

**EVIDENCE OF FRAUD FOR STATEMENTS IN CATEGORY 3**

**Category 3. Liberty Mutual Falsely Represented That The “P” Code In The Claim Numbers Did Not Indicate The Nature Of Policies And Concealed Their True Meaning**

**A. Representations from Exhibit A**

Paragraph 26: On November 4, 1999, Georges Prouty from Liberty Mutual misrepresented that “P just indicates liability policies” and that he did not “know what type of liability policies.” Archangeli contact database notes for Georges Prouty at DRM 3613 (Ex. A-27); *see also* Prouty Depo. at 104:2–10, 147:1–149:17.

As set forth in Paragraph 26, Liberty Mutual represented that it could not determine the type of policy associated with the list of open claim numbers attached to the Umbrella Excess Policy that Scotts provided to Liberty Mutual. *See, e.g.*, LMIC 4788 (Jan 15, 2008 Francisco Decl. Ex. S (Doc. No. 167)) (list of open policies). In his deposition, Georges Prouty from Liberty Mutual admitted that he told Diane Archangeli from DRM that he did not know what the “P” in the claim numbers indicated:

Q. Sir, my question is simply, did you indicate to Diane as it indicates here that you didn’t know what type of liability policy the P referred to?

...  
A. That would have been something I would have said to her, sure.

Prouty Depo. at 148:6–11 (O.A. Tab 93; Doc. No. 189). Joyce Armstrong from Scotts confirmed that was her understanding as well based on Liberty Mutual’s representations. Armstrong Depo. at 938:6–24 (O.A. Tab 80; Doc. No. 174–75) (“Yes. The discussion with George continued on to talk about the meaning of the P, and he thought it meant any kind of—he wasn’t sure what kind of liability number . . .”).

Other testimony also confirmed that Liberty Mutual personnel repeatedly misrepresented or concealed the true meaning of the “P” code in the claim numbers from both Scotts and DRM.

*See, e.g.*, Kostecki Depo. at 106:24–107:6 (O.A. Tab 87; Doc. No. 183) (“ Q. . . . [W]ith respect to the May 2000 meeting, Mr. Kostecki, do you recall anyone telling Scotts or DRM what P means in front of claims? . . . A. No, I don’t recall that at all.”); Merchant Depo. at 217:13–17 (O.A. Tab 89; Doc. No. 185) (“Q. Did you or anyone from Liberty Mutual ever tell Scotts or DRM what the P code stood for in front of the claim numbers? A. It never came up in any of my conversations or during my investigation.”); Butler Depo. at 487:18–488:13 (O.A. Tab 83; Doc. No. 178–79) (“Q. Did Liberty Mutual ever tell you that the “P” code in front of the claim numbers indicated that they had paid claims under a general liability or public liability policy issued to Scotts? . . . A. No.”).

### **B. Falsity**

Contrary to their representations and omissions to both Scotts and DRM, Liberty Mutual knew that the “P” code on the claim numbers actually confirmed that they were claims made under *general liability policies* (also known as public liability or primary liability policies), which Liberty Mutual had issued to Scotts:

- Q. And what about the claim number on Merchant Exhibit 22 tells you anything?
- A. The P letter in the front of it.
- Q. What does that tell you?
- A. That’s typically what we would use for a claim that would be under a general liability policy, associated with it.

Merchant Depo. at 125:1–7 (O.A. Tab 89; Doc. No. 185).

Numerous other Liberty Mutual witnesses also confirmed the meaning and import of the “P” code in front of the claim numbers. *See also, e.g.*, Olson Depo. at 135:11–136:4 (O.A. Tab 99; Doc. No. 194) (“P” means “general liability”); McCullough Depo. at 52:11–14 (O.A. Tab 88; Doc. No. 184) (“P” means “public liability or general liability”); Olson Depo. at 116:11–13 (O.A. Tab 99; Doc. No. 194) (“P” means “public liability”); Schlemmer Depo at 103:11–20,

117:12–15 (O.A. Tab 94; Doc. No. 190) (same); Brigada Depo. at 77:23–79:6, 75:4–21 (O.A. Tab 82; Doc. No. 177) (same).

### **C. Materiality**

One of the central issues in the negotiations leading up to the settlement agreement was what evidence Liberty Mutual had regarding any policies issued, what types of policies had been issued, and what years the policies covered. As Ms. Archangeli testified:

Q. In creating settlement targets did you need to take into account the fact that Liberty Mutual was taking a position that there was not evidence of coverage?

...

A. That was the main issue when trying to do the settlement targeting. We were unable to prove everything we thought we needed to prove in order to shift the burden to Liberty Mutual to disprove coverage, so we were . . . targeting [settlement] based on what we had at the time, which was only some secondary evidence of the early policies.

Butler Depo. at 492:18–493:9 (O.A. Tab 83; Doc. No. 178–79).

Likewise, Ms. Armstrong made clear that the evidence Liberty Mutual provided was crucial to the settlement:

The representations and omissions made by Liberty Mutual were critical to Scotts' decision to enter into the July 2000 settlement agreement, which constituted a total buy-out of all policies. Scotts repeatedly asked Liberty Mutual for information regarding insurance coverage because that information was a central topic of the discussions that took place regarding the settlement of the environmental claims submitted to Liberty Mutual and the settlement agreement that Scotts ultimately agreed to execute in July 2000.

