

EVIDENCE OF FRAUD FOR STATEMENTS IN CATEGORY 5

Category 5. Liberty Mutual Falsely Denied The Significance Of The Meaning Of Policy Numbers

A. Representations from Exhibit A

Paragraph 3: In the course of the March 5, 1999 meeting, Liberty Mutual denied that the policy numbers were evidence of policies. See Armstrong Jan. 8, 2008 Depo. at 917:3–919:1.

As set forth in paragraph 3, Liberty Mutual denied that the policy numbers that Scotts provided were evidence of Liberty Mutual policies. In fact, several Liberty Mutual personnel repeatedly denied or concealed the significance and meaning of the codes contained within the policy numbers despite the fact that these letters and numbers contained significant secondary evidence of the policies issued to Scotts, including the type of policy provided, the year the policy was provided, and the number of other policies provided to the same insured.

As Ms. Archangeli testified:

Q. Did Liberty Mutual ever tell you that their internal codes or numbers on the policy numbers told them how many insurance policies had been issued to Scotts prior to 1967?

...

A. As I recall, I had conversations with several Liberty Mutual representatives asking them to explain what codes and I guess the series of numbers and letters in the policy numbers meant, and explained that at Travelers and at Aetna and various companies there were certain things you could derive from the policy numbers. And I remember asking specifically several people what, you know, they could tell me about those series of numbers and letters and getting no helpful information or no information at all.

Butler Depo. at 485:11–486:10 (O.A. Tab 83; Doc. No. 178–79).

Ms. Armstrong confirmed the same:

Q. Okay. What—what did Liberty Mutual say the policy numbers meant in response to Diane Archangeli?

- A. They didn't—they said that—they didn't respond to that, and they said that this wasn't evidence of coverage by Liberty Mutual.

Armstrong Depo. at 918:21–919:1 (O.A. Tab 80; Doc. No. 174–75). Liberty Mutual personnel could not recall ever telling Scotts or DRM about the meaning of the policy codes. *See, e.g.*, O'Brien Depo. at 102:14–18 (O.A. Tab 91; Doc. No. 187); Prouty Depo. at 158:11–17 (O.A. Tab 93; Doc. No. 189); Merchant Depo. at 215:4–10 (O.A. Tab 89; Doc. No. 185).

B. Falsity

Contrary to Liberty Mutual's representations, the policy numbers themselves are embedded with hidden codes that contain significant secondary evidence of policies. The letters signify the type of coverage. The letters that appear before Liberty Mutual's policy numbers issued to Scotts, for instance, include the code "LP." That code confirms that Liberty Mutual issued a public liability policy to Scotts, which, according to Liberty Mutual witnesses, means a primary liability policy:

- Q. In reviewing the loss analysis on this document, can you determine whether or not the coverage that was issued to O. M. Scott during this period of time was the equivalent of a comprehensive general liability policy or was a more limited public liability policy as you just mentioned?
- A. By the use of the LP, that was the designation that we used for our CGL policy in effect at that time.
- Q. All right. And for the benefit of the jury who will watch this tape, can you explain to me what a CGL policy is?
- A. It's a comprehensive general liability policy, which subject to all of the terms and conditions and endorsements that might be added to it, covers a number of hazards or can cover a number of hazards.

McCullough Depo. at 35:8–36:1 (O.A. Tab 88; Doc. No. 184); *see also* Olson Depo. at 85:13–19 (O.A. Tab 92; Doc. No. 188).

In addition, the final digits in a Liberty Mutual policy number provide other critical information. One of the digits tells Liberty Mutual how many other insurance policies Liberty

Mutual issued to the same insured, and another digit represents the last number of the year in which the policy was issued:

- Q. What's the significance of the last two numbers in the policy number?
- A. The 9 indicates the effective year, and the 2 indicates that it is the second policy that would have been written for this client, not the second liability policy but the second policy of any type that would be written for these people.
- Q. Do you mean—when you say the second policy written for the client, do you mean the second policy at any time?
- A. I mean the second type of policy that would be written. The first or Number 1 could be any other type of policy.
- Q. So if the last two digits were—instead of 29 were 79, that would indicate there were seven other lines of coverage issued by Liberty Mutual?
- A. There would have been six other policies before the Number 7 of some type.
- Q. And the 9 is the effective year. What do you mean by that?
- A. This one reads 1959, so the 9 coincides with '59.
- Q. So it matches the last year—the last number of the year in which it is issued?
- A. That is correct.

