

FIRST REGULAR SESSION
SENATE COMMITTEE SUBSTITUTE FOR
HOUSE BILL NO. 417
93RD GENERAL ASSEMBLY

Reported from the Committee on Small Business, Insurance and Industrial Relations, May 5, 2005, with recommendation that the Senate Committee Substitute do pass.

1286S.02C

TERRY L. SPIELER, Secretary.

AN ACT

To amend chapters 303, 374, 375, and 507, RSMo, by adding thereto ten new sections relating to certain insurance claims adjudication practices.

Be it enacted by the General Assembly of the State of Missouri, as follows:

Section A. Chapters 303, 374, 375, and 507, RSMo, are amended by adding thereto
2 ten new sections, to be known as sections 303.390, 374.071, 375.1063, 375.1064,
3 375.1065, 375.1066, 375.1067, 375.1068, 375.1069, and 507.091, to read as follows:

303.390. 1. This section shall be known and may be cited as the
2 **"Uninsured Motorist Stipulation of Benefits Act of 2005".**

3 **2. An owner and operator of a motor vehicle who operates the motor**
4 **vehicle on the public highways of this state, or who knowingly permits the**
5 **operation of the motor vehicle on the public highways of this state, who fails**
6 **to have in full force and effect a complying liability policy providing at least**
7 **the minimum liability coverage required by this state and covering the motor**
8 **vehicle at the time of an accident shall:**

9 **(1) Be deemed to have waived any right to recover against a complying**
10 **policyholder for noneconomic loss; and**

11 **(2) Recover, if at all, only for an award covering economic loss.**

12 **Such waiver shall not apply if it can be proven that the accident was caused,**
13 **wholly or in part, by a tortfeasor's operating a motor vehicle under the**
14 **influence of drugs or alcohol, or who is convicted of vehicular assault or**
15 **homicide. The provisions of this section shall not apply to an uninsured**
16 **motorist whose immediately previous insurance policy meeting the**
17 **requirements of section 303.190 was terminated or nonrenewed for failure to**
18 **pay the premium, unless notice of termination or nonrenewal for failure to**
19 **pay such premium was provided by such insurer at least thirty days prior to**

20 the time of the accident.

21 3. In an action against a complying policyholder by a person deemed
22 to have waived recovery under subsection 2 of this section:

23 (1) Any award in favor of such person shall be reduced by an amount
24 equal to the portion of the award representing compensation for noneconomic
25 losses;

26 (2) The trier of fact shall not be informed, directly or indirectly, of such
27 waiver or of its effect on the total amount of such person's recovery.

28 4. Nothing in this section shall be construed to preclude recovery
29 against an alleged tortfeasor of benefits provided or economic loss coverage.

30 5. There is a rebuttable presumption of a knowing violation of the
31 minimum insurance requirements contained in subsection 2 of this section if
32 such insurance has lapsed, terminated, or otherwise been ineffective for a
33 period of at least thirty days prior to the accident.

34 6. Passengers in the uninsured motor vehicle are not subject to such
35 waiver.

374.071. 1. The following records of the department are not public
2 records and are not available for public examination under section 374.070:

3 (1) Any document or other material in any consumer complaint file
4 maintained under section 374.085, including medical records, repair
5 estimates, adjuster notes, insurance policy provisions, recordings or
6 transcripts of witness interviews, and any other records regarding coverage,
7 settlement, payment, or denial of claim asserted under an insurance policy;

8 (2) Any document or other material submitted by an insurer or
9 producer under section 374.190, or any other inquiry, information request, or
10 data call initiated by the department.

11 2. Any record that is not public under this section is confidential and
12 is not subject to disclosure, including discovery or subpoena, unless the
13 subpoena is issued by the proper prosecuting attorney, attorney general,
14 administrative hearing officer, or court. The director may only produce the
15 documents or other material to another state or federal governmental agency
16 or officer under a lawful request, subpoena, or formal discovery
17 procedure. The documents or material may, in the discretion of the director,
18 be made public once admitted as evidence in any administrative, civil, or
19 criminal enforcement proceeding.

