

MAINE STATE LEGISLATURE

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119th MAINE LEGISLATURE

FIRST REGULAR SESSION-1999

Legislative Document

No. 2058

H.P. 1435

House of Representatives, March 25, 1999

An Act Relative to Insurance Compliance Self-audit.

Reference to the Committee on Banking and Insurance suggested and ordered printed.

A handwritten signature in black ink that reads "Joseph W. Mayo".

JOSEPH W. MAYO, Clerk

Presented by Representative MAYO of Bath.
Cosponsored by Senator LaFOUNTAIN of York,
Senator ABROMSON of Cumberland and
Representatives: GLYNN of South Portland, JONES of Pittsfield, NUTTING of Oakland,
O'NEIL of Saco, SULLIVAN of Biddeford.

Be it enacted by the People of the State of Maine as follows:

2 Sec. 1. 24-A MRSA c. 5, sub-c. III is enacted to read:

4 **SUBCHAPTER III**

6 **INSURANCE COMPLIANCE SELF-AUDITS**

8 **§491. Definitions**

10 As used in this subchapter, unless the context otherwise
12 indicates, the following terms have the following meanings.

14 1. Insurance compliance self-audit. "Insurance compliance
16 self-audit" means a voluntary internal evaluation, review,
18 assessment or audit not otherwise expressly required by law of an
20 insurer or an activity regulated under the state insurance laws
22 and rules adopted under them, or other laws of this State or
other states or federal law applicable to an insurer, or of
management systems related to the insurer or activity, that is
designed to identify and prevent noncompliance and to improve
compliance with such statutes or rules.

24 2. Insurance compliance self-audit document. "Insurance
26 compliance self-audit document" means any document prepared as a
28 result of or in connection with and not prior to an insurance
30 compliance self-audit. "Insurance compliance self-audit
32 document" includes a written response to the findings of an
34 insurance compliance self-audit. "Insurance compliance
36 self-audit document" includes, but is not limited to, field notes
38 and records of observations, findings, opinions, suggestions,
conclusions, drafts, memoranda, drawings, photographs,
computer-generated or electronically recorded information, phone
records, maps, charts, graphs and surveys, if this supporting
information is collected or developed for the primary purpose and
in the course of an insurance compliance self-audit. "Insurance
compliance self-audit document" also includes any of the
following:

40 A. A report prepared by an auditor, who may be an employee
42 of the insurer or an independent contractor, which may
44 include the scope of the audit, the information gained in
the audit and conclusions and recommendations, with exhibits
and appendices;

46 B. Memoranda and documents analyzing portions or all of the
48 report and discussing potential implementation issues;

2 C. An implementation plan that addresses correcting past
3 noncompliance, improving current compliance and preventing
4 future noncompliance; or

5 D. Analytic data generated in the course of conducting the
6 insurance compliance self-audit.

7 **§492. Privilege**

8 This section creates a privilege.

9 1. Privilege established. An insurance compliance
10 self-audit document is privileged information and is not
11 discoverable or admissible as evidence in any civil or criminal
12 legal action or in any administrative proceeding, except as
13 provided in sections 493 and 494. If any insurance compliance
14 self-audit document provided by an insurer to the commissioner or
15 the superintendent is disclosed to a 3rd party by the
16 superintendent's office, that document is not admissible as
17 evidence in any civil or criminal legal action or administrative
18 proceeding.

19 2. Privilege extends to individuals. An insurance
20 compliance self-audit may be conducted by the insurer, its
21 employees or by independent contractors. If any insurer, person
22 or entity performs or directs the performance of an insurance
23 compliance self-audit, an officer or employee involved with the
24 insurance compliance self-audit or any consultant who is hired
25 for the purpose of performing the insurance compliance self-audit
26 may not be examined in any civil, criminal or administrative
27 proceeding as to the insurance compliance self-audit or any
28 insurance compliance self-audit document. This subsection does
29 not apply if the privilege set forth in subsection 1 is
30 determined under section 493 and 494 not to apply.

31 3. Voluntary submission does not constitute waiver. An
32 insurer may voluntarily submit, in connection with examinations
33 conducted under chapter 3, an insurance compliance self-audit
34 document to the superintendent, or the superintendent's designee,
35 as a confidential document without waiving the privilege set
36 forth in this subchapter to which the insurer would otherwise be
37 entitled. The superintendent may order the production to the
38 bureau of an insurance compliance self-audit document in
39 conjunction with examinations conducted under Title 24-A, chapter
40 3. Such production by order is considered involuntary. Any
41 provisions permitting the superintendent to make records and
42 reports public, as well as provisions permitting the
43 superintendent to exchange information and data with the National
44 Association of Insurance Commissioners or its successor
45 organization, do not apply to any insurance compliance self-audit
46 document.

document submitted under this paragraph. Any insurance compliance self-audit document submitted to the superintendent remains the property of the insurer.

