

## **EVIDENCE OF FRAUD FOR STATEMENTS IN CATEGORY 10**

### **Category 10: Liberty Mutual Falsely Represented The Significance/Meaning Of Umbrella Policy As Evidence Of Coverage**

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

Paragraph 17: Mr. Merchant's December 6, 1999 letter stated that Liberty Mutual was "unable to verify" that the Umbrella Policy was complete or accurate. Dec. 6, 1999 Merchant letter at LMIC 002919 (Ex. A-21).

Paragraph 31: During the 1998–2000 negotiations, Liberty Mutual told DRM "that we didn't have proof of the [excess] policy because they said it was only a partial policy." Butler Sept. 18, 2007 Depo. at 344:19–345:3. *See also* Butler Sept. 26, 2007 Depo. at 483:11–22 (Liberty Mutual disputed that the umbrella excess policy was a complete or accurate policy by calling it alleged throughout the negotiations.).

During Scotts' negotiations with Liberty Mutual, Liberty Mutual continued to dispute Scotts' evidence of coverage, including the accuracy and completeness of the 1967–1968 Umbrella Excess Liability Policy that Scotts provided to Liberty Mutual. *See* Liberty Mutual Umbrella Excess Liability Policy 10/1/67–10/1/68, OMS 1652–1672 (Jan. 15, 2008 Barnhart Decl. Ex. B-16 (Doc. No. 171)). On December 6, 1999, Mr. Merchant sent a letter to Ms. Archangeli of DRM denying any coverage for Scotts' environmental claims. *See* Dec. 6, 1999 Merchant letter, LMIC 002918–002922 (O.A. Tab 9; Feb. 8, 2008 Barnhart Decl. Ex. A-21 (Doc. No. 200)). Among other things, the letter stated that Liberty Mutual could not verify the accuracy and completeness of what Liberty Mutual called the "alleged" Umbrella Excess Liability Policy:

Furthermore, O.M. Scotts has provided Liberty Mutual with a copy of an alleged umbrella excess liability policy. The alleged policy documents that you provided purportedly include a umbrella excess declarations page, two endorsements and a Umbrella Excess Liability Policy Jacket. At this juncture Liberty Mutual has been unable to verify that these documents represent a complete

and accurate copy of all terms and conditions of any policy that may have been issued to O.M. Scotts by Liberty Mutual.

*Id.* at LMIC 002919 (emphasis added).

Consistent with Mr. Merchant’s representations in the December 6, 1999 denial letter, Ms. Archangeli testified that Liberty Mutual never acknowledged that the umbrella policy was an accurate and complete policy:

- Q. So did Liberty Mutual dispute that the umbrella excess liability policy that you had provided to Liberty Mutual was a complete or accurate policy?
- ...
- A. Yes, they did object to that and they called it alleged throughout our negotiations even though the policy jacket had the coverage terms and conditions within it.
- Q. Did Liberty Mutual ever acknowledge that the umbrella excess policy that had been provided was a complete and accurate policy and confirmed that coverage had been provided?
- ...
- THE WITNESS: No.

Butler Depo. at 483:11–484:6 (O.A. Tab 83; Doc. No. 178-179) (emphasis added).

Likewise, Ms. Archangeli also testified that Liberty Mutual represented that the Umbrella Excess Liability Policy was insufficient to prove coverage because it was only a partial policy:

- Q. Didn’t Liberty in the course of —didn’t Liberty in the course of settlement negotiations concede coverage for a period of years?
- A. Never. Never. Even when we gave them our policy, the excess policy, they still said that we didn’t have proof of the policy because they said it was only a partial policy.

Butler Depo. at 344:19–345:3 (O.A. Tab 83; Doc. No. 178-179) (emphasis added); *see also*

Armstrong Depo. at 865:23–866:4 (O.A. Tab 80; Doc. No. 174-175) (“Q. Wasn't it the case that as of the time of the settlement, Liberty had recognized the two primary and two excess policies that had been issued— A. No. Q. —in the late 1960’s? A. No.”).

## B. Falsity

As it turns out, Liberty Mutual's representations that they were incapable of verifying that the Umbrella Excess Liability Policy was a "complete and accurate" copy of a Liberty Mutual policy were false. Contrary to Liberty Mutual's repeated representations, Scotts' insurance expert, Ronald Hendy, opined that the copy of the 1967–1968 Umbrella Excess Liability Policy that Scotts produced to Liberty Mutual during their negotiations contained all of the required provisions:

The basic structure of an Umbrella policy is that it typically includes: (i) a "Declarations" page (setting forth details as to the name of the insured(s), the policy number, the policy period, limits of liability insured, the insurance premium, the deductible if any), (ii) an "Attestation" or "Signatory Page" (with validating signatures on behalf of the insurer), (iii) one or more "Insuring Agreements" (setting forth the grant or promise of insurance coverage), (iv) a statement of "Definitions" (defining certain terms in the policy that are to assume definitions other than commonly ascribed by common usage), (v) a statement of "Conditions" (setting forth any conditions that are to apply or warranties that must be complied with), (vi) a statement of "Exclusions," and (vii) a set of "Endorsements." Typically such documentation is assembled in a cover document often referred to as a policy "Jacket." The copy of the 1967–1968 Umbrella Excess Liability Policy (Bates LMIC 2876–2896) produced by Scotts in fact contains evidence of all the above provisions.

