

SECOND REGULAR SESSION
SENATE COMMITTEE SUBSTITUTE FOR

SENATE BILL NO. 1157

91ST GENERAL ASSEMBLY

Reported from the Committee on Insurance and Housing, April 4, 2002, with recommendation that the Senate Committee Substitute do pass.

TERRY L. SPIELER, Secretary.

4706S.02C

AN ACT

To amend chapter 375, RSMo, by adding thereto six new sections relating to insurance compliance audits.

Be it enacted by the General Assembly of the State of Missouri, as follows:

Section A. Chapter 375, RSMo, is amended by adding thereto six new sections, to be known as sections 375.1063, 375.1064, 375.1065, 375.1066, 375.1067 and 375.1068, to read as follows:

375.1063. As used in sections 375.1063 to 375.1068, the following terms mean:

- (1) "Director", the director of the department of insurance;**
- (2) "Insurance compliance audit", a voluntary, internal evaluation, review, assessment or audit not otherwise expressly required by law of an insurer that is designed to identify and prevent noncompliance and to improve compliance with statutes, rules, regulations and orders governing the operation of the insurer;**
- (3) "Insurance compliance self-evaluative audit document" or "document", a document prepared as a result of or in connection with and not prior to an insurance compliance audit. An insurance compliance self-evaluative audit document may include a written response to the findings in an insurance compliance audit. Such a document may include, but is not limited to, field notes and records of observations, findings, opinions, suggestions, conclusions, drafts, memoranda, drawings, photographs, computer-generated or electronically recorded information, phone records, maps, charts, graphs and surveys, if this supporting information is collected or prepared in the course of an insurance compliance audit or attached as an exhibit to the audit. Such document may also include any of the following:**

(a) An insurance compliance audit report prepared by an auditor, who may be an employee of the insurer or an independent contractor, which may include the scope of the audit, the information gained in the audit, and conclusions and recommendations, with exhibits and appendices;

(b) Memoranda and documents analyzing portions or all of the insurance compliance audit report and discussing potential implementation issues;

(c) An implementation plan that addresses correcting past noncompliance, improving current compliance and preventing future noncompliance; or

(d) Analytic data generated in the course of conducting the insurance compliance audit;

(4) "Insurer", as defined in section 375.012.

375.1064. 1. An insurance compliance self-evaluative audit document is privileged information and is not admissible as evidence in any legal action in any civil, criminal or administrative proceeding, except as provided in sections 375.1065 and 375.1066. Nothing in sections 375.1063 to 375.1068 shall limit, waive or abrogate the scope or nature of any statutory or common law privilege including, but not limited to, the work product doctrine, the attorney-client privilege, or the subsequent remedial measures exclusion. An insurance compliance self-evaluative audit document submitted to the director of insurance remains property of the insurer and is not subject to disclosure pursuant to chapter 610, RSMo. Documents, communications, data, reports or other information created as a result of a claim involving personal injury or workers' compensation made against an insurance policy are not insurance compliance self-evaluative audit documents and are admissible as evidence in civil proceedings as otherwise provided by applicable rules of evidence or civil procedure, subject to any applicable statutory or common law privilege, including but not limited to the work product doctrine, the attorney-client privilege, or the subsequent remedial measures exclusion.

2. If any insurer, person or entity performs or directs the performance of an insurance compliance audit, an officer or employee involved with the insurance compliance audit or any consultant hired for the purpose of performing the insurance compliance audit shall not be examined in any civil, criminal or administrative proceeding as to the audit or any insurance compliance self-evaluative audit document. This subsection shall not apply if the insurance compliance self-evaluative audit, insurance compliance self-evaluative audit document, or any portion thereof, is not privileged. A person involved in preparing insurance compliance self-evaluative audit or insurance compliance self-evaluative audit document who becomes aware of any alleged criminal violations shall report that violation to the

insurer. Within thirty days after receiving the report, the insurer shall provide the information to the director of insurance.

3. An insurer may voluntarily submit, in connection with examinations conducted pursuant to chapter 374, RSMo, an insurance compliance self-evaluative document to the director, or the director's designee, as a confidential document without waiving the privilege prescribed in sections 375.1063 to 375.1068, except that the director may disclose such voluntarily submitted document to the National Association of Insurance Commissioners in the same manner as other documents are disclosed.

4. Disclosure of an insurance compliance self-evaluative audit document to a governmental agency, whether voluntary or pursuant to compulsion of law, does not constitute a waiver of the privileges pursuant to section 375.1064 with respect to any other person or other governmental agency.

