

SB 701

1 THE STATE SENATE
2 Monday, February 23, 2009

3 Senate Bill No. 701
4 As Amended

5 SENATE BILL NO. 701 - By: Brown of the Senate and Sullivan of the
6 House.

7 [insurance - creating privilege - self-evaluative audit -
8 codification -
9 emergency]

10 BE IT ENACTED BY THE PEOPLE OF THE STATE OF OKLAHOMA:

11 SECTION 1. NEW LAW A new section of law to be codified
12 in the Oklahoma Statutes as Section 6830 of Title 36, unless there
13 is created a duplication in numbering, reads as follows:

14 A. Except as provided in Sections 2 and 3 of this act, an
15 insurance compliance self-evaluative audit is privileged information
16 and is not discoverable, or admissible as evidence in any legal
17 action in any civil, criminal, or administrative proceeding. The
18 privilege created herein is a matter of substantive law of this
19 state and is not merely a procedural matter governing civil or
20 criminal procedures in the courts of this state.

21 B. If any company, person, or entity performs or directs the
22 performance of an insurance compliance audit, an officer, employee
23 or agent involved with the insurance audit, or any consultant who is
24 hired for the purpose of performing the insurance compliance audit,
25 may not be examined in any civil, criminal, or administrative

1 proceeding as to the insurance compliance audit or any insurance
2 compliance self-evaluative audit document, as defined in this
3 section. This section does not apply if the privilege set forth in
4 subsection A of this section is determined under Section 2 or 3 of
5 this act not to apply.

6 C. A company may voluntarily submit, in connection with
7 examinations conducted under this act, an insurance compliance self-
8 evaluative audit document to the Insurance Commissioner, or
9 designee, as a confidential document without waiving the privilege
10 set forth in this section to which the company would otherwise be
11 entitled; provided, however, that the provisions of the Oklahoma
12 Insurance Code permitting the Commissioner to make confidential
13 documents public and grant access to documents to the National
14 Association of Insurance Commissioners shall not apply to the
15 insurance compliance self-evaluative audit document. Any such
16 report furnished to the Insurance Commissioner shall not be provided
17 to any other persons or entities and shall be accorded the same
18 confidentiality and other protections as provided above for
19 voluntarily submitted documents.

20 D. A company's insurance compliance self-evaluative audit
21 document submitted to the Commissioner shall remain subject to all
22 applicable statutory or common law privileges including, but not

1 limited to, the work product doctrine, attorney-client privilege, or
2 the subsequent remedial measures exclusion.

3 E. Any compliance self-evaluative audit document so submitted
4 and in the possession of the Commissioner shall remain the property
5 of the company and shall not be subject to any disclosure or
6 production under the Oklahoma Open Records Act.

7 F. Disclosure of an insurance compliance self-evaluative audit
8 document to a governmental agency, whether voluntary or pursuant to
9 compulsion of law, shall not constitute a waiver of the privilege
10 set forth in subsection A of this section with respect to any other
11 persons or any other governmental agencies.

12 SECTION 2. NEW LAW A new section of law to be codified
13 in the Oklahoma Statutes as Section 6831 of Title 36, unless there
14 is created a duplication in numbering, reads as follows:

15 A. The privilege set forth in Section 1 of this act does not
16 apply to the extent that it is expressly waived by the company that
17 prepared or caused to be prepared the insurance compliance self-
18 evaluative audit document.

19 B. In a civil or administrative proceeding, a court of record
20 may, after an in camera review, require disclosure of material for
21 which the privilege set forth in Section 1 of this act is asserted,
22 if the court determines one of the following:

23 1. The privilege is asserted for a fraudulent purpose; or

1 2. The material is not subject to the privilege.

