

EVIDENCE OF FRAUD FOR STATEMENTS IN CATEGORY 13

Category 13. Liberty Mutual Falsely Represented That “P” Numbers In List Of Open Claims Were Not Liberty Mutual Claim Numbers

As noted at oral argument and in earlier filings, the allegations in this section are primarily directed to Scotts’ bad faith claim, not its fraud claim. *See* July 5, 2007 Ray letter (Feb. 8, 2008 Barnhart Decl. Ex. A-1 (Doc. No. 200)). Under Scotts’ bad faith claim, the chronology of false statements is particularly important. *See Princeton Gamma-Tech Inc. v. Hartford Insurance Group*, No. SOM-L-1289-91, slip op. at 316–83 (N.J. Super. Ct. Law Div. June 5, 1997); *In re Tutu Water Wells Contamination Litig.*, 78 F. Supp. 2d 436, 443 (D. V.I. 1999). Scotts does not rely on these misstatements as the primary basis of its fraud claim, but contends that the evidence contained in this section should be admissible in support of the widespread fraudulent conduct described elsewhere, given the disputed issues of fact and the chronology of denials embodied in the evidence set forth below.

A. Representations from Exhibit A

Paragraph 4: In the course of the March 5, 1999 meeting, Scotts discussed the Umbrella Excess Liability Policy that Scotts had located with the “P” claim numbers listed on the back. Liberty Mutual denied that the claim numbers attached to the umbrella policy were Liberty Mutual claim numbers. *See* Armstrong Aff. at ¶ 5 (Ex. A-8); Armstrong Jan. 8, 2008 Depo. at 931:2–20; Diane Archangeli’s contact database notes for Georges Prouty, DRM 3613 (Francisco Decl. Ex. TT) (Doc. No. 167).

Paragraph 25: During the May 25, 2000 meeting, the Liberty Mutual representatives repeated the representation that the claim numbers attached to the Umbrella Excess Liability policy were not Liberty Mutual claims. *See* Butler Sept. 18, 2007 Depo. at 222:2–224:9; Armstrong Aff. at ¶ 6 (Ex. A-8); June 2004 email chain at OMS 1966 (Ex. A-22).

Paragraph 29: At a meeting on May 25, 2000, Liberty Mutual representatives recanted Mr. Prouty’s statements. *See* Butler Sept. 18, 2007 Depo. at 223:4–13. *See also* Armstrong Jan. 8, 2008 Depo. at 981:20–982:6. At the meeting held on May 25,

2000, Liberty Mutual returned to its prior position that the claim numbers “were not Liberty Mutual claim numbers.” Butler Sept. 18, 2007 Depo. at 224:6–11; *see also* Armstrong Jan. 8, 2008 Depo. at 938:25–939:12; 981:20–982:6.

As set forth in these paragraphs, Liberty Mutual represented that the numbers on the open claims attached to the Umbrella Excess Policy were not Liberty Mutual claim numbers. The first such representation took place at a March 5, 1999 meeting:

During this meeting, the parties discussed the umbrella excess liability policy and the list of claim numbers under the “Public Liability Claims” and “Open Claims” headings attached to the umbrella policy. At that meeting, Ms. Yahia told me that she did not recognize the claim numbers and then specifically told me that they definitely were not Liberty Mutual claim numbers. No Liberty Mutual representative corrected this statement or said anything to the contrary.

Aug. 1, 2007 Armstrong Aff. at ¶ 5 (O.A. Tab 24; Feb. 8, 2008 Barnhart Decl. Ex. A-8 (Doc. No. 200)) (emphasis added).

Ms Archangeli’s notes from her later conversation with Georges Prouty also confirm that Ms. Yahia’s made those representations regarding the claim numbers at the March 1999 meeting:

Called to see if he found the claim numbers. He said that they are Liberty [Mutual] claim numbers but . . . doesn’t know what type of liability policies. . . . He offered that, “of course the claim numbers are LM claim numbers, the sheet on which they are printed is Liberty [Mutual] letterhead. This, of course is different than what Terr[i] [Yahia] has previously . . . [entry cuts off here]

Diane Archangeli’s contact database notes for Georges Prouty, DRM 3613 (O.A. Tab 48; Feb. 8, 2008 Barnhart Decl. Ex. A-27 (Doc. No. 200)) (emphasis added); *see also* Armstrong Depo. at 931:16–20 (O.A. Tab 80; Doc. No. 174–75) (“Q. And what do you recollect being said about the claim numbers at that March, 1999 meeting, the first meeting with Liberty? A. I recall Terri Yahia saying they weren’t Liberty Mutual claim numbers.”).

