

EVIDENCE OF FRAUD FOR STATEMENTS IN CATEGORY 7

Category 7. Liberty Mutual Falsely Represented That The Material It Produced To DRM Was Of No Significance

A. Representation from Exhibit A

Paragraph 8: On or about August 13, 1999, Ms. Yahia spoke with Ms. Archangeli about the materials Ms. Yahia would be sending in her August 27, 1999 letter. Liberty Mutual misled Ms. Archangeli by representing that the materials contained nothing significant or helpful. *See* Butler Sept. 18, 2007 Depo. at 334:19–335:13; Armstrong Jan. 7, 2008 Depo. at 852:18–854:15.

As set forth in Paragraph 8, Liberty Mutual represented that the material it produced to DRM contained nothing of significance. On or about August 13, 1999, Ms. Archangeli had a telephone conversation with Ms. Yahia regarding the status of Liberty Mutual's search and what they had found. Although Ms. Yahia indicated that she would be sending some documents, Ms. Yahia represented that these materials contained nothing significant or helpful to Scotts' position. Both Ms. Archangeli and Ms. Armstrong testified that the main point of the conversation was that Liberty Mutual had found nothing to support Scotts' claims that it had been insured by Liberty Mutual during the 1950's and 1960's. As Ms. Archangeli testified:

Q. Looking at the first paragraph of Butler Exhibit 32, you had had a telephone call with Terri Yahia of Liberty Mutual on or about August 13, 1999 in which she told you that she would be sending along some documents; correct?

...

THE WITNESS: Yeah. I think the main point is she said they were unable to find any secondary evidence to help bolster our case. She was giving me the status update which was the same as it had been before; they couldn't find anything.

BY MR. WOLKOFF:

Q. But she also told you that she would be sending along whatever results the policy search had uncovered; correct?

A. Right. She said it's not anything that's going to be useful but I'll send it along and I said thanks.

Q. And did you tell Joyce Armstrong of that conversation?

A. Oh, I sure did.

Butler Depo. at 334:11-335:13 (O.A. Tab 83; Doc. No. 178-179) (emphasis added).

As to Ms. Armstrong, she could not recall whether she was on the call with Ms. Archangeli and Ms. Yahia or if Ms. Archangeli relayed the contents of the call to her, but in either event, Ms. Armstrong's recollection of the conversation mirrors that of Ms. Archangeli.

As Ms. Armstrong testified:

Q. Now, looking still at Exhibit 20 for identification, Ms. Archangeli refers to a conference—a telephone conference call she had with Ms. Yahia on August 13th, 1999, about the status of Liberty Mutual's policy search, correct?

A. Yes.

Q. And Diane Archangeli filled you in on that conversation, correct?

A. I may have been on that conference call.

Q. In any event, you knew what was said in that conference call, correct?

A. Yes.

Q. Terri Yahia said that she didn't think that she had anything useful, but whatever she had, she would be sending along; is that correct?

A. Actually, it—it looks like she said that she couldn't find any policies or secondary evidence that bolster existing evidence.

...

Q. And in sum and substance, Ms. Yahia said during that call, whether it was to you directly or as you found out from Diane Archangeli afterwards, that she didn't have anything that was going to be useful, in her opinion, but she would send whatever she found along, correct?

A. Correct.

Armstrong Depo. at 852:18–854:11 (O.A. Tab 80; Doc. No. 174-175) (emphasis added).

Ms. Archangeli and Ms. Armstrong's testimony regarding the substance of Ms. Yahia's statements during the August 13, 1999 call is confirmed by contemporaneous documentation. Ms. Archangeli's contact database notes indicate that, during her telephone conference with Ms. Yahia, Ms. Yahia stated "they didn't find any additional policy information." Archangeli contact database notes for T. Yahia at DRM 3615 (O.A. Tab 17, Feb. 8, 2008 Barnhart Decl. Ex.

A-15 (Doc. No. 200)). Ms. Archangeli also confirmed her understanding of Ms. Yahia's representations in a letter dated August 18, 1999 to Ms. Yahia (and copied to Mr. Merchant and Ms. Armstrong). *See* Aug. 18, 1999 Armstrong letter at LMIC 005024 (O.A. Tab 18, Feb. 8, 2008 Barnhart Decl. Ex. A-16 (Doc. No. 200)). The letter states:

Although it sounds as though Liberty Mutual was not able to find any policies or secondary evidence that bolster our existing evidence of policies from the 1950's issued to the O. M. Scotts & Sons Company, we look forward to receiving whatever results your policy search uncovered.

