

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 1999

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HOUSE BILL 1106

Short Title: Insurer Audits Privileged.

(Public)

Sponsors: Representative Gibson.

Referred to: Insurance, if favorable, Judiciary I.

April 15, 1999

A BILL TO BE ENTITLED

AN ACT TO ESTABLISH A PRIVILEGE FOR AUDITS CONDUCTED BY INSURERS.

The General Assembly of North Carolina enacts:

Section 1. Article 3 of Chapter 58 of the General Statutes is amended by adding the following new sections to read:

"§ 58-3-220. Insurance compliance audit and insurance compliance self-critical analysis document defined.

As used in this section and in G.S. 58-3-221 through G.S. 58-3-226, the term '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, rules, orders, or industry or professional standards, which is conducted by or on behalf of an insurer licensed pursuant to this Chapter. The term 'insurance compliance self-critical analysis document' or 'document' means a document prepared as a result of or in connection with an insurance compliance audit. An insurance compliance self-critical analysis document may include a written response to the findings of an insurance compliance audit. The document may include, as applicable, field notes and records of observations, workpapers, findings, opinions, suggestions, conclusions, drafts, memoranda, drawings, photographs, exhibits, computer-generated or electronically recorded information, phone records, maps, charts, graphs,

1 and surveys, provided this supporting information is collected or developed for the
2 primary purpose and in the course of an insurance compliance audit. If the insurance
3 compliance audit is conducted by an auditor, who may be an employee of the insurer or
4 an independent contractor, the document may include the scope of the audit, the
5 information gained in the audit and conclusions and recommendations, with exhibits and
6 appendices. The document may also include (i) memoranda and documents analyzing
7 portions, or all, of the insurance compliance audit report and discussing potential
8 implementation issues, (ii) an implementation plan that addresses correcting past
9 noncompliance, improving current compliance and preventing future noncompliance, and
10 (iii) analytic data generated in the course of conducting the insurance compliance audit.

11 **"§ 58-3-221. Audit documents privileged.**

12 (a) An insurance compliance self-critical analysis privilege is created to protect the
13 confidentiality of insurance compliance self-critical analysis documents or
14 communications in regard to their content relating to voluntary internal compliance audits
15 conducted by insurers in regard to activities regulated under this Chapter. The purpose of
16 the privilege is to protect the actions of insurers in conducting voluntary internal audits of
17 compliance programs and management systems and in assessing and improving
18 compliance with State and federal statutes, rules, and orders.

19 (b) Except as provided in G.S. 58-3-222 through G.S. 58-3-224, an insurance
20 compliance self-critical analysis document is privileged information and is not
21 discoverable or admissible evidence in any legal action in any civil, criminal, or
22 administrative proceeding. The privilege is a matter of substantive law of this State and
23 is not merely a procedural matter governing administrative, civil, or criminal procedures
24 in the courts of this State.

25 (c) If an insurer, person, or entity performs or directs the performance of an
26 insurance compliance audit, an officer, employee, or agent involved with the insurance
27 compliance audit or any consultant who is hired for the purpose of performing the
28 insurance compliance audit, shall not be examined in any civil, criminal, or
29 administrative proceeding as to the insurance compliance audit or any insurance
30 compliance self-critical analysis document. This section does not apply if it is
31 determined under G.S. 58-3-223 or G.S. 58-3-224 that the privilege does not apply.

32 **"§ 58-3-222. Submission to Commissioner.**

33 (a) Upon request of the Commissioner, an insurer must submit an insurance
34 compliance self-critical analysis document to the Commissioner, or the Commissioner's
35 designee, as a confidential document without waiving the privilege to which the insurer
36 would otherwise be entitled. The Commissioner shall not make insurance compliance
37 self-critical analysis documents available to the National Association of Insurance
38 Commissioners. To the extent the Commissioner has the authority to compel the
39 disclosure of an insurance compliance self-critical analysis document under other
40 provisions of applicable law, any report furnished to the Commissioner shall not be
41 provided to any other person or entity and shall be accorded the same confidentiality and
42 other protections as provided in G.S. 58-3-221 for voluntarily submitted documents. Any
43 use of an insurance compliance self-critical analysis document furnished as a result of a

1 request of the Commissioner, whether under a claim of authority to compel disclosure or
2 not, is limited to determining whether any disclosed defects in an insurer's policies or
3 procedures or inappropriate treatment of customers has been remedied or that an
4 appropriate plan for their remedy is in place. The Commissioner shall not impose any
5 type of administrative fine or penalty as to any issue addressed or matter covered in an
6 insurance compliance self-critical analysis document furnished at the Commissioner's
7 request, except where there is clear and convincing evidence that the insurer failed to
8 undertake reasonable corrective action, eliminate inappropriate treatment of customers, or
9 failed to implement an appropriate plan to rectify any noncompliance with State and
10 federal statutes, rules, and orders.

11 (b) An insurer's compliance self-critical analysis document submitted to the
12 Commissioner remains subject to all applicable statutory or common law privileges. An
13 insurance compliance self-critical analysis document submitted to and in the possession
14 of the Commissioner remains the property of the insurer and is not subject to any
15 disclosure or production and are not public records pursuant to G.S. 58-2-100 or G.S.
16 132-1.

17 (c) Disclosure of an insurance compliance self-critical analysis document to a
18 governmental agency, whether voluntary or pursuant to compulsion of law, does not
19 constitute a waiver of the privilege with respect to any other person or any other
20 government agency.

21 **"§ 58-3-223. Waiver of privilege by insurer; grounds for determination of privilege.**

22 (a) The self-critical analysis privilege does not apply to the extent that it is
23 expressly waived by the insurer that prepared or caused to be prepared the insurance
24 compliance self-critical analysis document.