20 3. The director may release contents of any record that is not public
21 under this section as part of an examination report under section 374.205, if

22 the release is in the public interest. In all cases, the director may release an
23 incident report record consisting of the date and immediate facts and
24 circumstances surrounding the initial consumer report or complaint.

25 4. No waiver of any applicable privilege or claim of confidentiality
26 regarding any document shall occur as a result of disclosure to the director
27 or by the director in sharing documents with other state and federal
28 regulatory agencies, the National Association of Insurance Commissioners,
29 and its affiliates and subsidiaries, or state or federal law enforcement
30 authorities, and the recipient of such document is bound by the provisions of
31 this section as to the confidentiality of such document.

375.1063. As used in sections 375.1063 to 375.1069, the following terms
2 mean:

3 (1) "Director", the director of the department of insurance;

4 (2) "Insurance compliance audit", a voluntary, internal evaluation,
5 review, assessment, audit, or investigation for the purpose of identifying or
6 preventing noncompliance with, or promoting compliance with laws,
7 regulations, orders, or industry or professional standards, which is conducted
8 by or on behalf of an insurer, or which involves an activity regulated under
9 this chapter and chapter 384, RSMo;

10 (3) "Insurance compliance self-evaluative audit document" or
11 "document", any document prepared as a result of or in connection with and
12 not prior to an insurance compliance audit. An insurance compliance self-
13 evaluative audit document may include, but is not limited to, as applicable,
14 field notes and records of observations, findings, opinions, suggestions,
15 conclusions, drafts, memoranda, drawings, photographs, exhibits, computer-
16 generated or electronically recorded information, phone records, maps,
17 charts, graphs, and surveys, provided this supporting information is collected
18 or developed for the primary purpose and in the course of an insurance
19 compliance audit. An insurance compliance self-evaluative audit document
20 also includes, but is not limited to, any of the following:

21 (a) An insurance compliance audit report prepared by an employee of
22 the insurer or an independent contractor, which may include the scope of the
23 audit, the information gained in the audit, and conclusions and
24 recommendations, with exhibits and appendices;

25 (b) Memoranda and documents analyzing portions or all of the
26 insurance compliance audit report and discussing potential implementation
27 issues;

28 (c) An implementation plan that addresses correcting past
29 noncompliance, improving current compliance, and preventing future
30 noncompliance; or

31 (d) Analytic data generated in the course of conducting the insurance
32 compliance audit;

33 (4) "Insurer", as defined in section 375.012 and those insurance
34 companies operating under the provisions of chapter 383, RSMo.

375.1064. 1. Except as provided in sections 375.1065 and 375.1066, an
2 insurance compliance self-evaluative audit document is privileged
3 information and is not discoverable or admissible as evidence in any legal
4 action in any civil, criminal, or administrative proceeding. The privilege
5 created herein is a matter of substantive law of this state and is not merely
6 a procedural matter governing civil or criminal procedures in the courts of
7 this state.

8 2. If any insurer, person, or entity performs or directs the performance
9 of an insurance compliance audit, an officer, employee, or agent involved with
10 the insurance compliance audit or any consultant hired for the purpose of
11 performing the insurance compliance audit shall not be examined in any civil,
12 criminal, or administrative proceeding as to the audit or any insurance
13 compliance self-evaluative audit document. This subsection shall not apply
14 if the privilege is determined inapplicable pursuant to sections 375.1065 and
15 375.1066.

16 3. If requested by the director, an insurer shall submit, in connection
17 with examinations conducted pursuant to sections 374.190 and 374.205, RSMo,
18 an insurance compliance self-evaluative document to the director, or the
19 director's designee, as a confidential document without waiving the privilege
20 prescribed in this section to which the insurer would otherwise be entitled;
21 except that any provision of law permitting the director to make confidential
22 documents public or any provisions granting access to the National
23 Association of Insurance Commissioners shall not apply to the insurance
24 compliance self-evaluative audit document so submitted. To the extent that
25 the director has the authority to compel the disclosure of an insurance
26 compliance self-evaluative audit document under other provisions of
27 applicable law, any such report furnished to the director shall not be
28 provided to any other persons or entities and shall be accorded the same
29 confidentiality and other protections prescribed in this subsection.