Id. Neither Ms. Yahia nor Mr. Merchant ever corrected this statement or the misrepresentations made by Ms. Yahia. To the contrary, Ms. Yahia's August 27, 1999 letter stated: "As we also discussed, Liberty Mutual did not locate any relevant policies during its search." Aug. 27, 1999 Yahia letter at DRM 3271 (O.A. Tab 102; Jan. 15, 2008 Francisco Decl. Ex. U (Doc. No. 167)).

B. Falsity

As it turns out, Ms. Yahia's representations were false. The documents that Ms. Yahia had located did contain secondary evidence of policies, albeit limited information relating to the years 1965-1967. On or about August 27, 1999, Ms. Yahia sent Ms. Archangeli a letter enclosing a copy of documents that she referenced. *See* Aug. 27, 1999 Yahia letter, DRM 3271-3507 (O.A. Tab 102; Jan. 15, 2008 Francisco Decl. Ex. U (Doc. No. 167)). Notably, Ms. Yahia copied Messrs. Merchant and Prouty on the correspondence, but did *not* copy Ms. Armstrong. *Id.* at DRM 3272. Most of the documents related to coverage under a directors and officers policy, but one of the documents included in the packet of materials was an internal loss run for "OM Scott" generated on May 11, 1999. *Id.* at DRM 3273-3278. Based on the discovery taken in this action, the May 11, 1999 loss run detailed losses that Liberty Mutual previously paid under general liability policies issued to Scotts from 1965 to 1967.

Contrary to Ms. Yahia's representations that the materials sent to Ms. Archangeli contained nothing to help support Scotts' position, numerous Liberty Mutual witnesses, including Ms. Yahia, testified that loss runs constitute significant secondary evidence of coverage.

- Yahia Depo. at 295:17-20 (O.A. Tab 96; Doc. No. 192-193):
 - Q. You would agree a loss run can be secondary evidence of policy?
 - A. Yes. Anything relating to a policy can be secondary evidence of coverage.

- O'Brien Depo at 93:13-23 (O.A. Tab 91; Doc. No. 187):
 - Q. When you evaluate the weight of the secondary evidence at Liberty Mutual to decide whether to acknowledge coverage, do you take into account loss runs?
...
 - A. In the cases I have worked on in the past, yes, we have taken into account loss runs.

- Prouty Depo. at 66:23-67:4, 82:22-83:5 (O.A. Tab 93; Doc. No. 189):
 - Q. You would agree, would you not, that loss run information is important information to both the insurance company and the insured when looking for secondary evidence of coverage?
...
 - A. Yes, I agree.
* * * *

 - Q. Sir, you would agree, would you not, that loss runs are important evidence – secondary evidence of coverage?
...
 - A. Loss runs are definitely something that should be considered as part of any coverage investigation.

- Kostecki Depo. at 36:8-14 (O.A. Tab 87; Doc. No. 183):
 - Q. Let me break it down. You would agree, would you not, that loss runs are important evidence when you're trying to find secondary evidence of coverage?
...
 - Q. Correct.

A. It could be something to be considered.

- Merchant Depo. at 224:15-18 (O.A. Tab 89; Doc. No. 185):

Q. When you're trying to -- you would agree, would you not, that loss runs can be evidence -- secondary evidence of coverage, correct?

A. It could be.

- Schlemmer Depo. at 44:12-20 (O.A. Tab 94; Doc. No. 190):

Q. In trying to determine whether or not Liberty Mutual did, in fact, insure someone, have you ever looked for loss runs?

A. Yes.

Q. Why?

A. Sometimes with a loss run you can identify historical claims, and sometimes in those claims, you'll find information about the types of coverages provided.

Additionally, contrary to Ms. Yahia's representations at the time, Mr. Prouty conceded during his deposition that the loss run Ms. Yahia sent to DRM should have been *sufficient* for Liberty Mutual to determine that Scotts was insured by Liberty Mutual under a policy with an effective date of October 1, 1965:

Q. And you can conclude from this, can you not, that Scotts was an insured of Liberty Mutual in 1965?

...

A. If this was produced by Liberty Mutual via Liberty Mutual systems, then it would certainly be an indication to me that there was coverage, that there were policies issued.

Q. What evidence—I'm not asking about terms, conditions or policies now. I'm only asking what evidence would you need to see to simply determine that Scotts was an insured of Liberty Mutual.