375.1065. 1. The privilege established in section 365.1064 does not apply to the extent that it is expressly waived by an insurer that prepared or caused to be prepared the insurance compliance self-evaluative audit document.

2. In a criminal, civil or administrative proceeding, a court may, after an in camera review, require disclosure of material for which the privilege established in section 375.1064 is asserted, if the court determines at least one of the following:

- (1) The privilege is asserted for a fraudulent purpose;**
- (2) The material is not subject to the privilege; or**
- (3) Even if subject to the privilege, the material shows evidence of noncompliance with state and federal statutes, rules, regulations or orders and the insurer failed to undertake reasonable corrective action or eliminate the noncompliance within a reasonable time.**

3. In addition to the exceptions prescribed in subsection 2 of this section, in a criminal proceeding, a court may, after an in camera review, require disclosure of material for which the privilege established in section 375.1064 is asserted, if the court determines that the material contains evidence relevant to the commission of a criminal offense and all of the following factors are present:

- (1) The prosecuting attorney or attorney general has a compelling need for the information;**
- (2) The information is not otherwise available; and**
- (3) The prosecuting attorney or attorney general is unable to obtain the substantial equivalent of the information by any means without incurring unreasonable cost and delay.**

375.1066. 1. Within fourteen days after the prosecuting attorney or attorney

general makes a written request by certified mail for disclosure of an insurance compliance self-evaluative audit document, the insurer may file with the circuit court a petition requesting an in camera hearing on whether such document or portions of the document are subject to disclosure. Failure by the insurer to file a petition waives the privileges outlined in sections 375.1063 to 375.1068.

2. An insurer asserting the privilege prescribed by sections 375.1063 to 375.1068 in response to a request for disclosure pursuant to this section shall include in its request for an in camera hearing the following information, which shall also at that time be provided to the person requesting disclosure:

- (1) The date of the insurance compliance self-evaluation audit document;
- (2) The identity of the entity or individual conducting the audit;
- (3) The general nature of the activities covered by the audit; and
- (4) An identification of the portions of the document for which the privilege is being asserted.

3. Upon the filing of a petition pursuant to this section, the court shall issue an order scheduling, within thirty days after the filing of the petition, an in camera hearing to determine whether the document or portions of the document are privileged pursuant to sections 375.1063 to 375.1068 or are subject to disclosure.

4. The court, after an in camera review, may require disclosure of the material for which the privilege in section 375.1064 is asserted if the court determines that any one of the conditions set forth in subsection 2 or 3 of section 375.1065 are applicable. Upon making such a determination, the court may only compel the disclosure of this portion of a document relevant to issues in dispute in the underlying proceeding. Any compelled disclosure shall not cause the document to be considered a public document or deemed to be a waiver of the privilege for any other civil, criminal or administrative proceeding. A party unsuccessfully opposing disclosure may apply to the court for an appropriate order protecting the document from further disclosure.

375.1067. An insurer asserting the privilege set forth in section 375.1064 has the burden of demonstrating the applicability of the privilege. Once the insurer has established the applicability of such privilege, a party seeking disclosure pursuant to subdivision (1) or (3) of subsection 2 or subsection 3 of section 375.1065 has the burden of proving the appropriate elements exempting the document or portions thereof from the privilege. The parties may at any time stipulate in proceedings pursuant to sections 375.1065 or 375.1066 to entry of an order directing that specific information contained in a document is or is not subject to the privilege provided pursuant to section 375.1064. Any such stipulation may be limited to the instant proceeding and,

absent specific language to the contrary, is not applicable to any other proceeding.

375.1068. The privilege and limitations on disclosure provided in section 375.1064 through 375.1067 shall not extend to any of the following:

(1) Documents, communications, data, reports or other information required to be collected, developed, maintained, reported or otherwise made available to a regulatory agency pursuant to state or federal statutes, rules, regulations or orders;

(2) Documents, communications, data, reports or other information required to be made available to the director or his examiners pursuant to subdivision (2) of subsection 2 of section 374.205, RSMo, or section 374.190, RSMo;

(3) Information obtained by observation or monitoring by any regulatory agency;

(4) Information obtained from a source independent of the insurance compliance audit; or

(5) Documents, communication, data, reports, memorandums, drawings, photographs, exhibits, computer records, maps, charts, graphs and surveys kept or prepared in the ordinary course of business.

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