

EVIDENCE OF FRAUD FOR STATEMENTS IN CATEGORY 9

Category 9. Liberty Mutual Falsely Represented The Recollection Of Former Liberty Mutual Personnel

A. Representations from Exhibit A

Paragraph 12: On October 28, 1999, Ms. Yahia sent Ms. Archangeli a letter in which she disputed Mr. Decker's recollection that he had sold general liability policies to Scotts. See Oct. 28, 1999 Yahia letter at DRM 0081 (Ex. A-25).

As set forth above, when Terri Yahia learned that Ms. Archangeli had contacted Art Decker, a former Liberty Mutual employee, Ms. Yahia sent a letter asserting that Mr. Decker did not recall anything about Liberty Mutual issuing general liability insurance to Scotts. See Oct. 28, 1999 Yahia letter at DRM 0081 (O.A. Tab 57; Feb. 8, 2008 Barnhart Decl. Ex. A-25 (Doc. No. 200)) ("He also stated that you asked Mr. Decker if he recalled anything about Liberty Mutual's selling general liability policies to Scotts. Mr. Decker responded to you that he did not.").

B. Falsity

In his conversation with Ms. Archangeli, Mr. Decker said that he *did* recall providing some kind of insurance to Scotts, although he could not be sure what kind. Ms. Yahia's categorical denial of Mr. Decker "recalling anything" about Liberty Mutual selling general liability insurance to Scotts is not true. Mr. Decker remembered working on the Scotts account and working with specific Scotts personnel:

Q. Do you recall when you were a business line salesperson in Columbus working on the O.M. Scott account?

A. Yes.

* * * * *

Q. You dealt with Bill Marsh at O.M. Scott in connection with insurance renewals?

A. Yes.

Q. Do you remember the years in which you were dealing with Bill Marsh?

- A. It would be the same years I was in Columbus. I was the only one there.
- Q. From 1963 to 1967?
- A. Yes.
- Q. Is it your recollection that you dealt with Bill Marsh during each of those years?
- A. Yes.

Decker Depo. at 14:20–23, 15:17–16:3 (O.A. Tab 85; Doc. No. 181). Ms. Archangeli testified that Mr. Decker was “sure that Liberty insured O.M. Scott and Sons from the mid 1950’s,” although “he could not remember accurately the kind of insurance it was that Liberty issued to O.M. Scott.” Butler Depo. at 383:20–385:1 (O.A. Tab 83; Doc. No. 178–79).

C. Materiality

Ms. Yahia’s written representation was important to Scotts. Scotts and DRM had sought information from Liberty Mutual’s former employees to evaluate the secondary evidence of coverage, as Liberty Mutual agreed that former employees could be an important source of secondary evidence:

- 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.”).

Underscoring the importance of Mr. Decker’s recollections, DRM and Scotts asked Liberty Mutual to seek out *other* agents who might have such a recollection of providing insurance to Scotts during the relevant time:

- 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 first told Scotts and DRM that they were not permitted to contact former employees and then, speaking for Mr. Decker, categorically denied that Mr. Decker had any recollection of providing general liability insurance to Scotts. That flies in the face of Ms. Archangeli's testimony that Mr. Decker told Ms. Archangeli that he *did* recall Liberty Mutual providing insurance to Scotts. *See* Decker Depo. at 14:20–23, 15:17–16:3 (O.A. Tab 85; Doc. No. 181); Butler Depo. at 383:20–384:21 (O.A. Tab 83; Doc. No. 178–79). Ms. Yahia clearly knew, or should have known, that Mr. Decker's recollections supported Mr. Marsh's sworn affidavit that Liberty Mutual had insured Scotts in the 1950's and 1960's. Ms. Yahia's categorical denial, without further explanation, is sufficient to establish knowledge based on Ms. Yahia's own disregard and recklessness as to whether the denial was true or false. *See also* Yahia Depo. at 161:1–15 (O.A. Tab 96; Doc. No. 192–93) (testifying that she spoke to Mr.

Decker once, and has no recollection of what he said about whether he did or did not remember providing insurance for Scotts).

E. Intent

Liberty Mutual knew that Scotts and DRM spoke with Mr. Decker and sought to speak with other former Liberty Mutual employees as well. *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.”). Liberty Mutual knew that Scotts and DRM were seeking such secondary evidence to determine Scotts’ settlement position. And Liberty Mutual knew the truth about what Mr. Decker said, not to mention the other internal information available to Liberty Mutual that confirmed that Mr. Decker did in fact sell ten years of general liability insurance to Scotts in the 50’s and 60’s.

As set forth previously, Liberty Mutual also knew that Scotts was relying on all of Liberty Mutual’s misrepresentations and omissions regarding secondary evidence of coverage, 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

Liberty Mutual “cut off” any ability for Scotts or DRM to contact Liberty Mutual’s former employees or discuss secondary evidence of coverage. As a result, Scotts and DRM were *forced to rely* on Liberty Mutual’s characterizations as to what secondary evidence the former employees could offer. Once again, Liberty Mutual took the position that Mr. Decker had nothing to offer by way of secondary evidence to support Scotts’ claims. Rather than relying on Mr. Decker’s recollection alone, DRM and Scotts also requested that Liberty Mutual contact *other* former employees and report back as to their recollections as well—a request that Liberty Mutual failed to fulfill. *See* Butler Depo. at 470:11–471:5 (O.A. Tab 83; Doc. No. 178–79) (quoted *supra* § C).

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).