McCullough Depo. at 42:15–43:16 (O.A. Tab 88; Doc. No. 184); *see also* Olson Depo. at 87:3–16 (O.A. Tab 92; Doc. No. 188). The policy codes also contained additional significant information regarding the division that issued the policies and other characteristics of the insured. *See* Olson Depo. at 66:3–67:22 (O.A. Tab 99; Doc. No. 194) (explaining that other digits reveal type of market, the originating division, and the originating production office); *id.* at 102:14–19 (noting that the policy number reveals that Scotts policies were business market policies).

C. Materiality

The information contained in the policy number coding was of crucial importance in helping to determine the years and types of policies Liberty Mutual had issued to Scotts and the quantity of secondary evidence demonstrating that Liberty Mutual did, in fact, insure Scotts in

the 1950's and 1960's. Scotts was trying to determine how many other policies had been issued, over what years, and what type. As Ms. Armstrong testified:

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 ¶ 3 (O.A. Tab 23; Feb. 8, 2008 Barnhart Decl. Ex. A-26 (Doc. No. 200)). Likewise, 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); *see also* O'Brien Depo. at 93:7–12 (O.A. Tab 91; Doc. No. 187) (“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.”).

Scotts and DRM requested such information from Liberty Mutual precisely because it was important to Scotts in the negotiations:

Q. Did you or, to your knowledge, did anybody on behalf of Scotts or from DRM ever discuss or ask Liberty whether any policy numbers or other numbers on the umbrella policy jacket meant anything?

...

- A. Yes, in sum and substance.
...
Q. Who asked that?
A. Diane Archangeli.
Q. In a letter?
A. I believe she asked it verbally and I think she referenced it in a letter.
Q. And what was it that she asked?
A. I believe that she asked what the meaning of the policy numbers were and what kind of coverage was evidenced by the policy numbers that were in the policy that we found.

Armstrong Depo. at 841:25–842:19 (O.A. Tab 80; Doc. No. 174–75). *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 policy codes were well known to Liberty Mutual and its personnel. They are described in the *very manual* that was used to conduct the “Phase II” search for information relating to Scotts. See Feb. 16, 1999 Liberty Mutual Phase II training materials at LMIC 009393, (O.A. Tab 38; filed under seal as Ex. A-28 to Scotts’ Memo Contra Liberty Mutual’s Rule 11 Motion (Doc. No. 119)). Multiple Liberty Mutual personnel, including Liberty Mutual personnel involved in the Scotts negotiations, testified to the meaning of digits in the policy numbers. For example, Mr. Merchant had no trouble decoding policy numbers:

- Q. Sir, let me ask it this way: What the numbers in the policy number tell you on Merchant Exhibit 20 is that a general liability policy was issued to Scotts by Liberty Mutual with an effective date of 1965, correct?
MS. FRANCISCO: Objection.
A. It signifies that a policy may have been issued sometime in 1965, and the LP would signify general liability.

Merchant Depo. at 117:17–118:1 (O.A. Tab 89; Doc. No. 185).

Ms. O’Brien testified:

- Q. Do you know what the last three digits of the LE policy signify?
- A. Well, oftentimes the third digit, the 7, will correspond to the year—the second digit of the year the policy was issued. So in this case, if it's 67, 7 matches the 7, which is the third digit.
- Q. So if a policy is issued, say, in 1967, you would expect to see a 7 as the last digit?
- A. Yes.

O'Brien Depo at 100:5–14 (O.A. Tab 91; Doc. No. 187).