...

A. A loss run showing losses and paid and that type of thing that was produced by Liberty Mutual would certainly be evidence of that.

Prouty Depo. at 216:4-20 (O.A. Tab 93; Doc. No. 189). Unbeknownst to Ms. Archangeli, the loss run not only confirmed that Scotts was insured by Liberty Mutual as of 1965, but also that *Scotts was insured by Liberty Mutual under a general liability policy as of 1965. See, e.g.,*

Butler Depo. 487:18-488:2 (O.A. Tab 83; Doc. No. 178-179); Kostecki Depo. at 106:24–107:6 (O.A. Tab 87; Doc. No. 183); 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 117:12–15 (O.A. Tab 94; Doc. No. 190); Merchant Depo. at 125:1–7; 217:13–17 (O.A. Tab 89; Doc. No. 185).

C. Materiality

Ms. Yahia’s representations regarding the materials she sent to DRM, and the May 11, 1999 loss run in particular, were material to Scotts’ decision to settle with Liberty Mutual for a low figure. *See, e.g.*, Feb. 7, 2008 Armstrong Aff. at ¶ 2 (O.A. Tab 23; Feb. 8, 2008 Barnhart Decl. Ex. A-26 (Doc. No. 200)) (“The representations and omissions made by Liberty Mutual were critical to Scotts’ decision to enter into the July 2000 settlement agreement.”). After repeatedly assuring Scotts and DRM that it had undertaken a diligent, company-wide search and found no secondary evidence of coverage, Ms. Yahia finally sent a small packet of documents to Ms. Archangeli of DRM, but not to Ms. Armstrong of Scotts. *See* Aug. 27, 1999 Yahia letter, DRM 3271-3507 (O.A. Tab 102; Jan. 15, 2008 Francisco Decl. Ex. U (Doc. No. 167)). Liberty Mutual sought to convince Scotts that it had no secondary evidence of policies by misrepresenting what it had found. Those representations were important. As Ms. Armstrong stated in her sworn affidavit:

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)).

Contrary to Ms. Yahia’s representation, the May 11, 1999 loss run constituted secondary evidence of policies that Liberty Mutual would consider sufficient to prove at least three years of coverage (from 1965-1967) under Liberty Mutual’s own internal policies. In addition, although Ms. Armstrong instructed Liberty Mutual to direct all correspondence to her attention at Scotts, *see* Jan. 28, 1999 Merchant letter at LMIC 003370 (O.A. Tab 64, Feb. 8, 2008 Barnhart Decl. Ex. A-7 (Doc. No. 200)), *Liberty Mutual never sent the August 27, 1999 letter or any of its attachments to Ms. Armstrong. See* Aug. 27, 1999 Yahia letter at DRM 3272 (O.A. Tab 102; Jan. 15, 2008 Francisco Decl. Ex. U (Doc. No. 167)). Nor did Liberty Mutual inform Scotts of the letter’s existence or mention the loss run in any subsequent meetings or discussions with Scotts. In fact, prior to the execution of the settlement agreement, no one from Scotts even knew the loss run existed.¹ *See* Armstrong Depo. at 858:10–16 (O.A. Tab 80; Doc. No. 174-175) (“Q. I’ve placed in front of you what we’ve had marked as Armstrong Exhibit 22 for identification. Did you see a copy of this letter or its attachments prior to the settlement in July of 2000? A. No.”).

During oral argument on Liberty Mutual’s motion for summary judgment, Liberty Mutual’s counsel argued that Ms. Armstrong did not ask Ms. Archangeli for a copy of the materials she received from Ms. Yahia. But Ms. Armstrong talked to both DRM and Liberty Mutual and was told by both that there was no secondary evidence of policies or nothing useful.

¹ As previously discussed in the Summary of Evidence and Attachments Supporting Elements of Fraud at 11–12, Liberty Mutual cannot “undo” fraudulent statements made directly to Scotts by simply claiming that Ms. Yahia sent limited documentation to DRM. Because DRM was an independent contractor, and not Scotts’ agent, Ms. Archangeli’s knowledge cannot be imputed to Scotts. *See, e.g., Wright v. Campbell Soup Co.*, No. 7-04-02, 2004 WL 1770558, at *5 (Ohio App. Ct. Aug. 9, 2004).

Certainly a jury could find her conduct to be reasonable in light of what Ms. Armstrong was told, and not told, about the evidence that had been found.