§493. Exceptions

1. **Express waiver.** The privilege set forth in section 492 does not apply to the extent the insurer that prepared or caused to be prepared the insurance compliance self-audit document expressly waives the privilege by so stating its intent in writing.

2. **Fraud; not privileged.** In a civil or administrative proceeding, a court of record may, after an in camera review, require disclosure of material as to which the privilege set forth in section 492 is asserted, if the court determines one of the following:

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

B. The material is not subject to the privilege.

3. **Relevant to criminal offense.** The privilege set forth in section 492 does not apply if the material contains evidence relevant to commission of a criminal offense under state insurance laws and all of the following factors are present:

A. The Attorney General or the district attorney has a compelling need for the information;

B. The information is not otherwise available; and

C. The Attorney General or the district attorney is unable to obtain the substantial equivalent of the information by any means without incurring unreasonable cost and delay.

§494. Assertion of privilege

1. **In camera hearing request.** Within 30 days after the Attorney General or the district attorney under section 493, subsection 2 or 3 makes a written request by certified mail for disclosure of an insurance compliance self-audit document, the insurer 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-audit document or portions of the document are privileged or subject to disclosure. An insurer asserting the insurance compliance self-audit privilege in response to a request for disclosure under this subsection shall include in its request for an in camera hearing all of the information set forth in subsection 4.

2 2. Hearing scheduled. Upon the filing of a petition under
3 this subsection, the court shall issue an order scheduling,
4 within 45 days after the filing of the petition, an in camera
5 hearing to determine whether the insurance compliance self-audit
6 document or portions of the document are privileged under this
7 section or subject to disclosure.

8
9 3. Court determinations. The court, after an in camera
10 review, may require disclosure of material for which the
11 privilege in section 492 is asserted if the court determines,
12 based upon its in camera review, that any one of the conditions
13 set forth in section 493, subsection 2 applies as to a civil or
14 administrative proceeding or that any one of the conditions set
15 forth in section 493, subsection 3 applies as to a criminal
16 proceeding. Upon making such a determination, the court may
17 compel the disclosure of only those portions of an insurance
18 compliance self-audit document relevant to issues in dispute in
19 the underlying proceeding. A party unsuccessfully opposing
20 disclosure may apply to the court for an appropriate order
21 protecting the document from further disclosure.

22 4. Filing objections. An insurer asserting the insurance
23 compliance self-audit privilege in response to a request for
24 disclosure under this section shall provide to the Attorney
25 General or the district attorney, as the case may be, at the time
26 of filing any objection to the disclosure, all of the following
27 information:

28 A. The date of the insurance compliance self-audit document;

29 B. The identity of the entity conducting the audit;

30 C. The general nature of the activities covered by the
31 insurance compliance self-audit; and

32 D. An identification of the portions of the insurance
33 compliance self-audit document for which the privilege is
34 being asserted.

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37 **§495. Procedure**

38 1. Insurer burden of proof. An insurer asserting the
39 insurance compliance self-audit privilege set forth in section
40 492 has the burden of demonstrating the applicability of the
41 privilege. A party seeking disclosure under section 493,
42 subsection 2 has the burden of proving that the privilege is
43 asserted for a fraudulent purpose or that the privilege is not
44 available. The Attorney General or the district attorney seeking

2 disclosure under section 493, subsection 3 has the burden of
3 proving the elements set forth in section 493, subsection 3.

4 2. Stipulations. The parties may at any time stipulate in
5 proceedings under section 493 or 494 to entry of an order
6 directing that specific information contained in an insurance
7 compliance self-audit document is or is not subject to the
8 privilege provided under section 492.

10 **§496. Exclusions**

12 The privilege set forth in section 492 does not extend to
13 any of the following:

14 1. Required information. Documents, communications, data,
15 reports or other information required to be collected, developed,
16 maintained, reported or otherwise made available to a regulatory
17 agency pursuant to this code or other federal or state law, rule
18 or order;

19 2. Regulatory information. Information obtained by
20 observation or monitoring by any regulatory agency; or

21 3. Independent information. Information obtained from a
22 source independent of the insurance compliance self-audit.

23 **§497. Effect on existing privileges**

24 Nothing in this section limits, waives or abrogates the
25 scope or nature of any statutory or common law privilege
26 including, but not limited to, the work product doctrine, the
27 attorney-client privilege or the subsequent remedial measures
28 exclusion.

29 **§498. Immunities**

30 An insurer is immune from the imposition of all penalties
31 under the state insurance laws for any violations of those laws
32 if:

33 1. Violation subject of audit. The violations were the
34 subject of an insurance compliance self-audit; and

35 2. Corrective measures. The insurer has taken reasonable
36 steps to correct such violations within 90 days of the conclusion
37 of an insurance compliance self-audit.

38 **§499. Confidentiality**

2 The superintendent is required to maintain the
3 confidentiality of information protected under this subchapter,
4 subject to the specific exceptions set forth in section 493 and
5 496.

6

SUMMARY

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10 This bill encourages insurers to engage in self-auditing
11 functions to facilitate compliance with the Maine Insurance Code.