

Introduced by

Representatives Wald, Berg, Porter

Senators Klein, Mutch, Tallackson

1 A BILL for an Act to provide a self-critical insurance analysis privilege.

2 **BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:**

3 **SECTION 1. Definitions.** In this Act, unless the context or subject matter otherwise
4 requires:

- 5 1. "Commissioner" means the insurance commissioner.
- 6 2. "Insurance compliance audit" means a voluntary, internal evaluation, review,
7 assessment, audit, or investigation for the purpose of identifying or preventing
8 noncompliance with, or promoting compliance with, laws, regulations, orders, or
9 industry or professional standards, which is conducted by or on behalf of an insurer
10 licensed or regulated under title 26.1, or which involves an activity regulated under
11 title 26.1.
- 12 3. "Insurance compliance self-critical analysis audit document" means a document
13 prepared as a result of or in connection with an insurance compliance audit. An
14 insurance compliance self-critical analysis audit document may include a written
15 response to the findings of an insurance compliance audit. An insurance
16 compliance self-critical analysis audit document may include, as applicable, field
17 notes and records of observations, workpapers, findings, opinions, suggestions,
18 conclusions, drafts, memoranda, drawings, photographs, exhibits,
19 computer-generated or electronically recorded information, phone records, maps,
20 charts, graphs, and surveys, provided this supporting information is collected or
21 developed for the primary purpose and in the course of an insurance compliance
22 audit. An insurance compliance self-critical analysis audit document also includes:
- 23 a. An insurance compliance audit report prepared by an auditor, who may be an
24 employee of the insurer 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.

- 4. "Insurer" means an insurance company, nonprofit service corporation, or health maintenance organization organized under the laws of this state or a foreign insurance company, nonprofit service corporation, or health maintenance organization authorized to do business in this state.

SECTION 2. Self-critical analysis privilege created - Scope. An insurance compliance self-critical analysis privilege is created to protect the confidentiality of insurance compliance self-critical analysis documents or communications in regard to their content relating to voluntary internal compliance audits conducted by insurers and persons in regard to activities regulated under title 26.1, both to conduct voluntary internal audits of its compliance programs and management systems, and to assess and improve compliance with state and federal statutes, rules, and orders. The insurance compliance self-critical analysis privilege applies to all litigation or administrative proceedings pending on the effective date of this Act.

SECTION 3. Insurance compliance self-critical analysis document not discoverable or admissible. Except as provided in sections 5, 6, and 7 of this Act, an insurance compliance self-critical analysis audit document is privileged information and is not discoverable or admissible evidence in any legal action in any civil, criminal, or administrative proceeding. The privilege is a matter of substantive law of this state and is not merely a procedural matter governing administrative, civil, or criminal procedures in the courts of this state.

SECTION 4. Application of privilege. If an insurer, person, or entity performs or directs the performance of an insurance compliance audit, an officer, employee, or agent involved with the insurance compliance 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

1 administrative proceeding as to the insurance compliance audit or any insurance compliance
2 self-critical analysis audit document. This section does not apply if it is determined under
3 section 6 or 7 that the privilege does not apply.

4 **SECTION 5. Submission to commissioner.**

- 5 1. Upon request of the commissioner, an insurer must submit an insurance
6 compliance self-critical analysis audit document to the commissioner, or the
7 commissioner's designee, as a confidential document under the provisions of
8 section 26.1-03-19.4 without waiving the privilege set forth in this Act to which the
9 insurer would otherwise be entitled. However, the provisions of sections
10 26.1-03-19.3 and 26.1-03-19.4 permitting the commissioner to make confidential
11 documents public and accessible to the national association of insurance
12 commissioners does not apply to the insurance compliance self-critical analysis
13 audit documents voluntarily submitted. To the extent the commissioner has the
14 authority to compel the disclosure of an insurance compliance self-critical analysis
15 audit document under other provisions of applicable law, any report furnished to
16 the commissioner may not be provided to any other person or entity and must be
17 accorded the same confidentiality and other protections as provided above for
18 voluntarily submitted documents. Any use of an insurance compliance self-critical
19 analysis audit document furnished as a result of a request of the commissioner,
20 whether under a claim of authority to compel disclosure or not, is limited to
21 determining whether any disclosed defects in an insurer's policies or procedures or
22 inappropriate treatment of customers has been remedied or that an appropriate
23 plan for their remedy is in place. The commissioner may not impose any type of
24 administrative fine or penalty as to any area addressed or matter covered in an
25 insurance compliance self-critical analysis audit document furnished at the
26 commissioner's request, except where there is clear and convincing evidence that
27 the insurer failed to undertake reasonable corrective action, eliminate inappropriate
28 treatment of customers, or failed to implement an appropriate plan to rectify any
29 noncompliance with state and federal statutes, rules, and orders.
- 30 2. An insurer's insurance compliance self-critical analysis audit document submitted
31 to the commissioner remains subject to all applicable statutory or common law

1 privileges including the work product doctrine, attorney-client privilege, or the
2 subsequent remedial measures exclusion. An insurance compliance self-critical
3 analysis audit document submitted to and in the possession of the commissioner
4 remains the property of the insurer and is not subject to any disclosure or
5 production under section 44-04-18.

- 6 3. Disclosure of an insurance compliance self-critical analysis audit document to a
7 governmental agency, whether voluntary or pursuant to compulsion of law, does
8 not constitute a waiver of the privilege with respect to any other person or any
9 other government agency.