Moreover, although Ms. Archangeli received a copy of the May 11, 1999 loss run, she could not have fully appreciated its significance at the time. As Liberty Mutual itself has acknowledged in written discovery in this case, the type of policy to which the loss run related was “*indeterminable on its face*” without knowing the meaning of the “P” codes set forth on the document. *See* Liberty Mutual’s Responses to Scotts’ First Set of Requests for Admission at 4 (O.A. Tab 76; filed under seal as Aug. 6, 2007 Butler Decl. Ex. A-30 (Doc. No. 120)). Yet, Liberty Mutual withheld that very information. *See, e.g.*, Prouty Depo. at 148:6–11 (O.A. Tab 93; Doc. No. 189); Butler Depo. at 487:18–488:13 (O.A. Tab 83; Doc. No. 178–79). Given this critical omission, Ms. Yahia’s representations regarding the insignificance of the materials she sent were particularly significant. *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 or should have known that Ms. Yahia’s representations—that the materials she produced to DRM contained nothing significant—were false. Indeed, as discussed above, multiple Liberty Mutual witnesses, including Ms. Yahia and Mr. Merchant, have testified that the loss run sent to Ms. Archangeli constituted valuable secondary evidence of policies, *see, e.g.*, Yahia Depo. at 295:17-20 (O.A. Tab 96; Doc. No. 192-193); Merchant Depo. at 224:15-18 (O.A. Tab 89; Doc. No. 185); Prouty Depo. at 66:23-67:4; 82:22-83:5 (O.A. Tab 93; Doc. No. 189), that the “P” code in the claims numbers indicated a general liability policy, *see, e.g.*, Merchant Depo. at 125:1-7; 217:13-17 (O.A. Tab 89; Doc. No. 185); Schlemmer Depo. at 117:12-15 (O.A. Tab 94; Doc. No. 190), and that the loss run sent to DRM was sufficient for

Liberty Mutual to determine that Scotts was insured by Liberty Mutual under a policy with an effective date at least as of October 1, 1965. *See, e.g.*, Prouty Depo. at 216:4-20 (O.A. Tab 93; Doc. No. 189). Thus, unlike Scotts and DRM, Liberty Mutual knew or should have known that the loss run was significant because, using Liberty Mutual's own internal codes, it showed that Liberty Mutual had insured Scotts under three years of general liability insurance.

E. Intent

Liberty Mutual had every reason to misrepresent and “belittle” the limited documentation that it sent to DRM. Had Liberty Mutual acknowledged its significance—and told Scotts that the information confirmed that Liberty Mutual had issued at least three years of general liability insurance—Liberty Mutual's “lost policy” defense would have been weakened. Ms. Yahia herself acknowledged in her August 27, 1999 cover letter that the documents were being provided in connection with settlement negotiations. *See* Aug. 27, 1999 Yahia letter at DRM 3271 (O.A. Tab 102; Jan. 15, 2008 Francisco Decl. Ex. U (Doc. No. 167)).

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 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

Liberty Mutual represented that the evidence that it was sending to DRM did not contain “any policy information,” *see* Archangeli contact database notes for T. Yahia at DRM 3615 (O.A. Tab 17, Feb. 8, 2008 Barnhart Decl. Ex. A-15 (Doc. No. 200)), and told DRM that the limited documentation did not contain anything “useful,” *see* Butler Depo. at 334:11–335:13 (O.A. Tab 83; Doc. No. 178–179); Armstrong Depo. at 852:18–854:11 (O.A. Tab 80; Doc. No. 174–175). Ms. Yahia’s own cover letter discounted the significance of the enclosures. *See* Aug. 27, 1999 Yahia letter at DRM 3271 (O.A. Tab 102; Jan. 15, 2008 Francisco Decl. Ex. U (Doc. No. 167)). Ms. Armstrong from Scotts was not copied on that letter. At a subsequent meeting, Ms. Armstrong met with Liberty Mutual and was told face-to-face that Liberty Mutual’s search for secondary evidence had come up empty. *See, e.g.*, Feb. 7, 2008 Armstrong Aff. at ¶ 4 (O.A. Tab 23; Feb. 8, 2008 Barnhart Decl. Ex. A-26 (Doc. No. 200)) (stating that, during the May 2000

meeting, Liberty Mutual represented that it “had not located any policies or secondary evidence of policies from the 50s and 60s”). Given that evidence, Ms. Armstrong acted reasonably in light of what she knew and what she was told.

As set forth previously, Scotts 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).