Scotts tried to determine any prior insurance coverage, assess the scope of that coverage, analyze the quantity and strength of any evidence regarding such coverage, and solicit Liberty Mutual's assessment of the insurance coverage and evidence regarding such insurance coverage because that information was very important to Scotts. Scotts sought such information because its decisions regarding what to demand, what to agree upon, and, if necessary, whether to litigate the issue of insurance coverage with Liberty

Mutual was based on Liberty Mutual's representations regarding such matters.

Feb. 7, 2008 Armstrong Aff. at ¶ 2–3 (O.A. Tab 23; Feb. 8, 2008 Barnhart Decl. Ex. A-26 (Doc. No. 200)).

As such, the quantity and strength of the secondary evidence was also very important. *See also* Schlemmer Depo. at 56:24–57:3 (O.A. Tab 94; Doc. No. 190) (“Q. You’d want to look at the whole package of evidence? A. I’d want to look at as much information as I could have, yes.”); Merchant Depo. at 18:22–19:2 (O.A. Tab 89; Doc. No. 185) (“Q. All right. And you are aware that Liberty Mutual sometimes evaluates secondary evidence of coverage to determine whether or not it insured a policyholder, correct? That is correct.”); O’Brien Depo. at 93:7–12 (O.A. Tab 91; Doc. No. 187) (“A. In a lost policy situation, we evaluate the weight of the secondary evidence with our in-house counsel and with the review of state law and make a decision, along with unit director and management, as to how to handle the situation.”).

The meaning of the “P” code was likewise important to those discussions. Liberty Mutual’s efforts to conceal the true meaning of the “P” codes precluded both Scotts and DRM from confirming what type of policies had been issued and how far back they went. Without knowing that “P” confirmed that Scotts had made claims under general liability policies issued to Scotts, neither Scotts nor DRM could determine or confirm that Liberty Mutual had in fact issued general liability policies dating back to *at least 1959*—although Liberty Mutual certainly knew or should have known that. *See, e.g.*, Schlemmer Depo. at 43:23–44:11 (O.A. Tab 94; Doc. No. 190) (noting that he generally seeks out evidence that will help determine the type of policy issued). *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 that the “P” code embedded in the claim numbers meant that the claims were made under general liability policies issued to Scotts. In fact, the individuals involved in the negotiation or approval of the Scotts settlement—including Mr. Merchant and Mr. Schlemmer—both testified that they knew what the “P” code meant. Schlemmer Depo. at 103:11–20, 117:12–15 (O.A. Tab 94; Doc. No. 190); Merchant Depo. at 125:1–7 (O.A. Tab 89; Doc. No. 185). The meaning of the “P” codes was, in fact, well known as evidenced by the fact that multiple other Liberty Mutual witnesses also testified to its import and meaning. 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); Brigada Depo. at 75:4–21, 77:23–79:6 (O.A. Tab 82; Doc. No. 177).

#### **E. Intent**

Liberty Mutual knew that Scotts and DRM had requested information regarding the “P” codes, *see* Prouty Depo. at 148:6–11 (O.A. Tab 93; Doc. No. 189), and Liberty Mutual also knew that Scotts was seeking any and all information regarding the type and scope of coverage. *See, e.g.*, Schlemmer Depo. at 43:23–44:11 (O.A. Tab 94; Doc. No. 190) (noting that he generally seeks out evidence that will help determine the type of policy issued); Feb. 7, 2008 Armstrong Aff. at ¶ 3 (O.A. Tab 23; Feb. 8, 2008 Barnhart Decl. Ex. A-26 (Doc. No. 200)) (“Scotts tried to determine any prior insurance coverage [and] assess the scope of that coverage . . . .”). Notwithstanding such requests, and despite the fact that the “P” codes confirmed the type of coverage that had been issued, *see supra* § B, Liberty Mutual concealed the truth about the meaning of the “P” codes. *See supra* § D.

Liberty Mutual also knew that Scotts was relying on all of Liberty Mutual’s misrepresentations and omissions, 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 relied on Liberty Mutual’s representations that it did not know what the “P” code meant, and Liberty Mutual’s other omissions as to the meaning of “P,” when it

evaluated the body of secondary evidence available to it prior to entering into the settlement agreement. *See, e.g.*, Feb. 7, 2008 Armstrong Aff. at ¶¶ 4–6 (O.A. Tab 23; Feb. 8, 2008 Barnhart Decl. Ex. A-26 (Doc. No. 200)(discussing reliance on representations regarding secondary evidence); Butler Depo. at 491:19–492:7; 493:11–18 (O.A. Tab 83; Doc. No. 178–79) (same). Critically, Scotts did not know that the claim numbers confirmed that Scotts had issued general liability policies back to 1959. That reliance was certainly justifiable, given that they were Liberty Mutual’s own internal codes; neither Scotts nor DRM had access to Liberty Mutual’s internal coding system. Moreover, even Liberty Mutual acknowledged that the weight of secondary evidence is central to a lost policy case. *See, e.g.*, O’Brien Depo. at 93:7–12 (O.A. Tab 91; Doc. No. 187).

Scotts also justifiably relied on all of Liberty Mutual’s representations regarding the existence, meaning, and significance of secondary evidence of coverage. *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).