

## **EVIDENCE OF FRAUD FOR STATEMENTS IN CATEGORY 4**

### **Category 4. Liberty Mutual Falsely Represented That It Did Not Have Specimen Policies And Could Not Reconstruct The Terms And Conditions Of Scotts' Policies**

#### **A. Representations from Exhibit A**

Paragraph 36: During the 1998–2000 negotiations, Brian Merchant told Diane Archangeli several times on the phone that Liberty Mutual was unable to provide specimen policies in this case. Several times, Liberty Mutual represented that specimen policies were not available. Butler Depo. at 301:7–302:7; Butler Depo. at 526:17–527:17.

As set forth in Paragraph 36, Liberty Mutual represented that it had no specimen policies to reconstruct the terms and conditions of Scotts' missing policies. As Ms. Butler testified:

- Q. Now, you mentioned something about specimen policies. I want to ask you about that, Ms. Butler.
- A. Sure.
- Q. Did somebody at DRM or at Scotts, to your knowledge, ask someone at Liberty [Mutual] for specimen policies?
- A. I did.
- Q. Did you do that anywhere in writing?
- A. I don't know. I'd have to read this. It's not in writing. I definitely did several times over the phone.
- Q. Just to get your best recollection, do you remember asking for specimen policies of anyone at Liberty [Mutual] in writing?
- A. Absolutely. Brian Merchant. I know I went over and over it with him. I know I had gotten specimen policies from Liberty [Mutual] in the past. I was shocked and dismayed that they were unable to provide them in this case when we know we had gotten them before in other cases.

Butler Depo. at 301:7–302:7 (O.A. Tab 83; Doc. No. 178–79) (emphasis added). *See also* Armstrong Depo. at 821:23–822:13 (O.A. Tab 80; Doc. No. 174–75).

#### **B. Falsity**

Contrary to Liberty Mutual's representations, Liberty Mutual had specimen policies in its own files for the policies issued to Scotts in the 50's and 60's. Liberty Mutual produced those specimen policies in this litigation. Liberty Mutual's own 30(b)(6) designee testified that those

specimen policies were the policies used in the 50's and 60's. *See* Liberty Mutual's 9/3/63 specimen Umbrella Excess Liability Policy form number GPO 2682 (O.A. Tab 50; Jan. 15, 2008 Barnhart Decl. Ex. B-18 (Doc. No. 171)); Liberty Mutual's specimen Comprehensive General Liability Policy, form GPO 2120 R4 (10-1-58) (O.A. Tab 51; Jan. 15, 2008 Barnhart Decl. Ex. B-30 Doc. No. 171)); Liberty Mutual's specimen Comprehensive General Liability Policy form GPO 2120 R5 301 (Jan. 15, 2008 Barnhart Decl. Ex. B-34 (Doc. No. 171)); McCullough Depo. at 88:6–16; 148:19–150:17 (O.A. Tab 88; Doc. No. 184).

### **C. Materiality**

The terms and conditions of the policies were important to the negotiations, as all the parties to the negotiations acknowledged. Liberty Mutual argued that the terms and conditions were important and Scotts and DRM likewise sought all secondary evidence regarding any terms and conditions. *See, e.g.*, Merchant Depo at 179:17–180:10 (O.A. Tab 89; Doc. No. 185); Butler Depo. at 493:21–494:9 (O.A. Tab 83; Doc. No. 178–79); Aug. 14, 1998 Armstrong letter at LYBTY-03137 (O.A. Tab. 1; Jan. 15, 2008 Francisco Decl. Ex. J (Doc. No. 167)) (asking Liberty Mutual to “[p]lease review your claim files, underwriting files, reinsurance files and any other records which may provide evidence of policies” issued by Liberty Mutual to Scotts and “provide us with copies of any information that you locate”); Dec. 28, 1998 Armstrong letter, LMIC 005474–76 (O.A. Tab 3; Francisco Decl. Ex. M (Doc. No. 167)) (asking Liberty Mutual to “*please furnish certified copies of all policies as well as certified copies of any other potentially responsive property, general liability, umbrella, excess, auto, business and package policies*” and to “[p]lease also provide copies of secondary evidence and reinsurance information related to any incomplete or missing policies.”) (emphasis in original). As the record evidence indicates, Scotts and DRM sought specimen policies from Liberty Mutual

because they were important to reconstructing Liberty Mutual's actual policies. As Ms. Butler testified:

Q. Now, Ms. Butler, there was some discussion about specimen policies earlier. Can insurance companies reconstruct the terms and conditions of its policies using secondary evidence?

...

