

EVIDENCE OF FRAUD FOR STATEMENTS IN CATEGORY 8**Category 8. Liberty Mutual Falsely Represented That Scotts/DRM Was Not Allowed To Contact Former Liberty Mutual Personnel****A. Representations from Exhibit A**

Paragraph 13: In her October 28, 1999 letter to Ms. Archangeli, Ms. Yahia represented that it was “unethical” for DRM to contact former Liberty Mutual employees. *See* Oct. 28, 1999 Yahia letter, DRM 0081–82 (Ex. A-25).

In addition, Ms. Yahia represented that contacting Mr. Decker was “wholly inappropriate,” adding:

[I]t is unethical for you to contact any present or former employee regarding your claims, and it surprises me that you have done so. Your Liberty Mutual contacts for this matter have been and continue to be, Brian Merchant, Georges Prouty, and me.

Oct. 28, 1999 Yahia letter, DRM 0081–82 (O.A. Tab 57; Feb. 8, 2008 Barnhart Decl. Ex. A-25 (Doc. No. 200)).

B. Falsity

Liberty Mutual’s representations were false or misleading. In fact, Mr. Stern testified that Ms. Yahia’s representations were “substantially inaccurate.” Expert Report of Geoffrey Stern Relating to Representations by Terri Yahia (Oct. 29, 2007) at 4 (O.A. Tab 58; Feb. 8, 2008 Barnhart Decl. Ex. A-19 (Doc. No. 200)) (“Accordingly, and based upon the materials that I have reviewed, it is my opinion that Ms. Yahia’s statements to Ms. Archangeli were substantially inaccurate.”). As Mr. Stern found:

As to former employees, neither Rule 4.2 nor its Comments “require a lawyer representing a client in a matter adverse to a corporation to seek permission of that corporation’s attorney before interviewing former employees of the corporate party about the subject of the representation [M]ost support the view expressed in an ABA Formal Opinions, which has made clear that neither the text nor the Comments cover former employees.”

Id.

In fact, Liberty Mutual’s own Mr. Schlemmer testified that the objection to contacting former employees did not have “anything to do with law or legal or any of that stuff.” As he testified:

- Q. Did you instruct anyone to tell Scotts and DRM they were not allowed to contact former employees?
- A. I don’t know whether or not I instructed anyone to do that. We generally asked our insureds not to contact former employees, largely because, as you can imagine, we’re dealing with a number of policyholders. These people worked many years. I’m assuming Mr. Decker is probably retired, and, you know, *it really has nothing to do with law or legal or any of that stuff.* It has something to do with treating our former employees with dignity and respect and not having their phones ringing at different times of the day and people asking them questions. We try to sort of manage that so that they’re not being—they’re not having their retirement interrupted. We just like to not interrupt their lives. They gave their loyalty to the organization. They worked hard in their years. You can imagine. You wouldn’t want a bunch of your former clients always calling you when you’re trying to enjoy your retirement. I certainly wouldn’t. *That was really it.* We just didn’t feel like Mr. Decker should have to worry about getting phone calls and answering questions. We were willing to ask him questions.

Schlemmer Depo. at 196:12–197:15 (O.A. Tab 94; Doc. No. 190) (emphasis added).

C. Materiality

Soliciting information from Liberty Mutual employees was an important potential source of secondary evidence, as Liberty Mutual’s own personnel acknowledged:

- Q. Would you agree with me that information supplied by former Liberty Mutual employees would be important as part of the process in determining whether there was insurance coverage?
- A. It would be—
- ...
- A. That’s something we would consider.

Kostecki Depo. at 156:22–157:6 (O.A. Tab 87; Doc. No. 183); *see also* Schlemmer Depo. at 199:2–6 (O.A. Tab 94; Doc. No. 190) (“Q. If you’re trying to reconstruct whether or not Liberty Mutual provided insurance coverage to Scotts, it would be important to talk to former employees; would it not? A. Again it could be. Maybe, maybe not.”).

As a result of Ms. Yahia’s representations regarding the permissibility of contacting former employees, DRM and Scotts undertook no further efforts to contact former Liberty Mutual employees or solicit additional policy information from them. Instead, Scotts and DRM were forced to simply ask Liberty Mutual to contact former employees. As Ms. Archangeli testified:

- Q. Now, at some point you mentioned with Mr. Wolkoff, Ms. Butler, that you talked to Liberty Mutual folks about trying to get them to contact former employees of Liberty Mutual. Do you recall that?
- A. Yes.
- Q. Did you forward some names to Liberty Mutual as names you had identified for people for them to talk to?
- A. Yes, I did.
- Q. Do you recall them ever giving you a report back that I contacted so and so and this is what he or she said?
- ...
- A. No, I don’t remember them ever following up on any of the leads that I gave them.

Butler Depo. at 470:11–471:5 (O.A. Tab 83; Doc. No. 178–79). *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

Ms. Yahia knew or should have known that her representations were false or misleading. The true facts were publicly known. *See* Expert Report of Geoffrey Stern Relating to Representations by Terri Yahia (Oct. 29, 2007) at 2–4 (O.A. Tab 58; Feb. 8, 2008 Barnhart Decl.

Ex. A-19 (Doc. No. 200)) (citing Model Rules of Professional Conduct (ABA 2007) at 4.2, comments to the rule, and case law). Moreover, Mr. Schlemmer’s testimony—which contradicts the basis for Ms. Yahia’s statements—creates a material dispute as to the reasons for Ms. Yahia’s stated basis for trying to block all communications with former Liberty Mutual employees. Contrary to Liberty Mutual’s representations, Mr. Schlemmer testified that Liberty Mutual’s objection did not have “anything” to do with the law. Schlemmer Depo. at 196:12–197:15 (O.A. Tab 94; Doc. No. 190) (quoted *supra* § B).

E. Intent

Liberty Mutual knew that Scotts and DRM spoke with Mr. Decker and sought to speak with other former Liberty Mutual employees. *See* Oct. 28, 1999 Yahia letter at DRM 0081 (O.A. Tab 57; Feb. 8, 2008 Barnhart Decl. Ex. A-25 (Doc. No. 200)). (“It has just come to my attention that you have contacted Mr. Art Decker, a retired Liberty salesman who lives in Naples, Florida.”). Yet, Liberty Mutual specifically sought to “shut down” all communications with Liberty Mutual’s former employees.

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

DRM and Scotts justifiably relied on Ms. Yahia’s statement about contacting former employees and were forced to forgo contacting former Liberty Mutual employees as a result of Liberty Mutual’s representations. Instead, Scotts and DRM were forced to rely on Liberty Mutual for any information regarding Liberty Mutual’s former employees, which, according to Liberty Mutual, ultimately failed to disclose any additional secondary evidence of coverage. Butler Depo. at 470:11–471:5 (O.A. Tab 83; Doc. No. 178–79) (quoted *supra*).

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).