

CHAPTER 148  
HOUSE BILL No. 2357<sup>o</sup>

AN ACT pertaining to self audits by insurance companies.

*Be it enacted by the Legislature of the State of Kansas:*

Section 1. (a) Except as provided in sections 2 and 3, and amendments thereto, 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.

(b) If any insurance company, 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 who is hired for the purpose of performing the insurance compliance audit, may not be examined in any civil, criminal or administrative proceeding as to the insurance compliance audit or any insurance compliance self-evaluative audit document, as defined in this section. This subsection (b) shall not apply if the privilege set forth in subsection (a) of this section is determined under sections 2 and 3, and amendments thereto, not to apply.

(c) Any insurance company may voluntarily submit, in connection with any examination conducted under chapter 40 of the Kansas Statutes Annotated, and amendments thereto, an insurance compliance self-evaluative audit document to the commissioner as a confidential document in the same manner as provided in chapter 40 of the Kansas Statutes Annotated, and amendments thereto, for documents required to be provided to the commissioner in the course of an examination by the commissioner without waiving the privilege set forth in this section to which the insurance company would otherwise be entitled. Any provision in chapter 40 of the Kansas Statutes Annotated, and amendments thereto, permitting the commissioner to make confidential documents public or to grant the national association of insurance commissioners access to confidential documents shall not apply to the insurance compliance self-evaluative audit document voluntarily submitted by an insurance company. To the extent that the commissioner 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 commissioner shall not be provided to any other persons or entities and shall be accorded the same confidentiality and other protections as provided above for voluntarily submitted documents. Any use of an insurance compliance self-evaluative audit document furnished as a result of a request of the commissioner under a claim of authority to compel disclosure shall be limited to determining whether or not any disclosed defects in an insurers' policies and procedures or inappropriate treatment of customers has been remedied or that an appropriate plan for their remedy is in place.

(1) Any insurance company's insurance compliance self-evaluative audit document submitted to the commissioner shall remain subject to all applicable statutory or common law privileges including, but not limited to, the work product doctrine, attorney-client privilege, or the subsequent remedial measures exclusion.

(2) Any compliance self-evaluative audit document so submitted and in the possession of the commissioner shall remain the property of the insurance company and shall not be subject to any disclosure or production under the Kansas open records act. The provision of this paragraph shall expire on July 1, 2010, unless the legislature reenacts such provision. The provision of this paragraph shall be reviewed by the legislature prior to July 1, 2010.

(d) Disclosure of an insurance compliance self-evaluative audit document to a governmental agency, whether voluntary or pursuant to compulsion of law, shall not constitute a waiver of the privilege set forth in subsection (a) with respect to any other persons or any other governmental agencies. Nothing in this act shall prohibit the division of post audit from having access to all insurance compliance self-evaluative audit documents in the custody of the commissioner.

Sec. 2. (a) The privilege set forth in section 1, and amendments thereto, shall not apply if, after an in camera review consistent with the code of civil procedure, a court or administrative tribunal of record determines:

(1) The insurance compliance self-evaluative audit document shows evidence of noncompliance with applicable laws and regulations and appropriate efforts to achieve compliance with such laws and regulations were not promptly initiated and pursued with reasonable diligence upon discovery of noncompliance; or

(2) to the extent that it is expressly waived by the insurance company that prepared or caused to be prepared the insurance compliance self-evaluative audit document; or

(3) the privilege is asserted for a fraudulent purpose; or

(4) the material is not subject to the privilege.

(b) In a criminal proceeding, after an in camera review, a court may require disclosure of material for which the privilege described in section 1, and amendments thereto, is asserted, if the court determines 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 under chapter 40 of Kansas Statutes Annotated, and amendments thereto, and all three of the following factors are present:

(A) The commissioner, attorney general, or a county or district attorney, has a compelling need for the information;

(B) the information is not otherwise available; and

(C) the commissioner, attorney general, or a county or district attorney is unable to obtain the substantial equivalent of the information by any other means without incurring unreasonable cost and delay.

Sec. 3. (a) Within 30 days after the commissioner, attorney general, or a county or district attorney serves on an insurance company a written request by certified mail for disclosure of an insurance compliance self-evaluative audit document under this subsection, the insurance company 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 insurance compliance self-evaluative audit document or portions of the document are privileged under this act or subject to disclosure. The court has jurisdiction over a petition filed by any insurance company under this section requesting an in camera hearing on whether the insurance compliance self-evaluative audit document or portions of the document are privileged or subject to disclosure. Failure by the insurance company to file a petition waives the privilege for this request only.

