

SECOND REGULAR SESSION

SENATE BILL NO. 823

93RD GENERAL ASSEMBLY

INTRODUCED BY SENATOR KLINDT.

Read 1st time January 9, 2006, and ordered printed.

TERRY L. SPIELER, Secretary.

3659S.011

AN ACT

To amend chapter 375, RSMo, by adding thereto seven new sections relating to insurance compliance self-evaluative audit privilege.

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, or which involves an activity regulated under this chapter and chapter 384, RSMo;
- (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, 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

21 audit. An insurance compliance self-evaluative audit document also
22 includes, but is not limited to, any of the following:

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

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

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

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

35 (4) "Insurer", as defined in section 375.012 and those insurance
36 companies operating under the provisions of chapter 383, RSMo.

375.1064. 1. Except as provided in sections 375.1065 and 375.1066,
2 an insurance compliance self-evaluative audit document is privileged
3 information and is not discoverable or admissible as evidence in any
4 legal action in any civil, criminal, or administrative proceeding. The
5 privilege created herein is a matter of substantive law of this state and
6 is not merely a procedural matter governing civil or criminal
7 procedures in the courts of this state.

8 2. If any insurer, person, or entity performs or directs the
9 performance of an insurance compliance audit, an officer, employee, or
10 agent involved with the insurance compliance audit or any consultant
11 hired for the purpose of performing the insurance compliance audit
12 shall not be examined in any civil, criminal, or administrative
13 proceeding as to the audit or any insurance compliance self-evaluative
14 audit document. This subsection shall not apply if the privilege is
15 determined inapplicable pursuant to sections 375.1065 and 375.1066.

16 3. If requested by the director, an insurer shall submit, in
17 connection with examinations conducted pursuant to sections 374.190
18 and 374.205, RSMo, an insurance compliance self-evaluative document
19 to the director, or the director's designee, as a confidential document
20 without waiving the privilege prescribed in this section to which the
21 insurer would otherwise be entitled; except that any provision of law

22 permitting the director to make confidential documents public or any
23 provisions granting access to the National Association of Insurance
24 Commissioners shall not apply to the insurance compliance self-
25 evaluative audit document so submitted. To the extent that the
26 director has the authority to compel the disclosure of an insurance
27 compliance self-evaluative audit document under other provisions of
28 applicable law, any such report furnished to the director shall not be
29 provided to any other persons or entities and shall be accorded the
30 same confidentiality and other protections prescribed in this
31 subsection.

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

38 5. Disclosure of an insurance compliance self-evaluative audit
39 document to a governmental agency, whether voluntary or pursuant to
40 compulsion of law, does not constitute a waiver of the privileges
41 pursuant to this section with respect to any other persons or any other
42 governmental agencies.

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

5 2. In a civil proceeding, a court may, after an in-camera review,
6 require disclosure and order the admissibility of, if otherwise
7 competent material for which the privilege established in section
8 375.1064 is asserted, if the court determines at least one of the
9 following:

10 (1) The privilege is asserted for a fraudulent purpose; or

11 (2) The material is not subject to the privilege.

12 3. In a criminal proceeding, a court of record may, after an in-
13 camera review, require disclosure of material for which the privilege
14 pursuant to section 375.1064 is asserted, if the court determines at least
15 one of the following:

16 (1) The privilege is asserted for a fraudulent purpose;

17 (2) The material is not subject to the privilege; or

18 (3) The material contains evidence relevant to commission of a
19 criminal offense and the prosecuting attorney or attorney general has
20 made a good faith request or lawful subpoena for the information.

21 4. In any administrative or civil proceeding initiated by the
22 director, the administrative hearing officer or court may, after an in-
23 camera review, require public disclosure of material for which the
24 privilege established in section 375.1064 is asserted, if the
25 administrative hearing officer or court determines at least one of the
26 following:

27 (1) The privilege is asserted for a fraudulent purpose;

28 (2) The material is not subject to the privilege; or

29 (3) The material contains evidence relevant to a breach of a civil
30 duty owed by the insurer to others, and the director is unable to obtain
31 the substantial equivalent of the information by independent means
32 without incurring unreasonable cost and delay.