In a November 1999 telephone call, Mr. Prouty informed Ms. Archangeli that the claim numbers either were Liberty Mutual claim numbers or were “probably” Liberty Mutual claim numbers, but he went on to state that he could not identify “what type of liability policies” were associated with the claim numbers. *See* Archangeli’s contact database notes for Georges Prouty, DRM 3613 (O.A. Tab 48; Feb. 8, 2008 Barnhart Decl. Ex. A-27 (Doc. No. 200)); Butler Depo. at 222:20–223:13 (O.A. Tab 83; Doc. No. 178–79). As explained in Category 3, that statement itself was misleading because the claim numbers do, in fact, identify the type of policy issued to Scotts.

Nearly seven months later, during the critical May 25, 2000 meeting, Liberty Mutual representatives stated that the claim numbers were not Liberty Mutual numbers, thereby “recanting” Mr. Prouty’s statement, according to witnesses. As Ms. Archangeli testified:

- Q. Now, was there any discussion about these open claim numbers that we see on page LMIC—was there any discussion about the second meeting with Liberty [Mutual] in May of 2000 of the open claim numbers that appear on Page LMIC 004788 within Butler Exhibit 12?
- A. Yes.
- Q. What was the discussion on that topic?
- A. We told them that we thought that there were policies issued as far back as 1958; asked them to explain what they understood these open claims to be and we went back and forth about whether this was enough evidence to prove that Liberty Mutual actually provided or issued the policies to Scotts.
- Q. Did you mention at that meeting that George Prouty had told you unequivocally that these were, in fact, Liberty Mutual claim numbers?
- A. Yes, I believe I did.
- Q. And what was said?
- A. I just—
- Q. At that meeting?
- A. What I remember the conversation being is that they were taking a stance that was in conflict to the previous position they had taken. Even though George Prouty had earlier said he thought they were probably Liberty Mutual policies, he

thought they were Liberty Mutual policies, he recanted at the meeting and Terri Yahia said she wasn't sure.

- Q. Do you believe that George Prouty was at this meeting in May of 2000? You don't list him as being at the meeting?
- A. Whoever was there, they were recanting the position that there were policies; that the policy numbers were Liberty Mutual policy numbers.

Butler Depo. at 222:2–223:21 (O.A. Tab 83; Doc. No. 178–79) (emphasis added).

Ms. Armstrong confirmed the same:

- Q. Now, at the second meeting in May of 2000, you say the P claim numbers were raised again?
- A. Yes.
- Q. And who raised the topic?
- A. Diane Archangeli.
- Q. And what is it that she asked?
- A. She—the discussion was as to whether Liberty Mutual would acknowledge or accept that these were Liberty Mutual claim numbers.
- Q. And what was said?
- A. Terri Yahia said they were not Liberty Mutual claim numbers.
- Q. Now, did anybody—who else was there from Liberty Mutual?
- A. Terri Yahia, Bob Kostecki, and Brian Merchant.
- Q. Now, Mr. Kostecki was new to the matter; isn't that right?
- A. Yes.
- Q. He didn't say anything about the P claim numbers one way or the other, right?
- A. Right.
- Q. And Brian Merchant, he didn't say anything about the P claim numbers either; is that right?
- A. Right.
- * * * * *
- Q. Now, as had been said in the May 26th, 2000, letter, George Prouty had unequivocally agreed that these P claim numbers were Liberty Mutual numbers; isn't that right?
- ...
- A. My—yes, my understanding is that he told Diane that and it was later with—withdrawn.

Armstrong Depo. at 938:25–940:1, 981:20–982:2 (O.A. Tab 80; Doc. No. 174–75); *see also*

Aug. 1, 2007 Armstrong Aff. at ¶ 6 (O.A. Tab 24; Feb. 8, 2008 Barnhart Decl. Ex. A-8 (Doc.

No. 200)) (at the May 2000 meeting, “Ms. Yahia told me—as she had the year before—that the claim numbers attached to the umbrella policy were not Liberty Mutual claim numbers.”).

B. Falsity

In fact, the claim numbers were Liberty Mutual numbers, as Liberty Mutual subsequently personnel confirmed:

- Q. In light of the accuracy of the claim data on the public liability ledger attached to the umbrella policy for the policy beginning in 1965, do you have any reason to believe that the entries for claims for the period 10-1-63 to 10-1-64 are inaccurate in any respect?
- A. No, I don't.
- Q. And do you have any reason to believe that the entries listed for the policy beginning 10-1-64 to 10-1-65 are inaccurate in any respect?
- A. No.

Olson Depo. at 154:2–12 (O.A. Tab 99; Doc. No. 194).