10 **SECTION 6. Waiver of privilege by insurer - Grounds for determination of**
11 **privilege - Civil, administrative, or criminal proceedings.**

- 12 1. The self-critical analysis privilege does not apply to the extent that it is expressly
13 waived by the insurer that prepared or caused to be prepared the insurance
14 compliance self-critical analysis audit document.
- 15 2. In a civil or administrative proceeding, a court of record, after an in-camera review,
16 may require disclosure of material for which the privilege is asserted, if the court
17 determines one of the following:
- 18 a. The privilege is asserted for a fraudulent purpose; or
19 b. The material is not subject to the privilege.
- 20 3. In a criminal proceeding, a court of record, after an in-camera review, may require
21 disclosure of material for which the privilege is asserted, if the court determines
22 one of the following:
- 23 a. The privilege is asserted for a fraudulent purpose;
24 b. The material is not subject to the privilege; or
25 c. The material contains evidence relevant to commission of a criminal offense,
26 and all three of the following factors are present:
- 27 (1) The commissioner, state's attorney, or attorney general has a
28 compelling need for the information;
29 (2) The information is not otherwise available; and

- (3) The commissioner, state's 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 7. Determination of privilege - Procedure.

1. If a person seeks from an insurer communications involving an insurance compliance audit or any insurance compliance self-critical analysis audit document during the course of a pending civil or criminal proceeding, the insurer may assert the self-critical analysis privilege and provide the information set forth in subsection 6 during the course of those proceedings just as any other privilege is asserted in the courts of this state. If the court is required to make a determination as to the privilege, the court shall follow the procedure and conditions set forth in subsection 5.
2. If there is a pending administrative proceeding, or there is no pending civil or criminal proceeding, the commissioner, state's attorney, or attorney general may serve on an insurer a written request by certified mail for disclosure of an insurance compliance self-critical analysis audit document. Within thirty days after the commissioner, state's attorney, or attorney general serves on an insurer a written request by certified mail for disclosure of an insurance compliance self-critical analysis 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-critical analysis audit document or portions of the document are privileged under this Act or subject to disclosure. The court has jurisdiction over a petition filed by an insurer under this subsection requesting an in-camera hearing on whether the insurance compliance self-critical analysis document or portions of the document are privileged or subject to disclosure. Failure by the insurer to file a petition waives the privilege for only the specific request made.
3. An insurer asserting the insurance compliance self-critical analysis privilege in response to a request for disclosure under this section shall include in its request for an in-camera hearing all of the information set forth in subsection 6.

1 4. Upon the filing of a petition under this section, the court shall issue an order
2 scheduling, within forty-five days after the filing of the petition, an in-camera
3 hearing to determine whether the insurance compliance self-critical analysis audit
4 document or portions of the document are privileged under this Act or subject to
5 disclosure.

6 5. The court, after an in-camera review, may require disclosure of material for which
7 the privilege is asserted if the court determines, based upon its in-camera review,
8 that any one of the conditions set forth in subsection 2 of section 6 of this Act is
9 applicable as to a civil or administrative proceeding or that any one of the
10 conditions set forth in subsection 3 of section 6 of this Act is applicable as to a
11 criminal proceeding. Upon making such determination, the court may only compel
12 the disclosure of those portions of an insurance compliance self-critical analysis
13 document relevant to issues in dispute in the underlying proceeding. A compelled
14 disclosure may not be considered to be a public document or be deemed to be a
15 waiver of the privilege for any other civil, criminal, or administrative proceeding. An
16 insurer unsuccessfully opposing disclosure may apply to the court for an
17 appropriate order protecting the document from further disclosure.

18 6. An insurer asserting the insurance compliance self-critical analysis privilege in
19 response to a request for disclosure under this section shall provide at the time of
20 making and filing any objection to the disclosure all of the following information:
21 a. The date of the insurance compliance self-critical analysis audit document.
22 b. The identity of the entity conducting the audit;
23 c. The general nature of the activities covered by the insurance compliance
24 audit; and
25 d. An identification of the portions of the insurance compliance self-critical
26 analysis audit document for which the privilege is being asserted.

27 **SECTION 8. Privilege - Burden of proof - Stipulation.** An insurer asserting the
28 insurance compliance self-critical analysis privilege set forth in this Act has the burden of
29 demonstrating the applicability of the privilege. Once an insurer has established the
30 applicability of the privilege, a party seeking disclosure has the burden of proving that the
31 privilege is asserted for a fraudulent purpose. The commissioner, state's attorney, or attorney

1 general seeking disclosure of the privilege has the burden of proving the elements set forth in
2 subdivisions a and c of subsection 3 of section 6 of this Act.

3 The parties may at any time stipulate in proceedings under section 6 or 7 of this Act to
4 entry of an order directing whether the specific information contained in an insurance
5 compliance self-critical analysis audit document is or is not subject to the privilege provided
6 under this Act. Any such stipulation may be limited to the instant proceeding and, absent
7 specific language to the contrary, is not applicable to any other proceeding.

8 **SECTION 9. Nonapplication of privilege.** The self-critical analysis privilege set forth
9 in this Act does not extend to:

- 10 1. Documents, communications, data, reports, or other information expressly required
11 to be collected, developed, maintained, or reported to a regulatory agency
12 pursuant to title 26.1, or other federal or state law;
- 13 2. Information obtained by observation or monitoring by any regulatory agency; or
- 14 3. Information obtained from a source independent of the insurance compliance audit.