(b) Any insurance company asserting the insurance compliance self-evaluative privilege in response to a request for disclosure under this subsection shall include in its request for an in camera hearing all of the information set forth in subsection (e) of this section.

(c) Upon the filing of a petition under this section, the court shall issue an order scheduling, within 45 days after the filing of the petition, an in camera hearing to determine whether the insurance compliance self-evaluative audit document or portions of the document are privileged under this act or subject to disclosure.

(d) After an in camera review, the court may require disclosure of material for which the privilege in section 1, and amendments thereto, is asserted if the court determines, based upon its in camera review, that any one of the conditions set forth in paragraphs (1) and (2) of subsection (b) of section 2, and amendments thereto, is applicable as to a civil or administrative proceeding or that any one of the conditions set forth in paragraphs (1) through (3) of subsection (c) of section 2 and amendments thereto, is applicable as to a criminal proceeding. Upon making such a determination, the court may only compel the disclosure of those portions of an insurance compliance self-evaluative audit 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 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.

(e) At the time of filing any objection to the disclosure, any insurance company asserting the insurance compliance self-evaluative privilege in

response to a request for disclosure under this section shall provide to the commissioner, attorney general, or a county or district attorney, all of the following information:

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

Sec. 4. (a) Any insurance company asserting the insurance compliance self-evaluative privilege set forth in section 1, and amendments thereto, has the burden of demonstrating the applicability of the privilege. Once any insurance company has established the applicability of the privilege, the party seeking disclosure under paragraph (1) of subsection (b) of section 2, and amendments thereto, has the burden of proving that the privilege is asserted for a fraudulent purpose. The commissioner, attorney general, or a county or district attorney seeking disclosure under subsection (c) of section 2, and amendments thereto, has the burden of proving the elements set forth in subsection (c) of section 2 and amendments thereto.

(b) The parties may at any time stipulate in proceedings under sections 2 or 3, and amendments thereto, to entry of an order directing that specific information contained in an insurance compliance self-evaluative audit document is or is not subject to the privilege provided under section 1 and amendments thereto. 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.

Sec. 5. The privilege set forth in section 1, and amendments thereto, shall not affect any other privilege and shall not extend to any of the following:

- (a) Documents, communications, data, reports or other information collected, developed, maintained or reported to a regulatory agency pursuant to chapter 40 of Kansas Statutes Annotated, and amendments thereto, or other provisions of federal or state law;
- (b) information obtained by observation or monitoring by any regulatory agency; or
- (c) information obtained from a source independent of the insurance compliance audit.

Sec. 6. As used in this act, the following words and phrases shall have the meaning ascribed to them in this section: (a) "Commissioner" means the commissioner of insurance or the commissioner's authorized designee.

(b) "Insurance company" or "insurer" shall have the meaning ascribed to the term insurer in K.S.A. 40-112 and amendments thereto.

(c) "Insurance compliance audit" means 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 any insurance company licensed or regulated under the Kansas insurance code, or which involves an activity regulated under the Kansas insurance code. Once initiated an audit shall be completed within a reasonable period of time. Nothing in this section shall be construed to authorize uninterrupted or continuous auditing.

(d) "Insurance compliance self-evaluative audit document" means any document prepared as a result of or in connection with an insurance compliance audit. An insurance compliance self-evaluative audit document may include:

- (1) A written response to the findings of an insurance compliance audit.
- (2) Any supporting information is collected or developed for the primary purpose and in the course of an insurance compliance audit including, but is not limited to, 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.
- (3) Any of the following:
  - (A) An insurance compliance audit report prepared by an auditor, who may be an employee of the insurance company 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.

(e) Presiding officer shall have the meaning ascribed to it in K.S.A. 77-514 and amendments thereto.

Sec. 7. The insurance compliance self-evaluative privilege created by this act shall apply to all litigation or administrative proceedings pending on the effective date of this act.

Sec. 8. No provision of this act nor the release of any self-evaluative audit document hereunder 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.

Sec. 9. This act shall take effect and be in force from and after its publication in the statute book.

Approved April 15, 2005.

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