Moreover, Liberty Mutual personnel repeatedly testified as to the meaning of letters in these or similar claim numbers and their familiarity with the lettering system confirms that the numbers were Liberty Mutual numbers. *See, e.g.*, Olson Depo. at 116:11–13, 135:11–136:4 (O.A. Tab 99; Doc. No. 194); McCullough Depo. at 52:11–14 (O.A. Tab 88; Doc. No. 184); Schlemmer Depo at 103:11–20, 104:10–13, 117:12–15 (O.A. Tab 94; Doc. No. 190); Merchant Depo. at 125:1–7 (O.A. Tab 89; Doc. No. 185); Brigada Depo. at 75:4–21, 77:23–79:6 (O.A. Tab 82; Doc. No. 177).

C. Materiality

Scotts was seeking confirmation from Liberty Mutual as to whether claim numbers were Liberty Mutual's claim numbers or not. Although Mr. Prouty stated at one point that the claim numbers either were or “probably” were Liberty Mutual numbers, Butler Depo. at 222:20–223:13 (O.A. Tab 83; Doc. No. 178–79), Liberty Mutual's lead representative (Ms. Yahia)

denied that the claim numbers were Liberty Mutual claim numbers at both face-to-face meetings held with Scotts. Her second denial came at a *subsequent* meeting held after Mr. Prouty left his position. *See* Aug. 1, 2007 Armstrong Aff. at ¶ 6 (O.A. Tab 24; Feb. 8, 2008 Barnhart Decl. Ex. A-8 (Doc. No. 200)) (at the May 2000 meeting, “Ms. Yahia told me—as she had the year before—that the claim numbers attached to the umbrella policy were not Liberty Mutual claim numbers.”); *see also* Armstrong Depo. at 935:23–936:14, 938:25–940:1, 981:20–982:6 (O.A. Tab 80; Doc. No. 174–75); Butler Depo. at 222:2–224:11 (O.A. Tab 83; Doc. No. 178–79) (all quoted *supra* § A). In that regard, Liberty Mutual sought to convince Scotts that the claim numbers were not Liberty Mutual claim numbers and thereby create uncertainty as to the meaning and strength of the evidence provided. *See also*, “Materiality” section in Category 1 § C, which sets forth additional evidence supporting materiality here. (To minimize any duplication, Scotts refers the Court to that section in lieu of reproducing that evidence again here.)

D. Knowledge

Liberty Mutual knew, should have known, that the claim numbers were Liberty Mutual’s claim numbers. *See* Olson Depo. at 116:11–13, 135:11–136:4, 153:11–154:12 (O.A. Tab 99; Doc. No. 194); McCullough Depo. at 52:11–14 (O.A. Tab 88; Doc. No. 184); Schlemmer Depo at 103:11–20, 104:10–13, 117:12–15 (O.A. Tab 94; Doc. No. 190); Merchant Depo. at 125:1–7 (O.A. Tab 89; Doc. No. 185); Brigada Depo. at 75:4–21, 77:23–79:6 (O.A. Tab 82; Doc. No. 177).

E. Intent

Intent is supported by the fact that, after Mr. Prouty stated the claim numbers either were or “probably” were Liberty Mutual numbers, Liberty Mutual made a point of “recanting” or disputing that statement. *See* Butler Depo. at 222:2–224:11 (O.A. Tab 83; Doc. No. 178–79)

(quoted supra § C). Liberty Mutual knew that Scotts had specifically requested information about the claim numbers. *See* Aug. 1, 2007 Armstrong Aff. at ¶ 5 (O.A. Tab 24; Feb. 8, 2008 Barnhart Decl. Ex. A-8 (Doc. No. 200)) (reporting that the parties discussed the claim numbers and that Ms. Yahia denied that they were Liberty Mutual numbers). Liberty Mutual also knew that Scotts and DRM were seeking all information about Scotts' policies. *See* O'Brien Depo. at 72:19-23 (O.A. Tab 91; Doc. No. 187); Prouty Depo. at 189:19–190:3 (O.A. Tab 93; Doc. No. 189).

As set forth previously, Liberty Mutual also knew that Scotts was relying on Liberty Mutual's misrepresentations and omissions regarding any secondary evidence of coverage, and Liberty Mutual made its misrepresentations and omissions with the intent that Scotts would rely on them. That evidence is set forth in detail in the discussion of false statements under Category 1. To avoid unnecessary duplication, Scotts refers the Court to the evidence described in greater detail under "Intent" in Category 1 § E. All of that evidence supports Liberty Mutual's intent to mislead here as well.

