

1999 HOUSE INDUSTRY, BUSINESS AND LABOR

HB 1255

1999 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1255

House Industry, Business and Labor Committee

Conference Committee

Hearing Date 1-19-99

Tape Number	Side A	Side B	Meter #
2	x		785 - 3360
Committee Clerk Signature <i>Lisa Horner</i>			

Minutes: Tom Smith introduced HB 1255 relating to providing a self-critical insurance analysis privilege. (See written testimony)

Chairman Berg: If a company does a critical analysis of their own practices and they find something to improve on that information is confidential to that company. If the books are still open to the commissioner, he comes in and finds the same things there is no change in current law.

Tom Smith: That's correct. It doesn't change the existing law, but it puts a mechanism in the statute to encourage the insurance company to do a very harsh self-critical analysis of its own practices and procedures to make sure that they do everything possible so that they are complying with the statutes in law and treating the policy holders correctly.

Only when the commissioner requests the documents can he do anything to the insurance company.

Rep. Stefonowicz: Is there a time limit on a self-critical analysis?

Tom Smith: Not specifically stated in the legislation is there any time limit, but in practicality there is a time limit. By statute and by law the insurance company is required to be examined by the insurance commissioner's office no less than five years. Every time they do an examination and look at the finances of the company they also do a market conduct examination that is part of that report. This is the maximum time that can go by in between examinations.

Chris Edison: General council for the Insurance Department testified in support of HB 1255.

Our concern with this is the right of the commissioner to access the information and what will the implications be if the commissioner did access that information. At this point our concerns have been alleviated by changes that have been made in the bill. In our procedures what we will do is examine a company in their marketing practices on a variety of issues. On conclusion of the exam, if we find any violations then we will take action.

Rep. Johnson: Is it your intent that after every market conduct exam that you ask that company for a complete self analysis?

Chris Edison: Yes. As a matter of procedure it is our intent to specifically ask for that self analysis.

Chairman Berg closed the hearing.

Rep. Keiser made a motion for a Do pass.

Vice Chairman Kempenich second the motion.

The roll call vote was 14 yea, 1 nay. The motion carries.

Vice Chairman Kempenich will carry the bill.

Date: 1-19-99
Roll Call Vote #: 1

1999 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 1255

House Industry, Business and Labor Committee

Subcommittee on _____
or
 Conference Committee

Legislative Council Amendment Number _____

Action Taken do pass

Motion Made By Keiser Seconded By Kempenich

Representatives	Yes	No	Representatives	Yes	No
Chair - Berg	/		Rep. Thorpe	/	
Vice Chair - Kempenich	/				
Rep. Brekke	/				
Rep. Eckstrom	/	/			
Rep. Froseth	/				
Rep. Glassheim	/				
Rep. Johnson	/				
Rep. Keiser	/				
Rep. Klein	/				
Rep. Koppang	/				
Rep. Lemieux					
Rep. Martinson	/				
Rep. Severson	/				
Rep. Stefonowicz	/				

Total (Yes) 14 No 1

Absent 0

Floor Assignment Kempenich

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE (410)
January 21, 1999 11:39 a.m.

Module No: HR-13-0962
Carrier: Kempenich
Insert LC: . Title: .

REPORT OF STANDING COMMITTEE

HB 1255: Industry, Business and Labor Committee (Rep. Berg, Chairman) recommends **DO PASS** (14 YEAS, 1 NAY, 0 ABSENT AND NOT VOTING). HB 1255 was placed on the Eleventh order on the calendar.

1999 SENATE INDUSTRY, BUSINESS AND LABOR

HB 1255

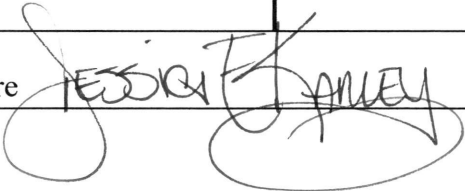
1999 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB1255

Senate Industry, Business and Labor Committee

Conference Committee

Hearing Date February 24, 1999

Tape Number	Side A	Side B	Meter #
1	x		1886-1485
Committee Clerk Signature 			

Minutes:

Senator Mutch opened the hearing on HB1255. All senators were present.

Tom Smith testified in support of HB1255. His testimony is included. Senator Heitkamp asked if individuals have a compelling need. Mr. Smith said that right now they have access to all information. Senator Mutch asked him if this idea was unique to North Dakota. Mr. Smith that legislation similar to this. Mr. Smith told him that one other state has passed a bill similar to this and that it is pending on several other states.

Chris Edison, General Council, testified in support of HB1255. Senator Heitkamp asked him if this will or will not limit them. He said that the only document access that they are limited about is their own self analysis.

Tom Kelsh testified in support of HB1255. He felt that there should be more protection.