Oct. 29, 2007 Hendy Report at ¶ 25 (O.A. Tab 52; Jan. 15, 2008 Barnhart Decl. Ex. B-14 (Doc. No.171)). As Mr. Hendy testified, "Scotts produced primary evidence in the form of a Declarations Page, policy extension schedules (endorsements) and the 'jacket' containing the insuring agreements, definitions, exclusions, conditions and endorsements from the Umbrella Excess Liability Policy LEI-181-010660-97 issued by Liberty Mutual for the policy period October 1, 1967 to October 1, 1968 (Bates OMS 1652, OMS 1654, OMS 1656–OMS 1661)." *Id.* at ¶ 117.

Moreover, other Liberty Mutual witnesses, including Georges Prouty, testified that the Umbrella Excess Liability Policy provided to Liberty Mutual was sufficient to establish that Liberty Mutual had in fact issued an umbrella policy to Scotts during the 1967–1968 timeframe:

Q. So this dec page would appear to indicate that Scotts did, in fact, get an umbrella excess liability policy from Liberty Mutual, correct?

...

Q. I'm asking that it did, in fact, occur.

...

A. This would indicate to me that a policy – an umbrella excess liability policy was issued to the O. M. Scotts & Company for the period 10-1-67 to 10-1 something.

Prouty Depo. at 113:1–10 (O.A. Tab. 93; Doc. No. 189).

Mr. Prouty also testified that he was not aware of any missing components from the policy provided to Liberty Mutual:

Q. Right. My only question is, do you know of anything that is a required part of the policy that we marked as A.S. Exhibit 16 that is, in fact, missing?

...

A. I do not.

*Id.* at 87:19–88:1

### **C. Materiality**

Liberty Mutual's representations regarding the completeness or accuracy of the 1967–1968 Umbrella Excess Liability Policy were important. Scotts was trying to evaluate the strength and significance of the evidence provided to Liberty Mutual. *See, e.g.*, Feb. 7, 2008 Armstrong Aff. at ¶¶ 3–5 (O.A. Tab 23; Feb. 8, 2008 Barnhart Decl. Ex. A-26 (Doc. No. 200)). Liberty Mutual's representations regarding the Umbrella Excess Liability Policy were part of that determination. *See id.* As Ms. Armstrong stated in her sworn affidavit of February 7, 2008:

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.

*Id.* at ¶ 3. *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 its representations regarding the 1967–1968 Umbrella Excess Liability Policy were false. Contrary to what Liberty Mutual represented to Scotts and DRM, substantial evidence indicates that relevant Liberty Mutual personnel knew or should have known that the copy of the Umbrella Excess Liability Policy Scotts produced during negotiations was not only accurate and complete, but sufficient for Liberty Mutual to conclude that the policy had in fact been issued. *See, e.g.*, Oct. 29, 2007 Hendy Report at ¶¶ 25, 117 (O.A. Tab 52; Jan. 15, 2008 Barnhart Decl. Ex. B-14 (Doc. No.171)); Prouty Depo. at 87:19–88:1, 113:1–10, 135:22–136:7 (O.A. Tab. 93; Doc. No. 189).

Indeed, Liberty Mutual witnesses, including Georges Prouty, testified that during the 1998 to 2000 timeframe they determined internally that Liberty Mutual had in fact issued the policy:

- Q. Was that also a determination that you reached in the '98 to 2000 time frame, that is, that Liberty Mutual had, in fact, issued an umbrella excess policy to Scotts that had an effective date of 10-1-67?
- A. What I recall is that we made a determination that Liberty Mutual issued the '67 policy to Scotts at one point in time.

Prouty Depo. at 114:10–17 (O.A. Tab. 93; Doc. No. 189).

Notably, despite the position Liberty Mutual took regarding the umbrella policy, Mr. Prouty testified that he did not recall any communications with other Liberty Mutual personnel in which someone told him that the policy was not genuine. *See id.* at 136:22–137:8. Yet, Liberty Mutual purposely disputed the accuracy and completeness of the “alleged” Umbrella Excess Liability Policy.

In fact, unbeknownst to Scotts and DRM, Liberty Mutual personnel internally expressed “concern” over the position that Liberty Mutual took with regard to the “alleged” Umbrella Excess Liability Policy. On October 22, 1999, Mr. Prouty circulated to Mr. Merchant and Ms. Yahia a revised draft of the letter that Mr. Merchant ultimately sent on December 6, 1999 denying any coverage for Scotts’ environmental claims. *Compare* Oct. 22, 1999 Prouty email attaching draft letter, LMIC 1699–1704 (O.A. Tab 103) *with* Dec. 6, 1999 Merchant letter, LMIC 002918–002922 (O.A. Tab 9; Feb. 8, 2008 Barnhart Decl. Ex. A-21 (Doc. No. 200)).

