

FIRST REGULAR SESSION

[PERFECTED]

HOUSE COMMITTEE SUBSTITUTE FOR

HOUSE BILL NO. 388

93RD GENERAL ASSEMBLY

Reported from the Committee on Insurance March 9, 2005, with recommendation that the House Committee Substitute for House Bill No. 388 Do Pass. Referred to the Committee on Rules pursuant to Rule 25(26)(f).

Reported from the Committee on Rules March 10, 2005 with recommendation that House Committee Substitute for House Bill No. 388 Do Pass with no time limit for debate.

Taken up for Perfection April 5, 2005. House Committee Substitute for House Bill No. 388 ordered Perfected and printed, as amended.

STEPHEN S. DAVIS, Chief Clerk

1285L.02P

AN ACT

To amend chapters 374 and 375, RSMo, by adding thereto eight new sections relating to insurance compliance audits.

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

Section A. Chapters 374 and 375, RSMo, are amended by adding thereto eight new sections, to be known as sections 374.071, 375.1063, 375.1064, 375.1065, 375.1066, 375.1067, 375.1068, and 375.1069, to read as follows:

374.071. 1. The following records of the department are not public records and are not available for public examination under section 374.070:

(1) Any document or other material in any consumer complaint file maintained under section 374.085, including medical records, repair estimates, adjuster notes, insurance policy provisions, recordings or transcripts of witness interviews, and any other records regarding coverage, settlement, payment, or denial of claim asserted under an insurance policy;

(2) Any document or other material submitted by an insurer or producer under

EXPLANATION — Matter enclosed in bold-faced brackets [thus] in the above bill is not enacted and is intended to be omitted from the law. Matter in **bold-face** type in the above bill is proposed language.

9 section 374.190, or any other inquiry, information request, or data call initiated by the
10 department.

11 2. Any record that is not public under this section is confidential and is not subject
12 to disclosure, including discovery or subpoena, unless the subpoena is issued by the proper
13 prosecuting attorney, attorney general, administrative hearing officer, or court. The
14 director may only produce the documents or other material to another state or federal
15 governmental agency or officer under a lawful request, subpoena, or formal discovery
16 procedure. The documents or material may, in the discretion of the director, be made
17 public once admitted as evidence in any administrative, civil, or criminal enforcement
18 proceeding.

19 3. The director may release contents of any record that is not public under this
20 section as part of an examination report under section 374.205, if the release is in the public
21 interest. In all cases, the director may release an incident report record consisting of the
22 date and immediate facts and circumstances surrounding the initial consumer report or
23 complaint.

24 4. No waiver of any applicable privilege or claim of confidentiality regarding any
25 document shall occur as a result of disclosure to the director or by the director in sharing
26 documents with other state and federal regulatory agencies, the National Association of
27 Insurance Commissioners, and its affiliates and subsidiaries, or state or federal law
28 enforcement authorities, and the recipient of such document is bound by the provisions of
29 this section as to the confidentiality of such document.

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

- 2 (1) "Director", the director of the department of insurance;
- 3 (2) "Insurance compliance audit", a voluntary, internal evaluation, review,
4 assessment, audit, or investigation for the purpose of identifying or preventing
5 noncompliance with, or promoting compliance with laws, regulations, orders, or industry
6 or professional standards, which is conducted by or on behalf of an insurer, or which
7 involves an activity regulated under this chapter and chapter 384, RSMo;
- 8 (3) "Insurance compliance self-evaluative audit document" or "document", any
9 document prepared as a result of or in connection with and not prior to an insurance
10 compliance audit. An insurance compliance self-evaluative audit document may include,
11 but is not limited to, as applicable, field notes and records of observations, findings,
12 opinions, suggestions, conclusions, drafts, memoranda, drawings, photographs, exhibits,
13 computer-generated or electronically recorded information, phone records, maps, charts,
14 graphs, and surveys, provided this supporting information is collected or developed for the
15 primary purpose and in the course of an insurance compliance audit. An insurance

16 compliance self-evaluative audit document also includes, but is not limited to, any of the
17 following:

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

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

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

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

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

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

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

14 3. If requested by the director, an insurer shall submit, in connection with
15 examinations conducted pursuant to sections 374.190 and 374.205, RSMo, an insurance
16 compliance self-evaluative document to the director, or the director's designee, as a
17 confidential document without waiving the privilege prescribed in this section to which the
18 insurer would otherwise be entitled; except that any provision of law permitting the
19 director to make confidential documents public or any provisions granting access to the
20 National Association of Insurance Commissioners shall not apply to the insurance
21 compliance self-evaluative audit document so submitted. To the extent that the director
22 has the authority to compel the disclosure of an insurance compliance self-evaluative audit
23 document under other provisions of applicable law, any such report furnished to the

24 **director shall not be provided to any other persons or entities and shall be accorded the**
25 **same confidentiality and other protections prescribed in this subsection.**

26 **4. An insurer's insurance compliance self-evaluative audit document submitted to**
27 **the director shall remain subject to all applicable statutory or common law privileges. Any**
28 **such document so submitted and in the possession of the director shall remain the property**
29 **of the insurer and shall not be subject to any disclosure or production pursuant to chapter**
30 **610, RSMo.**

31 **5. Disclosure of an insurance compliance self-evaluative audit document to a**
32 **governmental agency, whether voluntary or pursuant to compulsion of law, does not**
33 **constitute a waiver of the privileges pursuant to this section with respect to any other**
34 **persons or any other governmental agencies.**

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

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

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

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

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

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

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

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

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

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

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

24 **(3) The material contains evidence relevant to a breach of a civil duty owed by the**
25 **insurer to others, and the director is unable to obtain the substantial equivalent of the**

26 information by independent means without incurring unreasonable cost and delay.

27 **375.1066. 1.** The insurer that prepared or caused the document to be prepared may
28 file with the appropriate court a petition requesting an in-camera hearing pursuant to
29 section 375.1065 on whether the document or portions of the document are privileged
30 pursuant to sections 375.1063 to 375.1069. Failure by the insurer to file a petition pursuant
31 to this subsection within forty-five days of the insurer's receipt of the request for disclosure
32 waives the privilege for this request only.

33 **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 pursuant to subsection 2 or 3 of section 375.1065, that any one of the
conditions set forth in subsection 2 of section 375.1065 is applicable as to a civil 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;
- (3) The general nature of the activities covered by the audit; and
- (4) An identification of the portion of the document for which the privilege is being
asserted.

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

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

8 2. The parties may at any time stipulate in proceedings pursuant to section
9 375.1065 or 375.1066 to entry of an order directing that specific information contained in
10 a document is or is not subject to the privilege established pursuant to section 375.1064.
11 Any such stipulation may be limited to the instant proceeding and, absent specific language
12 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
2 following:

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

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

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

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

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