Page 2

Senate Industry, Business and Labor Committee

Bill/Resolution Number Hb1255

Hearing Date February 24, 1999

Courtney Koble testified in a neutral position on HB1255. Her testimony is included. Senator Mutch asked her if the amendment would say that we would have to report to the commissioner. She said that he was correct but they could also do it by a resolution. Senator Mutch asked her why they would want to do that. Ms. Koble said that they would like to make sure that this is not abused and that it is used as part of an official procedure. Senator Klein asked her if she felt that this is a good idea. She said yes. Senator Klein asked her why they would want to create another issue. Ms. Koble said that they would be doing so only if they brought it up themselves.

Chris Edison, General Council for the insurance department, spoke on the amendments. Committee discussion took place on March 1, 1999.

Senator Klein motioned for a do pass committee recommendation on HB1255. Senator Krebsbach seconded his motion. The motion carried with a 6-0-1 vote. Senator Mutch will carry the bill.

SR383941

Date: 3/1
Roll Call Vote #: 1

1999 SENATE STANDING COMMITTEE ROLL CALL VOTES
HOUSE BILL/RESOLUTION NO. 1255

Senate INDUSTRY, BUSINESS AND LABOR COMMITTEE Committee

Subcommittee on _____
or
 Conference Committee

Legislative Council Amendment Number _____

Action Taken DO PASS

Motion Made By KLEIN Seconded By KREBSBACH

Senators	Yes	No	Senators	Yes	No
Senator Mutch	X				
Senator Sand	X				
Senator Krebsbach	X				
Senator Klein	X				
Senator Mathern	X				
Senator Heitkamp	X				
Senator Thompson		X			

Total (Yes) 6 No 1

Absent 0

Floor Assignment MUTCH

REPORT OF STANDING COMMITTEE (410)
March 3, 1999 1:43 p.m.

Module No: SR-38-3941
Carrier: Mutch
Insert LC: . Title: .

REPORT OF STANDING COMMITTEE

HB 1255: Industry, Business and Labor Committee (Sen. Mutch, Chairman) recommends **DO PASS** (6 YEAS, 1 NAY, 0 ABSENT AND NOT VOTING). HB 1255 was placed on the Fourteenth order on the calendar.

1999 TESTIMONY

HB 1255

PREPARED TESTIMONY ON HOUSE BILL 1255 -
SELF-CRITICAL INSURANCE ANALYSIS PRIVILEGE

House Industry, Business & Labor Committee
Tuesday, January 19, 1999

House Bill 1255 would create a new privilege which we call an self-critical insurance analysis privilege. This privilege arises as a result of an "insurance compliance audit" which results in persons doing the audit and generating "insurance compliance self-critical analysis audit documents."

SELF-CRITICAL ANALYSIS PRIVILEGE

What is an insurance compliance audit?

This audit involves a voluntary, internal evaluation, review, assessment, or audit (not otherwise expressly required by law) of an insurance company or an activity regulated under the insurance code, or other state or federal law applicable to the insurance company, or of management systems related to the insurance company or activity, that is designed to identify and prevent noncompliance and to improve compliance with those statutes, rules, or orders. The audit itself may be conducted by the insurance company, its employees, or by independent contractors.

"Insurance compliance self-critical analysis audit document" is defined as documents prepared as a result of or in connection with and not prior to an insurance compliant audit. What constitutes an "insurance compliance self-critical analysis audit document" is found on pages 2-3 of HB 1255. Any "insurance compliance self-critical

analysis audit document” prepared in accordance with the law is privileged information and is not admissible as evidence in any legal action in any civil, criminal, or administrative proceeding. The exception to this privilege is specified on page 7 of HB 1255. Not within the scope of the privilege are documents, communications, data, reports, and other information (normal business records) created in the company’s day-to-day operations.

Purpose of the privilege.

The self-critical analysis privilege is designed to encourage insurance companies and persons conducting activities regulated under the insurance code to conduct voluntary internal audits of their compliance programs and management systems and to assess and improve compliance with state and federal statutes, rules, and orders. The legislation recognizes an insurance compliance self-critical analysis privilege to protect the confidentiality of communications relating to voluntary internal compliance audits.

Procedural application of the privilege.

The self-critical analysis privilege can be asserted just as any other privilege is asserted when there is an ongoing civil action. An insurance company may, upon request by the commissioner, submit a privileged document to the insurance commissioner as a confidential document and not waive the privilege. If the commissioner requests such a document, the commissioner cannot impose any penalty or fine against the insurance company unless the insurance company has failed to implement corrective action.

In a civil or administrative proceeding, a court of law may, after an “in-camera” review, require disclosure of material which the insurance company believes to be

privileged. The basis of the disclosure must be that the privilege was asserted for fraudulent purposes, or the material was not subject to the privilege.