In sum, that evidence demonstrates that Liberty Mutual assigned a "lost policy" discount to the settlement negotiations, precisely because Liberty Mutual representatives claimed that Liberty Mutual could not find policies or evidence of policies sufficient to determine coverage, and Liberty Mutual *told Scotts* that Scotts should *discount* its settlement demands as a result of the "lost policy" defense. *See* Merchant Depo. at 79:12–17 (O.A. Tab 89; Doc. No. 185); Schlemmer Depo. at 211:24–212:7 (O.A. Tab 94; Doc. No. 190); Prouty Depo. at 152:3–6 (O.A. Tab 93; Doc. No. 189); Butler Depo. at 492:9–16 (O.A. Tab 83; Doc. No. 178–79). Liberty Mutual knew that Scotts and DRM were seeking any and all information about any Scotts' policies to determine Scotts' settlement position. *See* O'Brien Depo. at 72:19–23 (O.A. Tab 91;

Doc. No. 187); Prouty Depo. at 189:19–190:3 (O.A. Tab 93; Doc. No. 189). If Liberty Mutual failed to convince Scotts to settle its claims inexpensively, Liberty Mutual knew it faced the risk of expensive litigation and significant exposure. *See, e.g.*, Schlemmer Depo. at 74:11–75:4 (O.A. Tab 94; Doc. No. 190); Merchant Depo. at 86:19–87:9; 295:16–296:2 (O.A. Tab 89; Doc. No. 185). Liberty Mutual wanted to eliminate that risk and “avoid . . . getting involved in expensive declaratory judgment litigation.” Merchant Depo. at 299:2–16 (O.A. Tab 89; Doc. No. 185); *see also* Schlemmer Depo. at 27:12–29:7 (O.A. Tab 94; Doc. No. 190). That is why Liberty Mutual made the representations that it made.

F. Justifiable Reliance

Scotts and DRM had the claim numbers and presented them to Liberty Mutual, but Scotts and DRM sought *verification* that the claim numbers were in fact Liberty Mutual claim numbers. Only Liberty Mutual could do that. Instead, Liberty Mutual denied that the claim numbers were Liberty Mutual numbers at the only two meetings held with Scotts’ personnel, both before and after Ms. Butler’s discussion with Mr. Prouty. *See* Armstrong Depo at 949:10–950:8; 983:23–984:5 (O.A. Tab 80; Doc. No. 174–75). Indeed, in an internal memo that Ms. Armstrong wrote four years after the settlement agreement—and long before any litigation—Ms. Armstrong reported that “we found references to claims with claim numbers that seem to be those used by Liberty Mutual, but they *deny that the claim numbers are theirs.*” June 2004 e-mail chain at OMS 1966 (Feb. 8, 2008 Barnhart Decl. Ex. A-22 (Doc. No. 200)) (emphasis added).

As the evidence indicates, Ms. Armstrong gave credence to Liberty Mutual’s misrepresentations insofar as the lead spokesperson at the last meeting held with Scotts again denied that the claim numbers were Liberty Mutual claim numbers. As set forth previously, Scotts also relied on Liberty Mutual’s other representations regarding the existence, meaning, and significance of secondary evidence of coverage as well. *See* Feb. 7, 2008 Armstrong Aff. at

¶¶ 3–6 (O.A. Tab 23; Feb. 8, 2008 Barnhart Decl. Ex. A-26 (Doc. No. 200)). That evidence is set forth in detail in the discussion of false statements under Category 1. To avoid unnecessary duplication, Scotts refers the Court to the evidence described in greater detail under “Justifiable Reliance” for Category 1 § F.

In sum, that evidence demonstrates that Scotts could not determine what other evidence Liberty Mutual had internally, could not determine what searches Liberty Mutual had done internally, and could not know Liberty Mutual’s own determinations regarding such evidence. *Id.* Scotts was at the mercy of Liberty Mutual to disclose the truth regarding those matters. Both Ms. Armstrong and Ms. Archangeli testified that had Liberty Mutual been truthful about the extent, significance, and meaning of the secondary evidence that Liberty Mutual had in its files, Scotts would not have settled under the terms that it did. *See, e.g.*, Feb. 7, 2008 Armstrong Aff. at ¶ 6 (O.A. Tab 23; Feb. 8, 2008 Barnhart Decl. Ex. A-26 (Doc. No. 200)); Butler Depo. at 491:19–492:7; 493:11–19 (O.A. Tab 83; Doc. No. 178–79). Even Liberty Mutual’s own witnesses acknowledged that it was reasonable for Scotts to expect Liberty Mutual to be up front and honest in its dealing with Scotts. *See* Schlemmer Depo. at 79:7–10 (O.A. Tab 94; Doc. No. 190).