2 C. In a criminal proceeding, a court of record may, after an in
3 camera review, require disclosure of material for which the
4 privilege described in Section 1 of this act is asserted, if the
5 court determines one of the following:

6 1. The privilege is asserted for a fraudulent purpose;

7 2. The material is not subject to the privilege; or

8 3. The material contains evidence relevant to commission of a
9 criminal offense under this Code, and all three of the following
10 factors are present:

11 a. the Insurance Commissioner, district attorney, or
12 Attorney General has a compelling need for the
13 information,

14 b. the information is not otherwise available, and

15 c. the Insurance Commissioner, district attorney, or
16 Attorney General is unable to obtain the substantial
17 equivalent of the information by any other means
18 without incurring unreasonable cost and delay.

19 SECTION 3. NEW LAW A new section of law to be codified
20 in the Oklahoma Statutes as Section 6832 of Title 36, unless there
21 is created a duplication in numbering, reads as follows:

22 A. Within thirty (30) days after the Insurance Commissioner,
23 District attorney, or Attorney General serves on an insurer a

1 written request by certified mail for disclosure of an insurance
2 compliance self-evaluative audit document under this act, the
3 company that prepared or caused the document to be prepared may file
4 with the appropriate court a petition requesting an in camera
5 hearing on whether the insurance compliance self-evaluative audit
6 document or portions of the document are privileged or subject to
7 disclosure. Failure by the company to file a petition waives the
8 privilege for this request only.

9 B. A company asserting the insurance compliance self-evaluative
10 privilege in response to a request for disclosure under this act
11 shall include in its request for an in camera hearing all of the
12 information set forth in subsection E of this section.

13 C. Upon the filing of a petition under this subsection, the
14 court shall issue an order scheduling, within forty-five (45) days
15 after the filing of the petition, an in camera hearing to determine
16 whether the insurance compliance self-evaluative audit document or
17 portions of the document are privileged under this section or
18 subject to disclosure.

19 D. The court, after an in camera review, may require disclosure
20 of material for which the privilege in Section 1 of this act is
21 asserted if the court determines, based upon its in camera review,
22 that any one of the conditions set forth in subsection B of Section
23 2 of this act is applicable as to a civil or administrative

1 proceeding or that any one of the conditions set forth in subsection
2 C of Section 2 of this act is applicable as to a criminal
3 proceeding. Upon making such a determination, the court may only
4 compel the disclosure of those portions of an insurance compliance
5 self-evaluative audit document relevant to issues in dispute in the
6 underlying proceeding. Any compelled disclosure will not be
7 considered to be a public document or be deemed to be a waiver of
8 the privilege for any other civil, criminal, or administrative
9 proceeding. A party unsuccessfully opposing disclosure may apply to
10 the court for an appropriate order protecting the document from
11 further disclosure.

12 E. A company asserting the insurance compliance self-evaluative
13 privilege in response to a request for disclosure under this act
14 shall provide to the Insurance Commissioner, district attorney, or
15 Attorney General, as the case may be, at the time of filing any
16 objection to the disclosure, all of the following information:

- 17 1. The date of the insurance compliance self-evaluative audit
18 document;
- 19 2. The identity of the entity conducting the audit;
- 20 3. The general nature of the activities covered by the
21 insurance compliance self-evaluative audit; and

1 4. An identification of the portions of the insurance
2 compliance self-evaluative audit document for which the privilege is
3 being asserted.

4 SECTION 4. NEW LAW A new section of law to be codified
5 in the Oklahoma Statutes as Section 6833 of Title 36, unless there
6 is created a duplication in numbering, reads as follows:

7 A. A company asserting the insurance compliance self-evaluative
8 privilege set forth in Section 1 of this act has the burden of
9 demonstrating the applicability of the privilege. Once a company
10 has established the applicability of the privilege, the party
11 seeking disclosure under this act has the burden of proving that the
12 privilege is asserted for a fraudulent purpose. The Insurance
13 Commissioner, district attorney, or Attorney General seeking
14 disclosure under this act has the burden of proving the elements set
15 forth in subsection B or C of Section 2 of this act.