Similarly, Mr. McCullough had no problem translating letter codes in the policy numbers:

- Q. Do you know why Liberty Mutual developed a new symbol? This is LG instead of LP?
- A. That is correct. LG, to the best of my knowledge, when we issued the '66 edition of the approved policy form, we changed our prefixes.

McCullough Depo. at 154:20–24 (O.A. Tab 88; Doc. No. 185); *see also, e.g.*, Merchant Depo. at 76:11–13 (O.A. Tab 89; Doc. No. 185) (agreeing that “LP” refers to a general liability or public liability policy); *id.* at 113:20–114:9 (agreeing that last number on last three digits usually means the effective year of the policy).

E. Intent

Liberty Mutual knew that Scotts was seeking any secondary evidence that would help reveal the scope, length, and type of coverage that Liberty Mutual provided to Scotts. *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 . . .”). Among other things, the policy codes revealed just that—the type of insurance provided, the number of prior policies provided, and the years of the policies issued. *See supra* § B. Yet, Liberty Mutual

repeatedly denied or concealed the significance and meaning of the codes contained within the policy numbers.

Liberty Mutual knew that Scotts was relying on 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 their 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 justifiably relied on Liberty Mutual’s own representations and concealment as to the meaning of their own policy numbers. Only Liberty Mutual could confirm what the numbers and letters signified. In discussing the meaning of the policy numbers between themselves, Scotts and DRM remarked that, while they could not determine what the codes meant, Liberty Mutual should be able to do so:

- Q. Okay. And I’m asking now about the so-called code numbers for policies. What did you talk about with regard to that or about that topic with Diane Archangeli prior to the settlement?
- A. We felt that Liberty Mutual ought to be able to identify information from a policy number, but we wouldn’t know what that information would be.

Armstrong Depo. at 837:10–17 (O.A. Tab 80; Doc. No. 174–75).

Liberty Mutual argues that it was insignificant because Scotts “knew” the information through other documents, but that is not true. The policy number identified the number of previous policies that had been issued to Scotts. Neither Scotts nor DRM had access to any of that information. That is unique information concealed from both Scotts and DRM. As to the year of coverage, Liberty Mutual now argues that Scotts had invoices showing policies were issued back to 1965 and therefore the last digit was immaterial. But that contradicts other arguments that Liberty Mutual itself has made. In her deposition, Ms. Yahia argued that the invoices did not prove policies were issued:

- Q. That invoice indicates, does it not, that Liberty Mutual at one point issued a three-year policy to Scotts, correct?
- A. I don’t know whether that is what that means or not.
- Q. As you sit here today, do you know what that means?
- A. No, I couldn’t tell you for sure what that means.

Yahia Depo. at 18:10–18 (O.A. Tab 96; Doc. No. 192–93) (emphasis added).

Similarly, Mr. Schlemmer testified:

- Q. Reading this invoice, it would be reasonable to conclude, would it not, that Liberty Mutual insured Scotts from 1965 to 1966 under a three-year policy?
- ...
- A. Not necessarily. I don't know what their premium program was. I would conclude it's an audit period of 10-1-65 to '66, but that's just my own personal conclusion. I'm not familiar with the form, but I don't know whether those dates translate to effective dates, and I don't know whether it ties to the three-year policy statement below. Not being familiar with this form, I wouldn't know how to interpret it.
- Q. Would that be your position as to all invoices from the 1960s, that since you're not familiar with the form, you wouldn't know how to interpret them?
- ...
- A. Sitting here today, yes.

Schlemmer Depo. at 160:19–161:15 (O.A. Tab 94; Doc. No. 190) (emphasis added). Liberty Mutual cannot have it both ways—arguing on the one hand that Scotts could “figure out” the coverage, but disputing the meaning and import of the very same evidence. In this case, Scotts looked to Liberty Mutual to decipher Liberty Mutual’s own codes and the meaning and import of them, which Liberty Mutual concealed from both Scotts and DRM.

Scotts 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).