

FIRST REGULAR SESSION

SENATE BILL NO. 55

93RD GENERAL ASSEMBLY

INTRODUCED BY SENATOR KLINDT.

Pre-filed December 1, 2004, and ordered printed.

TERRY L. SPIELER, Secretary.

0287S.011

AN ACT

To amend chapter 375, RSMo, by adding thereto seven 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 seven new sections, to be known as sections 375.1063, 375.1064, 375.1065, 375.1066, 375.1067, 375.1068, and 375.1069, to read as follows:

375.1063. As used in sections 375.1063 to 375.1069, the following terms mean:

(1) "Director", the director of the department of insurance;

(2) "Insurance compliance audit", a voluntary, internal evaluation, review, assessment, audit, or investigation for the purpose of identifying or preventing noncompliance with, or promoting compliance with laws, regulations, orders, or industry or professional standards, which is conducted by or on behalf of an insurer;

(3) "Insurance compliance self-evaluative audit document" or "document", any 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 of an insurance compliance audit. An insurance compliance self-evaluative audit document may include, but is not limited to, as applicable, field notes and records of observations, findings, opinions, suggestions, conclusions, drafts, memoranda, drawings, photographs, exhibits, computer-generated or electronically recorded information, phone records, maps, charts, graphs, and surveys, provided this supporting information is collected or developed for the primary purpose and in the course of an insurance compliance audit. 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. An insurance compliance self-evaluative audit document also includes, but is not limited to, 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. Except as provided in sections 375.1065 and 375.1066, an insurance compliance self-evaluative audit document is privileged information and is not discoverable or admissible as evidence in any legal action in any civil, criminal, or administrative proceeding. The privilege created herein is a matter of substantive law of this state and is not merely a procedural matter governing civil or criminal procedures in the courts of this state.

2. If any insurer, person, or entity performs or directs the performance of an insurance compliance audit, an officer, employee, or agent 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 privilege is determined inapplicable pursuant to sections 375.1065 and 375.1066.

3. If requested by the director, an insurer shall submit, in connection with examinations conducted pursuant to sections 374.190 and 374.205, 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 this section to which the insurer would otherwise be entitled, except that any provision of law permitting the director to make confidential documents public or any provisions granting access to the National Association of Insurance Commissioners shall not apply to the insurance compliance self-evaluative audit

document so submitted. To the extent that the director has the authority to compel the disclosure of an insurance compliance self-evaluative audit document under other provisions of applicable law, any such report furnished to the director shall not be provided to any other persons or entities and shall be accorded the same confidentiality and other protections prescribed in this subsection.

4. An insurer's insurance compliance self-evaluative audit document submitted to the director shall remain subject to all applicable statutory or common law privileges. Any such document so submitted and in the possession of the director shall remain the property of the insurer and shall not be subject to any disclosure or production pursuant to chapter 610, RSMo.

5. 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 this section with respect to any other persons or any other governmental agencies.

375.1065. 1. The privilege established in section 375.1064 shall not apply to the extent that it is expressly waived by the insurer that prepared or caused to be prepared the insurance compliance self-evaluative audit document.

2. In a 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) The material contains evidence relevant to a breach of a civil duty owed by the insurer to others, and all of the following factors are present:

(a) The person or entity requesting the information has a compelling need for the information;

(b) The information is not otherwise available; and

(c) The person or entity requesting the information is unable to obtain the substantial equivalent of the information by any means without incurring unreasonable cost and delay.

3. In a criminal proceeding, a court of record may, after an in-camera review, require disclosure of material for which the privilege pursuant to 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) The material contains evidence relevant to commission of a criminal offense and all three of the following factors are present:

(a) The prosecuting attorney or attorney general has a compelling need for

the information;

(b) The information is not otherwise available; and

(c) The prosecuting attorney or attorney general is unable to obtain the substantial equivalent to the information by any other means without incurring unreasonable cost and delay.

375.1066. 1. Within thirty days after the prosecuting attorney or attorney general serves on an insurer a written request by certified mail for disclosure of an insurance compliance self-evaluative audit document, the insurer that prepared or caused the document to be prepared may file with the appropriate court a petition requesting an in-camera hearing on whether the document or portions of the document are privileged pursuant to sections 375.1063 to 375.1069. The court has jurisdiction over such a petition filed by an insurer. Failure by the insurer to file a petition pursuant to this subsection waives the privilege for this request only.

2. An insurer asserting the privilege prescribed by sections 375.1063 to 375.1069 in response to a request for disclosure pursuant to this section shall include in its request for an in-camera hearing all of the information set forth in subsection 5 of this section.

3. Upon the filing of a petition pursuant to this section, the court shall issue an order scheduling, within forty-five 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 375.1069 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, based on its in-camera review, that any one of the conditions set forth in subsection 2 of section 375.1065 is applicable as to a civil or administrative proceeding or that any one of the conditions set forth in subsection 3 of section 375.1065 is applicable as to a criminal proceeding. 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 will not be considered to be a public document or be deemed 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.

5. An insurer asserting the insurance compliance self-evaluative audit privilege in response to a request for disclosure pursuant to this section shall provide to the prosecuting attorney or attorney general, as the case may be, at the

time of filing any objection to disclosure, all of the following information:

- (1) The date of the insurance compliance self-evaluation audit document;
- (2) The identity of the entity conducting the audit; and
- (3) The general nature of the activities covered by the audit.

375.1067. 1. 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, the party seeking disclosure pursuant to subdivision (1) of subsection 2 of section 375.1065 has the burden of proving that the privilege is asserted for a fraudulent purpose. The prosecuting attorney or attorney general seeking disclosure pursuant to subsection 3 of section 375.1065 has the burden of proving the elements set forth pursuant to that subsection.

2. The parties may at any time stipulate in proceedings pursuant to section 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 established pursuant to section 375.1063. Any such stipulation may be limited to the instant proceeding and, absent specific language to the contrary, shall not be applicable to any other proceeding.

375.1068. The privilege provided in section 375.1064 shall not extend to any of the following:

- (1) Documents, communications, data, reports, or any other information expressly required to be collected, developed, maintained, or reported to a regulatory agency pursuant to state or federal law;
- (2) Information obtained by observation or monitoring by any regulatory agency; or
- (3) Information obtained from a source independent of the insurance compliance audit.

375.1069. 1. The insurance compliance self-evaluative privilege created pursuant to sections 375.1063 to 375.1069 shall apply to all litigation or administrative proceedings initiated after the effective date of sections 375.1063 to 375.1069.

2. Except as expressly provided, nothing in sections 375.1063 to 375.1069, nor the release of any self-evaluative audit document 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.