16 B. The parties may at any time stipulate in proceedings under
17 Section 2 or 3 of this act to entry of an order directing that
18 specific information contained in an insurance compliance self-
19 evaluative audit document is or is not subject to the privilege
20 provided under Section 1 of this act. Any such stipulation may be
21 limited to the instant proceeding and, absent specific language to
22 the contrary, shall not be applicable to any other proceeding.

1 SECTION 5. NEW LAW A new section of law to be codified
2 in the Oklahoma Statutes as Section 6834 of Title 36, unless there
3 is created a duplication in numbering, reads as follows:

4 The privilege set forth in Section 1 of this act shall not
5 extend to any of the following:

- 6 1. Documents, communications, data, reports, or other
7 information expressly required to be collected, developed,
8 maintained, or reported to a regulatory agency pursuant to this act,
9 or other federal or state law;
- 10 2. Information obtained by observation or monitoring by any
11 regulatory agency; or
- 12 3. Information contained from a source independent of the
13 insurance compliance audit.

14 SECTION 6. NEW LAW A new section of law to be codified
15 in the Oklahoma Statutes as Section 6835 of Title 36, unless there
16 is created a duplication in numbering, reads as follows:

17 As used in this act:

- 18 1. "Insurance compliance audit" means a voluntary internal
19 evaluation, review, assessment, audit, or investigation for the
20 purpose of identifying or preventing noncompliance with, or
21 promoting compliance with, laws, regulations, orders, or industry or
22 professional standards, which is conducted by or on behalf of a

1 company licensed or regulated under the Oklahoma Insurance Code, or
2 which involves an activity regulated under this Code; and

3 2. "Insurance compliance self-evaluative audit document" means
4 documents prepared as a result of or in connection with an insurance
5 compliance audit. An insurance compliance self-evaluative audit
6 document may include, but is not limited to, as applicable, field
7 notes and records of observations, findings, opinions, suggestions,
8 conclusions, drafts, memoranda, drawings, photographs, exhibits,
9 computer-generated or electronically recorded information, phone
10 records, maps, charts, graphs, and surveys; provided, this
11 supporting information is collected or developed for the primary
12 purpose and in the course of an insurance compliance audit. An
13 insurance compliance self-evaluative audit document also includes,
14 but is not limited to, any of the following:

15 a. an insurance compliance audit report prepared by an
16 auditor, who may be an employee of the company or an
17 independent contractor, which may include the scope of
18 the audit, the information gained in the audit, and
19 conclusions and recommendations, with exhibits and
20 appendices,

21 b. memoranda and documents analyzing portions or all of
22 the insurance compliance audit report and discussing
23 potential implementation issues,

- 1 c. an implementation plan that addresses correcting past
2 noncompliance, improving current compliance, and
3 preventing future noncompliance, or
4 d. analytic data generated in the course of conducting
5 the insurance compliance audit.

6 SECTION 7. NEW LAW A new section of law to be codified
7 in the Oklahoma Statutes as Section 6836 of Title 36, unless there
8 is created a duplication in numbering, reads as follows:

9 The insurance compliance self-evaluative privilege created by
10 this act shall apply to all litigation or administrative proceedings
11 pending at the effective date of this act.

12 SECTION 8. NEW LAW A new section of law to be codified
13 in the Oklahoma Statutes as Section 6837 of Title 36, unless there
14 is created a duplication in numbering, reads as follows:

15 Nothing in this act nor the release of any self-evaluative audit
16 document hereunder shall limit, waive, or abrogate the scope or
17 nature of any statutory or common law privilege including, but not
18 limited to, the work product doctrine, the attorney-client
19 privilege, or the subsequent remedial measures exclusion.

20 SECTION 9. It being immediately necessary for the preservation
21 of the public peace, health and safety, an emergency is hereby
22 declared to exist, by reason whereof this act shall take effect and
23 be in full force from and after its passage and approval.

1 COMMITTEE REPORT BY: COMMITTEE ON JUDICIARY, dated 2-17-09 - DO
2 PASS, As Amended and Coauthored.