



## T.H.E. Insurance vs. Mendez Trucking

T.H.E. Insurance is an approved, non-admitted carrier in California. Because T.H.E. Insurance is not admitted it is required to do business in California through a surplus lines broker. T.H.E. Insurance contracted with James Hilbrant Insurance Services to serve as its surplus lines broker in California. James Hilbrant, in turn, contracted with several California retail insurance brokers, including Robert Varner.

T.H.E. Insurance issued to Mendez Trucking a trucker's commercial insurance policy with limits of \$1,000,000.00. T.H.E. Insurance had distributed to James Hilbrant a standard application form to be used by retail brokers in California to take applications for insurance. Robert Varner had taken Mendez Trucking's insurance application on this company-approved form. The application listed only two trucks to be insured. The policy provided coverage for "scheduled" vehicles only. The only scheduled vehicles were those two trucks listed on the application. After that, unbeknownst to T.H.E. Insurance, Robert Varner apparently issued numerous certificates of insurance on behalf of Mendez Trucking that acknowledged coverage for all trucks owned or operated by Mendez Trucking.

Four days after the policy was issued an employee of Mendez Trucking was driving a truck at Southern Pacific's Intermodal Container Transfer Facility in Carson when it collided with another truck operated by Walter Flagg, an employee of Southern Pacific. Neither truck was scheduled under the policy issued by T.H.E. Insurance. Mendez Trucking claimed the accident was reported to T.H.E. Insurance through Robert Varner. Robert Varner acknowledged receiving the accident report but admits he did not pass the report along to T.H.E. Insurance.

Walter Flagg sued for personal injuries. Mendez Trucking alleged it tendered its defense of the Flagg lawsuit to T.H.E. Insurance. T.H.E. Insurance disputed this contention. The Flagg lawsuit went to a jury trial and the jury found in favor of Flagg and against Mendez Trucking and Southern Pacific and awarded Flagg damages in the sum of \$1,120,000.00. The court entered judgment on the verdict.

Southern Pacific learned during trial for the first time that it had allegedly been named as an additional insured on the policy. A claims representative of Southern Pacific discovered a certificate of insurance apparently issued by Robert Varner that named Southern Pacific as an additional insured. Southern Pacific made its first written tender for defense and indemnification during the trial. T.H.E. Insurance declined the tender.

Southern Pacific claimed that Mendez Trucking had a contractual obligation to have Southern Pacific named as an additional insured on the T.H.E. Insurance policy. Shortly after the Flagg trial, Southern Pacific denied Mendez Trucking any further access to Southern Pacific's yards. Mendez Trucking claimed this decision caused Mendez Trucking to go into bankruptcy. Mendez Trucking blamed T.H.E. Insurance, alleging that if T.H.E.

Insurance had accepted the tender and had defended and indemnified Mendez Trucking and Southern Pacific, Southern Pacific would not have terminated its contracts with them.

Mendez Trucking also alleged that Robert Varner was the actual or ostensible agent of T.H.E. Insurance. Robert Varner allegedly represented himself to be an agent of T.H.E. Insurance, he produced a proprietary insurance application with T.H.E. Insurance Company's name on it, and in his alleged capacity as agent for T.H.E. Insurance, he allegedly issued numerous certificates of insurance (one of which named Southern Pacific as an additional insured) in favor of Mendez Trucking. The application supposedly directed the applicant to report claims to the "Agent/Broker." Mendez Trucking contended this referred to Robert Varner.

Mendez Trucking claimed that Robert Varner had committed a grievous error when he listed just two trucks on the insurance application to T.H.E. Insurance. According to Mendez Trucking, Robert Varner had supposedly been instructed by them to secure coverage for all trucks owned or operated by them.

T.H.E. Insurance brought this declaratory relief action in United States District Court for a determination that it had no duty to defend or indemnify either Mendez Trucking or Southern Pacific. Both Mendez Trucking and Southern Pacific counterclaimed and sought damages under several theories including breach of the covenant of good faith and fair dealing. Mendez Trucking sought to reform the policy to properly list all their vehicles. Southern Pacific claimed it was entitled to coverage because it relied upon the certificate allegedly issued by Robert Varner that named Southern Pacific as an additional insured.

T.H.E. Insurance contended it could not have acted in bad faith because there was a "genuine issue of liability" whether coverage existed under the policy. T.H.E. Insurance contended that Robert Varner could not be the ostensible agent of T.H.E. Insurance because no act or omission of T.H.E. Insurance caused or contributed to Mendez Trucking's belief that Varner was an agent for T.H.E. Insurance. T.H.E. Insurance also contended that Mendez Trucking could not reform the insurance policy because Mendez Trucking delayed in filing its reformation action and should therefore be barred by laches. T.H.E. Insurance further contended that unclean hands barred Mendez Trucking from reforming the insurance policy. Mendez Trucking had allegedly provided false answers in its application for insurance regarding their history of insurance cancellations and non-renewals.

T.H.E. Insurance canceled the insurance policy on the basis of "unacceptable number of vehicles to be insured." T.H.E. Insurance had learned several days prior to the cancellation that Mendez Trucking owned or operated approximately fifty-nine different vehicles.

Judge Richard Paez granted summary judgment in favor of T.H.E. Insurance. The court ruled there was a "genuine issue of liability" and T.H.E. Insurance could not be liable in bad faith to Mendez Trucking. Judge Paez also held that no reasonable trier of fact could find that Mendez Trucking reasonably believed Robert Varner was acting as the agent for T.H.E. Insurance. In addition, Judge Paez found that Mendez Trucking's reformation claim was barred by laches.