25 (b) In a civil or administrative proceeding, the court, after an in-camera review,
26 may require disclosure of material for which the privilege is asserted, if the court
27 determines either (i) the privilege is asserted for a fraudulent purpose, or (ii) the material
28 is not subject to the privilege.

29 (c) In a criminal proceeding, the court, after an in-camera review, may require
30 disclosure of material for which the privilege is asserted, if the court determines one of
31 the following:

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

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

34 (3) The material contains evidence relevant to commission of a criminal
35 offense, and all three of the following factors are present:

36 a. The Commissioner or prosecutor has a compelling need for the
37 information;

38 b. The information is not otherwise available; and

39 c. The Commissioner or prosecutor is unable to obtain the
40 substantial equivalent of the information by any other means
41 without incurring unreasonable cost and delay.

42 **"§ 58-3-224. Determination of privilege; procedure.**

1 (a) If a person seeks from an insurer communications involving an insurance
2 compliance audit or any insurance compliance self-critical analysis document during the
3 course of a pending civil or criminal proceeding, the insurer may assert the self-critical
4 analysis privilege and provide the information set forth in G.S. 58-3-223 during the
5 course of those proceedings just as any other privilege is asserted in the courts of this
6 State. If the court is required to make a determination as to the privilege, the court shall
7 follow the procedure and conditions set forth in G.S. 58-3-222.

8 (b) If there is a pending administrative proceeding, or there is no pending civil or
9 criminal proceeding, the Commissioner or prosecutor may serve on an insurer a written
10 request by certified mail for disclosure of an insurance compliance self-critical analysis
11 document. Within 30 days after the Commissioner or prosecutor serves on an insurer a
12 written request by certified mail for disclosure of an insurance compliance self-critical
13 analysis document, the insurer that prepared or caused the document to be prepared may
14 file with the Superior Court of Wake County a petition requesting an in-camera hearing
15 on whether the insurance compliance self-critical analysis document or portions of the
16 document are privileged or subject to disclosure. The superior court has jurisdiction over
17 a petition filed by an insurer under this subsection requesting an in-camera hearing on
18 whether the insurance compliance self-critical analysis document or portions of the
19 document are privileged or subject to disclosure. Failure by the insurer to file a petition
20 waives the privilege for the specific request made only.

21 (c) An insurer asserting the insurance compliance self-critical analysis privilege in
22 response to a request for disclosure under this section shall include in its request for an
23 in-camera hearing all of the information set forth in G.S. 58-3-223.

24 (d) Upon the filing of a petition under this section, the court shall issue an order
25 scheduling, within 45 days after the filing of the petition, an in-camera hearing to
26 determine whether the insurance compliance self-critical analysis document or portions
27 of the document are privileged or subject to disclosure.

28 (e) The court, after an in-camera review, may require disclosure of material for
29 which the privilege is asserted if the court determines, based upon its in-camera review,
30 that any one of the conditions set forth in G.S. 58-3-223(b) is applicable as to a civil or
31 administrative proceeding or that any one of the conditions set forth in G.S. 58-3-223(c)
32 is applicable as to a criminal proceeding. Upon making such determination, the court
33 may only compel the disclosure of those portions of an insurance compliance self-critical
34 analysis document relevant to issues in dispute in the underlying proceeding. A
35 compelled disclosure shall not be considered to be a public document or be deemed to be
36 a waiver of the privilege for any other civil, criminal, or administrative proceeding. An
37 insurer unsuccessfully opposing disclosure may apply to the court for an appropriate
38 order protecting the document from further disclosure.

39 (f) An insurer asserting the insurance compliance self-critical analysis privilege in
40 response to a request for disclosure under this section shall provide at the time of making
41 and filing any objection to the disclosure all of the following information:

- 42 (1) The date of the insurance compliance self-critical analysis document;
- 43 (2) The identity of the entity conducting the audit;

1 (3) The general nature of the activities covered by the insurance compliance
2 audit; and

3 (4) An identification of the portions of the insurance compliance self-
4 critical analysis document for which the privilege is being asserted.

5 **"§ 58-3-225. Privilege; burden of proof; stipulation.**

6 An insurer asserting the insurance compliance self-critical analysis privilege has the
7 burden of demonstrating the applicability of the privilege. Once an insurer has
8 established the applicability of the privilege, a party seeking disclosure has the burden of
9 proving that the privilege is asserted for a fraudulent purpose. The Commissioner or
10 prosecutor seeking disclosure of the privilege has the burden of proving the elements set
11 forth in G.S. 58-3-223(c)(1) and (3).

12 The parties may at any time stipulate in proceedings under G.S. 58-3-223 or G.S. 58-
13 3-224 to entry of an order directing whether the specific information contained in an
14 insurance compliance self-critical analysis document is or is not subject to the privilege.
15 Any such stipulation may be limited to the instant proceeding and, absent specific
16 language to the contrary, is not applicable to any other proceeding.

17 **"§ 58-3-226. Applicability of privilege.**

18 The self-critical analysis privilege does not apply to:

19 (1) Documents, communications, data, reports, or other information
20 expressly required to be collected, developed, maintained, or reported to
21 a regulatory agency pursuant to this Chapter, or other federal or State
22 law;

23 (2) Information obtained by observation or monitoring by any regulatory
24 agency; or

25 (3) Information obtained from a source independent of the insurance
26 compliance audit."

27 Section 2. This act becomes effective October 1, 1999, and applies to all
28 litigation or administrative proceedings instituted on or after that date.