30 4. An insurer's insurance compliance self-evaluative audit document

31 submitted to the director shall remain subject to all applicable statutory or
32 common law privileges. Any such document so submitted and in the
33 possession of the director shall remain the property of the insurer and shall
34 not be subject to any disclosure or production pursuant to chapter 610, RSMo.

35 5. Disclosure of an insurance compliance self-evaluative audit
36 document to a governmental agency, whether voluntary or pursuant to
37 compulsion of law, does not constitute a waiver of the privileges pursuant to
38 this section with respect to any other persons or any other governmental
39 agencies.

375.1065. 1. The privilege established in section 375.1064 shall not
2 apply to the extent that it is expressly waived by the insurer that prepared
3 or caused to be prepared the insurance compliance self-evaluative audit
4 document.

5 2. In a civil proceeding, a court may, after an in-camera review, require
6 disclosure and order the admissibility of, if otherwise competent material for
7 which the privilege established in section 375.1064 is asserted, if the court
8 determines at least one of the following:

- 9 (1) The privilege is asserted for a fraudulent purpose; or
10 (2) The material is not subject to the privilege.

11 3. In a criminal proceeding, a court of record may, after an in-camera
12 review, require disclosure of material for which the privilege pursuant to
13 section 375.1064 is asserted, if the court determines at least one of the
14 following:

- 15 (1) The privilege is asserted for a fraudulent purpose;
16 (2) The material is not subject to the privilege; or
17 (3) The material contains evidence relevant to commission of a criminal
18 offense and the prosecuting attorney or attorney general has made a good
19 faith request or lawful subpoena for the information.

20 4. In any administrative or civil proceeding initiated by the director,
21 the administrative hearing officer or court may, after an in-camera review,
22 require public disclosure of material for which the privilege established in
23 section 375.1064 is asserted, if the administrative hearing officer or court
24 determines at least one of the following:

- 25 (1) The privilege is asserted for a fraudulent purpose;
26 (2) The material is not subject to the privilege; or
27 (3) The material contains evidence relevant to a breach of a civil duty
28 owed by the insurer to others, and the director is unable to obtain the

29 substantial equivalent of the information by independent means without
30 incurring unreasonable cost and delay.

375.1066. 1. The insurer that prepared or caused the document to be
2 prepared may file with the appropriate court a petition requesting an in-
3 camera hearing pursuant to section 375.1065 on whether the document or
4 portions of the document are privileged pursuant to sections 375.1063 to
5 375.1069. Failure by the insurer to file a petition pursuant to this subsection
6 within forty-five days of the insurer's receipt of the request for disclosure
7 waives the privilege for this request only.

8 2. An insurer asserting the privilege prescribed by sections 375.1063 to
9 375.1069 in response to a request for disclosure pursuant to this section shall
10 include in its request for an in-camera hearing all of the information set forth
11 in subsection 5 of this section.

12 3. Upon the filing of a petition pursuant to this section, the court shall
13 issue an order scheduling, within forty-five days after the filing of the
14 petition, an in-camera hearing to determine whether the document or
15 portions of the document are privileged pursuant to sections 375.1063 to
16 375.1069 or are subject to disclosure.

17 4. The court, after an in-camera review, may require disclosure of the
18 material for which the privilege in section 375.1064 is asserted if the court
19 determines, based on its in-camera review pursuant to subsection 2 or 3 of
20 section 375.1065, that any one of the conditions set forth in subsection 2 of
21 section 375.1065 is applicable as to a civil proceeding or that any one of the
22 conditions set forth in subsection 3 of section 375.1065 is applicable as to a
23 criminal proceeding. Upon making such a determination, the court may only
24 compel the disclosure of this portion of a document relevant to issues in
25 dispute in the underlying proceeding. Any compelled disclosure will not be
26 considered to be a public document or be deemed a waiver of the privilege for
27 any other civil, criminal, or administrative proceeding. A party
28 unsuccessfully opposing disclosure may apply to the court for an appropriate
29 order protecting the document from further disclosure.