375.1066. 1. The insurer that prepared or caused the document
2 to be prepared may file with the appropriate court a petition
3 requesting an in-camera hearing pursuant to section 375.1065 on
4 whether the document or portions of the document are privileged
5 pursuant to sections 375.1063 to 375.1069. Failure by the insurer to file
6 a petition pursuant to this subsection within forty-five days of the
7 insurer's receipt of the request for disclosure waives the privilege for
8 this request only.

9 2. An insurer asserting the privilege prescribed by sections
10 375.1063 to 375.1069 in response to a request for disclosure pursuant to
11 this section shall include in its request for an in-camera hearing all of
12 the information set forth in subsection 5 of this section.

13 3. Upon the filing of a petition pursuant to this section, the court
14 shall issue an order scheduling, within forty-five days after the filing
15 of the petition, an in-camera hearing to determine whether the
16 document or portions of the document are privileged pursuant to
17 sections 375.1063 to 375.1069 or are subject to disclosure.

18 4. The court, after an in-camera review, may require disclosure
19 of the material for which the privilege in section 375.1064 is asserted
20 if the court determines, based on its in-camera review pursuant to
21 subsection 2 or 3 of section 375.1065, that any one of the conditions set

22 forth in subsection 2 of section 375.1065 is applicable as to a civil
23 proceeding or that any one of the conditions set forth in subsection 3
24 of section 375.1065 is applicable as to a criminal proceeding. Upon
25 making such a determination, the court may only compel the disclosure
26 of this portion of a document relevant to issues in dispute in the
27 underlying proceeding. Any compelled disclosure will not be
28 considered to be a public document or be deemed a waiver of the
29 privilege for any other civil, criminal, or administrative proceeding. A
30 party unsuccessfully opposing disclosure may apply to the court for an
31 appropriate order protecting the document from further disclosure.

32 5. An insurer asserting the insurance compliance self-evaluative
33 audit privilege in response to a request for disclosure pursuant to this
34 section shall provide to the prosecuting attorney or attorney general,
35 as the case may be, at the time of filing any objection to disclosure, all
36 of the following information:

37 (1) The date of the insurance compliance self-evaluation audit
38 document;

39 (2) The identity of the entity conducting the audit;

40 (3) The general nature of the activities covered by the audit; and

41 (4) An identification of the portion of the document for which the
42 privilege is being asserted.

375.1067. 1. An insurer asserting the privilege set forth in
2 section 375.1064 has the burden of demonstrating the applicability of
3 the privilege. Once the insurer has established the applicability of
4 such privilege, the party seeking disclosure pursuant to subdivision (1)
5 of subsection 2 of section 375.1065 has the burden of proving that the
6 privilege is asserted for a fraudulent purpose. The prosecuting
7 attorney or attorney general seeking disclosure pursuant to subsection
8 3 of section 375.1065 has the burden of proving the elements set forth
9 pursuant to that subsection.

10 2. The parties may at any time stipulate in proceedings pursuant
11 to section 375.1065 or 375.1066 to entry of an order directing that
12 specific information contained in a document is or is not subject to the
13 privilege established pursuant to section 375.1064. Any such stipulation
14 may be limited to the instant proceeding and, absent specific language
15 to the contrary, shall not be applicable to any other proceeding.

375.1068. The privilege provided in section 375.1064 shall not

2 extend to any of the following:

3 (1) Documents, communications, data, reports, or any other
4 information expressly required to be collected, developed, maintained,
5 or reported to a regulatory agency pursuant to state or federal law;

6 (2) Information obtained by observation or monitoring by any
7 regulatory agency; or

8 (3) Information obtained from a source independent of the
9 insurance compliance audit.

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

5 2. Nothing in sections 375.1063 to 375.1069, nor the release of any
6 self-evaluative audit document shall limit, waive, or abrogate the scope
7 or nature of any statutory or common law privilege including, but not
8 limited to, the work product doctrine, the attorney-client privilege, or
9 the subsequent remedial measures exclusion.

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