The proposed revisions deleted the underlined language in the following excerpt:

At this Juncture, Liberty Mutual has been unable to verify the policy’s completeness, the policy limits or effective period as stated in the declarations. Additionally, Liberty Mutual has not confirmed that the policy jacket containing terms and conditions was the actual jacket attached to this alleged policy.

Oct. 22, 1999 Prouty email attaching draft letter at LMIC 1701 (O.A. Tab 103) (emphasis added). The revision replaced the deleted language so that the excerpt read:

At this Juncture, Liberty Mutual has been unable to verify that these documents represent a complete and accurate copy of all terms and conditions of any policy issued to O.M. Scotts by Liberty Mutual.

*Id.* (emphasis added); *see also* Merchant Depo. at 251:22-253:1 (O.A. Tab. 89; Doc. No. 185).

Immediately following this edit, the draft letter contained an internal notation stating:

(Even with this edit, I am still a little concerned about this position.  
However, you have the legal info on this point, so it really comes  
down to a business decision.)

Oct. 22, 1999 Prouty email attaching draft letter at LMIC 1701 (O.A. Tab 103) (emphasis added);  
*see also* Merchant Depo. at 251:22-253:1 (O.A. Tab. 89; Doc. No. 185).

Notwithstanding this concern, the letter that Liberty Mutual ultimately sent on December 6, 1999 contained this revised language. *See* Dec. 6, 1999 Merchant letter at LMIC 002919 (O.A. Tab 9; Feb. 8, 2008 Barnhart Decl. Ex. A-21 (Doc. No. 200)) (“At this Juncture, Liberty Mutual has been unable to verify that these documents represent a complete and accurate copy of all terms and conditions of any policy issued to O.M. Scotts by Liberty Mutual.”). Significantly, Mr. Merchant testified that all three Liberty Mutual employees on Mr. Prouty’s October 22, 1999 email—Mr. Merchant, Ms. Yahia, and Mr. Prouty—“expressed concern on the position taken” in this portion of the letter:

Q. Do you—Mr. Prouty did express concern, did he not, on the position taken with respect to policies in Merchant Exhibit 39?

...

A. It was a combination of Mr. Prouty and Miss Yahia.

Q. Between the two of them, they expressed concern on the position taken with respect to policies—

A. The three of us did.

Merchant Depo. at 255:24–256:9 (O.A. Tab. 89; Doc. No. 185) (emphasis added).

#### **E. Intent**

Liberty Mutual’s representations as to the accuracy and completeness of the Umbrella Excess Liability Policy were part of Liberty Mutual’s effort to convince Scotts that its policies and evidence of policies were inadequate or incomplete. Even Liberty Mutual’s own employees expressed “concern” internally over the position taken by Liberty Mutual disputing the completeness and accuracy of the “alleged” umbrella policy as evidence of coverage.

As set forth previously, Liberty Mutual knew that Scotts was relying on all of Liberty Mutual's misrepresentations and omissions regarding the existence of policies, their contents, and the other secondary evidence of policies, 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 and DRM could provide Liberty Mutual with a copy of the Umbrella Excess Liability Policy, as it did, but neither Scotts nor DRM were in a position to verify its accuracy and completeness using specimen policies from Liberty Mutual’s own files. As it turns out, Liberty Mutual could easily verify its accuracy and completeness based on Liberty Mutual’s own specimen policies and Liberty Mutual’s own internal “codes” contained within the policy numbers themselves. Although Scotts could argue that the policy appeared to be accurate and complete, Scotts had no means of *verifying* that it was. Liberty Mutual had that capability. Yet, Liberty Mutual sought to create doubt as to the “alleged” policy by repeatedly disputing its accuracy and completeness notwithstanding Liberty Mutual’s internal “concerns” over that misleading position.

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. In addition to relying on Liberty Mutual to produce any and all relevant secondary evidence of

coverage, Scotts also relied on Liberty Mutual's assessment of the evidence Scotts produced to Liberty Mutual as an indicator of the weight of that evidence during settlement negotiations. *See, e.g.*, Feb. 7, 2008 Armstrong Aff. at ¶¶ 3–5 (O.A. Tab 23; Feb. 8, 2008 Barnhart Decl. Ex. A-26 (Doc. No. 200)). Both Ms. Armstrong and Ms. Archangeli testified that had Liberty Mutual been truthful about the extent, significance, and meaning of the available secondary evidence, Scotts would not have settled under the terms that it did. *See, e.g., id.* at ¶ 6; 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, e.g.*, Schlemmer Depo. at 79:7–10 (O. A. Tab 94; Doc. No. 190).