30 5. An insurer asserting the insurance compliance self-evaluative audit
31 privilege in response to a request for disclosure pursuant to this section shall
32 provide to the prosecuting attorney or attorney general, as the case may be,
33 at the time of filing any objection to disclosure, all of the following
34 information:

35 (1) The date of the insurance compliance self-evaluation audit

36 **document;**

37 **(2) The identity of the entity conducting the audit;**

38 **(3) The general nature of the activities covered by the audit; and**

39 **(4) An identification of the portion of the document for which the**
40 **privilege is being asserted.**

375.1067. 1. An insurer asserting the privilege set forth in section
2 **375.1064 has the burden of demonstrating the applicability of the**
3 **privilege. Once the insurer has established the applicability of such privilege,**
4 **the party seeking disclosure pursuant to subdivision (1) of subsection 2 of**
5 **section 375.1065 has the burden of proving that the privilege is asserted for**
6 **a fraudulent purpose. The prosecuting attorney or attorney general seeking**
7 **disclosure pursuant to subsection 3 of section 375.1065 has the burden of**
8 **proving the elements set forth pursuant to that subsection.**

9 **2. The parties may at any time stipulate in proceedings pursuant to**
10 **section 375.1065 or 375.1066 to entry of an order directing that specific**
11 **information contained in a document is or is not subject to the privilege**
12 **established pursuant to section 375.1064. Any such stipulation may be limited**
13 **to the instant proceeding and, absent specific language to the contrary, shall**
14 **not be applicable to any other proceeding.**

375.1068. The privilege provided in section 375.1064 shall not extend to
2 **any of the following:**

3 **(1) Documents, communications, data, reports, or any other information**
4 **expressly required to be collected, developed, maintained, or reported to a**
5 **regulatory agency pursuant to state or federal law;**

6 **(2) Information obtained by observation or monitoring by any**
7 **regulatory agency; or**

8 **(3) Information obtained from a source independent of the insurance**
9 **compliance audit.**

375.1069. 1. The insurance compliance self-evaluative privilege created
2 **pursuant to sections 375.1063 to 375.1069 shall apply to all litigation or**
3 **administrative proceedings initiated after the effective date of sections**
4 **375.1063 to 375.1069.**

5 **2. Nothing in sections 375.1063 to 375.1069, nor the release of any self-**
6 **evaluative audit document shall limit, waive, or abrogate the scope or nature**
7 **of any statutory or common law privilege including, but not limited to, the**
8 **work product doctrine, the attorney-client privilege, or the subsequent**
9 **remedial measures exclusion.**

507.091. 1. When a civil action is filed in the courts of this state and an insurer may be obligated to provide a defense to such action or indemnity for any judgment rendered therein, such insurer shall have the right to intervene in such action and request the court to determine the extent of the insurer's coverage obligations, while reserving its rights with regard to providing coverage for the claims in the underlying civil action.

2. If an insurer does intervene, the court shall finally determine the extent of coverage before proceeding with the merits of the underlying action. The judgment of the trial court as to coverage shall be immediately appealable, notwithstanding issues relating to the underlying action remaining unresolved. When a judgment on the issues of coverage becomes final, the insurer shall be dismissed from the underlying action. If the insurer previously has undertaken the defense of the person named as a defendant in the underlying action and the final judgment on the coverage issues determines that it has no obligation to provide such defense, it may withdraw such defense.

3. Notwithstanding any other provision of law to the contrary, if an insurer proceeds in the manner prescribed in this section, the insurer's action shall not constitute a breach, either present or anticipatory, of any contract of insurance.

✓