership proceeding in accordance with the state receivership act. Receivership acts vary regarding the information that must be included in a report. Some laws require that each individual claimant must be named. Under certain circumstances, information may be submitted to the court under seal.

Federal privacy laws, such as the Gramm-Leach-Bliley Act (GLBA) and the Health Insurance Portability and Accountability Act (HIPAA), restrict the disclosure of personal information by insurance companies. In addition, states have adopted privacy statutes and regulations regarding the disclosure of information by insurance companies.

The disclosure requirements in these statutes are summarized in the attached Addendum. There are issues regarding the applicability of these laws in a receivership.

B. Considerations

GLBA

GLBA imposes restrictions on an insurer's disclosure of “non-public personal information” about a consumer. A list of names and addresses derived from personally identifiable financial information is non-public personal information. Subject to certain exceptions, an insurer is prohibited from disclosing to a nonaffiliated third party any non-public personal information, unless the consumer does not “opt out” after proper notice. This prohibition does not apply to disclosures to regulators, or to comply with laws, investigations, subpoenas or other judicial process. GLBA's privacy requirements do not override state law, except to the extent that a law is inconsistent with GLBA. A state law is not inconsistent with GLBA if the protection it affords is greater than the protection provided by GLBA.

HIPAA

HIPAA privacy standards apply to health plans, clearinghouses, and health care providers that transmit health information as defined in the act. HIPAA protects “individually identifiable health information”, which includes names and geographic subdivisions smaller than a state. HIPAA restricts the disclosure of protected health information without the consent of the individual.

State Privacy Laws

GLBA requires insurance regulators to adopt privacy standards for insurers. The NAIC has adopted the Privacy of Consumer Financial and Health Information Regulation. The NAIC Model rule applies to licensed insurers, producers and others required to be licensed. It does not specify whether it
applies to an insurer in receivership. However, a drafting note to the Model suggests that a rule could provide an exception for insurers in receivership.

C. Recommendations

A Receiver should consider the following:

1. If a receivership act requires the disclosure of a claimant's name and/or address:
   a. Is the information regarding the claimant considered publicly available under GLBA because disclosure is required by state law, or
   b. Is the requirement to disclose information regarding the claimant pre-empted because it is inconsistent with GLBA?

2. If GLBA governs the content of a claim report:
   a. What information may a claim report include if a claimant has opted out? What information may a claim report include if a claimant has not opted out?
   b. To avoid the administrative costs involved in identifying those claims who have opted out, should all claimants be treated as if they opted out?

3. Under HIPAA, what information may a claim report include regarding a health insurance claim filed by an individual?

4. Is an insurer in receivership a “licensee” under the state privacy law? If there is a conflict between a state's receivership act and privacy act, which law prevails?

5. If the disclosure of information regarding individuals with insurance claims is prohibited, should a claim report identify other claimants (e.g., corporations or general creditors)? If these claims are reported differently, will this impose an administrative burden on the receivership Estate?

6. Under what circumstances should a claim report be submitted to the court under seal for in camera inspection?

7. If a receivership act only requires that a claim report disclose the amount and class of each claim, what information should be provided to identify claims?
Addendum

Federal Privacy Laws

Gramm-Leach-Bliley Act (GLBA)

GLBA imposes requirements on financial institutions to protect the privacy of their customers. See 15 U.S.C. Subchapter I, §§ 6801-6809.

Applicability

GLBA applies to a “financial institution”, which is defined by 15 U.S.C. § 6809(3)(A) to mean an institution engaging in financial activities as described in 12 USC § 1843(k). Section 1843(k) provides that activities that are considered to be financial in nature include insuring, guaranteeing, or indemnifying against loss, harm, damage, illness, disability, or death, or providing and issuing annuities.

15 U.S.C. § 6809(4) defines “non-public personal information” to mean personally identifiable financial information resulting from any transaction with the consumer or any service performed for the consumer, or otherwise obtained by the financial institution. The term specifically includes “any list, description, or other grouping of consumers (and publicly available information pertaining to them) that is derived using any nonpublic personal information other than publicly available information”, but excludes “any list, description, or other grouping of consumers (and publicly available information pertaining to them) that is derived without using any nonpublic personal information.” Nonpublic personal information does not include “publicly available information”, as defined by regulations prescribed under 15 U.S.C. § 6804.

Non-public personal information is further described by regulations. 16 C.F.R. 313.3(n) provides examples of nonpublic personal information, including "any list of individuals' names and street addresses that is derived in whole or in part using personally identifiable financial information (that is not publicly available), such as account numbers." Nonpublic personal information does not include “any list of individuals' names and addresses that contains only publicly available information, is not derived, in whole or in part, using personally identifiable financial information that is not publicly available, and is not disclosed in a manner that indicates that any of the individuals on the list is a consumer of a financial institution.”

16 C.F.R. 313.3(o)(1) defines personally identifiable financial information to mean any information a consumer provides to a financial institution: (i) to obtain a financial product or service; (ii) about a consumer resulting from any transaction involving a financial product or service; or (iii) that a financial institution otherwise obtains about a consumer in connection with providing a financial product or service. Examples of such information include the fact that an individual is or has been a customer, or has obtained a financial product or service from a financial institution, and any information about a consumer that is disclosed in a manner that indicates that the individual is or has been a consumer of a financial institution.

