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SFA**BILL ANALYSIS**

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Senate Bill 674 (as introduced 9-26-01)
Sponsor: Senator Bill Bullard, Jr.
Committee: Financial Services

Date Completed: 10-2-01

CONTENT

The bill would amend the Insurance Code to create an "insurance compliance self-evaluative audit document" privilege, which would mean that the document could not be admitted as evidence in a civil, criminal, or administrative proceeding and a person who prepared the audit could not be compelled to testify about it. The bill also would do the following:

- Provide for the confidentiality and privilege of a document submitted to the Commissioner of the Office of Financial and Insurance Services.**
- Specify that the privilege would not apply if a court required disclosure after a private hearing.**
- Establish the burden of proof for asserting a privilege or grounds for disclosure.**
- Exempt specific information from the privilege.**

"Insurance compliance self-evaluative audit document" would mean a document prepared as a result of or in connection with an insurance compliance audit, and could include a written response to the findings of such an audit. (This term and the term "insurance compliance audit" are described more fully below.)

Creation of Privilege

The bill states that, except as otherwise provided, an insurance compliance self-evaluative audit document would be privileged information and would not be discardable or admissible as evidence in any civil, criminal, or administrative proceeding. Also, except as otherwise provided, a person involved in preparing such an audit or audit document would not be subject to examination concerning the audit or audit document in any civil, criminal, or administrative proceeding. If the audit or audit document or any portion of it were not privileged, however, the individual involved in its preparation could be examined concerning the portion that was not privileged.

If the document were disclosed to a governmental agency, whether voluntarily or as compelled by law, the disclosure would not constitute a waiver of the privilege applicable to the document with respect to any other person or governmental agency.

Neither of the proposed privileges would apply to the extent that it was expressly waived by the insurer that prepared the document or caused it to be prepared.

The bill states that it would not limit, waive, or abrogate the scope or nature of any other statutory or common law privilege.

Submission to Commissioner

In connection with examinations conducted under the Code, an insurer could submit an insurance compliance self-evaluative audit document to the Commissioner of the Office of Financial and Industry Services (OFIS), or his or her designee, as a confidential document under Section 222(7) of the Code without waiving the privileges described above. (That section requires an examination report to be withheld from public inspection until it is finalized and filed with the Commissioner; allows the Commissioner to withhold any examination report from the public as long as he or she considers proper; and provides that all information furnished to the OFIS and related to an examination report or investigation is confidential.)

To the extent of the Commissioner's 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 could not be given to any other person or entity and would have to be accorded the same confidentiality and other protections as provided in Section 222(7). If a self-evaluative audit document were furnished at the request of the Commissioner under a claim of authority to compel disclosure, any use of the document would be limited to determining whether any disclosed defects in an insurer's policies and procedures or inappropriate treatment of customers had been remedied or that an appropriate plan for remedy was in place.

An insurance compliance self-evaluative audit document submitted to the Commissioner would remain subject to all applicable statutory or common law privileges, including the work product doctrine, attorney-client privilege, and the subsequent remedial measures exclusion. A document submitted to the Commissioner would remain the property of the insurer and would not be subject to disclosure under the Freedom of Information Act.

Court-Required Disclosure

The privileges proposed by the bill would not apply if a court, after an in camera (private) review, required disclosure in a civil or administrative proceeding after determining that the privilege was asserted for a fraudulent purpose and/or that the material was not subject to the privilege.

The privileges also would not apply in a criminal proceeding under the same circumstances or if the court determined that the material contained evidence relevant to the Commissioner of a criminal offense under the Code, the Commissioner or the Attorney General had a compelling need for the information, the information was not otherwise available, and the Commissioner or Attorney General was unable to obtain the substantial equivalent of the information by any means without incurring unreasonable cost and delay.

Within 30 days after the Commissioner or the Attorney General made a written request by certified mail for disclosure of an insurance compliance self-evaluative audit document, the insurer that prepared the document or had it prepared could file with the Ingham County Circuit Court a petition requesting an in camera hearing on whether the document or portions of it were subject to disclosure. An insurer's failure to file a petition would waive the privilege for that request. An insurer asserting the privilege in response to a request for disclosure would have to include all of the following information:

- The date of the document.
- The identity of the entity or individual conducting the audit.
- The general nature of the activities covered by the audit.
- An identification of the portions of the document for which the privilege was being asserted.

Within 45 days after the petition was filed, the court would have to issue an order scheduling an in camera hearing. If the court required disclosure after the hearing, it could compel the disclosure of only those portions of the document relevant to issues in dispute in the underlying proceeding. Information required to be disclosed would not be considered a public document or a waiver of the privilege for any other civil, criminal, or administrative proceeding.

Assertion of Privilege

An insurer asserting the proposed privilege in response to a request for disclosure, would have to give the Commissioner or the Attorney General, at the time of filing any objection to the disclosure, the same the information that would have to be included if an insurer filed a petition for an in camera hearing.

The insurer would have the burden of demonstrating that the privilege applied. Once the insurer had met that burden, a party seeking disclosure in a civil or administrative proceeding on the ground that the privilege was asserted for a fraudulent purpose, would have the burden of proving that. If the Commissioner or Attorney General were seeking disclosure in a criminal proceeding on the ground that the material contained relevant evidence that was not otherwise available, the Commissioner or Attorney General would have the burden of proving the elements of that ground for disclosure.

In proceedings under the bill, the parties could stipulate at any time to entry of an order directing that specific information contained in an insurance compliance self-evaluative audit document was or was not subject to the proposed privilege. Any such stipulation could be limited to that particular proceeding and, absent specific language to the contrary, would not apply to any other proceeding.

Exceptions

The privileges proposed by the bill would not extend to any of the following:

- Documents, communications, data, reports, or other information expressly required to be collected, developed, maintained, or reported to a regulatory agency under the Code or other Federal or State law.
- Information obtained by observation or monitoring by any regulatory agency.
- Information obtained from a source independent of the insurance compliance audit.

Definitions

An insurance compliance self-evaluative audit document could include 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, if this supporting information were collected or developed for the primary purpose and in the course of an insurance compliance audit. An insurance compliance self-evaluative audit document also would include any of the following:

- An insurance compliance audit report prepared by an auditor, who could be an employee of the insurer or an independent contractor. The report could include the scope of the audit, the information gained in it, and conclusions and recommendations, with exhibits and appendices.
- Memoranda and documents analyzing portions or all of the insurance compliance audit report and discussing potential implementation issues.
- An implementation plan that addressed correcting past noncompliance, improving current

compliance, and preventing future noncompliance.
-- Analytic data generated in the course of conducting the insurance compliance audit.

"Insurance compliance audit" would mean 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, conducted by or on behalf of an insurer licensed or regulated under the Code or involving an activity regulated under the Code.

Proposed MCL 500.221

Legislative Analyst: S. Lowe

FISCAL IMPACT

The bill would have no fiscal impact on State or local government.

Fiscal Analyst: M. Tyszkiewicz