A procedural remedy is available to government officials in the context of a criminal proceeding to require the disclosure of otherwise privileged compliance documents. In a criminal proceeding, documents which are privileged can be obtained if they are unable to obtain the substantial equivalent of the information by any other means without incurring unreasonable cost and delay.

The insurance company asserting the insurance compliance self-critical analysis privilege has the burden of demonstrating the applicability of the privilege. Once the privilege is established, the burden shifts to the requesting party to demonstrate that the privilege is asserted for a fraudulent purpose.

Reason for the privilege.

The need for a self-critical analysis privilege has come to the forefront recently in light of the introduction and development of the Insurance Marketplace Standards Association (IMSA) program. Any insurance company seeking membership in IMSA is required to conduct a self-critical analysis of its policies and procedures to determine whether they comply with IMSA's Principles and Code of Ethical Market Conduct. Although IMSA only requires positive documentation necessary to support affirmative responses to a questionnaire as part of the insurance company's membership application process, some who arguably misunderstand the requirements of the IMSA program fear the documentation generated as part of IMSA's self-assessment process might note instances of noncompliance which would be available for discovery and thereby become a "road

map” for the plaintiff’s bar. The statutory self-critical analysis privilege is one way to protect against discovery of such self-critical documentation.

Although the IMSA program may have focused increased attention on the issue of a self-critical analysis privilege, enactment of a statutory self-critical analysis privilege is not designed to protect solely IMSA-related documentation. HB 1255’s definition of a “self-critical analysis audit document” encompasses several types of internal analysis which may or may not be IMSA-related. These would include internal audits or implementation of corrective compliance measures.

In addition to the foregoing, there are numerous public policy reasons for enacting a statutory self-critical analysis privilege.

- It is good public policy to encourage corporations to conduct a self-critical analysis of existing practices to identify and remedy instances of noncompliance with laws and regulations.
- With increasing pressure upon fiscal conservation in state budgets, enacting a self-critical analysis privilege to encourage insurance companies to enhance existing practices releases regulatory resources to focus upon other matters of concern to consumers and foregoes the expenditures associated with regulatory examinations and reviews.
- The legislation in no way impedes the insurance regulator’s right to pursue any insurance violation and affords an access right to the insurance regulator, but imposes an appropriate safeguard to limit the insurance regulator’s right to take regulatory action and limits further dissemination of documents given to the regulators.

- Without a statutory privilege to protect self-critical analysis documents from discovery by the plaintiff's bar, insurance companies will be less inclined to conduct a self-critical analysis for fear of potential litigation risk.
- Enactment of a self-critical analysis privilege benefits consumers, insurance companies, and regulators.
 - **Consumers:** benefit from greater scrutiny of insurance company compliance with laws and regulations designed to protect consumers - at no additional taxpayer expense.
 - **Insurance companies:** benefit from protection against unwarranted discovery of documentation which might provide fodder for increased litigation.
 - **Regulators:** benefit by being able to redirect resources previously devoted exclusively to financial and/or market conduct examinations of compliant companies toward those companies with greater evidence of questionable practices which adversely affect insurance consumers.

In closing, we want to emphasize that similar privileges are recognized in other contexts. Similar privileges exist at the present time under North Dakota (see attachment) If we fail to take advantage of the opportunity to enact HB 1255, insurance companies will be faced in the future with the difficult choice of aggressively investigating past insurance practices, and with correcting any violations or mistreatment of policyholders, or deliberating avoiding retrospective analysis of their practices in order to lessen the risk of civil liability.

EXISTING PRIVILEGES

Privileges under the law are nothing new. An example of the some of the privileges that presently exist under the law are as follows:

1. Lawyer-client privilege, N.D.R. Ev. P. 502.
2. Physician and psychotherapist - patient privilege, N.D.R. Ev. P. 503.
3. Husband-wife privilege, N.D.R. Ev. P. 504.
4. Clergyman privilege, N.D.R. Ev. P. 505.
5. Vote in political election, N.D.R. Ev. P. 506.
6. Trade secret, N.D.R. Ev. P. 507.
7. Governmental privilege, N.D.R. Ev. P. 508.
8. Identity of informer, N.D.R. Ev. P. 509.
9. Counselor - client privilege, N.D.C.C. § 43-47-09.
10. Deaf person interpreter privilege, N.D.C.C. § 28-33-06.
11. Guidance counselor privilege, N.D.C.C. § 31-01-06.1.
12. Medical peer review records, N.D.C.C. § 23-34-03.
13. News source, N.D.C.C. § 31-01-06.2.