16 C.F.R. 313.3(p)(1) provides that “publicly available information” means any information that a financial institution has a reasonable basis to believe is lawfully made available to the general public from federal, State, or local government records; widely distributed media; or “disclosures to the general public that are required to be made by Federal, State, or local law.”

Restrictions on Disclosure

GLBA imposes restrictions on a financial institution’s disclosure of non-public personal information provided by a consumer. Subject to certain exceptions, 15 U.S.C. § 6802 prohibits a financial institution from disclosing to a nonaffiliated third party any nonpublic personal information, unless the financial institution provides the consumer with an “opt out” notice, gives the consumer a reasonable opportunity to opt out, and the consumer does not opt out. Section 6802 (e) (8) provides that this prohibition does not apply to “the disclosure of nonpublic personal information to comply with Federal, State, or local laws, rules, and other applicable legal requirements;
to comply with a properly authorized civil, criminal, or regulatory investigation or subpoena or summons by Federal, State, or local authorities; or to respond to judicial process or government regulatory authorities having jurisdiction over the financial institution for examination, compliance, or other purposes as authorized by law.”

**Relation to State laws**

15 U.S.C. § 6807 provides that GLBA’s privacy requirements “shall not be construed as superseding, altering, or affecting any statute, regulation, order, or interpretation in effect in any State, except to the extent that such statute, regulation, order, or interpretation is inconsistent with the provisions of this subchapter, and then only to the extent of the inconsistency.” A state statute, regulation, order, or interpretation is not inconsistent with GLBA if the protection it affords is greater than the protection provided by GLBA.

**Health Insurance Portability and Accountability Act (HIPAA)**

*Applicability*

The HIPAA Standards for Privacy of Individually Identifiable Health Information apply to health plans, health care clearinghouses, and to any health care provider that transmits health information in electronic form in connection with transactions for which the Secretary of HHS has adopted standards under HIPAA.

*Restrictions on Disclosure*

HIPAA protects all “individually identifiable health information” held or transmitted by a covered entity. Under 45 C.F.R. § 164.514 (b), a name and any geographic subdivision smaller than a state, including street address, city, county, precinct, zip code or geocode, is considered an “identifier” of an individual.

45 CFR 164.512 describes the conditions under which protected health information can be disclosed without the consent of the individual. 45 CFR 164.512 (a) provides that a covered entity may use or disclose protected health information to the extent that such use or disclosure is required by law and the use or disclosure complies with and is limited to the relevant requirements of such law. A covered entity must meet the requirements described in § 164.512 (c) [relating to disclosures about victims of abuse, neglect or domestic violence]; (e) [relating to disclosures for judicial and administrative proceedings]; or (f) [relating to disclosures for law enforcement purposes].

2. **State Privacy Laws**

Title V of GLBA requires state insurance regulators to adopt standards relating to the privacy and disclosure of nonpublic personal financial information applicable to the insurance industry. States have adopted statutes or regulations based on the NAIC Privacy of Consumer Financial and Health Information Regulation (the “NAIC Model”).

*Applicability*

The NAIC Model applies to “licensees”, which is defined as “all licensed insurers, producers and other persons licensed or required to be licensed, or authorized or required to be authorized, or registered or required to be registered pursuant to the Insurance Law of this state, [and health maintenance organizations].” It does not specify whether it applies to an insurer in receivership. However, a drafting note to the Model states: “Because the notice requirements of this regulation could be a financial burden on a company in liquidation or receivership and negatively impact the ability of the liquidator or receiver to pay claims, regulators may want to consider adding an additional exception providing that licensees in liquidation or receivership are not subject to the notice provisions of this regulation.”

*Restrictions on Disclosure*

The NAIC Model defines “nonpublic personal financial information” to include personally identifiable financial information, and any list, description or other grouping of consumers (and publicly available information...
pertaining to them) derived using personally identifiable financial information that is not publicly available. “Personally identifiable financial information” as defined in the NAIC Model includes “[t]he fact that an individual is or has been one of the licensee's customers or has obtained an insurance product or service from the licensee”.

An example of nonpublic personal financial information given in the Model is a list of individuals' names and street addresses that is derived in whole or in part using personally identifiable financial information that is not publicly available, such as account numbers. In contrast, a list of individuals' names and addresses that contains only publicly available information, is not derived in whole or in part using personally identifiable financial information that is not publicly available, and is not disclosed in a manner that indicates that any of the individuals on the list is a consumer of a financial institution, is not considered to be nonpublic personal financial information.

The NAIC Model defines “publicly available information” to mean any information that a licensee has a reasonable basis to believe is lawfully made available to the general public from federal, state or local government records; widely distributed media; or disclosures to the general public that are required to be made by federal, state or local law.

3. State Receivership Laws

The contents of a claim report are typically described in the state receivership act. The act may also specify notice requirements for matters submitted to the court (See IRMA § 107). Under IRMA § 107 B (1), if the Receiver determines that any documents supporting the application are confidential, they may be submitted to the court under seal for in camera inspection.