
HOUSE BILL 3052

State of Washington

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By Representatives L. Thomas, Smith, Mielke, Grant, DeBolt, Dyer, Hickel, Sullivan and Robertson

Read first time 01/28/98. Referred to Committee on Financial Institutions & Insurance.

1 AN ACT Relating to self-audits by insurers; and adding a new
2 section to chapter 48.01 RCW.

3 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

4 NEW SECTION. **Sec. 1.** A new section is added to chapter 48.01 RCW
5 to read as follows:

6 (1) To encourage insurers both to conduct voluntary internal audits
7 of their compliance programs and management systems and to assess and
8 improve compliance with state and federal statutes, rules, and orders,
9 an insurance compliance self-evaluative privilege is recognized to
10 protect the confidentiality of communications relating to voluntary
11 internal compliance audits. The legislature hereby finds and declares
12 that protection of insurance consumers is enhanced by insurers'
13 voluntary compliance with this state's insurance and other laws and
14 that the public will benefit from incentives to identify and remedy
15 insurance and other compliance issues. It is further declared that
16 limited expansion of the protection against disclosure will encourage
17 voluntary compliance and improve insurance market conduct quality and
18 that the voluntary provisions of this section will not inhibit the

1 exercise of the regulatory authority by those entrusted with protecting
2 insurance consumers.

3 (2)(a) An insurance compliance self-evaluative audit document is
4 privileged information and is not admissible as evidence in any legal
5 action in any civil, criminal, or administrative proceeding, except as
6 provided in subsections (3) and (4) of this section. Documents,
7 communications, data, reports, or other information created as a result
8 of a claim involving personal injury made against an insurance policy
9 are not insurance compliance self-evaluative audit documents and are
10 admissible as evidence in civil proceedings as otherwise provided by
11 applicable rules of evidence or civil procedure, subject to any
12 applicable statutory or common law privilege, including but not limited
13 to the work product doctrine, the attorney-client privilege, or the
14 subsequent remedial measures exclusion.

15 (b) If any insurer performs or directs the performance of an
16 insurance compliance audit, an officer or employee involved with the
17 insurance compliance audit, or any consultant who is hired for the
18 purpose of performing the insurance compliance audit, may not be
19 examined in any civil, criminal, or administrative proceeding as to the
20 insurance compliance audit or any insurance compliance self-evaluative
21 audit document, as defined in this section. This subsection (2)(b)
22 does not apply if the privilege set forth in (2)(a) of this subsection
23 is determined under subsection (3) or (4) of this section not to apply.

24 (c) An insurer may voluntarily submit, in connection with
25 examinations conducted under chapter 48.03 RCW, an insurance compliance
26 self-evaluative audit document to the commissioner, or his or her
27 designee, as a confidential document without waiving the privilege set
28 forth in this section to which the insurer would otherwise be entitled.
29 However, any provisions permitting the commissioner to make
30 confidential documents public and to provide access to the national
31 association of insurance commissioners does not apply to a voluntarily
32 submitted insurance compliance self-evaluative audit document. This
33 subsection does not grant the commissioner any authority to compel an
34 insurer to disclose involuntarily or otherwise provide an insurance
35 compliance self-evaluative audit document.

36 (3)(a) The privilege set forth in subsection (2) of this section
37 does not apply to the extent that it is expressly waived by the insurer
38 that prepared or caused to be prepared the insurance compliance self-
39 evaluative audit document.

1 (b) In a civil or administrative proceeding, a court of record may,
2 after an in camera review, require disclosure of material for which the
3 privilege set forth in subsection (2) of this section is asserted, if
4 the court determines one of the following:

5 (i) The privilege is asserted for a fraudulent purpose;

6 (ii) The material is not subject to the privilege; or

7 (iii) Even if subject to the privilege, the material shows evidence
8 of noncompliance with state and federal statutes, rules, and orders and
9 the insurer failed to undertake reasonable corrective action or
10 eliminate the noncompliance within a reasonable time.

11 (c) In a criminal proceeding, a court of record may, after an in
12 camera review, require disclosure of material for which the privilege
13 described in subsection (2) of this section is asserted, if the court
14 determines one of the following:

15 (i) The privilege is asserted for a fraudulent purpose;

16 (ii) The material is not subject to the privilege;

17 (iii) Even if subject to the privilege, the material shows evidence
18 of noncompliance with state and federal statutes, rules, and orders and
19 the insurer failed to undertake reasonable corrective action or
20 eliminate such noncompliance within a reasonable time; or

21 (iv) The material contains evidence relevant to commission of a
22 criminal offense under this title, and all of the following factors are
23 present:

24 (A) The commissioner or attorney general has a compelling need for
25 the information;

26 (B) The information is not otherwise available; and

27 (C) The commissioner or attorney general is unable to obtain the
28 substantial equivalent of the information by any means without
29 incurring unreasonable cost and delay.