A. Absolutely.

Q. Did Liberty Mutual ever offer to reconstruct the terms and conditions for Scotts in this particular project?

...

THE WITNESS: No. In fact, we asked several times and were told that specimen policies were not available.

Butler Depo. at 526:17–527:17 (O.A. Tab 83; Doc. No. 178–79) (emphasis added). *See also*, e.g., Aug. 14, 1998 Armstrong letter at LYBTY-03137 (O.A. Tab. 1; Jan. 15, 2008 Francisco Decl. Ex. J (Doc. No. 167)); Dec. 28, 1998 Armstrong letter, LMIC 005474–76 (O.A. Tab 3; Francisco Decl. Ex. M (Doc. No. 167)). Liberty Mutual claims that Scotts and DRM were aware of common terms of the industry, but that is irrelevant to Scotts' fraud argument. Scotts and DRM wanted to reconstruct Liberty Mutual's policies. *See id.* at 527:7–14. Indeed, Liberty Mutual has contradicted itself on this very argument, claiming in other instances that the general terms of the industry are not sufficient because Liberty Mutual needs to know what its own terms and conditions were at the time. *See, e.g.*, Yahia Depo. at 97:3–13 (O.A. Tab 96; Doc. No. 192–93). *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**

The same people who worked on the Scotts' search for secondary evidence of coverage *knew* that Liberty Mutual had specimen policies. Ms. Chartrand, who searched for secondary evidence of coverage for Scotts, testified that Liberty Mutual had document collections “in the

litigation support facility which basically are things like claims manuals, training manuals, things that are typical and generic to the company.” Chartrand Depo at 20:5–12 (O.A. Tab 84; Doc.

No. 180). Those documents included specimen policies for policies issued in the 50’s and 60’s.

*Id.* at 22:3–13. As she testified:

- Q. So if a document request in litigation had come in asking for a claims manual or training manual, they would look to you—
- A. That’s right.
- Q. —to gather the documents and make them available for production?
- A. Mm-hmm. That’s right.
- Q. Do you know whether or not, as part of your—as part of the generic collection of documents that you referred to, did you have access to underwriting manuals?
- A. We did.
- Q. Historic underwriting manuals?
- A. Yes.
- Q. Did you have access to specimen policies?
- A. Yes.
- Q. That went back, say, to the 1960’s and 1950’s?
- A. Yes.

*Id.* at 21:20–22:13 (emphasis added).

Liberty Mutual also designated Mr. McCullough to testify as its corporate representative on the issue of specimen policies. *See* McCullough Depo. at 18:10–16 (O.A. Tab 88; Doc. No. 184). Mr. McCullough, who began working for Liberty Mutual in 1961 and retired from the company at the end of 2001, *see id.* at 10:14–18, testified in a “number” of depositions on similar topics during his forty-year career with Liberty Mutual, *see id.* at 19:18–20. He testified that the terms and conditions contained in the specimen policies would be the ones that Liberty Mutual used in the 50’s and 60’s. *See id.* at 88:6–16; 148:19–150:17. Liberty Mutual cannot credibly argue that it was unaware that it had such specimen policies.

### **E. Intent**

Liberty Mutual knew that Scotts was relying on Liberty Mutual's misrepresentations about its inability to reconstruct the terms of its missing policies with its specimen forms. One of the key pieces of evidence that Liberty Mutual claimed Scotts lacked were the actual policies, *see, e.g.*, Schlemmer Depo. at 211:24–212:7 (O.A. Tab 94; Doc. No. 190); Dec. 6, 1999 Merchant letter, LMIC 002918–002922 (Feb. 8, 2008 Barnhart Decl. Ex. A-21 (Doc. No. 200)), and Liberty Mutual claimed that it could not know the terms and conditions without the actual policies. Yahia Depo. at 97:3–13 (O.A. Tab 96; Doc. No. 192–93). That is not true. Moreover, Liberty Mutual knew that it had specimen policies for the very years that Scotts was an insured. *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' reliance on Liberty Mutual's representations was justified, as only Liberty Mutual was in a position to know whether it possessed specimen policies. The record establishes that Scotts and DRM requested these materials several times in different forms and yet never received the specimen policies that Liberty Mutual had in its own files. *See* Butler Depo. at 301:7–302:7 (O.A. Tab 83; Doc. No. 178–79). Scotts relied on Liberty Mutual's representations and omissions regarding all evidence of coverage. *See* Feb. 7, 2008 Armstrong Aff. at ¶ 5 (O.A. Tab 23; Feb. 8, 2008 Barnhart Decl. Ex. A-26 (Doc. No. 200)).

Scotts also justifiably relied on 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).