



JUDGE, JAMES, HOBAN & FISHER, LLC

Defense Only Lawyers with the Philosophy of Providing Our Clients with Additional & Effective & Successful Defense Arguments

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Judge, James, Hoban & Fisher, LLC, is a defense firm defending insurers, self-insureds, and local public entities, with heavy emphasis on trials, appeals and insurance coverage.



Law Offices in Park Ridge

JUDGE-MINTS: NUGGETS OF LAW FOR THE DEFENSE FROM JUDGE, JAMES, HOBAN & FISHER

ACCIDENT (INCIDENT) REPORT OF INSURED TO INSURER (INSURED-INSURER PRIVILEGED)

Accident (Incident) Reports are a source of discoverable evidence for Plaintiffs' attorneys if they are prepared in the ordinary course of business, unless they are otherwise privileged from discovery. Plaintiffs' attorneys will seek copies of Accident (Incident) Reports in discovery, hoping to find admissions of the insured or the insured's employees. (Examples of admissions sometimes found on "Accident (Incident) Reports": (1) we did not have the required lifeguard at the pool (swimming pool accident); (2) we saw water on the bathroom floor, but just did not get around to cleaning it up (slip and fall on water on bathroom floor); (3) we left the gate open, so our dog got out and bit plaintiff (dog bite accident); (4) our driver was distracted by his passenger and did not see the red light (intersection accident); (5) we knew one step on the engineer's ladder was broken and loose (railroad FELA case).

Two Ways To Prevent Plaintiffs' Attorneys From Obtaining & Effectively Using Accident (Incident) Report Forms

(1) Make The Accident (Incident) Report Insured-Insurer Privileged

Make the Accident (Incident) Report Form subject to the Insured-Insurer privilege of immunity by captioning the report as "Accident (Incident) Report of Insured to Insurer (Insured-Insurer Immunity Privilege)."

Insured-insurer immunity: The Appellate Court, in *Holland v. Schwan's Home Service, Inc.*, 2013 IL App (5th) 110560, 992 N.E.2d 43 (5th Dist. 2013), explained the insured-insurer immunity privilege as follows:

In addition, the court in *Chicago Trust Co.* also noted that the insurer-insured privilege as an offshoot of the attorney-client privilege, applies only when the insured may properly assume that the communication is made to the insurer for the dominant purpose of transmitting it to an attorney for the protection of the interests of the insured. (2013 IL App (5th) 110560 at Pars. 196-97, 992 N.E.2d at 85.)

The insured-insurer immunity privilege is part of the attorney-client immunity privilege and it applies in the circumstance where the insured provides information to the insurer for the dominant purpose of the insurer providing the information to an attorney retained to defend the insured.

(NOTE: If the Accident (Incident) Report does not go to the insurer, be sure it is directed to an attorney protecting the insured or to the Risk Manager in charge of Claims who: (1) will provide it to defense counsel for the insured; or (2) is a member of the company's control group making decisions on claims.)

(2) Make The Accident (Incident) Report Seek Only & Provide Only Facts, Not Opinions Or Conclusions

Make the Accident (Incident) Report Form such that it seeks/solicits “facts only” (hard evidentiary facts) and does not seek/solicit or call for “opinions or conclusions” about the accident/incident of the insured or the insured’s employees.

The facts the report will seek include:

- (1) Injured party’s name, address, phone, age, race and email.
- (2) Any statements made or volunteered by the injured party about the accident.
- (3) The date, time and place of the accident and factually (with no opinion or comments) how it happened (what happened). (Example: Injured party tripped over crack in steps or injured party stated she tripped over crack in steps.)
- (4) Name, address, employer, phone, age of any person who witnessed the injured fall down. (But, not what details the witness knows about the accident – let the witness’ version come out in a statement to an investigator or at a deposition, not on the Accident (Incident) Report Form.)
- (5) The Accident (Incident) Report Form should not call for or ask employees of the insured to comment or opine on the “who, where, when, how and why” the accident occurred.
- (6) The Accident (Incident) Report Form should seek the following information:
 - (1) The obvious or known or apparent injury.
 - (2) If medical assistance was rendered at the scene and by whom.
 - (3) If the injured party was removed by ambulance and the hospital to which the injured party was taken; or if the injured party was offered medical assistance, but declined medical assistance.
 - (4) List all injuries claimed by the injured party and state whether those were the only injuries claimed.

The Accident (Incident) Report Form, when filled out, should give Plaintiff’s attorney nothing but the “facts” and no opinions or conclusions which could be used as evidence against the insured (no admissions).