30 (4)(a) Within thirty days after the commissioner or attorney
31 general makes a written request by certified mail for disclosure of an
32 insurance compliance self-evaluative audit document under this
33 subsection, the insurer that prepared or caused the document to be
34 prepared may file with the appropriate court a petition requesting an
35 in camera hearing on whether the insurance compliance self-evaluative
36 audit document or portions of the document are privileged under this
37 section or subject to disclosure. The court has jurisdiction over a
38 petition filed by an insurer under this subsection requesting an in
39 camera hearing on whether the insurance compliance self-evaluative

1 audit document or portions of the document are privileged or subject to
2 disclosure. Failure by the insurer to file a petition waives the
3 privilege.

4 (b) An insurer asserting the insurance compliance self-evaluative
5 privilege in response to a request for disclosure under this subsection
6 shall include in its request for an in camera hearing all of the
7 information set forth in (e) of this subsection.

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

13 (d) The court, after an in camera review, may require disclosure of
14 material for which the privilege in subsection (2) of this section is
15 asserted if the court determines, based upon its in camera review, that
16 any one of the conditions set forth in subsection (3)(b)(i) through
17 (iii) is applicable as to a civil or administrative proceeding or that
18 any one of the conditions set forth in subsection (3)(c)(i) through
19 (iv) is applicable as to a criminal proceeding. Upon making such a
20 determination, the court may only compel the disclosure of those
21 portions of an insurance compliance self-evaluative audit document
22 relevant to issues in dispute in the underlying proceeding. Any
23 compelled disclosure will not be considered to be a public document or
24 be deemed to be a waiver of the privilege for any other civil,
25 criminal, or administrative proceeding. A party unsuccessfully
26 opposing disclosure may apply to the court for an appropriate order
27 protecting the document from further disclosure.

28 (e) An insurer asserting the insurance compliance self-evaluative
29 privilege in response to a request for disclosure under this subsection
30 (4) shall provide to the commissioner or attorney general, as the case
31 may be, at the time of filing any objection to the disclosure, all of
32 the following information:

33 (i) The date of the insurance compliance self-evaluative audit
34 document;

35 (ii) The identity of the entity conducting the audit;

36 (iii) The general nature of the activities covered by the insurance
37 compliance audit; and

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

4 (5)(a) An insurer asserting the insurance compliance self-
5 evaluative privilege set forth in subsection (2) of this section has
6 the burden of demonstrating the applicability of the privilege. Once
7 an insurer has established the applicability of the privilege, a party
8 seeking disclosure under subsection (3)(b)(i) or (iii) of this section
9 has the burden of proving that the privilege is asserted for a
10 fraudulent purpose or that the insurer failed to undertake reasonable
11 corrective action or eliminate the noncompliance within a reasonable
12 time. The commissioner or attorney general seeking disclosure under
13 subsection (3)(c) of this section has the burden of proving the
14 elements set forth in subsection (3)(c) of this section.

15 (b) The parties may at any time stipulate in proceedings under
16 subsection (3) or (4) of this section to entry of an order directing
17 that specific information contained in an insurance compliance self-
18 evaluative audit document is or is not subject to the privilege
19 provided under subsection (2) of this section.

20 (6) The privilege set forth in subsection (4) of this section shall
21 not extend to any of the following:

22 (a) Documents, communications, data, reports, or other information
23 required to be collected, developed, maintained, reported, or otherwise
24 made available to a regulatory agency pursuant to this title, or other
25 federal or state law, rule, or order;

26 (b) Information obtained by observation or monitoring by any
27 regulatory agency; or

28 (c) Information obtained from a source independent of the insurance
29 compliance audit.

30 (7) As used in this section:

31 (a) "Insurance compliance audit" means a voluntary, internal
32 evaluation, review, assessment, or audit not otherwise expressly
33 required by law of an insurer or an activity regulated under this
34 title, or other state or federal law applicable to an insurer, or of
35 management systems related to the insurer or activity, that is designed
36 to identify and prevent noncompliance and to improve compliance with
37 those statutes, rules, or orders. An insurance compliance audit may be
38 conducted by the insurer, its employees, or by independent contractors.

1 (b) "Insurance compliance self-evaluative audit document" means
2 documents prepared as a result of or in connection with and not prior
3 to an insurance compliance audit. An insurance compliance self-
4 evaluative audit document may include a written response to the
5 findings of an insurance compliance audit. An insurance compliance
6 self-evaluative audit document may include, but is not limited to, as
7 applicable, field notes and records of observations, findings,
8 opinions, suggestions, conclusions, drafts, memoranda, drawings,
9 photographs, computer-generated or electronically recorded information,
10 phone 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 may also include
14 any of the following:

15 (i) An insurance compliance audit report prepared by an auditor,
16 who may be an employee of the insurer or an independent contractor,
17 which may include the scope of the audit, the information gained in the
18 audit, and conclusions and recommendations, with exhibits and
19 appendices;

20 (ii) Memoranda and documents analyzing portions or all of the
21 insurance compliance audit report and discussing potential
22 implementation issues;

23 (iii) An implementation plan that addresses correcting past
24 noncompliance, improving current compliance, and preventing future
25 noncompliance; or

26 (iv) Analytic data generated in the course of conducting the
27 insurance compliance audit.

28 (8) This section does not limit, waive, or abrogate the scope or
29 nature of any statutory or common law privilege including, but not
30 limited to, the work product doctrine, the attorney-client privilege,
31 or the subsequent remedial measures exclusion.

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