PREPARED TESTIMONY ON HOUSE BILL 1255 -
SELF-CRITICAL INSURANCE ANALYSIS PRIVILEGE

Senate Industry, Business & Labor Committee
Wednesday, February 24, 1999

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COURTNEY KOBLE
TESTIMONY BY ~~ALBERT A. WOLF~~
ON BEHALF OF
NORTH DAKOTA TRIAL LAWYERS ASSN.
BEFORE
SENATE INDUSTRY, BUSINESS AND LABOR COMMITTEE

February 24, 1999

HB 1255 - Self-critical insurance analysis privilege

Chairman Mutch and members of the Committee.

COURTNEY KOBLE

My name is ~~Albert A. Wolf~~ and I am appearing here on behalf of the North Dakota Trial Lawyers Association to comment on HB 1255, and to suggest language that would make certain that the intent of the bill is not abused by a company for lack of clarity in the language of the bill.

We understand that the intent of the bill has been stated in the House Committee hearing to the effect that it is the documents or reports that are created by the self-critical analysis audit that is to be privileged from discovery in litigation or administrative proceedings, but not the documents or records of the company that are examined as part of the compliance self-critical analysis audit.

It appears that the language on page 1, lines 12 and 13 is stated with sufficient clarity, however the amendments we are proposing on page 2 at

lines 15 and 16 will be necessary to remove some conflict between the language on page 2 and the language on page 1.

Also the amendments which we are proposing at page 2, line 20 would assure that a self-critical insurance analysis audit is performed at the company level and not at a department or branch office manager. The amendments would allow the company to initiate the audit by action of the board of directors of the company or by reporting the initiation of the audit to the commissioner, if the privilege is to apply to litigation and administrative proceedings.

I recognize that the subject of the audit reported to the commissioner would not be discoverable as part of the open records of the commissioner, but the fact as to whether or not the report was made or that the board of directors of the company initiated the audit by its own resolution, would remain discoverable where the privilege is asserted against discovery or admissible evidence in a legal action.

This requirement would give assurances that the claims department, for example, of an insurance company could not initiate a self-critical analysis audit to cover a particular case or two in their department, and then claim a privilege as to the report that reviewed the method of handling of that claim without it being part of a larger company-wide audit.

There has been some discussion in the insurance industry that a certification that a company has brought about a compliance with a self-critical analysis audit report may be used in litigation involving the company and for that reason the last amendment has been presented for this Committee's consideration. It would seem that the very fact of the self-critical analysis audit or a compliance with the requirements of the audit are used in any way in defense of the company's actions, then the content of the audit report should be available for examination before the trial and admissible at the trial or administrative hearing if otherwise admissible under the rules governing the proceeding.

It appears that these amendments do not conflict with the legitimate purpose of this bill if it is to enable an insurance company to review internally any improper actions, practices or procedures that might otherwise violate the rules or statutes governing the insurance company.

These amendments would assure that the privilege and confidentiality of the self-analysis report was not used against the interests of other parties and still remains privileged from disclosure or discovery.

We urge the adoption of these amendments, or as many thereof as may be considered appropriate by the Committee.

PROPOSED AMENDMENTS TO HOUSE BILL 1255

Page 2, line 15, remove "in regard to their content" and insert "created by"

Page 2, line 15, remove "relating to"

Page 2, line 20, after "Act" insert "if the insurance compliance audit was initiated by a resolution of the board of directors of the company or if the commencement of the insurance compliance audit and the area or purpose of the audit is first reported to the commissioner to document that a formal company insurance compliance audit has been initiated"

Page 5, line 4, insert a new paragraph 4:

"4. If a certification of compliance or of corrective actions taken as a result of insurance compliance audit is used as a defense to a claim against the company, then the privilege is waived by the company."

Page 7, line 14, after "Information" insert "or documents requested or"

Renumber accordingly.

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No underscore, all new law

D Trial Lawyers Assn. - 2/22/99

PROPOSED AMENDMENTS TO HOUSE BILL 1255

Page 2, line 15, ^{remove} remove "in regard to their content" and insert "created by"

Page 2, line 15, ^{replace} remove "relating to" with "created by"

Page 2, line 20, after "Act" insert "if the insurance compliance audit was initiated by a resolution of the board of directors of the company or if the commencement of the insurance compliance audit and the area or purpose of the audit is first reported to the commissioner to document that a formal company insurance compliance audit has been initiated"

Page 5, line 4, insert a new paragraph 4:

"4. If a certification of compliance or of corrective actions taken as a result of insurance compliance audit is used as a defense to a claim against the company, then the privilege is waived by the company."

Page 7, line 14, after "Information" insert "or documents requested or"

Renumber accordingly.

Page 6, line 1, replace "4" with "5"
 Page 6, line 5, replace "5" with "6"
 Page 6, line 18, replace "6" with "7"