STATE OF OKLAHOMA

2nd Session of the 53rd Legislature (2012)

SENATE BILL 1474 By: Johnson (Rob)

AS INTRODUCED

An Act relating to an insurance compliance self-evaluative audit; creating privilege for insurance compliance self-evaluative audit; prohibiting person performing audit from being examined; allowing for voluntary submission of audit document; allowing document certain protections; limiting privilege if waived; providing for in camera determination by court for civil or criminal proceedings; allowing for filing of petition if request made for audit; allowing court to compel disclosure if certain conditions are met; requiring entity claiming privilege to prove privilege; allowing for stipulations to privilege; limiting scope of privilege; defining terms; providing for applicability of act; limiting effect of act on other statutory privileges; providing for codification; and declaring an emergency.

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

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

A. Except as provided in Sections 2 and 3 of this act, an insurance compliance self-evaluative audit 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 company, person, or entity performs or directs the performance of an insurance compliance audit, an officer, employee or agent involved with the insurance 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 section does not apply if the privilege set forth in subsection A of this section is determined under Section 2 or 3 of this act not to apply.

C. A company may voluntarily submit, in connection with examinations conducted under this act, an insurance compliance self-evaluative audit document to the Insurance Commissioner, or designee, as a confidential document without waiving the privilege set forth in this section to which the company would otherwise be entitled; provided, however, that the provisions of the Oklahoma Insurance Code permitting the Commissioner to make confidential documents public and grant access to documents to the National Association of Insurance Commissioners shall not apply to the insurance compliance self-evaluative audit document. Any such report furnished to the Insurance 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.

D. A 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.

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

F. 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 of this section with respect to any other persons or any other governmental agencies.

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

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

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

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

2. The material is not subject to the privilege.

C. In a criminal proceeding, a court of record may, after an in camera review, require disclosure of material for which the privilege described in Section 1 of this act 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 this Code, and all three of the following factors are present:

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

b. the information is not otherwise available, and

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

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

A. Within thirty (30) days after the Insurance Commissioner, district attorney, or Attorney General serves on an insurer a written request by certified mail for disclosure of an insurance compliance self-evaluative audit document under this act, the 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 or subject to disclosure. Failure by the company to file a petition waives the privilege for this request only.

B. A company asserting the insurance compliance self-evaluative privilege in response to a request for disclosure under this act 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 forty-five (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 section or subject to disclosure.

D. The court, after an in camera review, may require disclosure of material for which the privilege in Section 1 of this act is asserted if the court determines, based upon its in camera review, that any one of the conditions set forth in subsection B of Section 2 of this act is applicable as to a civil or administrative proceeding or that any one of the conditions set forth in subsection C of Section 2 of this act 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. A company asserting the insurance compliance self-evaluative privilege in response to a request for disclosure under this act shall provide to the Insurance Commissioner, district attorney, or Attorney General, as the case may be, at the time of filing any objection to the disclosure, 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 self-evaluative audit; and

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

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

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

B. The parties may at any time stipulate in proceedings under Section 2 or 3 of this act 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 of this act. 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.

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

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

1. Documents, communications, data, reports, or other information expressly required to be collected, developed, maintained, or reported to a regulatory agency pursuant to this act, or other federal or state law;

2. Information obtained by observation or monitoring by any regulatory agency; or

3. Information contained from a source independent of the insurance compliance audit.

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

As used in this act:

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

2. "Insurance compliance self-evaluative audit document" means documents prepared as a result of or in connection with 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 audit. An insurance compliance self-evaluative audit document also includes, but is not limited to, any of the following:

a. an insurance compliance audit report prepared by an auditor, who may be an employee of the 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.

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

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

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

Nothing in 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.

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

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